

Article 31(3)(c) of the VCLT and the principle of systemic integration

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**Article 31(3)(c) of the VCLT and
the Principle of Systemic Integration**

**by
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Thesis submitted for the degree of Ph.D.

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January 2010

I, Panagiotis Merkouris, confirm that the work presented in this thesis is my own. Where information has been derived from other sources, I confirm that this has been indicated in the thesis.

This study is dedicated to my loving family, without
whose help none of this would have been possible

ABSTRACT

The proliferation of international courts and tribunals combined with the expansion of the areas and density of regulation of international law has given rise to a debate on the issue of fragmentation of international law. Within this context and as a possible response to this fear of fragmentation, the issue of interpretation with specific reference to Article 31(3)(c) of the Vienna Convention on the Law of Treaties has come to the forefront.

The overarching aim of the present thesis entitled ‘Article 31(3)(c) of the VCLT and the Principle of Systemic Integration’ is to provide a comprehensive analysis of the content and the function of Article 31(3)(c) both as a conventional and as a customary rule (*i.e.* as principle of systemic integration). To this end, the thesis adopts a two-pronged approach. In the first Part of this thesis the analysis is based on the text of the provision itself, both on its written and unwritten elements (intertemporal law considerations). This analysis demonstrates that a proper understanding of Article 31(3)(c) leads us to the adoption of the *proximity criterion* as the only appropriate in the application of Article 31(3)(c).

Having concluded the textual analysis, the thesis then, in the second Part, considers Article 31(3)(c) from a different vantage point. It examines Article 31(3)(c) from the more general perspective of the system as a whole and analyses what the effects of more *systemic considerations* to the content of Article 31(3)(c) are. Within these parameters two issues arise: i) The principles of conflict resolution, which the thesis proves can be applied, in certain scenarios, in the interpretative process of Article 31(3)(c) and ii) more importantly the notion of *interpretation of customary law*. The relevant Chapter establishes that customary international law can be the object of interpretation and in such an interpretation Article 31(3)(c), as custom, plays a pivotal role.

Through this approach, both from a textual and a systemic perspective, the thesis offers a new and complete understanding of Article 31(3)(c) in all its manifestations and spheres of application.

PREFACE

This work reflects the law as it stood, to the best of the author's knowledge, on 25 January 2010. The discourse regarding the *travaux préparatoires* of the VCLT has appeared more extensively in 'Debating the Ouroboros of International Law : the Drafting History of Article 31(3)(c)', *ICLR* 9 (2007): 1-31; Similarly parts of the analysis on the *CCFT v. US* case will be appearing in 'Canons of Treaty Interpretation: Selected Case Studies From the World Trade Organization and the American Free Trade Agreement', in *Issues of Treaty Interpretation and the Vienna Convention on the Law of Treaties*, Malgosia Fitzmaurice, Olufemi Elias and Panos Merkouris (eds.) (Leiden: BRILL/Martinus Nijhoff, forthcoming 2010)

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Needless to say that the views expressed in this thesis are the author's alone.

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ABBREVIATIONS

Abbreviation	Full Title
<i>AAAA</i>	<i>Annuaire de l'Association des auditeurs et anciens auditeurs de l'Académie de droit international de La Haye</i>
AB	Appellate Body
Add.	Addendum
<i>AJIL</i>	<i>American Journal of International Law</i>
BIICL	British Institute of International and Comparative Law
<i>BYBIL</i>	<i>British Yearbook of International Law</i>
CBD	Convention on Biological Diversity
CCFT	Canadian Cattlemen for Fair Trade
CCH	Common Concern of Humankind
CEDAW	Convention on the Elimination of Discrimination against Women
<i>CETS</i>	<i>Council of Europe Treaty Series</i>
CJEC	Court of Justice of the European Communities
<i>CTS</i>	<i>Canada Treaty Series</i>
CUP	Cambridge University Press
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes, Annex 2 of the Marrakesh Agreement
EC	European Community
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECmHR	European Commission on Human Rights
ECR	European Court Reports
ECtHR	European Court of Human Rights
<i>EHRR</i>	<i>European Human Rights Reports</i>
<i>EJIL</i>	<i>European Journal of International Law</i>
FN	Footnote
<i>GAOR</i>	<i>General Assembly Official Records</i>
GATS	General Agreement on Trade and Services 1994, Annex 1B of the Marrakesh Agreement

Abbreviation	Full Title
GATT	General Agreement on Tariffs and Trade 1994, Annex 1A of the Marrakesh Agreement
<i>GYIL</i>	<i>German Yearbook of International Law</i>
IBFD	International Bureau of Fiscal Documentation
ICJ	International Court of Justice
<i>ICLQ</i>	<i>International and Comparative Law Quarterly</i>
<i>ICLR</i>	<i>International Community Law Review</i>
ICSID	International Centre for Settlement of Investment Disputes
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
ILA	International law Association
ILC	International law Commission
<i>ILM</i>	<i>International Legal Materials</i>
ILO	International Labour Organization
<i>ILR</i>	<i>International Law Reports</i>
Iran-USCT	Iran – United States Claims Tribunal
<i>Iran-USCTR</i>	<i>Iran – US Claims Tribunal Reports</i>
ITLOS	International Tribunal for the Law of the Sea
<i>JWT</i>	<i>Journal of World Trade</i>
<i>LNTS</i>	<i>League of Nations Treaty Series</i>
MUP	Manchester University Press
NAFTA	North American Free Trade Agreement
<i>NILR</i>	<i>Netherlands International Law Review</i>
<i>NYIL</i>	<i>Netherlands Yearbook of International Law</i>
OSPAR Convention	Convention for the Protection of the Marine Environment of the North-East Atlantic
OUP	Oxford University Press
PCA	Permanent Court of Arbitration
PCIJ	Permanent Court of International Justice
PR	Panel Report
<i>RCADI</i>	<i>Recueil des Cours de l' Académie de Droit International</i>

Abbreviation	Full Title
<i>RGDIP</i>	<i>Revue Générale de Droit Internaitonal Public</i>
<i>RIAA</i>	<i>Reports of International Arbitral Awards</i>
SOLAS	Safety of Life at Sea
SPS	Sanitary and Phytosanitary Measures
TBT	Technical Barriers to Trade
TRIPS	Trade Related Aspects of Intellectual Property
UAR	United Arab Republic
UK	United Kingdom
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNCLOS	United Nations Convention on the Law of the Sea
<i>UNTS</i>	<i>United Nations Treaty Series</i>
UNTS	United Nations Treaty Series
US	United States of America
VCLT	Vienna Convention on the Law of Treaties
VCLT-II	Vienna Convention on the Law of Treaties between States and International Organizations or Between International Organizations
Vol.	Volume
WTO	World Trade Organization
YILC	Yearbook of the International Law Commission
ZaöRV	Zeitschrift für ausländisches öffentliches Recht und Völkerrecht

LIST OF ICJ JUDGMENTS AND ADVISORY OPINIONS CITED AND THEIR ABBREVIATIONS

Short Title	Full Title
<i>Admission to the United Nations Advisory Opinion</i>	<i>Conditions of Admission of a State to Membership in the United Nations, Advisory Opinion of 28 May 1948, ICJ Rep. 1948, 57</i>
<i>Advisory Opinion on Nuclear Weapons</i>	<i>Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion of 8 July 1996, ICJ Rep. 1996, 226</i>
<i>Aegean Sea Continental Shelf case</i>	<i>Aegean Sea Continental Shelf (Greece v. Turkey), Judgment of 19 December 1978, ICJ Rep. 1978, 3</i>
<i>Ambatielos case</i>	<i>Ambatielos case (Greece v. the United Kingdom), Judgment on Merits of 19 May 1953, ICJ Rep. 1953, 10</i>
<i>Ambatielos case (Preliminary Objections)</i>	<i>Ambatielos case (Greece v. United Kingdom), Judgment on Preliminary Objections of 1 July 1952, ICJ Rep. 1952, 28</i>
<i>Anglo-Iranian Oil Company case</i>	<i>Anglo-Iranian Oil Company case (United Kingdom v. Iran), Preliminary Objections. Judgment of 22 July 1952, ICJ Rep. 1952, 93</i>
<i>Application of the Genocide Convention case</i>	<i>Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment of 26 February 2007, ICJ Rep. 2007</i>
<i>Arbitral Award of 31 July 1989 case</i>	<i>Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal), Judgment of 12 November 1991, ICJ Rep. 1991, 53</i>

<i>Barcelona Traction case</i>	<i>Case Concerning the Barcelona Traction, Light and Power Company, Limited (Second Phase) (Belgium v. Spain)</i> , Judgment of 5 February 1970, <i>ICJ Rep. 1970</i> , 3
<i>Border and Transborder Armed Actions case</i>	<i>Border and Transborder Armed Actions (Nicaragua v. Honduras)</i> , Judgment of 20 December 1988, <i>ICJ Rep. 1988</i> , 69
<i>Certain Expenses case</i>	<i>Certain Expenses of the United Nations (Article 17, paragraph 2 of the Charter)</i> , Advisory Opinion of 20 July 1962, <i>ICJ Rep. 1962</i> , 151
<i>Certain Questions of Mutual Assistance in Criminal Matters case</i>	<i>Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)</i> , Judgment of 4 June 2008, <i>ICJ Rep. 2008</i> , 1
<i>Congo v. Uganda case</i>	<i>Armed Activities on the Territory of Congo (Congo v. Uganda)</i> , Judgment of 19 December 2005, <i>ICJ Rep. 2005</i> , accessible at: http://www.icj-cij.org/docket/files/116/10455.pdf
<i>Diplomatic and Consular Staff in Tehran case</i>	<i>United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)</i> , Judgment of 24 May 1980, <i>ICJ Rep. 1980</i> , 3
<i>Dispute Regarding Navigational and Related Rights case</i>	<i>Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicaragua)</i> , Judgment of 13 July 2009, <i>ICJ Rep. 2009</i>
<i>Fisheries case</i>	<i>Fisheries case (United Kingdom v. Norway)</i> , Judgment of 18 December 1951, <i>ICJ Rep. 1951</i> , 116
<i>Fisheries Jurisdiction case</i>	<i>Fisheries Jurisdiction (United Kingdom of Great Britain and Northern Ireland v. Iceland)</i> , Judgment of 25 July 1974, <i>ICJ Rep. 1974</i> , 3

<i>Frontier Dispute</i> case	<i>Frontier Dispute</i> (Burkina Faso v. Republic of Mali), Judgment of 22 December 1986, <i>ICJ Rep. 1986</i> , 554
<i>Gabčíkovo-Nagymaros Project</i> case	<i>Case Concerning the Gabčíkovo-Nagymaros Project</i> (Hungary v. Slovakia), Judgment of 25 September 1997, <i>ICJ Rep. 1997</i> , 7
<i>Guardianship of Infants</i> case	<i>Case Concerning the Application of the Convention of 1902 Governing the Guardianship of Infants</i> (Netherlands v. Sweden), Judgment of 28 November 1958, <i>ICJ Rep. 1958</i> , 55
<i>Gulf of Maine</i> case	<i>Delimitation of the Maritime Boundary in the Gulf of Maine Area</i> (Canada v. United States of America), Judgment of 12 October 1984, <i>ICJ Rep. 1984</i> , 246
<i>Haya de la Torre</i> case	<i>Haya de la Torre Case</i> (Colombia v. Peru), Judgment of 13 June 1951, <i>ICJ Rep. 1951</i> , 71
<i>Headquarters Agreement Advisory Opinion</i>	<i>Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947</i> , Advisory Opinion of 26 April 1988, <i>ICJ Rep. 1988</i> , 12
<i>Interpretation of Peace Treaties Advisory Opinion</i>	<i>Interpretation of Peace Treaties</i> , Advisory Opinion of 30 March 1950, <i>ICJ Rep. 1950</i> , 65
<i>Jan Mayen</i> case	<i>Maritime Delimitation in the Area between Greenland and Jan Mayen</i> (Denmark v. Norway), Judgment of 14 June 1993, <i>ICJ Rep. 1993</i> , 38
<i>Kasikili/Sedudu Island</i> case	<i>Kasikili/Sedudu Island</i> (Botswana v. Namibia), Judgment of 13 December 1999, <i>ICJ Rep. 1999</i> , 1045
<i>Land and Maritime</i>	<i>Land and Maritime Boundary between Cameroon and</i>

<i>Boundary case</i>	<i>Nigeria (Cameroon v. Nigeria ; Equatorial Guinea intervening), Judgment of 10 October 2002, ICJ Rep. 2002, 303</i>
<i>Land and Maritime Boundary case (Preliminary Objections)</i>	<i>Land and Maritime Boundary between Cameroon and Nigeria (Preliminary Objections) (Cameroon v. Nigeria ; Equatorial Guinea intervening), Judgment of 11 June 1998, ICJ Rep. 1998, 275</i>
<i>Land, Island and Maritime Frontier Dispute case</i>	<i>Land, Island and Maritime Frontier Dispute (El Salvador v. Honduras; Nicaragua intervening), Judgment of 11 September 1992, ICJ Rep. 1992, 350</i>
<i>Libya/Chad Territorial Dispute case</i>	<i>Territorial Dispute (Libyan Arab Jamahiriya v. Chad), Judgment of 3 February 1994, ICJ Rep. 1994, 6</i>
<i>Lockerbie case</i>	<i>Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America), Preliminary Objections, Judgment of 27 February 1998, ICJ Rep. 1998, 115</i>
<i>Minquiers and Ecrehos case</i>	<i>Minquiers and Ecrehos (France v. United Kingdom), Judgment of 17 November 1953, ICJ Rep. 1953, 47</i>
<i>Namibia Advisory Opinion</i>	<i>Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276, Advisory Opinion of 21 June 1971, ICJ Rep. 1971, 16</i>
<i>Nicaragua case</i>	<i>Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) , Judgment of 27 June 1986, ICJ Rep. 1986, 14</i>
<i>North Sea Continental Shelf cases</i>	<i>North Sea Continental Shelf cases (Germany v. Denmark and the Netherlands), Judgment of 20 February 1969, ICJ</i>

	<i>Rep. 1969, 3</i>
<i>Northern Cameroons case</i>	<i>Case Concerning the Northern Cameroons (Preliminary Objections) (Cameroon v. the United Kingdom), Judgment of 2 December 1963, ICJ Rep. 1963, 15</i>
<i>Nuclear Tests case</i>	<i>Nuclear Tests case (Australia v. France), Judgment of 20 December 1974, ICJ Rep. 1974, 253</i>
<i>Oil Platforms case</i>	<i>Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America), Judgment on Preliminary Objections of 12 December 1996, ICJ Rep. 1996, 803</i>
<i>Qatar/Bahrain Maritime Delimitation case</i>	<i>Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain), Judgment of 15 February 1995, ICJ Rep. 1995, 18</i>
<i>Right of Passage case</i>	<i>Case Concerning Right of Passage over Indian Territory (Merits) (Portugal v. India), Judgment of 12 April 1960, ICJ Rep. 1960, 6</i>
<i>Right of Passage case (Preliminary Objections)</i>	<i>Case Concerning Right of Passage over Indian Territory (Preliminary Objections) (Portugal v. India), Judgment of 26 November 1957, ICJ Rep. 1957, 125</i>
<i>South-West Africa cases (Preliminary Objections)</i>	<i>South-West Africa Cases (Preliminary Objections) (Ethiopia and Liberia v. South Africa), Judgment of 21 December 1962, ICJ Rep. 1962, 319</i>
<i>South-West Africa cases (Second Phase)</i>	<i>South-West Africa (Second Phase) (Liberia and Ethiopia v. South Africa), Judgment of 18 July 1966, ICJ Rep. 1966, 6</i>
<i>Temple of Preah Vihear case</i>	<i>Temple of Preah Vihear (Merits) (Cambodia v. Thailand), Judgment of 15 June 1962, ICJ Rep. 1962, 6</i>
<i>Tunisia/Libya</i>	<i>Case Concerning the Continental Shelf (Tunisia v. Libyan</i>

<i>Continental Shelf case</i>	Arab Jamahiriya), Judgment of 24 February 1982, <i>ICJ Rep. 1982</i> , 18
<i>US Nationals in Morocco case</i>	<i>Case Concerning Rights of Nationals of the United States of America in Morocco</i> , (France v. United States of America), Judgment of 27 August 1952, <i>ICJ Rep. 1952</i> , 176
<i>Western Sahara Advisory Opinion</i>	<i>Western Sahara</i> , Advisory Opinion of 16 October 1975, <i>ICJ Rep. 1975</i> , 12
<i>WHO Agreement Advisory Opinion</i>	<i>Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt</i> , Advisory Opinion of 20 December 1980, <i>ICJ Rep. 1980</i> , 73

LIST OF PCIJ JUDGMENTS AND ADVISORY OPINIONS CITED AND THEIR ABBREVIATIONS

Short Title	Full Title
<i>Access to Port of Danzig Advisory Opinion</i>	<i>Access to, or Anchorage in, the Port of Danzig, of Polish War Vessels, Advisory Opinion of 11 December 1931, PCIJ Series A/B, No. 43, 127</i>
<i>Chorzów Factory case</i>	<i>Case Concerning the Factory at Chorzów (Germany v. Poland), Judgment on Jurisdiction of 26 July 1927, PCIJ Series A, No.9, 3</i>
<i>Customs Regime Advisory Opinion</i>	<i>Customs Regime between Germany and Austria, Advisory Opinion of 5 September 1931, PCIJ Series A/B, No. 41, 36</i>
<i>Employment of Women during the Night Advisory Opinion</i>	<i>Interpretation of the Convention of 1919 concerning Employment of Women during the Night, Advisory Opinion of 15 November 1932, PCIJ Series A/B, No. 50, 364</i>
<i>German Interest in Upper Silesia case</i>	<i>Case Concerning Certain German Interests in Polish Upper Silesia, (Germany v. Poland), Judgment on Merits of 25 May 1926, PCJI Series A, No.7, 3</i>
<i>ILO Advisory Opinion</i>	<i>Competence of the International Labour Organization in regard to International Regulation of the Conditions of Labour of Persons Employed in Agriculture, Advisory Opinion of 12 August 1922, PCIJ Series B, No.2, 9</i>
<i>Interpretation of the Neuilly Treaty case</i>	<i>Interpretation of Paragraph 4 of the Annex following Article 179 of the Treaty of Neuilly (Bulgaria v. Greece), Judgement of 12 September 1924, PCIJ Series A, No. 3, 3</i>
<i>Interpretation of the Treaty of Lausanne Advisory Opinion</i>	<i>Interpretation of Article 3, Paragraph 2, of the Treaty of Lausanne, Advisory Opinion of 21 November 1929, PCIJ Series B, No. 12, 3</i>

<i>Jurisdiction of the Danube Commission Advisory Opinion</i>	<i>Jurisdiction of the European Commission of the Danube between Galatz and Braila</i> , Advisory Opinion of 8 December 1927, <i>PCIJ Series B, No. 14</i> , 3
<i>Mavrommatis Palestine Concessions case</i>	<i>The Mavrommatis Palestine Concessions</i> (Greece v. the United Kingdom), Judgment of 30 August 1924, <i>PCIJ, PCIJ Series A No. 2</i> , 6
<i>Minorities in Upper Silesia case</i>	<i>Rights of Minorities in Upper Silesia (Minority Schools)</i> , (Germany v.. Poland), Judgment of 26 April 1928, <i>PCIJ Series A, No. 15</i> , 3
<i>Nationality Decrees in Morocco case</i>	<i>Nationality Decrees Issued in Tunis and Morocco</i> , Advisory Opinion of 7 February 1923, <i>PCIJ Series B., No. 4</i> , 3
<i>Oscar Chinn case</i>	<i>Oscar Chinn case</i> (United Kingdom v. Belgium), Judgment of 12 December 1934, <i>PCIJ Series A/B, No. 63</i> , 64
<i>Polish Nationals in Danzig Advisory Opinion</i>	<i>Treatment of Polish Nationals and other Persons of Polish Origin or Speech in the Danzig Territory</i> , Advisory Opinion of 4 February 1932, <i>PCIJ Series A/B, No. 44</i> , 4
<i>Polish Postal Service in Danzig Advisory Opinion</i>	<i>Polish Postal Service in Danzig</i> , Advisory Opinion of 16 May 1925, <i>PCIJ Series B No.11</i> , 5
<i>River Oder case</i>	<i>Case Relating to the Territorial Jurisdiction of the International Commission of the River Oder</i> (UK, Czechoslovakia, Denmark, Germany & Sweden v. Poland), Judgment of 10 September 1929, <i>PCIJ Series A, No. 23</i> , 3
<i>Serbian Loans case</i>	<i>Case Concerning the Payment of Various Serbian Loans Issued in France</i> (France vs. Serbia), Judgment of 12 July 1929, <i>PCIJ Series A, No. 20</i> , 3

LIST OF ECtHR, ECmHR AND ECJ JUDGMENTS CITED AND THEIR ABBREVIATIONS

Short Title	Full Title
<i>A-G v. Burgoa case</i>	<i>A-G v. Burgoa, Case 812/79, ECJ, (1980), ECR 2787</i>
<i>Al-Adsani v. UK case</i>	<i>Al-Adsani v. United Kingdom, Judgment of 21 November 2001, 34 EHRR 11</i>
<i>Algera case</i>	<i>Algera and others v. Common Assembly, Judgment of 12 July 1957, Court of Justice of the European Communities, 3 Rep. CJEC 133</i>
<i>Bantayeva case</i>	<i>Bantayeva and Others v. Russia, Judgment of 12 February 2009, (Application no. 20727/04).</i>
<i>Brannigan and McBride case</i>	<i>Brannigan and McBride v. the United Kingdom, Judgment of 26 May 1993, 17 EHHR 539</i>
<i>Brualla Gómez de la Torre v Spain case</i>	<i>Brualla Gómez de la Torre v Spain, Judgment of 19 December 1997, 33 EHHR 1341</i>
<i>Cipra et Kvasnicka case</i>	<i>Libor Cipra et Clastimil Kvasnicka v. Bezirkshauptmannschaft Mistelbach, Judgment of 16 January 2003, ECJ, Case C-439/01, ECR 2003 I-745</i>
<i>De Becker case</i>	<i>De Becker v. Belgium, Decision No. 214/56 of 9 June 1958, ECmHR</i>
<i>De Jong case</i>	<i>De Jong, Baljet and van den Brink v. the Netherlands, Judgment of 22 May 1984, 8 EHHR 20</i>
<i>Dinter case</i>	<i>Case C-175/82, Dinter v. Hauptzollamt Köln-Deutz (1983), ECR 969</i>
<i>Fleisch case</i>	<i>Case C-33/92, Fleisch GmbH v. Oberfinanzdirektion</i>

	<i>Hamburg</i> (1993), <i>ECR I-3047</i>
<i>Fogarty v. UK case</i>	<i>Fogarty v. United Kingdom</i> , Judgment of 21 November 2001, 34 <i>EHRR</i> 12
<i>Følgero case</i>	<i>Følgero and Others v. Norway</i> , Judgment of 29 June 2007, 46 <i>EHRR</i> 47
<i>Gölder v. UK case</i>	<i>Gölder v. United Kingdom</i> , Judgment of 21 February 1975, 1 <i>EHRR</i> 524
<i>Kudla case</i>	<i>Kudla v. Poland</i> , Judgment of 26 October 2000, 35 <i>EHHR</i> 11
<i>Mamatkulov and Askarov case</i>	<i>Mamatkulov and Askarov v. Turkey</i> , Judgment of 4 February 2005, 41 <i>EHRR</i> 494
<i>Matthews v. UK case</i>	<i>Matthews v. the United Kingdom</i> , Judgment of 18 February 1999, 28 <i>EHRR</i> 361
<i>McElhinney v. Ireland case</i>	<i>McElhinney v. Ireland</i> , Judgment of 21 November 2001, 34 <i>EHRR</i> 13
<i>Müller and Others case</i>	<i>Müller and Others v. Switzerland</i> , Judgment of 24 May 1988, 13 <i>EHRR</i> 212
<i>Murray v. UK case</i>	<i>Murray v. the United Kingdom</i> , Judgment of 28 October 1994, 19 <i>EHHR</i> 193
<i>Nikolova case</i>	<i>Nikolova v. Bulgaria</i> , Judgment of 25 March 1999, 31 <i>EHHR</i> 64
<i>Rudolf Gabriel case</i>	<i>Rudolf Gabriel</i> , Judgment of 11 July 2002, ECJ, <i>Case C-96/00</i> , <i>ECR 2002 I-06367</i>
<i>Selmouni v. France case</i>	<i>Selmouni v. France</i> , Judgment of 28 July 1999, 29 <i>EHRR</i> 403

<i>Tyrer v. UK case</i>	<i>Tyrer v. the United Kingdom</i> , Judgment of 25 April 1978, 2 <i>EHRR</i> 1
<i>Vasilescu case</i>	<i>Vasilescu v. Romania</i> , Judgment of 22 May 1998, 28 <i>EHHR</i> 241
<i>Yankov case</i>	<i>Yankov v. Bulgaria</i> , 11 December 2003, 40 <i>EHHR</i> 36

**LIST OF WTO & GATT PANEL AND APPELLATE BODY REPORTS CITED
AND THEIR ABBREVIATIONS**

Short Title	Full Title
<i>Brazil-Aircraft</i>	<i>Brazil – Export Financing Programme for Aircraft</i> , Panel Report adopted on 20 August 1999, WTO, WT/DS46/R
<i>Canada-Periodicals</i>	<i>Canada – Certain Measures Concerning Periodicals</i> , Appellate Body Report adopted on 30 July 1997, WTO, WT/DS31/AB/R
<i>Canada-Pharmaceuticals (PR)</i>	<i>Canada – Patent Protection of Pharmaceutical Products</i> , Panel Report adopted on 7 April 2000, WTO, WT/DS114/R
<i>EC – Bananas</i>	<i>European Communities – Regime for the Importation, Sale and Distribution of Bananas</i> , Panel Report adopted on 25 September 1997, WTO, WT/DS27/R
<i>EC – Chicken Classification (PR)</i>	<i>European Communities - Customs Classification of Frozen Boneless Chicken Cuts</i> , Panel Report adopted on 30 May 2005, WTO, WT/DS269/R & WT/DS286/R
<i>EC-Biotech</i>	<i>EC – Measures Affecting the Approval and Marketing of Biotech Products</i> , (United States of America, Canada & Argentina v. European Communities), Panel Report adopted on 21 November 2006, WTO, WT/DS291R, WT/DS292R, WT/DS293R
<i>EC-Chicken Classification (AB)</i>	<i>European Communities - Customs Classification of Frozen Boneless Chicken Cuts</i> , Appellate Body Report adopted on 27 September 2005, WTO, WT/DS269/AB/R and WT/DS286/AB/R
<i>EC-Poultry (AB)</i>	<i>European Communities – Measures Affecting the</i>

	<i>Importation of Certain Poultry Products</i> , Appellate Body Report adopted on 13 July 1998, WTO, WT/DS69/AB/R
<i>Indonesia – Autos</i>	<i>Indonesia – Certain Measures Affecting the Automobile Industry</i> , Panel Report adopted on 23 July 1998, WTO, WT/DS54/R, WT/DS59/R, WT/DS64/R
<i>Japan – Alcohol</i>	<i>Japan – Taxes on Alcoholic Beverages</i> , Appellate Body Report adopted on 1 November 1996, WTO, WT/DS8,10,11/AB/R
<i>Korea – Various Measures on Beef</i> (PR)	<i>Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef</i> , Panel Report adopted on 31 July 2000, WTO, WT/DS/161/R, WT/DS/169/R
<i>Turkey – Textiles</i>	<i>Turkey – Restrictions on Imports of Textile and Clothing Products</i> , Panel Report adopted on 19 November 1999, WTO, WT/DS34/R
<i>US-Cotton Yarn</i> (AB)	<i>United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan</i> , Appellate Body Report adopted on 5 November 2001, WTO, WT/DS192/AB/R
<i>US-FSC (21.5)</i> (AB)	<i>United States – Tax Treatment for ‘Foreign Sales Corporations’ Recourse to Article 21.5 of the DSU by the European Communities</i> , Appellate Body Report adopted on 14 January 2002, WTO, WT/DS/108/AB/RW
<i>US–Lamb Safeguards</i> (PR)	<i>United States – Safeguard Measures on Import of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia</i> , Panel Report adopted on 16 May 2001, WTO, WT/DS177/R & WT/DS178/R
<i>US-Shrimp</i> (AB)	<i>United States – Import Prohibition of Certain Shrimp and Shrimp Products</i> , Appellate Body Report adopted on 6

	November 1998, WTO, WT/DS58/AB/R
<i>US-Zeroing</i>	<i>United States – Continued Existence and Application of Zeroing Methodology</i> , Appellate Body Report adopted on 19 February 2009, WTO, WT/DS350/AB/R

LIST OF IRAN – UNITED STATES CLAIMS TRIBUNAL AWARDS CITED AND THEIR ABBREVIATIONS

Short Title	Full Title
<i>Amoco Corp. case</i>	<i>Amoco International Finance Corp. v. Iran</i> , Judgment of 14 July 1987, <i>Iran-USCTR</i> 15 (1987-II): 189
<i>Arthur Young case</i>	<i>Arthur Young and Company v. Islamic Republic of Iran, Telecommunications Company of Iran, Social Security Organization of Iran</i> , Award of 30 November 1987, <i>Iran-USCTR</i> 17 (1987-IV): 245
<i>Case A/2</i>	<i>Iran – United States, Case A/2, Iran – USCTR</i> 1 (1981): 101
<i>Case No. A/18</i>	<i>Case No. A/18</i> , Award of 6 April 1984, <i>Iran-USCTR</i> 5 (1984/I): 251
<i>Eastman and Kodak case</i>	<i>Eastman and Kodak v. Government of Iran</i> , Award of 1 July 1991, <i>Iran-USCTR</i> 27 (1991-II): 3
<i>Eastman Kodak case</i>	<i>Eastman Kodak v. Government of Iran</i> , Award of 11 November 1987, <i>Iran-USCTR</i> 17 (1987-IV): 153
<i>Esphahanian v. Bank Tejarat case</i>	<i>Esphahanian v. Bank Tejarat</i> , Award of 29 March 1983, <i>Iran-USCTR</i> 2 (1983/I): 157
<i>Foremost Tehran case</i>	<i>Foremost Tehran, Inc. v. Iran</i> , Award of 10 April 1986, <i>Iran-USCTR</i> 10 (1986-I): 229
<i>Grimm case</i>	<i>Grimm v. Iran</i> , Award of 18 February 1983, <i>Iran-USCTR</i> 2 (1983/I): 78
<i>INA Corp. case</i>	<i>INA Corporation v. Iran</i> , Judgment of 12 August 1985, <i>Iran – USCTR</i> 8 (1985-I): 378

<i>Kenneth P. Yeager case</i>	<i>Kenneth P. Yeager v. Islamic Republic of Iran</i> , Award of 2 November 1987, <i>Iran-USCTR</i> .17 (1987-IV): 92
<i>Phillips Petroleum case</i>	<i>Phillips Petroleum Co. Iran v. Iran</i> , Award of 29 June 1989, Case No. 39, <i>Iran-USCTR</i> 21 (1989-I): 79
<i>Schering Corp. case</i>	<i>Schering Corp. v. Iran</i> , Award of 13 April 1984, <i>Iran-USCTR</i> 5 (1984-I): 361
<i>Schott case</i>	<i>Schott v. Islamic Republic of Iran</i> , Award of 14 March 1990, <i>Iran-USCTR</i> 24 (1990-I): 203
<i>Sea-Land Service, Inc. case</i>	<i>Sea-Land Service, Inc. v. Iran</i> , Award of 20 June 1984, <i>Iran-USCTR</i> 6 (1984-II): 149
<i>Starrett Housing Corp. case</i>	<i>Starrett Housing Corp. v. Government of the Islamic Republic of Iran</i> , Award of 19 December 1983, <i>Iran-USCTR</i> 4 (1983-III): 122
<i>William L. Pereira Associates case</i>	<i>William L. Pereira Associates, Iran v. Islamic Republic of Iran</i> , Award of 17 March 1984, <i>Iran-USCTR</i> 5 (1984-I): 198

LIST OF ICTY JUDGMENTS CITED AND THEIR ABBREVIATIONS

Short Title	Full Title
<i>Aleksovski</i> case	<i>Prosecutor v. Zlatko Aleksovski</i> , Judgment of the Appeals Chamber of 24 March 2000, IT-95-14/1-A
<i>Celebici</i> case	<i>Prosecutor v. Hazim Delic</i> , Judgment of the Appeals Chamber of 20 February 2001, IT-96-21-A
<i>Furundžija</i> case (Appeals Chamber)	<i>Prosecutor v. Anto Furundžija</i> , Judgment of the Appeals Chamber of 21 July 2000, ICTY, IT-95-17/1-A
<i>Furundžija</i> case (Trial Chamber)	<i>Prosecutor v. Anto Furundžija</i> , Judgment of Trial Chamber II of 10 December 2008, ICTY, IT-95-17/1
<i>Tadić</i> case	<i>Prosecutor v. Dusko Tadić</i> , Judgment of the Appeals Chamber of 15 July 1999, IT-94-1-A

**LIST OF OTHER ARBITRAL AWARDS AND DOMESTIC CASE-LAW CITED
AND THEIR ABBREVIATIONS**

Short Title	Full Title
<i>Alex Genin case</i>	<i>Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil Genin v. Republic of Estonia</i> , Award of 25 June 2001, ICSID ARB/99/2
<i>Anglo Ottoman Tobacco case</i>	<i>Anglo Ottoman Tobacco C^o. Ltd, v. the Bulgarian Government</i> (UK v. Bulgaria), Judgment of 14 October 1924, <i>Tribunaux Arbitraux Mixtes</i> 4 (1925): 671
<i>Arone Kahane case</i>	<i>Arone Kahane successor v. Francesco Parisi and the Austrian State</i> (Romania v. Austria), Award of 19 March 1929, <i>Tribunaux Arbitraux Mixtes</i> 8 (1929): 943
<i>Beagle Channel Arbitration</i>	<i>Beagle Channel Arbitration</i> (the Argentine Republic v. the Republic of Chile), Award of 18 April 1977, 52 <i>ILR</i> 97
<i>CCFT v. US case</i>	<i>In the Consolidated Arbitration under Chapter Eleven of the North American Free Trade Agreement (NAFTA) and the UNCITRAL Arbitration Rules between the Canadian Cattlemen for Fair Trade (CCFT) and the United States of America</i> , Award on Jurisdiction of 28 January 2008
<i>Chamizal case</i>	<i>The Chamizal case</i> (Mexico v. United States of America), Award of 15 June 1911, <i>RIAA</i> 11 (1961): 309
<i>Chemins de Fer case</i>	<i>Affaire des Chemins de Fer Zeltweg-Wolfsberg et Unterdrauburg-Woellan</i> (Austria v. Yugoslavia), Award of 6 August 1934, <i>RIAA</i> 3 (1949): 1795
<i>Clipperton Island Arbitration</i>	<i>Clipperton Island Arbitration</i> (Mexico v. France), Award of 28 January 1931 <i>RIAA</i> 2 (1949): 1105
<i>Colleanu case</i>	<i>Colleanu v. German State</i> , Award of 12 January 1929,

	Germano – Rumanian Mixed Arbitral Tribunal, <i>Annual Digest of Public International Law 1929-1930</i> 5 (1933-4): 440
<i>Costa Rica v. Nicaragua</i> case	<i>Costa Rica v. Nicaragua</i> , Decision of October 7, 1916, Central American Court of Justice, <i>AJIL</i> 11 (1917): 181
<i>Dame Scheuhs</i> case	<i>Dame Scheuhs v. l' Etat Serbe-Croate-Slovène</i> (Germany v. Yugoslavia), Award of 3 October 1922, <i>Tribunaux Arbitraux Mixtes</i> 2 (1923): 677
<i>Eastern Bank Ltd</i> case	<i>Eastern Bank Ltd. v. the Turkish Government</i> (Turkey v. UK), Award of 28 December 1927, <i>Tribunaux Arbitraux Mixtes</i> 8 (1929): 188
<i>El Salvador v. Nicaragua</i> case	<i>El Salvador v. Nicaragua</i> , Decision of 9 March 1917, Central American Court of Justice, <i>AJIL</i> 11 (1917): 674
<i>Eritrea/Ethiopia Delimitation</i> case	<i>Decision regarding Delimitation of the Border between Eritrea and Ethiopia</i> (Eritrea v. Ethiopia), Decision of 12 April 2002, <i>RIAA</i> 25 (2006):83
<i>Gabriel Radic</i> case	<i>Marchinenfabrik u Mühlenbauaustalt v. Gabriel Radic</i> (Germany v. Yugoslavia), Award of 29 September 1922, <i>Tribunaux Arbitraux Mixtes</i> 2 (1923):653
<i>Georges Pinson</i> case	<i>Georges Pinson case</i> (France v. United Mexican States), Award of 13 April 1928, <i>RIAA</i> 5 (1952): 327
<i>Grisbadarna</i> case	<i>Grisbadarna case</i> (Norway v. Sweden), Award of 23 October 1909, <i>RIAA</i> 11 (1961): 147
<i>Guinea – Guinea-Bissau Maritime Delimitation</i> case	<i>Case concerning the Delimitation of the Maritime Boundary between Guinea and Guinea-Bissau</i> (Guinea v. Guinea-Bissau), Award of 14 February 1985, <i>RIAA</i> 19 (1990):149

<i>Guinea-Bissau – Senegal Maritime Delimitation case</i>	<i>Case Concerning the Delimitation of Maritime Boundary between Guinea-Bissau and Senegal</i> (Guinea Bissau v. Senegal), Arbitral Award of 31 July 1989 <i>RIAA</i> 20 (1993): 119
<i>Herman Wilhelm case</i>	<i>Maison Herman Wilhelm et Cie contre État tchécoslovaque</i> (Hungary v. Czechoslovakia), Award of 20 July 1929, <i>Tribunaux Arbitraux Mixtes</i> 9 (1930) : 583
<i>Iron Rhine Arbitration</i>	<i>Arbitration Regarding the Iron Rhine</i> ('Ijzeren Rijn') <i>Railway</i> (Belgium v. the Netherlands), Award of 24 May 2005, PCA
<i>Island of Palmas case</i>	<i>Island of Palmas case</i> (Netherlands v. United States of America), Award of 4 April 1928, <i>RIAA</i> 2 (1949): 829
<i>Japanese House Tax case</i>	<i>Japanese House Tax</i> (France, Germany and Great Britain v. Japan), Award of 22 May 1905, PCA, reproduced in James B. Scott (ed.), <i>The Hague Court Reports</i> (New York: OUP, 1916), at 84
<i>La Bretagne Arbitration</i>	<i>La Bretagne Arbitration</i> (1986), <i>RGDIP</i> 90 (1986): 716
<i>Loewen Group case</i>	<i>The Loewen Group, Inc. and Raymond L. Loewen v. United States of America</i> , ICSID case, No. ARB(AF)/98/3
<i>Mondev case</i>	<i>Mondev International Ltd. V. United States of America</i> , Award of 11 October 2002, ICSID ARB(AF)/99/2, <i>ICSID Rep.</i> 6 (2004): 192
<i>Mount Fitzroy case</i>	<i>Case concerning a boundary dispute between Argentina and Chile concerning the frontier line between boundary post 62 and Mount Fitzroy</i> (Argentina v. Chile), Award of 21 October 1994, <i>RIAA</i> 22 (2000): 3
<i>Muscat Dhows case</i>	<i>Muscat Dhows case</i> (France v. UK), Award of 8 August

	1905, <i>RIAA</i> 11 (1961): 83
<i>North Atlantic Coast Fisheries case</i>	<i>North Atlantic Coast Fisheries Case</i> (Great Britain v. United States of America), Award of 7 September 1910, <i>RIAA</i> 11 (1961): 167
<i>OSPAR Arbitration</i>	<i>Dispute Concerning Access to Information under Article 9 of the OSPAR Convention</i> (Ireland v. United Kingdom), Award of 2 July 2003, PCA
<i>Petroleum Development Ltd case</i>	<i>Petroleum Development Ltd v. Sheikh of Abu Dhabi</i> , Award of September 1951, 18 <i>ILR</i> 144
<i>Pinochet case</i>	<i>Regina v. Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No.3)</i> , 24 March 1999, House of Lords, 119 <i>ILR</i> 136
<i>Pope and Talbot v. Canada case</i>	<i>In the Matter of an Arbitration under Chapter Eleven of the North American Free Trade Agreement between Pope and Talbot Inc. and Government of Canada</i> , Award in respect of Damages of 31 May 2002
<i>Rainbow Navigation case</i>	<i>Rainbow Navigation v. Department of the Navy</i> , Award of 24 August 1990, 96 <i>ILR</i> 97
<i>S.S. Seaham Harbour case</i>	<i>Owners of S.S. Seaham Harbour v. The German Government</i> (UK v. Germany), Award of 7 February 1924), <i>Tribunaux Arbitraux Mixtes</i> 4 (1925): 29
<i>Sabotage cases</i>	<i>Lehigh Valley Railroad Company, and others (USA.) v. Germany</i> , Award of 16 October 1930, <i>RIAA</i> 8 (1958): 84
<i>Samoan Claims case</i>	<i>Samoan Claims</i> (Germany, Great Britain and United States of America), Award of 14 October 1902, <i>RIAA</i> 9 (1959):15
<i>Sarah Ann Gorham case</i>	<i>Sarah Ann Gorham v. United Mexican States</i> (US v.

	Mexico), Award of 24 October 1930, <i>RIAA</i> 4 (1951): 640
<i>Schreiber case</i>	<i>Schreiber et Cie contre État tchécoslovaque</i> (Hungary v. Czechoslovakia), Award of 29 July 1927 <i>Tribunaux Arbitraux Mixtes</i> 7 (1928) : 897
<i>Schumaker case</i>	<i>Wilhelm Schumaker v. Etat Allemand et l' Etat Serbe-Croate-Slovène</i> (Germany v. Yugoslavia), Award of 1 October 1922, <i>Tribunaux Arbitraux Mixtes</i> 2 (1923) : 602
<i>Souther Bluefin Tuna cases</i>	<i>Southern Bluefin Tuna cases, Provisional Measures</i> (New Zealand and Australia v. Japan), Order of 27 August 1999, ITLOS
<i>Stephens case</i>	<i>Stephens v. United Mexican States</i> , Award of 1927, <i>RIAA</i> 4 (1951): 265
<i>Técnicas Medioambientales Techmed S.A. case</i>	<i>Técnicas Medioambientales Techmed S.A. v. the United Mexican States</i> , Award of 29 May 2003, ICSID case No. ARB(AF)/00/2
<i>UK-France Continental Shelf Arbitration</i>	<i>UK-France Continental Shelf Arbitration</i> (1989), 18 <i>ILM</i> 397.
<i>Ungarische Erdgas case</i>	<i>Ungarische Erdgas A G contre Etat Roumain</i> (Romania v. Hungary), Award of 8 July 1929, <i>Tribunaux Arbitraux Mixtes</i> 9 (1930): 448
<i>US – France Air Services case</i>	<i>Case concerning the Air Service Agreement of 27 March 1946 between the United States of America and France</i> (US v. France), Award of 9 December 1978, <i>RIAA</i> 18 (1980): 417
<i>US-Italy Air Transport Arbitration</i>	<i>Air Transport Arbitration</i> (US v. Italy), Award of 17 July 1965, 45 <i>ILR</i> 393
<i>van Bokkelen case</i>	<i>van Bokkelen case</i> , Award of 24 May 1888, <i>Moore</i>

	<i>International Arbitrations 2 (1898):1807</i>
<i>Warsaw Electricity Company case</i>	<i>Affaire de la Compagnie d' Electricité de la Ville de Varsovie (France v. Poland), Award on Jurisdiction of 30 November 1929, RIAA 3 (1949) : 1669</i>
<i>Young Loan Arbitration</i>	<i>Young Loan Arbitration (Belgium, France, Switzerland, United Kingdom and United States of America v. Germany), Award of 16 May 1980, 59 ILR 494</i>
<i>Zafiro case</i>	<i>D. Earnshaw and Others v. United States (the Zafiro case), Award of 30 November 1925, RIAA 6 (1955): 160</i>

**LIST OF COLLECTIONS OF TREATIES, AWARDS AND DOCUMENTS CITED
AND THEIR ABBREVIATIONS**

Short Title	Full Collection Title and Citation
<i>Hertslet Treaties</i>	Lewis Hertslet, <i>A Complete Collection of the Treaties and Conventions, and Reciprocal Regulations, at Present Subsisting between Great Britain and Foreign Powers, and of the Laws, Decrees and Orders in Council Concerning the Same; so far as they Relate to Commerce and Navigation, to the Repression and Abolition of the Slave Trade; and to the Privileges and Interests of the Subjects of the High Contracting Parties</i> (London, Butterworth: 1827)
<i>Moore's Arbitrations</i>	John B. Moore, <i>History and Digest of the International Arbitrations to which the United States has been a Party, Together with Appendices Containing the Treaties Relating to such Arbitrations, and Historical and Legal Notes</i> (Washington, DC: Government Printing Office, 1898)
<i>Procès Verbaux</i>	Advisory Committee of Jurists, <i>Procès Verbaux of the Meetings of the Advisory Committee of Jurists: 16 June – 24 July 1920 with Annexes</i> (The Hague: van Langenhuysen, 1920)
<i>Tribunaux Arbitraux Mixtes</i>	<i>Recueil des Décisions des Tribunaux Arbitraux Mixtes Institués par les Traités de Paix</i> (Paris : Recueil Sirey, 1925-1931)
<i>Vienna Conference I</i>	United Nations, <i>United Nations Vienna Conference on the Law of Treaties, First Session, Vienna, 26 March – 24 May 1968, Official Records</i> (New York, NY: United Nations, 1969)
<i>Vienna Conference II</i>	United Nations, <i>United Nations Vienna Conference on the Law of Treaties, Second Session, Vienna, 9 April – 22 May 1969, Official Records</i> (New York, NY: United Nations, 1970)

Prolegomena

Plato, *Republic*, Book VII

...Imagine human beings living in an underground den which is open towards the light; they have been there from childhood, having their necks and legs chained, and can only see into the den. At a distance there is a fire, and between the fire and the prisoners a raised way, and a low wall is built along the way, like the screen over which marionette players show their puppets. Behind the wall appear moving figures, who hold in their hands various works of art, and among them images of men and animals, wood and stone, and some of the passers-by are talking and others silent. ... [The captives] see only the shadows of the images which the fire throws on the wall of the den ... Suppose now that you suddenly turn them round and make them look with pain and grief to themselves at the real images; ... [a]nd suppose further, that they are dragged up a steep and rugged ascent into the presence of the sun himself ... Some time will pass before they get the habit of perceiving at all; and at first they will be able to perceive only shadows and reflections in the water; then they will recognize the moon and the stars, and will at length behold the sun in his own proper place as he is. ... the way upwards is the way to knowledge ...¹

Plato's *Cave Metaphor* can be easily transposed to the field of interpretation. This is made absolutely clear considering the etymological origins of the term interpretation in its original Greek form *i.e.* 'hermineia'.² 'Hermineia' comes from 'Hermes' *i.e.* the ancient Greek god, Mercury.³ Hermes, apart from being the messenger of gods, was also entrusted with the duty of making the will of the gods known to man. He functioned as an intermediary, revealing to mere mortals the *true intentions* of the gods. Consequently, the Greek term for interpretation reflects exactly that; the process of revealing the true meaning and/or the true intentions of the parties. It is only through this search that true knowledge can be obtained.

The abovementioned search for the true intention of the parties is the common element shared by all later definitions,⁴ and was also identified in the

¹ Plato, *Republic*, Book VII, 7.514a *et seq.* (Translation as it appears in: Plato, *Republic* (First World Library – Literary Society, 2008).

² It is from this that the term 'hermeneutics' is derived.

³ Georgios Babiniotis, *Λεξικό της Νέας Ελληνικής Γλώσσας – με Σχόλια για τη Σωστή Χρήση των Λέξεων* (Αθήνα: Κέντρο Λεξικολογίας ΕΠΕ, 1998), at 676.

⁴ See for instance the definitions in *Corpus Juris Secundum* and Bryan A. Garner (ed.), *Black's Law Dictionary*, (St. Paul, MN: Thomson West, 2009, 9th ed.), at 894. (hereinafter, *Black's Law Dictionary*).

International Court of Justice (ICJ) by Judge de Castro in the *Aegean Sea Continental Shelf* case.⁵

Despite the fact that, within the context of international law, the issue of interpretation has been the subject of research from the very start,⁶ a quick glance at the writings of publicists will reveal that even today, the analysis of the process of interpretation still holds a prominent place in academic and judicial discourse. One would be hard pressed to find a case argued in an international tribunal, which did not in one way or another, deal with an issue of interpretation. This, of course, is a result of the inadequacy, or more precisely the ‘imperfect nature’ of language as a system for communicating ideas and notions.⁷

More recently, however, the process of interpretation as codified within Articles 31 and 32 of the 1969 Vienna Convention on the Law of Treaties⁸ (VCLT) came again to the forefront both in doctrine and in jurisprudence. However, it was not the entire process as such, which was the main focus, but a specific provision within Article 31. This provision was Article 31(3)(c) which goes:

Article 31

General rule of interpretation

...3. There shall be taken into account, together with the context:

... (c) any relevant rules of international law applicable in the relations between the parties.

This provision, which is customary international law,⁹ codifies the *principle of systemic integration*,¹⁰ which for some time had escaped closer scrutiny. To such a

⁵ Who held that: “It is a well-established principle that *the purpose of interpretation is to ascertain the true will of the parties*” (emphasis added); *Aegean Sea Continental Shelf* (Greece v. Turkey), Judgment of 19 December 1978, *ICJ Rep. 1978*, 3 (hereinafter *Aegean Sea Continental Shelf* case), Dissenting Opinion of Judge de Castro, at 63, para. 4.

⁶ Grotius, Vattel and Puffendorf, all dealt with interpretation extensively in their respective works.

⁷ In more detail on this imperfect nature of language and efforts to minimize its effects, see Ludwig Wittgenstein, *Tractatus Logico-Philosophicus* (London: Routledge Classics, 2005).

⁸ 1155 UNTS 331.

⁹ see *infra* note 27, where the various international courts and tribunals have unwaveringly held that Articles 31 and 32 are customary international law. Furthermore Judge Buergenthal considered Article 31(3)(c) as being “sound and undisputed in principle as far as treaty interpretation is concerned”; *Case Concerning Oil Platforms* (Islamic Republic of Iran v. United States of America), Judgment on

degree, in fact, that Thirlway claimed that he doubted "... whether this sub-paragraph will be of any assistance in the task of treaty interpretation".¹¹ Judge Weeramantry on his part, commenting on the vagueness of Article 31(3)(c) noted in the *Gabčíkovo-Nagymaros Project* case, that this provision "scarcely covers [the aspect of intertemporal law] with the degree of clarity requisite to so important a matter".¹² However, in the recent decades there has been a "flowering of case-law"¹³ with respect to Article 31(3)(c). Several tribunals started basing their judicial reasoning on an application of Article 31(3)(c).

This sudden interest in Article 31(3)(c) can be attributed to an accumulation of factors. The recent proliferation of international courts and tribunals,¹⁴ accompanied by the expansion and increasing density of areas regulated by international law, led to an increasing fear of fragmentation both at an institutional and a normative level. This fear of fragmentation was reflected by the fact that the 6th Committee delegated to the International Law Commission (ILC) the discussion on the issue of fragmentation and how it could be addressed. The ILC, in turn, established a Study Group to deal with the same matter.¹⁵ The Study Group eventually submitted a report finalised by Martti Koskenniemi.¹⁶ In that report, the Study Group examined a number of issues,¹⁷ amongst which one can find Article 31(3)(c) as a possible response to the issue of fragmentation.¹⁸

Preliminary Objections of 12 December 1996, *ICJ Rep. 1996*, 803, Separate Opinion of Judge Buergenthal, para. 22 (hereinafter *Oil Platforms* case).

¹⁰ Campbell McLachlan, 'The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention', *ICLQ* 54 (2005): 279; see also Combacau and Sur, who refer to a 'Principe d' Integration'; Jean Combacau and Serge Sur, *Droit International Public* (Paris: Montchrestien, 2004), at 175. Also one of the first to write on the topic of Article 31(3)(c) was Duncan French, 'Treaty Interpretation and the Incorporation of Extraneous Legal Rules', *ICLQ* 55 (2006): 281.

¹¹ Hugh Thirlway, 'The Law and Procedure of the International Court of Justice 1960 – 1989: Part Three', *BYIL* 62 (1991): 3, at 58.

¹² *Case Concerning the Gabčíkovo-Nagymaros Project* (Hungary v. Slovakia), Judgment of 25 September 1997, *ICJ Rep. 1997*, 7, Separate Opinion of Vice-President Weeramantry at 114. (hereinafter *Gabčíkovo-Nagymaros Project* case),

¹³ Richard Gardiner, *Treaty Interpretation* (Oxford: OUP, 2008), at 251.

¹⁴ See *infra* note 530.

¹⁵ *GAOR, 57th Session, Supplement No. 10 (A/57/10)*, Chap. IX.A, paras. 492-4 and 511.

¹⁶ Study Group of the International Law Commission, *Report on Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law – Finalized by Martti Koskenniemi* (A/CN.4/L.682), 13 April 2006 (hereinafter ILC Study Group); It is interesting to note that in the title the Study Group used the term 'diversification', because it was felt that 'fragmentation' had negative connotations.

¹⁷ Such as fragmentation as a phenomenon, self-contained regimes, conflict of norms, Article 103 UN Charter and *jus cogens* norms.

¹⁸ See ILC Study Group, *supra* note 16, paras. 410-80. Around the same time a Commentary of the two Vienna Conventions on the Law of Treaties was published, which also dealt, amongst all the other

All the above considerations led the present author to the selection of the examination of Article 31(3)(c) as the topic for the present thesis. The title ‘Article 31(3)(c) of the VCLT and the Principle of Systemic Integration’ has been intentionally worded in this way. As was mentioned *supra*, Article 31(3)(c) enshrines the principle of systemic integration *i.e.* the process “whereby international obligations are interpreted by reference to their normative environment”.¹⁹ However, as the ICJ stated in no unclear terms in the *Nicaragua* case, the fact that a customary rule has been codified in a convention does not lead to the disappearance of that rule. On the contrary, both conventional and customary rules continue to exist in parallel.²⁰ It is this reality that the title of the thesis aims to reflect. The subject of analysis is the principle of systemic integration both as a conventional (as enshrined in Article 31(3)(c) of the VCLT) and as a customary rule.

In tackling such a complex topic it is essential to identify the correct approach. The outline selected for the present thesis was influenced by the following considerations. Article 31(3)(c) and its customary equivalent *i.e.* the principle of systemic integration,²¹ offer the international judge the option of applying a *systemic interpretation*; this means an interpretation that takes into consideration the system in which the rule being interpreted functions. Article 31(3)(c), thus, is a provision that bridged the gap between rule and system. It is this antithesis and complementarity between rule and system – so characteristic of Article 31(3)(c) – that was selected as the most appropriate way to outline the function of the principle of systemic integration. Bearing this in mind, the ‘*plan binaire*’ was the most germane choice for the present thesis. A ‘*plan binaire*’ is a method of presentation of an academic thesis, which is based on an underlying antithesis and/or complementarity of the presented issues. It is structured in two parts, which highlight the above antithesis/complementarity.

With these considerations in mind, the thesis is structured in two Parts, with each part consisting of two Chapters. The first Part focuses on the analysis of the rule

issues of the law of treaties, with the Article 31(3)(c) provision; *see* Olivier Corten and Pierre Klein (eds.), *Conventions de Vienne sur le Droit des Traités; Commentaire Article par Article* (Bruxelles : Bruylant, 2006).

¹⁹ ILC Study Group, *supra* note 16, para. 413.

²⁰ *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America), Judgment of 27 June 1986, *ICJ Rep. 1986*, 14, paras. 176-8 (hereinafter *Nicaragua* case).

²¹ From this point onward these terms will be used interchangeably.

itself. The starting point is the text of Article 31(3)(c) and what the examination of its terms can reveal with respect to the extent that the normative environment ('system') of an interpreted term can be taken into consideration in the interpretative process. Article 31(3)(c) is examined to determine the effect of the system during interpretation.

In order to succeed in this, Part I is divided in two Chapters, the first of which focuses on the written elements of Article 31(3)(c). The various vague terms, of Article 31(3)(c) – such as 'relevant', 'rules', 'applicable' and 'parties' – are scrutinized in order to reveal their meaning. Since this is a process of interpretation, the process enshrined in Articles 31 and 32 of the VCLT is followed.²² The text, object and purpose, intention, *travaux préparatoires* and other supplementary means are all examined in order to reveal the meaning and scope of the text and its implications as to the effect of the 'system' within the process of interpretation.

Not all elements pertinent to the principle of systemic integration are explicitly mentioned within the text of Article 31(3)(c). It is these unwritten elements that the second Chapter considers. As will be demonstrated from an examination of the relevant *travaux préparatoires* references to intertemporal law were considered to be implicitly incorporated in Article 31(3)(c). Despite the fact that all proposals for an *expressis verbis* inclusion of intertemporal law in the text of Article 31(3)(c) rejected, any analysis on Article 31(3)(c) must address this issue. Consequently, Chapter II is devoted to an analysis of the issues that intertemporal law raises with respect to Article 31(3)(c). Although the Chapter seems to depart somewhat from the text of the provision (by examining elements not written into it), the provision still remains the starting point, albeit in a more indirect way, through reference to proposed drafts and the discussions within the ILC and the Vienna Conference on the Law of Treaties.

Since Article 31(3)(c), as mentioned, is the point of convergence between norm and system, the present author will next examine if the 'system' itself may not shed light into the proper function of Article 31(3)(c). Whereas Part I started from the text of the provision, Part II²³ reverses the point of departure. Instead of starting from

²² The question of whether Articles 31 and 32 can be interpreted and what rules are the apposite ones for this interpretation will be addressed *infra*.

²³ using the conclusions already arrived at in Part I.

the wording of the text of Article 31(3)(c), Part II examines ‘systemic considerations’, *i.e.* considerations relating to the proper functioning of the system as a whole.

By examining the problems arising from the function of the system of international law new light is shed into previously unidentified aspects of Article 31(3)(c). The starting point may be different, but the conclusions still reveal how Article 31(3)(c) should be applied.

As in Chapters I and II, where there was a shift from ‘written’ to ‘unwritten’ elements of Article 31(3)(c), a similar approach has been used in Chapters III and IV of Part II. Chapter III analyzes a phenomenon common to all imperfect systems; conflict and in this context, ‘conflict of norms’. Considering that there is a ‘presumption against conflict’²⁴ and that interpretation logically precedes recognition of conflict,²⁵ the Chapter examines whether the principles of conflict resolution, despite all their vagueness and problems, could be applied within the context of Article 31(3)(c). Chapter III, starting from a systemic issue *i.e.* normative conflict, eventually envisages scenarios where the principles of conflict resolution can be applied, with the appropriate modifications, within Article 31(3)(c). In this way, an examination of one of the fundamental problems of the system clarifies the principle of systemic integration.

Chapter IV continues this process, scrutinising to an even higher degree intricacies of the system of international law. This Chapter questions our understanding of one of the sources of international law; custom. The question that is posed is whether customary international law can also be interpreted similarly to conventional rules. Both in doctrine and jurisprudence, the main emphasis seems to be placed on the creation and identification of customary international law. However, this Chapter goes on to prove that from a theoretical perspective there is nothing to prohibit the possibility of interpretation of customary law. This point is reinforced by international jurisprudence, where despite appearances there is a plethora of relevant statements. Having established that the system of international law allows for interpretation of customary law, the Chapter then examines what rules of interpretation are applicable in such a context and whether the principle of systemic

²⁴ See in more detail *infra* Chapter III.

²⁵ *Id.*

integration²⁶ can operate in such an interpretative process. In this manner, Chapter IV illuminates another aspect of customary Article 31(3)(c) and clarifies our understanding first and foremost of the scope of its application.

Through these Chapters and by focusing on both a normative and a systemic approach to the issue at hand the present thesis offers a complete picture of Article 31(3)(c) and the principle of systemic integration; it clarifies partially explored areas of their function and identifies completely new ones.

In addressing the various theoretical and practical underpinnings of each Chapter the present author used extensively the jurisprudence of international courts and tribunals and attempted to include judgments that not only covered the entirety of regulatory framework of international law, but also showed a temporal continuity (*i.e.* judgments were not restricted to a specific period of time, but spanned from the early stages of international arbitration to the most recent case-law). A similar approach was followed with respect to research regarding doctrine. In this manner the author hopes to have offered a truly representative presentation of the current status of law.

Finally, before proceeding three points need to be addressed that will clarify some finer points on which the following analysis has been based:

i) What interpretative rules apply when interpreting Article 31 of the VCLT?

Since the main focus of this thesis is the examination of how Article 31(3)(c), both as custom and as a conventional rule, should be correctly interpreted, it is necessary to address the issue of what interpretative rules apply when interpreting Article 31 of the VCLT. That the rules of interpretation, as codified in the VCLT, should apply to themselves would seem to be the first choice. However, Article 4 of the VCLT which states that:

Article 4

Non-retroactivity of the present Convention

Without prejudice to the application of any rules set forth in the present Convention to which treaties would be subject under international law independently of the Convention, the Convention *applies only to treaties which are concluded by States after the entry into force of the present Convention* with regard to such States (emphasis added).

²⁶ Article 31(3)(c) as such *i.e.* as a conventional rule does not apply because the title of the VCLT itself specifies that it applies only with respect to treaties.

bars any such possibility. Consequently, the VCLT cannot be used, as such, to interpret any provision of the VCLT, including itself. This does not cause any major problems. Articles 31 and 32 have been repeatedly recognized as customary international law in international jurisprudence.²⁷ In this manner, the rules of interpretations as they exist within the VCLT can be interpreted not through application of Article 31 and 32 of the VCLT as such, *i.e.* as conventional rules, but through application of their customary law equivalents. This point brings us to the next question.

ii) Can Articles 31 and 32 have a different content from customary rules on interpretation?

Since Article 31 of the VCLT can be interpreted only through the customary rules on interpretation, the question that arises is whether the conventional Article 31 and the customary Article 31²⁸ can have different contents. In the *Nicaragua* case, the ICJ acknowledged the fact that even if a customary rule is codified in a treaty text, this does not mean that it ceases to exist, on the contrary “customary international law continues to exist alongside treaty law”,²⁹ which also implies that it can evolve and its content change. For that reason, it may be logical to wonder whether, after the codification of the customary rules on interpretation within Articles 31 and 32, the customary rules of interpretation have changed in content. The judicial practice would seem to indicate otherwise. In all the cases where the courts had to apply customary rules of interpretation they usually make a point of mentioning that Articles 31 and 32 are customary international law.³⁰ A further argument that proves this point is the application of Article 31(3)(c). In interpreting Article 31 of the VCLT, reference can be had to ‘all relevant rules of international law’. No rule could be more relevant than its own customary law equivalent. Conversely, in the interpretation of the customary

²⁷ *Japan – Taxes on Alcoholic Beverages*, Appellate Body Report adopted on 1 November 1996, WTO, WT/DS8,10,11/AB/R (*Japan – Alcohol*); *Arbitral Award of 31 July 1989* (Guinea-Bissau v. Senegal), Judgment of 12 November 1991, *ICJ Rep. 1991*, 53; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (Qatar v. Bahrain), Judgment of 15 February 1995, *ICJ Rep. 1995*, 18, para. 33; *Territorial Dispute* (Libyan Arab Jamahiriya v. Chad), Judgment of 3 February 1994, *ICJ Rep. 1994*, 6, para. 41; *Oil Platforms* case, para. 23.

²⁸ From this point onwards when the term ‘customary Article 31’ or any other similar variation is used, what is meant is the customary law equivalent of Article 31.

²⁹ *Nicaragua* case para. 176.

³⁰ See *supra* note 27 and the relevant case-law.

rules on interpretation³¹ no rule could be more relevant than the treaty codifying it. In this sense, Article 31(3)(c) and the principle of systemic integration ensure that with respect to the rules on interpretation, Articles 31 and 32 of the VCLT have the same content as their customary law counterparts.

iii) Can discussions within the ILC on the Law of Treaties be treated as preparatory work of the VCLT?

In the following Chapters, a large part of the analysis will focus on the discussions that occurred within the ILC. Consequently, it needs to be established that the ILC documents and discussions are material that fall within the interpretative process as defined by Articles 31 and 32. Interestingly enough, that point was raised in the discussions on Article 32 within the ILC. The general consensus seemed to be that the ILC documents and discussions could be considered as *travaux préparatoires*.³² The main reason for this was that when the ILC prepared drafts of conventions, usually in the diplomatic conferences these drafts were used and the arguments presented in the ILC influenced to a great degree the direction of the discussions in these conferences. But even if they could not be categorized as preparatory work, the interpreter could have recourse to the ILC documents as ‘other supplementary means’. The list provided by Article 32 is not an exhaustive one as clearly indicated by the term ‘including’, used in that Article. Due to the above, for the present analysis and in order to elucidate the meaning of Article 31(3)(c), recourse can be had to the discussions and the documents of the ILC as *travaux préparatoires* or at least as ‘other supplementary means’.

³¹ The possibility of interpretation of customary law and the fact that reference to codification treaties, in that context, is a form of *systemic interpretation* will be analyzed extensively *infra* in Chapter IV.

³² The Chairman, Tunkin, Rosenne and El-Erian, (A/CN.4/SR.873), in *YILC* (1966), Vol.I, Part II, at 205-6, paras. 25, 27, 28 and 34 respectively. It is noteworthy, that Rosenne originally had expressed misgivings as to the characterization of the ILC documents as *travaux préparatoires* (Rosenne, (A/CN.4/SR.872), in *YILC* (1966), Vol.I, Part II, at 201. para. 35); however, in the 873rd meeting he changed his opinion and agreed with Mr. Tunkin that the ILC documents were *travaux préparatoires* of a second order (the first order being the *travaux préparatoires* of the specific Conference relating to the drafting of a Treaty; in the case of the VLCT this would be the Vienna Conference on the Law of Treaties).

Part I: Article 31(3)(c) and the Principle of Systemic Integration from a Normative Point of View

Chapter I: The Elements of Article 31(3)(c) of the VCLT and the Principle of Systemic Integration

The text of Article 31 (3)(c) will be the starting point of the analysis presented in this Chapter. The ordinary meaning of the words in their context will be examined in order to find if any interpretative solutions can be arrived at. These original findings will, then, be supplemented by a presentation of all the discussions and documents that led to the final adoption of the text of Article 31(3)(c) as it stands today. Finally, the pre-VCLT jurisprudence will be used as a further ‘supplementary means’ to ‘confirm’ and/or ‘determine’³³ the meaning of any element of Article 31(3)(c) which has remained ambiguous. As mentioned *supra*³⁴ such an application of Articles 31 and 32 to interpret themselves is permitted with the following *proviso*. Articles 31 and 32, do not apply as such *i.e.* as conventional rules, due to the temporal and self-referential restrictions imposed on the VCLT by virtue of its own Article 4. Consequently, only customary rules on interpretation can apply in order to determine the content of Articles 31 and 32 of the VCLT. Nevertheless, since it is commonly accepted that Articles 31 and 32 are customary international law,³⁵ the content of customary Articles 31 and 32 and conventional Articles 31 and 32 coincides.

A further point that needs to be addressed is whether this process can be applied in order to identify the content of the principle of systemic integration as such, *i.e.* as custom. This touches upon the subject of interpretation of customary norms that will be analyzed more extensively *infra* in Chapter IV. However, in the present context, the analysis is sufficient for the identification of the content of the customary law ‘principle of systemic integration’, since the material presented *e.g.* ILC discussions, drafts, *travaux préparatoires* and relevant international jurisprudence are

³³ The two functions of Article 32 of the VCLT.

³⁴ In ‘Prolegomena’.

³⁵ See relevant case-law cited *supra* in ‘Prolegomena’.

nothing but various manifestations of practice and *opinio juris*, which evidence the existence and content of the relevant customary norm. In conclusion, by following this line of analysis the content of Article 31(3)(c), both *qua* conventional rule and *qua* custom (as ‘principle of systemic integration’) can be revealed.

I. Introduction

The antecedents of Article 31(3)(c) can be found as early as Grotius and Vattel. In the writings of Grotius one can find the first mention of recourse to the law of nations as a rule of interpretation,³⁶ whereas in the famous *The Law of Nations* Vattel suggests that if somebody has expressed himself in an obscure or equivocal manner

[w]e ought to interpret his obscure or vague expressions, in such a manner, that they may agree with those terms that are clear and without ambiguity, which he has used elsewhere, either in the same treaty, or in some other of the like kind.³⁷

Essentially, the writings of these two scholars cover *ab initio* the debate that would later ensue with respect as to which rules fall within Article 31(3)(c). Vattel seems to suggest a more expansive approach, whereas Grotius focuses on the general principles of international law, without taking any position on whether other rules or treaties could be used for interpretative purposes.

The focus of attention in the following decades shifted more to other aspects of interpretation, such as the existence or not of rules of interpretation and the existence of a hierarchy of interpretative rules. This is evidenced by the fact that in a series of researches, codes and discussions very little mention, if any at all, was made

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I shall not, however, admit the rule, ..., that the contracts of kings and peoples ought to be interpreted according to Roman law so far as possible, *unless* it is apparent that among certain peoples the body of civil law has been received as the law of nations in respect to the matters which concern the law of nations (emphasis added)

Hugo Grotius (translated and annotated by Clement Barksdale), *De Jure Belli ac Pacis (The Illustrrious Hugo Grotius of the Law of Warre and Peace with Annotations. III Parts and Memorials of the Author's Life and Death)* (London: printed by T. Warren, for William Lee, and are to be sold at his shop at the signe of the Turks-head in Fleet-Street, 1654), Book II, Chapter XVI, para. XXXI (entitled: *the contracts of kings are not to be interpreted according to Roman law*)

³⁷ Emerich de Vattel, *The Law of Nations or Principles on the Law of Nature Applied to the Conduct and Affairs of Nations and Sovereigns*, (London : G. G. J. and J. Robinson, 1793), Book II, Chapter XVII, para. 284.

with respect to the elements that constitute Article 31(3)(c). No mention at all is to be found in David Dudley Field's Draft Code of 1876³⁸, in Bluntschli's Draft Code³⁹, in the Draft of the International Commission of American Jurists of 1927⁴⁰ and in the Convention on Treaties of 1928.⁴¹ Some minor references exist in Fiore's Draft Code of 1918,⁴² in The Interpretation of Treaties of 1933⁴³ and finally, in the Draft Convention on the Law of Treaties of 1935, prepared by the Harvard Research on the Law of Treaties⁴⁴.

However, it was only in the 1950s that the international community decided to turn its full attention to the issue of interpretation and summon all its available resources to tackle the intricacies inherent to it. The debate over the finer points of legal interpretation was held, mainly, in three *fora*: The *Institut de Droit International*, the International Law Commission and of course, the United Nations Conference on the Law of Treaties. It is only through an examination and analysis of the arguments put forward in these *fora*, that one can start unveiling the meaning of the intentionally vague Article 31(3)(c) of the VCLT, nevertheless, let us examine first,⁴⁵ if the text of Article 31(3)(c) and its context can shed some light on its exact scope.

³⁸ 'Appendix 2: David Dudley Field's Draft Code', *AJIL* 29 (1935): 1207-8.

³⁹ 'Appendix 3: Bluntschli's Draft Code', *AJIL* 29 (1935): 1208-12.

⁴⁰ Submitted in Rio de Janeiro in 1927; 'Appendix 5: Draft of the International Commission of American Jurists', *AJIL* 29 (1935): 1222-4.

⁴¹ Adopted by the Sixth International Conference of American States at Havana, February 20, 1928, 'Appendix 1: Convention on Treaties', *AJIL* 29 (1935): 1205-7.

⁴² "[a]mbiguity may be eliminated by referring to stipulations of another treaty relating to analogous matters between the same parties", in 'Appendix 4: Fiore's Draft Code', *AJIL* 29 (1935): 1212, at 1219, para. 816.

⁴³ Submitted by the Seventh International Conference of American States in 1933 and the relevant part of which stated in Article 4 that

[i]n case the real will of the parties cannot be determined, it will be understood that the parties have wished to adjust their stipulations in accordance with the established rules of International Law

in 'Appendix 7: The Interpretation of Treaties', *AJIL* 29 (1935): 1225, at 1226, Article 4.

⁴⁴ Article 19 (a) went as follows: "... and the conditions prevailing at the time interpretation is being made, are to be considered in connection with the general purpose which the treaty is intended", in 'Draft Convention on the Law of Treaties', *AJIL* 29 (1935): 657, at 661, Article 19.

⁴⁵ In true Article 31 VCLT fashion.

II. Ordinary Meaning and Context of Article 31(3)(c) of the VCLT: An Article 31 – based Interpretation

Even from a cursory reading of the text of Article 31(3)(c) it is evident that it is far from clear.⁴⁶ Its function and scope of application rests on the understanding of certain specific terms. These terms would be the following:

- i) ‘rules’
- ii) ‘relevant’,
- iii) ‘applicable’ and
- iv) ‘parties’.

The corresponding questions would then be: ‘Which provisions are to be considered ‘rules’ under Article 31(3)(c)?’, ‘which rules are to be considered relevant and how is this relevancy determined?’, ‘which rules are considered as ‘applicable’ and finally ‘what parties are meant: Parties to the dispute or parties to the treaty being interpreted?’. This Section will now examine if the ordinary meaning of any of these words, alone or in combination with the context can offer a definitive solution as to the exact meaning of these terms.

A. ‘Rules of International Law’

International courts and tribunals when determining the ordinary meaning of a term constantly rely on definitions contained in various dictionaries, both legal and non-legal.⁴⁷ According to the *Compact Oxford English Dictionary* rule is “**rule** ...1 a

⁴⁶ The Vattelian axiom *in claris non fit interpretatio*, thus, does not apply. Although it has to be noted that the present author is in agreement with the critique exercised against this axiom within the ILC. The classification of a term as ‘clear’ is by itself a product of interpretation. Consequently, no term is *a priori* clear. This renders the aforementioned axiom nothing more than an “obscurantist tautology”; see Comments of Myres S. McDougal, of the United States Delegation to the Committee of the Whole of the Vienna Conference on the Law of Treaties, in United Nations, *United Nations Vienna Conference on the Law of Treaties, First Session, Vienna, 26 March – 24 May 1968, Official Records* (New York, NY: United Nations, 1969), at 167, para.38 (hereinafter *Vienna Conference I*).

⁴⁷ See for instance *EC – Measures Affecting the Approval and Marketing of Biotech Products*, (United States of America, Canada & Argentina v. European Communities), Panel Report adopted on 21 November 2006, WTO, WT/DS291R, WT/DS292R, WT/DS293R, paras. 4.163 *et seq.*; *United States – Safeguard Measures on Import of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, Panel Report adopted on 16 May 2001, WTO, WT/DS177/R & WT/DS178/R, para. 7.21 *et seq.*;

regulation or principle governing conduct or procedure within a particular sphere.”⁴⁸ However, since the term is employed within a specialized field, that of law, a legal definition should also be considered.⁴⁹ *Black’s Law Dictionary* defines rule as “... 1. [g]enerally, an established and authoritative standard or principle; a general norm mandating or guiding conduct or action in a given type of situation.”⁵⁰

Based on the above definitions, the term ‘rules’ of Article 31(3)(c) refers to binding rules of international law, emanating from an accepted source of international law, *i.e.* treaties, custom and/or general principles of law, recognized by civilized nations. This all-inclusive approach to the term ‘rules’ finds support in doctrine.⁵¹ There are very few authors who have deviated from this position. Schwarzenberger, for instance, argues that the term ‘rules of international law’ does not cover international agreements, based on the assumption that these are already incorporated in Article 31(3)(a).⁵² Similarly Sinclair, excludes from the scope of the term ‘relevant rules’ the general principles of law,⁵³ a position though, which does not seem to find support either in doctrine or international jurisprudence.

Finally, there are those who seem to opt for an even more extensive interpretation of the term ‘rules’. Gardiner seems to imply that based on Article 38 of

⁴⁸ Oxford Dictionaries, *Compact Oxford English Dictionary* (Oxford: OUP, 2008), accessible at www.askoxford.com (last accessed on 25 January 2010).

⁴⁹ A manifestation of such concerns can be found in Article 31(4) of the VCLT.

⁵⁰ *Black’s Law Dictionary*, *supra* note 4, at 1446.

⁵¹ ILC Study Group, *supra* note 16, para. 426; McLachlan, *supra* note 10, at 290; Joost Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (Cambridge: CUP: 2003), at 254; Mark E. Villiger, *Customary International Law and Treaties: A Study of their Interactions and Interrelations with Special Consideration of the 1969 Vienna Convention on the Law of Treaties* (Dordrecht: Martinus Nijhoff, 1985), at 268; Gabrielle Marceau, ‘Conflict of Norms and Conflict of Jurisdictions: The Relationship between the WTO Agreement and MEAs and Other Treaties’, *JWT* 35 (2001): 1081, at 1087; Richard Gardiner, *Treaty Interpretation* (Oxford: OUP, 2008), at 260-3; Abi-Saab suggests that the term includes *a fortiori* the rules of general international law but it “does not provide the criteria (or the circumstances) warranting such reference”; Georges Abi-Saab, ‘The Appellate Body and Treaty Interpretation’, in *The WTO at Ten: The Contribution of the Dispute Settlement System*, Giorgio Sacerdoti, Alan Yanovich and Jan Bohanes (eds.) (Cambridge: CUP, 2006), 453, at 463. There are very few authors that would exclude any category of rules from Article 31(3)(c).

⁵² Georg Schwarzenberger, ‘Myths and Realities of Treaty Interpretation: Article 27-29 of the Vienna Convention on the Law of Treaties’, *Current Legal Problems* 22 (1969): 205-27, at 220; However, this construction by Schwarzenberger takes into consideration only treaties that are posterior to the treaty being interpreted. But not all ‘relevant rules’ are necessarily posterior to the agreement; not all are ‘subsequent’ as Article 31(3)(a) requires. Actually, as it will be demonstrated *infra*, in the majority of cases where Article 31(3)(c) has been applied it is the other way around. Anterior treaties are the main point of reference. Consequently, ‘rules of international law’ can and does cover international agreements. Furthermore, the notion of ‘parties’ of Article 31(3)(a) may have a different meaning than that of Article 31(3)(c).

⁵³ Ian Sinclair, *The Vienna Convention on the Law of Treaties* (Manchester: MUP, 1984), at 139.

the ICJ Statute and since courts and tribunals have used that provision in order to identify the content of the term ‘rules of international law’,⁵⁴ there might be scope to argue that judicial decisions and teachings of the most highly qualified publicists, as long as they assist in the identification of rules, could be used through the process envisaged by Article 31(3)(c).⁵⁵

However, and irrespective of the question of whether the sources enumerated in Article 38 are a *numerus clausus*,⁵⁶ the preponderant opinion in doctrine is that judicial decisions and the writings of publicists do not create norms but evidence them; they are material ‘sources’ rather than ‘formal’ ones.⁵⁷ Considering them as falling under Article 31(3)(c) is more of a *lex ferenda* than a *lex lata*. Consequently, their proper place is in Article 32 of the VCLT, as ‘other supplementary means’, rather than Article 31(3)(c).⁵⁸

In conclusion, the ‘ordinary meaning’ of the term ‘rules’ seems to indicate all rules irrespective of their source.

B. ‘Relevant Rules’

The next problematic term is ‘relevant’. Once again, beginning the analysis from the available definitions: “**relevant • adjective** closely connected or appropriate to the matter in hand”⁵⁹ and

⁵⁴ *Gölder v. United Kingdom*, Judgment of 21 February 1975, 1 *EHRR* 524, para. 35 (hereinafter *Gölder v. UK*); *In the Matter of an Arbitration under Chapter Eleven of the North American Free Trade Agreement between Pope and Talbot Inc. and Government of Canada*, Award in respect of Damages of 31 May 2002, para. 46 (hereinafter *Pope and Talbot v. Canada*), accessible at: <http://www.naftaclaims.com/Disputes/Canada/Pope/PopeAwardOnDamages.pdf> (last accessed on 25 January 2010).

⁵⁵ Gardiner, *supra* note 13, at 268.

⁵⁶ See Lady Hazel Fox, ‘Time, History and Sources of Law Peremptory Norms: Is There a Need for New Sources of International Law?’, in *Time, History and International Law*, Malgosia Fitzmaurice, Matthew Craven and Maria Vogiatzi (eds.) (Leiden: Martinus Nijhoff, 2007), 119.

⁵⁷ Schwarzenberger *infra* note 534; see, however, Fitzmaurice, who argues that these sources are of much higher value than they are given credit for; Gerald Fitzmaurice, ‘Some Problems Regarding the Formal Sources of International Law’, in *Symbolae Verzijl : présentées au Professeur J. H. Verzijl à l’Occasion de son LXX-ième Anniversaire*, Jan H. Verzijl and Frederik M. van Asbeck (eds.) (The Hague : Nijhoff, 1958), 153

⁵⁸ See also *infra* in Chapter IV the analysis of case-law (e.g. *CCFT v. US* case) which has explicitly categorized decisions of international courts and tribunals as means of interpretations falling under Article 32.

⁵⁹ Oxford Dictionaries, *supra* note 48.

[l]ogically connected and tending to prove or disprove a matter in issue; having appreciable probative value – that is, rationally tending to persuade people of the probability or possibility of some alleged fact⁶⁰

and that

[t]he word ‘relevant’ means that any two facts to which it is applied are so related to each other according to the common course of events one either taken by itself or in connection with other facts proves or renders probable the past, present, or future existence or non-existence of the other.⁶¹

All the above definitions share the element of close connection. In search of how this connection can be established, most authors seem to agree that the most indisputable understanding is that the term ‘relevant’ refers to rules “*touching on the same subject matter* as the treaty provision or provisions being interpreted or which in any way affect that interpretation”.⁶²

Despite the above, the term remains quite unclear. For instance, the degree of identity of the ‘subject-matters’ of the treaty being interpreted and the rule being referred to via Article 31(3)(c) is still unclear⁶³ and not analyzed in doctrine. Consequently, the ‘same subject-matter’ understanding of the term ‘relevant’ seems to be *only one* of the possible ways to identify relevancy.⁶⁴

C. ‘Applicable Rules’

Despite the scrutiny under which Article 31(3)(c) has been put, an analysis of the term ‘applicable’ in doctrine is almost non-existent.⁶⁵ This may be partially attributed

⁶⁰ *Black’s Law Dictionary*, *supra* note 4, at 1404.

⁶¹ James F. Stephen, *A Digest of the Law of Evidence 2* (London: MacMillan, 1881, 4th ed.).

⁶² Gardiner, *supra* note 13, at 260; similarly see Mark E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Leiden: Martinus Nijhoff, 2009), at 433; Heen-Jüri Uibopuu, ‘Interpretation of Treaties in the Light of International Law: Art. 31, para. 3(c) of the Vienna Convention on the Law of Treaties’, *AAAA* 40 (1970): 1-42, at 4; Ulf Linderfalk, *On the Interpretation of Treaties* (Dordrecht: Springer, 2009), at 178.

⁶³ For instance in *Certain Questions of Mutual Assistance in Criminal Matters* (Djibouti v. France), Judgment of 4 June 2008, *ICJ Rep.* 2008, 1, para. 112, (hereinafter *Certain Questions of Mutual Assistance in Criminal Matters* case) the Court seems to have accepted that as to what Article 31(3)(c) pertains complete identity of subject-matter is not an essential requirement. Even a partial identity is sufficient. See in more detail the judicial reasoning at paras. 105-14.

⁶⁴ See in more detail *infra* the ‘proximity criterion’ analysis.

⁶⁵ Gardiner mentions it *in passim*; Gardiner, *supra* note 13, at 260 *et seq.*

to the fact that even the definitions of the term, *i.e.* “**applicable • adjective** relevant or appropriate”⁶⁶, “**apply, vb.** ... 3. To put to use with a particular subject matter”,⁶⁷ seem to connect this term with another one preceding it: ‘relevant’. This would seem a somewhat tautological self-reference, which is what probably prompted Villiger to suggest that the ordinary meaning of the term ‘applicable’ excludes non-binding rules from the scope of Article 31(3)(c).⁶⁸

D. ‘Parties’

Finally, the term which has sparked a fiery debate with respect to the scope of Article 31(3)(c) is the term ‘parties’. According to the available dictionary definitions a ‘party’ should be understood as “**party • noun** ... 4. a person or group forming one side in an agreement or dispute”⁶⁹ or “**party.** ... 1. One who takes part in a transaction ... 2. One by or against whom a lawsuit is brought”.⁷⁰ What is immediately striking about these two definitions is that they reflect the overall controversy over the same term in Article 31(3)(c). Both definitions identify party as either a party to an agreement/legal transaction, *i.e.* in our context a treaty, or as a party to a legal dispute. Consequently, the ordinary meaning of the term, can offer no assistance in identifying its intended meaning.⁷¹

⁶⁶ Oxford Dictionaries, *supra* note 48.

⁶⁷ *Black’s Law Dictionary*, *supra* note 4, at 116.

⁶⁸ Villiger, *supra* note 62, at 433 ; However, as will be shown *infra* international jurisprudence has not always followed this interpretation. See *Dispute Concerning Access to Information under Article 9 of the OSPAR Convention* (Ireland v. United Kingdom), Award of 2 July 2003, PCA, (hereinafter *OSPAR Arbitration*), Dissenting Opinion of Judge Griffith QC, paras. 1 *et seq.* accessible at <http://www.pca-cpa.org/upload/files/OSPAR%20Award.pdf> (last accessed on 25 January 2010); *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, Appellate Body Report adopted on 6 November 1998, WTO, WT/DS58/AB/R (hereinafter *US-Shrimp* (AB)).

⁶⁹ Oxford Dictionaries, *supra* note 48.

⁷⁰ *Black’s Law Dictionary*, *supra* note 4, at 1231-2.

⁷¹ Authors who have argued in favour of interpreting the term as ‘parties to the treaty’ include: Mustafa K. Yasseen, ‘L’Interprétation des Traités d’après la Convention de Vienne sur le Droit des Traités’, *RCADI* 151 (1976/III) : 1, at 63 ; Ulf Linderfalk, ‘Who are the ‘Parties’?: Article 31 Paragraph 3 (c) of the 1969 Vienna Convention and the ‘Principle of Systemic Integration’ Revisited’, *NILR* 55 (2008): 343, at 343 *et seq.*; Linderfalk, *supra* note 62, at 178; Philippe Sands, ‘Sustainable Development: Treaty, Custom, and the Cross-fertilization of International Law’, in *International Law and Sustainable Development: Past Achievements and Future Challenges*, Alan Boyle and David Freestone (eds.) (Oxford: OUP, 1999), 39, at 57; authors who have adopted the more expansive interpretation of ‘parties to the dispute’ include: Marceau, *supra* note 51, at 1087; David Palmeter and Petros Mavroidis, ‘The WTO Legal System: System of Law’, *AJIL* 92 (1998): 398, at 411 and Panos Merkouris, ‘Debating the Ouroboros of International Law : the Drafting History of Article 31(3)(c)’, *ICLR* 9 (2007): 1-31.

To circumvent this ambiguity, one can also examine the context of Article 31(3)(c). Article 2(1)(g) of the VCLT defines the term ‘party’ as “a State which has consented to be bound by the treaty and for which the treaty is in force”. However, this does not mean *ipso facto* that the term should be understood as meaning only ‘parties to the interpreted treaty’. For instance, throughout the VCLT when the drafters wanted to stress that all the parties to a treaty should partake in a specific action or obligation, they usually did so explicitly.⁷² Furthermore, in Article 66(a) of the VCLT the term ‘parties’ means ‘parties to the dispute’.⁷³ Additionally, the immediate context of Article 31(3)(c), *i.e.* the provisions of Article 31, uses the term ‘party’ in a variety of ways and with a certain degree of flexibility. Whereas the term ‘parties’ in Article 31(3)(a) may not raise definitional problems when contrasted to the definition of Article 2(1)(g), the same cannot be said for the term as used in Article 31(2)(a) and (b). In those provisions, the term ‘parties’ is being used with respect to acts relating to the conclusion of a treaty. However, unless a State is bound upon its own signature,⁷⁴ it cannot be considered as a ‘party’ as defined in Article 2(1)(g). Consequently, in provisions 31(2)(a) and (b) of the VCLT the term ‘parties’ is not used *stricto sensu*, but *lato sensu*; in a more flexible manner. To add insult to injury, and to prove beyond a shred of a doubt that the ordinary meaning and the context of Article 31(3)(c) cannot assist in the search for the true meaning of Article 31(3)(c), one need not go further than the fact that academics, using the same aforementioned provisions and the same contextual framework (the VCLT) end up with completely contradictory results.⁷⁵

Finally, as McLachlan very concisely points out, the term ‘parties’ of Article 31(3)(c) can actually be construed in four different ways:

- i) that *all parties to the interpreted treaty* should be parties to the treaty relied upon via Article 31(3)(c)

⁷² See for instance Articles 15(c), 20(2), 30(3), 57(b), 59(1) where the term “all the parties” is being used.

⁷³ Article 66(a) of the VCLT.

⁷⁴ Or unless those acts take place after ratification and entry into force of the treaty.

⁷⁵ See on the one hand, Linderfalk who argues that the term ‘parties’ should be interpreted restrictively, and on the other hand Marceau, Palmeter and Mavroidis who claim that the same provisions clearly demonstrate that the term ‘parties’ should be understood as ‘parties to the dispute’; Linderfalk, *supra* note 71, 349 *et seq.*; and *contra* Gabrielle Marceau, ‘WTO Dispute Settlement and Human Rights’, *EJIL* 13 (2002): 753, at 782; Palmeter and Mavroidis, *supra* note 71, 398 *et seq.*; see also Gardiner, who, however, does not take a stand on the issue; Gardiner, *supra* note 13, 263-5 and 269-75.

ii) that *all parties to the dispute* should be parties to the other treaty,

iii) that if a treaty is not in force between all members of the treaty under interpretation, it can be considered under Article 31(3)(c) *only if the rule contained therein is customary international law* and

iv) that complete identity of parties is not required as long as the treaty relied upon, through Article 31(3)(c), can be said to express the common intentions or at least a common understanding of all the parties.⁷⁶

Despite the fact that all these interpretations have their drawbacks,⁷⁷ it is the last option that McLachlan, Pauwelyn and Young seem to opt for, based on the ambiguity of the term as such, the object and purpose of the rules on interpretation and relevant jurisprudence.⁷⁸ The fact, however, remains that an Article 31-based interpretation of Article 31(3)(c) does not lead to any concrete results as to the term ‘parties’.

⁷⁶ McLachlan, *supra* note 10, at 314-5.

⁷⁷ Isabelle van Damme, *Treaty Interpretation by the WTO Appellate Body* (Oxford: OUP, 2009), at 372, FN 75.

⁷⁸ McLachlan, *supra* note 10, at 315; Pauwelyn, *supra* note 51, at 257-63; Margaret A. Young, ‘The WTO’s Use of Relevant Rules of International Law: An Analysis of the Biotech Case’, *ICLQ* 56 (2007): 907, at 914-8.

III. Preparatory Work of the VCLT and pre-ILC Documents as other Supplementary Means: An Article 32 – based Interpretation

The analysis in the previous Section confirmed that the wording of Article 31(3)(c) is so vague, that it can offer very little assistance in determining its exact content. As Judge Weeramantry noted in the *Gabčíkovo-Nagymaros* case, the provision “scarcely covers this aspect with the degree of clarity requisite to so important a matter”.⁷⁹ For this reason and in order to either confirm the preliminary findings or determine the content of the still mercurial areas of Article 31(3)(c), the preparatory work of the VCLT alongside some pre-ILC documents will be scrutinized.⁸⁰

A. The Discussions within the *Institut de Droit International*

The fact that the *Institut de Droit International* devoted four sessions⁸¹ to discussing the problematic aspects of legal interpretation, is the most solid proof that the international community was aware of its complexity.⁸² The debate focused mainly on the following issues: whether there is a possibility and usefulness in drafting rules of interpretation; what should be the hierarchy between them; which should be given priority, the search for the intention of the parties or the text and the ever-existing *apple of Discord*, the use of *the travaux préparatoires* in the interpretative process.

This, of course does not mean that other issues were not considered as well, but they were not given the same amount of scrutiny.⁸³ Still, in the discussions within the *Institut de Droit International*, one can find the first indications of what would later become Article 31(3)(c) of the VCLT.

⁷⁹ *Gabčíkovo-Nagymaros Project* case, Separate Opinion of Judge Weeramantry, at 114.

⁸⁰ As mentioned *supra* in ‘Prolegomena’ the documents of the ILC are to be considered as *travaux préparatoires* for the purposes of interpreting the VCLT alongside with the documents of the *Vienna Conferences on the Law of Treaties*. The pre-ILC documents, although not falling under the notion of *travaux préparatoires*, nevertheless are to be examined because:

- i) they reveal a logical process of evolution of the various notions pertinent to the understanding of Article 31(3)(c) and
- ii) they themselves functioned as a springboard for the various discussions within the ambit of the ILC.

For these reasons, and also bearing in mind that the term ‘other supplementary means’ of Article 32 was intentionally left undefined, the pre-ILC documents are ‘other supplementary means’ to be taken into consideration when interpreting Article 31(3)(c).

⁸¹ Spanning over a period of six years.

⁸² The sessions were the following: Bath Session, 1950, Sienna Session, 1952, Aix-en-Provence Session, 1954 and finally, Grenada Session, 1956.

⁸³ For instance there was little debate on the issue of intertemporality, that would later on dominate the discussions in the ILC.

1. Article 31(3)(c): The first Stages of Identification

Characteristic of the early efforts of identifying rules of interpretation is the fact that Sir Hersch Lauterpacht, in his Report for the *Institut de Droit International* during the Bath Session, makes absolutely no reference whatsoever to either interpretation based on the ‘relevant rules of international law applicable in the relations between the parties’ or to interpretation with reference to general principles of international law.⁸⁴ No direct reference, let alone indirect mention, is made to any such notion. Therefore, we can only infer, through the various comments of the members of the *Institut*, what was later to become Article 31(3)(c).

It was only during the closing stages of the debate, in the section reserved for observations to Lauterpacht’s Report, that Verdross raised for the very first time the issue. Verdross made reference to a *fundamental*, according to him, rule of interpretation; namely that any treaty provision should be interpreted “under the light of general international law”.^{85,86} This principle, according to Verdross, was not merely an academic fiction but was supported jurisprudentially by the case-law of the PCIJ.⁸⁷

Verdross’ contribution to the clarification of the rules of interpretation did not stop at the enunciation of this principle. On the contrary, he went on to identify two further principles that albeit distinct, existed in a complementary relationship to the first one. According to Verdross interpretation must also be based on the ‘general principles of law recognized by civilized nations’, a rule incorporated in Article 38(1)(c) of the ICJ Statute and second, that the two previous rules unveil a third one; in the process of finding the true meaning of a treaty it is sometimes necessary to have

⁸⁴ In a report that spans 69 pages and covers almost all major interpretative theories, no reference to this issue is to be found; see Herch Lauterpacht, ‘De l’ Interprétation des Traités’, *Annuaire de l’ Institut de Droit International* (1950): Session de Bath, Tome I, 366-434.

⁸⁵ Comments by Alfred von Verdross, in *Institut de Droit International*, ‘De l’ Interprétation des Traités’, *Annuaire de l’ Institut de Droit International* (1950), : Session de Bath, Tome I, at 455.

⁸⁶ The fact, that it was Verdross, that brought forth this issue, should probably not come as a complete surprise, bearing in mind that already in 1935 he had delivered a course in the Hague Academy of International Law on that subject, see Alfred von Verdross, ‘Les Principes Généraux du Droit dans la Jurisprudence Internationale’, *RCADI* 52 (1935/II): 191-251.

⁸⁷ *Case Concerning Certain German Interests in Polish Upper Silesia*, (Germany v. Poland), Judgment on Merits of 25 May 1926, *PCJI Series A, No.7*, 3, at 22 (hereinafter *German Interest in Upper Silesia* case); *Case Concerning the Factory at Chorzów* (Germany v. Poland), Judgment on Jurisdiction of 26 July 1927, *PCIJ Series A, No.9*, 3, at 27 (hereinafter *Chorzów Factory* case).

recourse to “the principles underlying the matter to which the text refers”.⁸⁸ It is this last principle that seems to be closer to Article 31(3)(c) of the VCLT but, alas, it is this very proposition that was least discussed within the ambit of the *Institut de Droit International*.

These concise remarks by Verdross, although solitary,⁸⁹ remained the subject-matter of the discussions of the *Institut de Droit International*. They instigated a heated debate that lasted up to the very end of the *Institut’s* deliberations.

One of the most interesting analogies that were made in this context belongs to Max Huber. In 1951, while elaborating his understanding of the judicial interpretative process, Huber came to the conclusion that the search for the “true intention of the parties”, is reached through a process similar to “concentric circles”.⁹⁰ Judge Huber, evidently, set the ‘intention of the parties’ at the very center of the interpretative process⁹¹ and linked it to Article 31(3)(c) in the following way. The judge strives to find the intention of the parties, first in the closest ‘concentric circle’ of the contested clauses, then in the further ‘circle’ of the context of the treaty, then in the general principles of international law and finally in the general principles of law recognized by the civilized nations.

Two points need to be raised here; first, although Huber through this construction seems to be tacitly accepting a hierarchical value of the different rules of interpretation, he nevertheless considered reference to the general principles of international law as a *sine qua non* ‘concentric circle’, of which the judicial interpretative enquiry must consist. The second point to be made is that his ‘concentric circles’ encompass only two out of the three rules identified by Verdross. The “principles underlying the matter to which the text refers” are completely left out. In this respect, Huber seems to have adopted a conservative approach as to what other norms the interpreter can resort to and furthermore, to have not given due consideration to the principle which would become the founding stone of what is now known as the *New Haven approach*.

⁸⁸ *Case Relating to the Territorial Jurisdiction of the International Commission of the River Oder* (UK, Czechoslovakia, Denmark, Germany & Sweden v. Poland), Judgment of 10 September 1929, *PCIJ Series A, No. 23*, 3, at 26 (hereinafter *River Oder* case); and von Verdross, in *Institut de droit International*, *supra* note 85, at 456.

⁸⁹ No one else up to this point had touched upon this subject.

⁹⁰ Comments by Max Huber, in *Institut de Droit International*, ‘De l’ Interprétation des Traités’, *Annuaire de l’ Institut de Droit International* (1952): session de Sienne, Tome I, at 215.

⁹¹ An approach, from which the ILC later deviated by setting in the center the text itself, *see infra*.

The aforementioned led Lauterpacht to consider the possibility of adjoining a Resolution No.7 to the other Resolutions of the *Institut* regarding interpretation of treaties. It is evident, though, both by Lauterpacht's own statements and the way that the draft Resolution was formulated⁹² that there was major uncertainty as to the exact meaning of the terms used and the *gravitas* of the rule itself. Lauterpacht, hesitantly, attempted to clarify Verdross's 'general international law', as meaning customary international law⁹³, whereas the Resolution⁹⁴ was formulated both in a mandatory as well as a widely discretionary way.⁹⁵ This is further evidenced by the fact that Lauterpacht stated his reservations *expressis verbis*; according to his opinion an article referring to these principles of international law, was far from indispensable.⁹⁶ The members of the *Institut* seemed to be unsure of the necessity of incorporating such a rule.⁹⁷ During the Sienna Session the scales seemed to be tipping against the retention of this amendment.

The criticism seemed to focus on two issues;

- redundancy, and
- bar to progressive development of international law.

As to the first point, Rousseau stated that the article referring to 'general principles of international law'⁹⁸ was a rule barren of any effectiveness; a fact which made it more dangerous even than the rules of '*acte clair*' and *contra preferentem*, that had already been discarded with.⁹⁹ Similarly, Guggenheim criticized the reference to 'principles of international law' as a tautology, since it was the very Resolutions of the *Institut* that strove to define the principles of international law on the matter.¹⁰⁰ However, this criticism does not seem to differentiate between 'procedural' and 'substantive' principles of international law. Rules of interpretation fall under the first

⁹² Hersch Lauterpacht, in Institut de Droit International, *supra* note 90, at 217.

⁹³ This in hindsight would have been a much more progressive line than the one finally adopted by the majority of the members of the *Institut*.

⁹⁴ Via the common practice of using brackets, connoting the possible variations of a certain term or expression.

⁹⁵ The two formulas are the following: "...must be interpreted" and "It is permissible to interpret".

⁹⁶ Hersch Lauterpacht, in Institut de Droit International, *supra* note 90., at 365.

⁹⁷ From what one can gather from the *dicta* of the people that took the floor in the ensuing discussions, in the sessions from 1952 to 1956.

⁹⁸ Again here we note, that the term used is 'general principles', not 'customary international law', nor 'general international law'.

⁹⁹ Rousseau, in Institut de Droit International, 'De l' Interpretation des Traités', *Annuaire de l' Institut de Droit International*, (1952): Session de Sienna, Tome II, at 378.

¹⁰⁰ Guggenheim, in Institut de Droit International, *supra* note 99, at 384 and 404-5.

category. However, the ‘procedural’ principle of interpretation according to which interpretation must be based on the general principles of international law, encompasses both categories, ‘procedural’ and ‘substantive’ principles. Consequently, it is a far cry from being a tautology.

Rolin considered that the notion of ‘principles of international law’ was incorporated within the term ‘natural meaning [of the words]’¹⁰¹ and no specific need existed for an explicit enunciation¹⁰², whereas Basdevant, fearing the ambiguity of the terms in question, opted for abandoning any reference to ‘principles of international law’.¹⁰³

On the other hand, apart from Verdross, who evidently stood by his proposal only the Drafting Committee had expressed, at least initially, the opinion that interpretation must happen “with a *background* dominated by the principles of customary international law” (emphasis added).¹⁰⁴ However, a shift occurred during the last meeting on the issue of interpretation during the Sienna Session. Members of the *Institut* that had previously advocated against the inclusion of any reference to ‘principles of international law’ completely changed their original position.¹⁰⁵

2. Shifting from Tentativeness to Acceptance

In the Grenada Session, a change of *Rapporteurs*¹⁰⁶ coincided with a marked shift in the stance of the members of the *Institut* with regards to the inclusion or not of a rule making reference to the ‘general principles of international law’. The final form of the articles proposed by Lauterpacht, had incorporated the ‘general principles of

¹⁰¹ Rolin, in *Institut de Droit International*, *supra* note 99, at 386.

¹⁰² Similarly Sir McNair considered this reference as, purely and simply, redundant, Sir Arnold McNair, in *Institut de Droit International*, *supra* note 99, at 404.

¹⁰³ Basdevant, in *Institut de Droit International*, *supra* note 99, at 387; Kaeckenbeeck, was also of the opinion that no reference to general principles should be made, albeit for different reasons. Drawing from his experience as President of the Arbitral Tribunal for High Silesia, he stated that these principles were commonly used by the parties to put a break to progressive interpretations of the clauses in question. *See* Kaeckenbeeck, in *Institut de Droit International*, *supra* note 99, at 385; However, it is exactly this need for unification and progressiveness that 31(3)(c), is nowadays called upon to address.

¹⁰⁴ *Institut de Droit International*, *supra* note 99, at 384.

¹⁰⁵ Both Lauterpacht and Basdevant, submitted that although this rule did not seem to offer much to the project, it nevertheless was not completely without merit and therefore should be retained, Hersch Lauterpacht & Basdevant, in *Institut de Droit International*, *supra* note 99, at 405; According to Basdevant one cannot compartmentalize *in abstracto* the juridical environment in which the treaty finds itself placed, and that environment is formed by the rules of law, part of which form the general principles of international law, Basdevant, in *Institut de Droit International*, *supra* note 99, at 405.

¹⁰⁶ Sir Gerald Fitzmaurice substituted Hersch Lauterpacht.

international law’, in the second sentence of the first article¹⁰⁷ being preceded only by the ‘natural meaning’.¹⁰⁸ This incorporation, at such a high level, among the proposed rules of interpretation, especially taken into consideration the objection to its very incorporation expressed in the Sienna Session, is very interesting¹⁰⁹.

Following this line, several members of the *Institut* not only applauded this solution, but actually proposed that the ‘general principles of international law’ are of such fundamental importance that they should be the first to be mentioned in the first article,¹¹⁰ a proposition that found the *Rapporteur*, Sir Gerald Fitzmaurice, in complete agreement.¹¹¹

This proposal for a re-ordering of the paragraphs met with some objections; the main arguments were, firstly, that the normal process was to study the text itself and its context and only afterwards to refer to the general principles,¹¹² the other way round seemed to lack practicality; and secondly, that this reversal of order, would be detrimental to the accepted hierarchy¹¹³; first reference to the text and then to the other elements of treaty interpretation.

As a result of the discussion Fitzmaurice drafted a new set of articles, which, however, made absolutely no reference to the ‘general principles of international law’.¹¹⁴ Essentially, the discussions had led to a circular motion. From no mention in the beginning, up until Verdross’ suggestion, to a tentative acceptance, to a more general acceptance, to once again, no mention at all.

Explaining the reasons behind his choice, Fitzmaurice argued that the incorporation of the ‘general principles of international law’, had resulted in such a heated debate and a divide within the members of the *Institut* that he considered it more prudent to simply eradicate any related reference¹¹⁵; all the more because

¹⁰⁷ Alongside ‘context’ and ‘good faith’.

¹⁰⁸ Hersch Lauterpacht, in Institut de Droit International, ‘De l’ Interprétation des Traités’, *Annuaire de l’ Institut de Droit International* (1954): Session de Aix-en-Provence, Tome I, at 225.

¹⁰⁹ And probably attributable to the opinions of the *Rapporteur* himself.

¹¹⁰ Jessup and Liang, in Institut de Droit International, ‘De l’ Interprétation des Traités’, *Annuaire de l’ Institut de Droit International* (1956): Session de Grenade, at 330-1 and 332 respectively.

¹¹¹ Sir Gerald Fitzmaurice, in Institut de Droit International, *supra* note 110, at 332.

¹¹² Badawi, in Institut de Droit International, *supra* note 110, at 333.

¹¹³ Basdevant, in Institut de Droit International, *supra* note 110, at 336. However, Basdevant was in agreement that a reference to “*general principles of international law*” should exist, an opinion he had already expressed in the Sienna Session, *see supra* notes 103 and 105 and accompanying text.

¹¹⁴ Nor for that matter to ‘good faith’, *see* Institut de Droit International, *supra* note 110, at 337-8.

¹¹⁵ Sir Gerald Fitzmaurice, in Institut de Droit International, *supra* note 110, at 338.

it does not serve any purpose to mention [them]. The interpretation of treaties depends itself on international law, and thus on the [general] principles that form its base.^{116, 117}

This reasoning echoes the principle of systemic integration and essentially, advocates the unity of the system of international law. This moving back and forth, as to whether any reference should be made to the ‘general principles of international law’, is highly demonstrative of the awkwardness that all the members of the *Institut*, especially the *Rapporteurs*, felt. On the one hand, such a reference might reflect the true status of the interpretative process, on the other, there were fears that it might be redundant or even worse too rigid, too inflexible to cope with the tides and ebbs that are characteristic of the art of legal interpretation.

However, at this point the members of the *Institut* seemed to have reached a consensus as to the existence of such a rule, albeit finding it perhaps unnecessary or extremely cumbersome to put it down in black letter law. This change is evident by the fact that the eradication, proposed by Fitzmaurice, raised several voices of dissent and absolutely not one supporting it *expressis verbis*.^{118, 119}

This resulted in a final redrafting of the first article that mentioned the “general principles of international law” at the end of the first paragraph. This formulation, somewhat reminiscent of Huber’s ‘concentric circles’ construction, benefits from a lack of an explicit acknowledgment of hierarchy. When put to vote, 44 voted in favour, 1 against and 1 abstained.

¹¹⁶ *Id.*

¹¹⁷ A similar idea albeit in a more simplified form had been expressed by Rolin in the Sienna Session, *see supra* note 100.

¹¹⁸ Jenks, Jessup, Hambro, van Asbeck and Basdevant took the floor to argue that the wording ‘general principles of international law’ should be retained in the text of the final Resolution of the *Institut*; Jenks, Jessup, Hambro, van Asbeck & Basdevant, in *Institut de Droit International*, *supra* note 110, at 341, 342, 343, 343 and 344 respectively.

¹¹⁹ Of special importance are the remarks of van Asbeck and Basdevant; the first acknowledged that the lack of “unity of vision and conception within the international community” might dictate the importance of relying on the text, but that should not mean *ipso facto* that all other principles of interpretation should be discarded, especially the “general principles of international law”. However, this lack of unity might be reversing itself in an international community aware of the pitfalls of fragmentation, and that might in some way explain the rise of the use of Article 31(3)(c) by international judicial bodies; the second, Basdevant, identified the potential importance of these principles by reference to Lauterpacht’s example of ‘territory’ as a ‘generic term’, during the Siena Session.

Looking back through these debates, what is striking is that setting the ‘general principles of international law’ within the *corpus* of interpretative rules was far from easy. But this does not amount to saying that there was ever a debate on whether the ‘general principles of international law’ were truly a part of the interpretative process. If one looks closely at the raised objections, one will find arguments such as tautology¹²⁰, or that these principles are already incorporated in other terms existing within the proposed articles¹²¹ that they are so vague that might become abused or raise dangers in the interpretative quest of the judges¹²² or that their inclusion in the rules was merely redundant.¹²³ No one at any point argued that these principles do not form part of the interpretative process. It is clear, thus, that at least “the general principles of international law” form an essential part of the canons of interpretation.

However, it is regrettable, that the *Institut*, felt probably itself not ready to tackle the third of the rules that Verdross had originally proposed and the PCIJ had adopted in *the River Oder Case*, *i.e.* “principles underlying the matter to which the text refers”.¹²⁴

B. The Debate Continues within the ILC

The debate within the ambits of the *Institut de Droit International* and the accompanying Resolution, were, however, neither the final solution to the difficult issue of interpretation nor a generally accepted consensus as to the rules;¹²⁵ it was merely one, in a series, of stepping stones that would eventually lead to Articles 31-32 of the VCLT.

The fact that the *Institut de Droit International* was one of the first to tackle the issue of interpretation, should not lead us to the unfounded conclusion that its members were the first to realize the importance of this issue for the international legal system as a whole. The ILC during its first session in 1949, even before the

¹²⁰ Guggenheim, *supra* note 100.

¹²¹ Rolin, *supra* note 101.

¹²² Rousseau and Kaeckenbeeck, *supra* notes 99 and 103, respectively.

¹²³ Lord McNair, *supra* note 102.

¹²⁴ *Supra* note 88 and accompanying text.

¹²⁵ Even this issue was debated *i.e.* whether one should talk about rules or of principles of international law, the former being of a more rigid character the latter of a more normative and *ergo* of a more flexible nature; for a more detailed analysis of this debate see *supra*.

relevant sessions of the *Institut de Droit International*,¹²⁶ had already selected the issue of Law of Treaties as one suitable for codification. However, not until 1964 did the ILC reach the stage of tackling the issue of interpretation¹²⁷ and then again only after Sir Humphrey Waldock's second Report on the Law of Treaties¹²⁸.

1. From 'Principles' to 'Rules'

With the members of the *Institut* having reached a consensus that general principles of international law are contained within what would become Article 31(3)(c), the ILC did not rehash these discussions, but using them as a springboard, focused on the remaining unresolved issues. The ILC debated whether interpretation should take into account a wider array of norms and rules of the international system and not be solely restricted to this small and dangerously vague category of general principles.

¹²⁶ In Bath, Sienna, Aix-en-Provence and Grenada respectively.

¹²⁷ Mr. Brierly was appointed as the first *Special Rapporteur*. In 1950 Brierly submitted his first report. It was a general consideration of a proposed work on the law of treaties. (J. Brierly, *Report on the Law of Treaties* (A/CN.4/23) in *YILC* (1950), Vol. II, at 222 *et seq.*) At this point the Commission expressed its will for the issue of treaties to which international organizations are parties, to be tackled as well (see ILC, *Report of the International Law Commission covering its Second Session, 5 June - 29 July 1950* (A/1316) in *YILC* (1950), Vol. II: 364, paras.161-2). However, this issue was to be dealt with a few decades later and would form the basis of VCLT-II. It was considered more productive to focus mainly, at this point, on treaties concluded between States (see ILC, *Report of the International Law Commission covering its Third Session, 16 May - 27 July 1951* (A/1858) in *YILC* (1951), Vol. II:123, at 136). In 1952 Sir Hersch Lauterpacht was appointed *Special Rapporteur*, and remained in that post until 1954. By 1954 Lauterpacht was unable to continue his work in that function due to his appointment as judge in the ICJ and Sir Gerald Fitzmaurice was elected to continue his work as *Special Rapporteur*. From 1956 to 1960 Sir Gerald Fitzmaurice presented five reports on several aspects of the law of treaties; none of these, unfortunately, dealt with the issue of interpretation (see Sir Gerald Fitzmaurice, *First Report on the Law of Treaties* (A/CN.4/101) in *YILC* (1956), Vol. II, at 104 *et seq.*; Sir Gerald Fitzmaurice, *Second Report on the Law of Treaties* (A/CN.4/107) in *YILC* (1957), Vol. II, at 16 *et seq.*; Sir Gerald Fitzmaurice, *Third Report on the Law of Treaties* (A/CN.4/115) in *YILC* (1958), Vol. II, at 20 *et seq.*; Sir Gerald Fitzmaurice, *Fourth Report on the Law of Treaties* (A/CN.4/120) in *YILC* (1959), Vol. II, at 37 *et seq.*; Sir Gerald Fitzmaurice, *Fifth Report on the Law of Treaties* (A/CN.4/130) in *YILC* (1960), Vol. II, at 69 *et seq.*). What is evident from these reports is that Sir Gerald Fitzmaurice, although building on the conclusions of his predecessors, tackled the issue *de novo*, and framed the proposed drafts "in the form of an expository code rather than of a convention" (see ILC, *Report of the International Law Commission covering the Work of its Fourteenth Session, 24 April-29 June 1962* (A/5209), in *YILC* (1962), Vol. II: 157, at 159). This was the approach that Sir Fitzmaurice had opted for during the discussions within the *Institut de Droit International*. In 1961 due to Sir Fitzmaurice's appointment to the ICJ, Sir Humphrey Waldock, was elected to continue his work. At the same time, a shift occurred, by which the ILC decided that it should abandon its approach on the law of treaties, in the form of a code and rather focus on proposing articles in the form of a convention; see GAOR, 16th Session, Supplement No.9, (A/4843), para. 39, *contra see* Fitzmaurice, *First Report on the Law of Treaties*, at 107.

¹²⁸ Sir Humphrey Waldock, *Third Report on the Law of Treaties* (A/CN.4/167 and Add.1-3), in *YILC* (1964), Vol. II: 5, at 8-10 and 52-62.

Waldock submitted a version of Article 31(3)(c) (then Draft Article 70) which read as follows: “1.(b) in the light of the rules of international law [in force at the time of its conclusion]”.¹²⁹ The point that stole the spotlight was the use of the term ‘rules’ in lieu of ‘principles’, a substitution that prompted a multitude of reactions. Some members of the ILC considered that the term ‘rules’ was either completely erroneous, since not all rules, but only the “basic principles of international law which had a bearing on the treaty, were applicable in its interpretation”¹³⁰ or outright too general, since such a term would encompass treaty-based rules, which consisted the vast majority of internationally binding rules.¹³¹

Another group, however, considered this term advantageous compared to ‘principles’ for exactly the same reasons. In interpreting a treaty provision, the interpreter should bear in mind, not only the principles but all the relevant rules, be they of treaty or customary nature. Treaties were not created in a legal vacuum and the totality of these rules provided the necessary contextual background for the interpretative process.¹³² Separate mention needs to be made to Mr. de Luna, who was the first to touch upon the subtlety of the term ‘general’ and its links to regional custom. According to him, this term should not be included since it would not make allowance for rules of a regional nature.¹³³

The discussions on the articles on the law of treaties were resumed by the ILC in 1966; however, in the meantime, the Governments were asked to submit their comments. The US and Israeli Governments agreed that the reference to ‘rules of international law’ should be maintained, however, the US was of the opinion that the

¹²⁹ Sir Humphrey Waldock, (A/CN.4/SR.769), in *YILC* (1964), Vol. I, at 309.

¹³⁰ Tunkin, (A/CN.4/SR.769), in *YILC* (1964), Vol. I, at 310.

¹³¹ The Chairman & Verdross, (A/CN.4/SR.769), in *YILC* (1964), Vol. I, at 310 and 312. Mr. Verdross reinforced this argument by referring both to the formula used by the *Institut de Droit International* (although prominent members of the ILC had agreed at this point that the wording selected by the *Institut de Droit International* was weak at best, and its adoption would be tantamount to an admission by the ILC that it was unable to form an opinion on the point; see the Chairman, Sir Humphrey Waldock, (A/CN.4/SR.769), in *YILC* (1964), Vol. I, at 312) as well as to international jurisprudence (see the relevant examples that the same person had raised in the discussions in the *Institut de Droit International*, *supra* notes 85-8).

¹³² Sir Humphrey Waldock, Yasseen and Tabibi, (A/CN.4/SR.769), in *YILC* (1964), Vol. I, at 310 and 312.

¹³³ Mr. de Luna, (A/CN.4/SR.769), in *YILC* (1964), Vol. I, at 310. This opinion found, in the subsequent meeting strong support from Sir Humphrey Waldock and Mr. Yasseen, (A/CN.4/SR.770), in *YILC* (1964), Vol. I, at 316. Opposing arguments, promulgating the notion of ‘general principles’ were raised by Verdross and Bartos, (A/CN.4/SR.770), in *YILC* (1964), Vol. I, at 316.

term ‘general’ would create confusion, and thus, should be deleted¹³⁴, whereas Israel suggested that not only should it be made clear that ‘rules of international law’ referred to substantive rules, including the rules of interpretation, but also that the order of the provisions of Article 31 VCLT (then Draft Article 69(1)(a) & (b))¹³⁵ should be reversed, thus giving primacy to the ‘rules of international law’.¹³⁶ The Netherlands, on the other hand, considered the reference to the ‘rules of international law’ as of secondary importance and preferred the deletion of that sub-paragraph.¹³⁷

2. *In dubio pro ambage*¹³⁸

When the ILC resumed discussing the issue of interpretation, Waldock, having taken into consideration the comments of the Governments and of the Sixth Committee, submitted a redrafted version of Article 31 (then Draft Article 69), which read as follows: “1. *A treaty shall be interpretedin the light of....(b) the rules of international law*”.¹³⁹ What is striking in this new version of Article 31(3)(c) is that it reflects the notable shift that had occurred from the initial drafts and discussions that only referred to either ‘principles’ or ‘general rules of international law’.¹⁴⁰

This draft by Waldock, contained only necessary formulations in order to achieve a common ground for consensus, but even in this condensed form, it managed to reflect the change in the stance of the ILC members and the Governments. Although necessary from a practical point of view, it was exactly this vagueness that was criticized by certain members of the ILC,¹⁴¹ and some went even so far as

¹³⁴ US, in ILC, *ANNEX: Comments by Governments on Parts I, II and III of the Draft Articles on the Law of Treaties Drawn up by the Commission at its Fourteenth, Fifteenth and Sixteenth Sessions*, (A/6309/Rev.1), in *YILC* (1966), Vol. II: 279, at 359.

¹³⁵ ILC Draft 1964:

Article 69 (General Rule of Interpretation): 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to each term: (a) In the context of the treaty and in the light of its objects and purposes; and (b) In the light of the rules of general international law in force at the time of its conclusion

¹³⁶ Israel, *supra* note 134, at 300-1.

¹³⁷ The Netherlands, *ibid.*, at 322-3.

¹³⁸ This is the author’s paraphrasing of a principle of Criminal Law, the *in dubio pro reo* principle, which means “in case of doubt favour the accused”. Bearing that in mind, the title translates to: *in case of doubt favour vagueness*.

¹³⁹ Sir Humphrey Waldock, (A/CN.4/SR.869), in *YILC* (1966), Vol. II, Part II, at 184.

¹⁴⁰ Or ‘rules of general international law’ for that matter.

¹⁴¹ Briggs, (A/CN.4/SR.870), in *YILC* (1966), Vol. II, Part II, at 187; Reuter, who considered that the “attempt at simplification had perhaps been pushed rather far”, and initially suggested moving sub-paragraph (b) to the end of the Article (a transfer, supported by Jiménez de Aréchaga,

suggesting the deletion of the whole sub-paragraph, since not only did it cause more problems than it solved¹⁴² but also because, as they considered, it was an unnecessary self-reference.¹⁴³

Such suggestions were, nevertheless, not given serious consideration; a fact which seems to indicate that the reference to international law in the process of interpretation had gained almost uniform acceptance within the ILC and was considered non-expendable,¹⁴⁴ offering the advantage of the terms being given a “univocal” and not a “multivocal” meaning.¹⁴⁵

Hence, the greater part of the debate focused on clarifying what was to be encompassed by the term ‘rules’. Most members agreed that sub-paragraph (b) included regional rules,¹⁴⁶ although there was the opinion that this should be restricted to regional rules of a customary nature.¹⁴⁷ To this restriction, both the Chairman and the *Special Rapporteur* were opposed, as they felt that ‘rules’ should incorporate not only principles of international law and general custom, but also regional custom and rules that were treaty-based.¹⁴⁸

As a result of this, the Drafting Committee proposed the following text: “[Article 69(3)(c)] any relevant rules of international law applicable between the parties”.¹⁴⁹ This sub-paragraph was finally adopted by 13 votes to none, with 3 abstentions¹⁵⁰ and without an amendment.¹⁵¹

(A/CN.4/SR.870), in *YILC* (1966), Vol. II, Part II, at 190), although eventually he reconsidered his position on the subject for reasons mentioned *infra*, Reuter, (A/CN.4/SR.870), in *YILC* (1966), Vol. II, Part II, at 188 and (A/CN.4/SR.871), in *YILC* (1966), Vol. II, Part II, at 195.

¹⁴² Tunkin, (A/CN.4/SR.870), in *YILC* (1966), Vol. II, Part II, at 190.

¹⁴³ Mr. Briggs, considered that the “rules” were to be understood as rules of interpretation, thus rendering the provision completely unnecessary, Briggs, (A/CN.4/SR.870), in *YILC* (1966), Vol. II, Part II, at 187; *contra* Mr. El-Erian submitted that the scope of the relevant provision was not confined to rules of interpretation but extended also to substantive rules, El-Erian, (A/CN.4/SR.871), in *YILC*, (1966), Vol. II, Part II, at 196.

¹⁴⁴ Jiménez de Aréchaga, (A/CN.4/SR.870), in *YILC* (1966), Vol. II, Part II, at 190; the Chairman, (A/CN.4/SR.871), in *YILC* (1966), Vol. II, Part II, at 197.

¹⁴⁵ de Luna, (A/CN.4/SR.871), in *YILC* (1966), Vol. II, Part II, at 194; thus promoting the notion of unity.

¹⁴⁶ Castrén, Tunkin, Jiménez de Aréchaga and Amado, (A/CN.4/SR.870), in *YILC* (1966), Vol. II, Part II, at 188, 190, 190 and 191 respectively.

¹⁴⁷ Verdross, (A/CN.4/SR.870), in *YILC* (1966), Vol. II, Part II, at 191.

¹⁴⁸ The Chairman, (A/CN.4/SR.871), in *YILC* (1966), Vol. II, Part II, at 197; Sir Humphrey Waldock, (A/CN.4/SR.872), in *YILC* (1966), Vol. II, Part II, at 199.

¹⁴⁹ (A/CN.4/SR.883), in *YILC* (1966), Vol. II, Part II, at 267, para. 90.

¹⁵⁰ (A/CN.4/SR.884), in *YILC* (1966), Vol. II, Part II, at 270, para. 30.

¹⁵¹ (A/CN.4/SR.893), in *YILC* (1966), Vol. II, Part II, at 329, para. 34.

Essentially, the ILC faced the same problems as in the earlier sessions. However, instead of delegating the finding of answers to later sessions, this time the ILC had to reach an agreement on a Draft Article. Faced with this, it adopted the following response: Vagueness through the adoption of the wording ‘rules of international law’. This term was preferred as being vague enough to satisfy everyone, from those wishing the most expansive interpretation to those advocating the most restrictive one.¹⁵² However, it must be noted that this response did not actually break the cycle, it merely postponed its recurrence.

C. Sixth Committee and the Vienna Conference on the Law of Treaties

1. The Sixth Committee

The debate moved, next, to the Sixth Committee that was called to discuss the adopted Draft Articles and decide on the feasibility of a Conference on the Law of Treaties. With regards to the reference to sub-paragraph (3)(c), the comments of the Governments followed pretty much in the footsteps of the members of the ILC. The most interesting point is that they considered that the ‘rules of international law’ should have been mentioned in the first paragraph and not ostracized to the third one.¹⁵³

2. Coming full Circle – The Vienna Conference on the Law of Treaties

The final stage of the debate took place in the Conference on the Law of Treaties. Although the debate was monopolized, as to interpretation, on other issues such as hierarchy and *travaux préparatoires*, there were, nevertheless, some points raised with regards to Article 31(3)(c) (then Article 27(3)(c) of the ILC Draft). The delegation of Czechoslovakia, firstly reiterated the criticism of the Sixth Committee as to the transfer of the ‘rules of international law’ to paragraph 3.

The most important issue, however, was raised by the Federal Republic of Germany, which submitted an amendment.¹⁵⁴ This amendment, essentially proposed

¹⁵² See analysis of relevant debate *supra*.

¹⁵³ Ukraine & Byelorussia, (A/CN.6/22/SR.978), paras. 18-9 and (A/CN.6/21/SR.908), para. 14 respectively.

¹⁵⁴ Which eventually was not put to vote due to a procedural obstacle.

the addition of a further sub-paragraph (d) that would have gone as follows: “(d) any relevant international obligation of one or more of the parties”.¹⁵⁵ The reason for this amendment, according to the German delegation, was that they felt that *if* Article 31(3)(c) referred only to general international law, then it was too restrictive. It seemed to the German delegation logical that treaty obligations, which each one of the parties had undertaken with respect to other third States, should also be taken into consideration, in order to avoid conflicting obligations.¹⁵⁶ Of course this amendment was not aimed to cover cases of genuine conflict, but cases where a conflict of obligations could be avoided through an effective interpretation that would safeguard the coherency of the legal order and not cause “unwarranted harm to at least one of the parties”.¹⁵⁷ This amendment proposal touched upon the final aspect of 31(3)(c) that had not been raised during the previous discussions, *i.e.* which treaties could be taken into consideration, treaties that both parties were parties to, treaties that at least one party was a member of, or treaties to which all parties of the treaty in question were parties to?¹⁵⁸ The German delegation seemed to opt for the most extensive approach. Linderfalk suggests, the fact that this amendment did not find its way into the text of the VCLT can be construed as tacit recognition that no state agreed with Germany on this issue.¹⁵⁹

However, taking into consideration the reason why the German delegation submitted this amendment proposal, *i.e.* to allow for Article 31(3)(c) to reach its full potential, *if the term ‘rules’ was to be understood as referring only to customary law*, demonstrates that a different understanding of the non-incorporation of the German amendment may be more appropriate.

Since, as was demonstrated *supra*, there was substantial support behind the notion that the term ‘rules’ applied to conventional rules as well, the German amendment would already be included in Article 31(3)(c), so there was no need for an additional provision. This was actually the point of the Kenyan Representative’s

¹⁵⁵ Federal Republic of Germany, (A/CONF/39/C.1/L.214)

¹⁵⁶ Federal Republic of Germany, in *Vienna Conference I*, *supra* note 46, at 172, para.10.

¹⁵⁷ *Ibid.*, paras.11-2.

¹⁵⁸ This question would be raised several years later in a WTO Dispute Panel, and the solution opted for would be the last one, see *EC – Measures Affecting the Approval and Marketing of Biotech Products*, (United States of America, Canada & Argentina v. European Communities), Panel Report adopted on 21 November 2006, WTO, WT/DS291R, WT/DS292R, WT/DS293R, paras. 7.68-7.70 (hereinafter *EC-Biotech* case).

¹⁵⁹ Linderfalk, *supra* note 71, at 361.

response to the German amendment. He felt that it was unnecessary, since it was already part and parcel of Article 31(3)(c).¹⁶⁰ Furthermore, the amendment was never put to vote¹⁶¹ due to a procedural technicality.¹⁶² Bearing all these in mind, the fact that Germany did not pursue this issue is probably more a result of considering the amendment as already incorporated in the existing Article 31(3)(c), which was the opinion shared by Kenya as well. Consequently, it is actually the lack of any objection, at least on a preliminary level, as to the substance of this amendment that might be critical in ascertaining the true meaning of Article 31(3)(c). The fact that no one objected immediately to the German amendment may indicate that they shared the same opinion as that of the Kenyan delegate.

In the end, the text of Article 31 remained unchanged and was adopted without any objections.

D. Conclusions and Summary

Having completed the examination of how Article 31(3)(c) evolved through the discussions in the three main *fora*, it is clear that this provision was existent from the very start, even as back as Grotius and Vattel, albeit in various forms and debated at various levels of intensity. Such a clarity was, unfortunately, lacking in the exact scope of Article 31(3)(c). Several issues, such as intertemporal law¹⁶³ or the notion of ‘parties’ were left intentionally vague to allow the reaching of an agreement and avoiding simultaneously putting at risk the very existence of the provision. A lot of the discussions seemed to be trapped in a vicious circle, coming back to the same issues again and again. However, the incorporation of a provision such as Article 31(3)(c) was considered essential. It is true that certain of the participants in the three main *fora* examined, felt that the essence of Article 31(3)(c) was incorporated in several other provisions¹⁶⁴ and in notions such as good faith, permeating the totality of the system and providing a sense of systemic integration and unity. Nevertheless, the

¹⁶⁰ *Vienna Conference I, supra* note 46, at 181, para. 31.

¹⁶¹ Despite the fact that representative of the Soviet Union considered that the German amendment raised an issue of substance; *Vienna Conference I, supra* note 46, at 185, para. 80.

¹⁶² *Ibid.*, at 185, para. 81.

¹⁶³ *See infra* Chapter II.

¹⁶⁴ Including the already agreed provisions on interpretation.

clear majority felt that this role should be given a black letter expression within the VCLT.

It is true that it cannot be argued that a general agreement existed *ab initio* as to what the term ‘rules’ meant. Eventually, however, the understanding seemed to be that this term covered, not only general principles and customary international law but also conventional rules.¹⁶⁵ Unfortunately, during the *travaux préparatoires* very little attention, if any, was paid to the remaining terms of Article 31(3)(c): ‘relevant’, ‘applicable’ and ‘parties’. Only with respect to the latter and at the very last minute did the issue come to the forefront with the amendment proposed by the Federal Republic of Germany. The implications of this amendment, as they were analyzed *supra*, seem to point towards an expansive interpretation of the term ‘parties’, but this will have to be substantiated further *infra* in the next Section.

As a last point, it is interesting to highlight, that with the last amendment that was proposed by Germany regarding Article 31(3)(c), the debate on this provision came full circle and returned to the original arguments of Vattel and Grotius. By advocating in favour of an extensive interpretation that would be effective, avoid conflict of norms and would not cause “unwarranted harm to the parties”, the German amendment echoed Vattel’s construction of extensive and restrictive interpretation based on the distinction of things favourable and odious.¹⁶⁶ In cases of doubt, Vattel had suggested that equity should be the guide, and an extensive interpretation should be opted if it relates to things favourable, such as things that “tend to the common advantage” of the contracting parties or are “useful and salutary to human society”.¹⁶⁷

¹⁶⁵ As to the latter, although the general consensus seemed to be that they were included, no unanimity existed; this is implicitly reflected also in the German amendment which was premised on the hypothesis that some States might argue that Article 31(3)(c) referred only to customary international law; *see supra* analysis.

¹⁶⁶ Vattel, *supra* note 37, paras.290 *et seq.*, pp.238 *et seq.*

¹⁶⁷ *Ibid.*, paras.300-2.

IV. Jurisprudence (‘other Supplementary Means of Interpretation’) as ‘Determinative’ of the Content of Article 31(3)(c) of the VCLT: The ‘Proximity Criterion’ Revealed

The previous analysis illustrated the controversy and vagueness surrounding the various terms of Article 31(3)(c). Whereas, with respect to certain problematic terms, the analysis of the text complemented by an examination of the apposite *travaux préparatoires* assisted in revealing the meaning intended (as, for instance, with respect to the term ‘rules’), this was not the case with the remaining terms of Article 31(3)(c). For this reason and for the purposes of the present thesis, it was considered that recourse to ‘other supplementary means’ was in order. Reference to judicial decisions of the same or other international courts and tribunals is commonplace in international jurisprudence. It has also been explicitly categorized, in some recent cases such as the *CCFT v. US* and the *EC – Chicken Classification* cases,¹⁶⁸ as falling under Article 32 of the VCLT.

Based on these considerations, both recent and pre-VCLT jurisprudence will be examined to see if they can offer any insight as to the interpretative process enshrined in Article 31(3)(c).

A. Recent Jurisprudence Confirming or Determining Article 31(3)(c)

Recent jurisprudence seems to confirm the preliminary findings as to what the term ‘rules’ of Article 31(3)(c) includes. For instance the WTO Panel in the *EC-Biotech* case explicitly recognized that the term ‘rules of international law’ encompasses: “(i) international conventions (treaties), (ii) international custom (customary international law), and (iii) the recognized general principles of law”.¹⁶⁹ Various other courts and

¹⁶⁸ These cases will be analyzed in more detail *infra* in Chapter IV.

¹⁶⁹ *EC-Biotech* case, para. 7.67; although the Panel felt that the inclusion of ‘general principles’ may not be as straightforward as it seems, nevertheless in the end and persuaded by the relevant *US-Shrimp dicta*, it held that such principles also fell within Article 31(3)(c); *Id.*; this all-inclusive understanding of the term ‘rules’ seems to have been also implicitly held by the Appellate Body in *European Communities - Customs Classification of Frozen Boneless Chicken Cuts*, Appellate Body Report adopted on 27 September 2005, WTO, WT/DS269/AB/R and WT/DS286/AB/R, para. 199 (hereinafter *EC-Chicken Classification* (AB)); and in *Pope and Talbot v. Canada*, para. 46.

tribunals have also recognized each and every one of these possibilities in their relevant jurisprudence.¹⁷⁰

The discussion is less clear as one moves away from ‘rules’. With respect to the term ‘parties’ the *EC – Biotech* has been consistently cited as having adopted a restrictive interpretation *i.e.* that all parties to the interpreted treaty must be parties to the treaty referred to. It is true, that in that case the Panel adopted that solution, as can be seen from the relevant passage of the judgment:

This understanding of the term ‘the parties’ leads logically to the view that the rules of international law to be taken into account in interpreting the WTO agreements at issue in this dispute are those which are applicable in the relations between the WTO Members.¹⁷¹

However, what is not as clear is whether the Panel held that this should always be the interpretation of Article 31(3)(c). The Panel’s choice of words seems to leave open the possibility that a more expansive interpretation, in a different context, may be permissible:

¹⁷⁰ i) General Principles of Law, recognized by civilized nations, have been recognized as falling within the ‘rules’ of Article 31(3)(c) in: *Golder v. UK*, para. 35; where the ECtHR held that:

The principle whereby a civil claim must be capable of being submitted to a judge ranks as one of the universally ‘recognised’ fundamental principles of law; the same is true of the principle of international law which forbids the denial of justice. Article 6 para. 1 (art. 6-1) must be read in the light of these principles.

Mamatkulov and Askarov v. Turkey, Judgment of 4 February 2005, 41 *EHRR* 494, para. 111; a pre-VCLT case that recognizes this is the *Georges Pinson* case (France v. United Mexican States), Award of 13 April 1928, *RIAA* 5 (1952): 327, at 422, para. 50(4) (hereinafter *Georges Pinson* case); where the court held that a treaty must be deemed “to refer to such principles for all questions which it does not itself resolve expressly and in a different way” (translation).

ii) Customary International Law as falling within the ‘rules’ of Article 31(3)(c) has been recognized in: *Al-Adsani v. United Kingdom*, Judgment of 21 November 2001, 34 *EHRR* 11, paras. 55-6; *Fogarty v. United Kingdom*, Judgment of 21 November 2001, 34 *EHRR* 12, paras. 36-7; *McElhinney v. Ireland*, Judgment of 21 November 2001, 34 *EHRR* 13, paras 36-7; In the above three cases the rules on state immunity as customary international law were considered as ‘relevant’; and *Arbitration Regarding the Iron Rhine (‘Ijzeren Rijn’) Railway* (Belgium v. the Netherlands), Award of 24 May 2005, PCA, para. 58 (hereinafter *Iron Rhine Arbitration*); accessible at: <http://www.pca-cpa.org/upload/files/BE-NL%20Award%20corrected%20200905.pdf> (last accessed on 25 January 2010).

iii) Treaties as falling within the ‘rules’ of Article 31(3)(c) has been recognized in: *Certain Questions of Mutual Assistance in Criminal Matters* case, paras. 112-3.; *Selmouni v. France*, Judgment of 28 July 1999, 29 *EHRR* 403, paras. 97-8; In the *Selmouni* case the ECtHR referred to the 1984 UN Convention against Torture to interpret Article 3 of the ECHR; *Esphahanian v. Bank Tejarat*, Award of 29 March 1983, *Iran-USCTR* 2 (1983/I): 157, at 161; *Case No. A/18*, Award of 6 April 1984, *Iran-USCTR* 5 (1984/I): 251, at 260; *Grimm v. Iran*, Award of 18 February 1983, *Iran-USCTR* 2 (1983/I): 78, Dissenting Opinion of Howard M. Holtzmann, at 82; these cases of the Iran-USCT are cited in McLachlan, *supra* note 10, at 293-4 and FNs 62-4.

¹⁷¹ *EC-Biotech* case, para. 7.68.

Before applying our interpretation of Article 31(3)(c) to the present case, it is important to note that the present case is not one in which relevant rules of international law are applicable in the relations between all parties to the dispute, but not between all WTO Members, and in which all parties to the dispute argue that a multilateral WTO agreement should be interpreted in the light of these other rules of international law. Therefore, we need not, and do not, take a position on whether in such a situation we would be entitled to take the relevant other rules of international law into account.¹⁷²

A possibility which is reinforced by the fact that the disputing parties, seem to have also adopted the more flexible interpretation of Article 31(3)(c) in their submissions.¹⁷³ Such an expansive interpretation of the term ‘parties’ seems to have been the case in *US-Shrimp*. There the Appellate Body in interpreting the term ‘exhaustible natural resources’, took into consideration similarly worded provisions in other treaties such as: the 1982 United Nations Convention on the Law of the Sea (UNCLOS)¹⁷⁴ the 1992 Convention on Biological Diversity (CBD)¹⁷⁵ and the 1979 Bonn Convention on the Conservation of Migratory Species of Wild Animals.¹⁷⁶ The important point is that not only all WTO members were not parties to these conventions, but not even all the parties to the dispute.¹⁷⁷

As to the terms ‘relevant’ and ‘applicable’, very little has been stated *expressis verbis*. However, after the examination of the pre-VCLT jurisprudence, the aforementioned cases will be reappraised as to the criteria, or more precisely the criterion,¹⁷⁸ of relevancy they apply. However, as a preliminary comment, with respect to the term ‘applicable’ which as mentioned *supra* has been identified by Villiger as referring only to binding rules,¹⁷⁹ two recent cases seem to cast this claim in doubt. In his Dissenting Opinion in the *OSPAR Arbitration*, Judge Griffith

¹⁷² *Ibid.*, para. 7.72; this understanding of the *EC-Biotech* case has been adopted by: Marisa Martin, ‘Trade Law Implications of Restricting Participation in the European Union Emissions Trading Scheme’, *Georgetown International Environmental Law Review* 19 (2007): 437-74, at 471; Freya Baetens, ‘Muddling the Waters of Treaty Interpretation: Relevant Rules of International Law in the *Mox Plant, OSPAR Arbitration* and *EC-Biotech Case*’, *Nordic Journal of International Law* 77 (2008): 197-216.

¹⁷³ Young, *supra* note 78, at 915 and FN 50.

¹⁷⁴ 21 *ILM* 1261.

¹⁷⁵ 31 *ILM* 818.

¹⁷⁶ 19 *ILM* 15.

¹⁷⁷ *US-Shrimp* (AB), para. 130 and FNs 110-3.

¹⁷⁸ As will be proven *infra* there is one single criterion of relevancy, the ‘proximity criterion’ with various manifestations.

¹⁷⁹ Villiger, *supra* note 62, at 433; an opinion that seems to find support in the *OSPAR Arbitration*, paras. 99-105, where the court considered that a principle invoked by the parties was still *in statu nascendi* and had not yet attained customary law status.

considered as relevant rules which were not binding yet on the disputing parties. He based this on the intentions of the parties as they manifested through the fact that they were signatories to the 1999 Aarhus Convention.¹⁸⁰ Similarly, in the *Southern Bluefin Tuna* cases, Judge Treves considered relevant, for interpretative purposes, the 1995 Straddling Fish Stocks Agreement, despite the fact that it had neither entered into force nor was ratified by the disputing parties.¹⁸¹

B. An Analysis of the pre-VCLT Jurisprudence on Interpreting by Reference to other rules of International Law -- The Legal Genealogy of Article 31(3)(c)

As shown *supra*, in recent years, a “flowering of case-law”¹⁸² pertaining to Article 31(3)(c) has taken place. However, such case-law is post-VCLT and consequently cannot be the practical foundation of the emergence of the principle of systemic integration and its incorporation within the VCLT. Faced with this dilemma, two logical options present themselves; either the drafters of the VCLT created this principle from thin air, taking the ILC’s mandate of “progressive development of international law” to its absolute extremity or there has been case-law, albeit of not such a distilled and crystallized form, which prompted the drafting of Article 31(3)(c) and which so far has been neglected and ill-identified.

Since it is only the second position that can be proven or disproved with any degree of certainty it is to that latter one that the following analysis will focus.

1. Interpretation by Reference to other Treaties – An *Interpretative Renvoi*

In most cases brought before international courts and tribunals, prior to the VCLT, the interpretative tools used and rules applied are pretty straight-forward and their corollary within Article 31 and 32 of the VCLT are easily identifiable, *e.g.* textual interpretation, drafter’s intention, object and purpose, *travaux préparatoires*.¹⁸³

¹⁸⁰ *OSPAR Arbitration*, Dissenting Opinion of Judge Griffith, paras. 7-19.

¹⁸¹ *Southern Bluefin Tuna cases, Provisional Measures* (New Zealand and Australia v. Japan), Order of 27 August 1999, ITLOS, Separate Opinion of Judge Treves, para. 10 (hereinafter *Southern Bluefin Tuna cases*) accessible at: www.itlos.org (last accessed on 25 January 2010).

¹⁸² Gardiner, *supra* note 13, at 251.

¹⁸³ even rules and principles which did not find their way as such in the text of the VCLT articles, like the principle *ut res magis valeat quam pereat* (effective interpretation), restrictive interpretation and so on, were nevertheless the object of debate throughout the entire process from the Harvard Research,

Nevertheless, there is one specific category of cases, the categorization of which has left academics and practitioners alike at a state of awkwardness. These are the cases where the relevant international court or tribunal interpreted a provision of a treaty by reference not to an aspect of itself, be it text, intention, object or *travaux préparatoires*; but to an extrinsic source, *i.e.* other treaties.¹⁸⁴ Essentially, the courts use other relevant treaties¹⁸⁵ to shed light in obscure and/or dubious provisions of a treaty.

As will be proven in the ensuing analysis, there is surely no scarcity in relevant jurisprudence, yet it strikes one as odd that in the major works on treaty law and treaty interpretation, this interpretative tool seems to have been neglected, let alone categorized within an existing framework of interpretative rules.¹⁸⁶ Those authors that do attempt such a categorization, file this interpretative method alongside their analysis of *travaux préparatoires*,¹⁸⁷ although most do not fail to recognize that the former cannot be identified with the latter.¹⁸⁸ This seems to indicate that the position held for this subject is that they fall in the broader category of supplementary means of interpretation.¹⁸⁹ This is reinforced by the fact that the term ‘historical interpretation’ is sometimes employed to allude to this *modus* of interpretation.¹⁹⁰

through the *Institut de Droit International* up to the ILC and the Vienna Conference, and certain aspects of them are mirrored in specific manifestations of the prevailing rule of interpretation.

¹⁸⁴ Of course there have been cases where the court applied customary international law and general principles; *see* for instance the *Georges Pinson* case, at 422. However, as the previous analysis has demonstrated, reference to customary international law and general principles does not raise many issues. On the contrary, reference to anterior or posterior treaties can provide some useful insight as to the true nature of the process of Article 31(3)(c) and the way that each of its problematic terms should be understood. For these reasons, the focus of the following Sections will be pre-VCLT cases where the relevant court, during the interpretative process, referred to treaties other than the one interpreted.

¹⁸⁵ what constitutes a ‘relevant’ treaty and what criteria are used to determine this will be the object of the following analysis.

¹⁸⁶ *See* Arnold D. McNair, *The Law of Treaties* (Oxford: Clarendon Press, 1961); *see also* van Damme who makes an *in passim* reference to the topic but without going into an extensive analysis; Isabelle van Damme, ‘What Role is there for Regional International Law in the Interpretation of the WTO Agreements?’, in *Regional Trade Agreements and the WTO Legal System*, Lorando Bartels and Federico Ortino (eds.) (Oxford: OUP, 2006), 553, at 569-71.

¹⁸⁷ Sir Hersch Lauterpacht, ‘Les Travaux Préparatoires et l’ Intérpretation des Traités’, *RCADI* 48 (1934/II): 709-817; John H. Spencer, *L’ Interpretation des Traités par les Travaux Préparatoires* (Paris : Les Editions Internationales, 1934).

¹⁸⁸ Lauterpacht, *supra* note 187; Spencer, *supra* note 187, at 71 *et seq.*, especially at 101-3.

¹⁸⁹ The following authors tackle one aspect of the issue: Interpretation by reference to *in pari materia* treaties *i.e.* treaties that have the same subject-matter with the treaty being interpreted. This method of interpretation they consider to fall under Article 32 VCLT. *See* Anthony Aust, *Modern Treaty Law and Practice* (Cambridge: CUP, 2007, 2nd edition), at 248; Linderfalk, *supra* note 71, at 355; Linderfalk, *supra* note 62, at 255-9; György Haraszti, *Some Fundamental problems of the Law of Treaties* (Budapest: Akadémia Kiadó, 1973), at 148; a counterargument to this, however, is that even in the ILC no mention of this method was done in connection to *travaux préparatoires*. Berman, analysing the *Oil Platforms* case argues that the reference to other treaties cannot be considered as

The validity of such an equation will be analyzed *infra*, however, at this point and prior to having reached any conclusions, it seems premature to use this term to describe the interpretative process of reference to other treaties. However, a term has to be adopted in order to facilitate, if not anything else, at least linguistically, the following analysis. In Private International Law, when a case arises that is characterized by foreign elements, it is sometimes difficult to determine which legal system and set of rules, which *lex*, should be applied. Each system has a set of rules to resolve such question. Usually depending on the nature and plurality of these foreign elements, this question is re-addressed to another legal system. This is called a *renvoi*. Essentially, it is a referral of the problem of a legal classification from one legal system to another. Depending on the legal system which is called to resolve the issue, the recipient of this *renvoi* can be the *lex fori*¹⁹¹, the *lex loci delicti*¹⁹² and so on. This process bears more than a resemblance to the interpretative method in question. In the case at hand, we have a referral of legal interpretation from the context of one treaty to that of another one. Consequently, the term that will be used to describe this process will be ‘*interpretative renvoi*’. And as the Private International Law *renvoi* is not arbitrary, but stems from the evaluation of certain criteria, similarly, the following Sections will focus¹⁹³ on identifying the criteria on which the selection of the appropriate treaty is based.

2. Case-law Relating to *Interpretative Renvoi*.

As was mentioned *supra*, there is quite an extensive jurisprudence predating the VCLT that makes reference to this method of *interpretative renvoi*. This is not to say

‘context’ within Article 31(3)(c). According to him, it is more of a supplementary means of interpretation; Frank Berman, ‘Treaty ‘Interpretation’ in a Judicial Context’, *Yale Journal of International Law* 29 (2004): 315-22, at 317-22. However, 31(3)(c) is not context *stricto sensu* since the wording of Article 31(3) goes as follows: “There shall be taken into account, *together with the context...*” (emphasis added). Furthermore, it is very interesting to note that Verzijl, when analyzing the various methods of interpretation refers to *in pari materia* interpretation. He does not categorize this method of interpretation as falling under Article 32 or 31 for that matter. On the contrary, he actually, analyzes it in a category which he names “systematic interpretation” (in Chapter IV it will be shown why the term ‘systemic’ is more appropriate than ‘systematic’). In the same category one can find the context of the treaty, the preamble but also other judicial decisions. In this sense it is not quite clear whether Verzijl considered such a method of interpretation as falling under Article 31 or 32. However, the wording selected *i.e.* ‘systematic’ is a nod towards Article 31(3)(c); see Jan H.W. Verzijl, *International Law in a Historical Perspective: Vol. VI* (Leiden: Sijthoff, 1973), at 324.

¹⁹⁰ Lauterpacht, *supra* note 187; Spencer, *supra* note 187, at 71 *et seq.*

¹⁹¹ The law of the place where the case has arisen.

¹⁹² The law of the place where the act was committed.

¹⁹³ Apart from the legal classification of this method as mentioned *supra*.

that in all cases the international courts and tribunals agreed on the applicable criteria, let alone accepted this method. Striking is also the fact that, in many instances, the courts use the method without substantiating or mentioning its theoretical¹⁹⁴ basis and in other cases as an elusive notion withstanding any attempt of categorization. It is treated as a part of treaty interpretation, but at the same time, as a method that is uncertain and indeterminate in which area it falls. Having said that, all cases are pertinent in the sense that each allows a fragmented view of the larger picture; each offers instructive lessons and insight to this interpretative tool and all taken together illuminate and clarify the true nature of the referral to other treaties.

2.1. Cases where the Recourse to Anterior Treaties was Rejected

It would be too presumptuous to think that the totality of the international jurisprudence accepts *ipso facto* the recourse to other treaties as a valid interpretative tool. For this reason the ensuing analysis will have as a starting point the synoptic presentation of the main decisions where although one or more of the parties to the dispute argued that the court should consider treaties other than the ones in question, the court, nevertheless, rejected such recourse. Despite this rejection, conclusions can be arrived at, as to what the relevant court considered as lacking and which rendered a treaty ‘non-relevant’ for interpretative purposes.

In the *River Oder* case the PCIJ declined to consider several other preceding treaties that according to the parties could give a better insight as to the correct interpretation of Article 331 of the Treaty of Versailles.

Besides the arguments already considered, the Parties submitted several others during the written and oral proceedings drawn from certain provisions of the Peace Treaties concerning other rivers, in particular the Moselle and the Danube, and from the proceedings for the establishment of the definitive Statute of the latter river. The Court, being of the opinion that these arguments, drawn from independent provisions and diplomatic negotiations, cannot modify the conclusion which it has reached by means of a direct interpretation of the provisions applicable in the particular case, does not think it necessary to deal with these arguments.¹⁹⁵

¹⁹⁴ Or at least practical.

¹⁹⁵ *River Oder* case, at 30.

What is impressive in this statement¹⁹⁶ is that the Court considers that reference to treaties dealing with analogous issues, is inferior to a clearly textual approach.

Similarly, the PCIJ in two more cases seemed reluctant to accept recourse to anterior treaties. In the *ILO Advisory Opinion*,¹⁹⁷ the Court made absolutely no reference to the Convention of Berne, despite the fact that the French Government in its pleadings had made use of the said convention in order to interpret the terms ‘labour’ and ‘workers’, which were used in Part XIII of the Treaty of Versailles.¹⁹⁸

In the *Eastern Bank Ltd. v. the Turkish Government* case, it is interesting to note the way with which the arbitral court dispensed with the appellant’s claim for compensation. The argument put forward was based on an interpretation of article 25 of the Treaty of Lausanne through an analogy with article 297(h) of the Treaty of Versailles. The Court, however, rejected this on the grounds that such an interpretation by analogy cannot be justified, unless “to the extent that there is a conformity or analogy between the provisions of the two treaties”.^{199,200} In essence, the tribunal considered that in order for another treaty to be relevant for interpretative purposes, some sort of identity or at least *proximity* had to exist between the treaties. However, the tribunal ended the discussion there without going into further detail as to how such proximity was to be identified.

Finally, in the *Ungarische Erdgas A.G contre Etat Roumain* case the issue was the nationality of a company. The Romanian State contested the Hungarian nationality of the Company. The relevant provision was Article 250 of the Treaty of Trianon, which Romania interpreted by means of analogy through the criterion established in Article 297 of the Treaty of Versailles. In order to reinforce this argument, Romania submitted to the Court the fact that Articles 232 of the Treaty of Trianon and 297 of

¹⁹⁶ and to which we shall return *infra*

¹⁹⁷ *Competence of the International Labour Organization in regard to International Regulation of the Conditions of Labour of Persons Employed in Agriculture*, Advisory Opinion of 12 August 1922, *PCIJ Series B, No.2*, 9 (hereinafter *ILO Advisory Opinion*).

¹⁹⁸ *Acts and Documents Relating to Judgments and Advisory Opinions Given by the Court: Speeches Made and Read before the Court, Part II*, reproduced in *PCIJ Series C, No.1.*, 35, at 185; similarly in *Owners of S.S. Seaham Harbour v. The German Government*, the tribunal rejected taking into consideration other treaties without, however, offering any reason; see *Owners of S.S. Seaham Harbour v. The German Government* (UK v. Germany), Award of 7 February 1924), *Tribunaux Arbitraux Mixtes* 4 (1925): 29, at 29-30.

¹⁹⁹ *Eastern Bank Ltd. v. the Turkish Government* (Turkey v. UK), Award of 28 December 1927, *Tribunaux Arbitraux Mixtes* 8 (1929): 188, at 192.

²⁰⁰ In this *dictum* one could also read an implicit requirement in the sense that what is required is not merely an analogy of the subject-matter of the treaties but an analogy of the provisions themselves (hereinafter *Eastern Bank Ltd* case).

the Treaty of Versailles were identical. Consequently, according to Romania, Article 250 of the Treaty of Trianon should be interpreted in the light of Article 297 of the Treaty of Versailles.²⁰¹

The response of the Court is instructive. Firstly, it re-affirmed that the similitude of two provisions in two different treaties cannot *ipso facto* justify the application by analogy of all the provisions of the one to the other.^{202,203} Furthermore, when addressing the issue of possible conflict between the aforementioned provisions, it stated that no such issue²⁰⁴ could arise for two more reasons:

- i) the Treaty of Trianon was negotiated in an era posterior to that of the Treaty of Versailles and in a completely different historical context, which follows that it addressed different objects and purposes²⁰⁵ and
- ii) the Treaty Parties were not identical²⁰⁶

Summing up the court's position, it acknowledged that a similarity in the wording of different treaties was an important factor in determining relevancy, but it was neither the only one nor the most decisive one. Other considerations had to be factored in as well *i.e.* temporal proximity, identity or at least proximity of the subject-matter and identity or partial overlap of the parties to the treaties in consideration.

Apart from the lessons that can be gained from the *dicta* of all these cases,²⁰⁷ it is prudent at this point to underline that at least in two of them,²⁰⁸ despite the fact that the relevant courts rejected in their particular cases the recourse to anterior treaties, they were, nevertheless, open to such an idea as long as in one form or another certain criteria were met. One of them being the similitude of provisions, but by itself this is not enough; the *Ungarische Erdgas* case supplements this criterion with proximity not

²⁰¹ *Ungarische Erdgas A G contre Etat Roumain* (Romania v. Hungary), Award of 8 July 1929, *Tribunaux Arbitraux Mixtes* 9 (1930): 448 *et seq.* (hereinafter *Ungarische Erdgas* case).

²⁰² *Ungarische Erdgas* case, at 454.

²⁰³ At this point the decision seems to echo the *Eastern Bank Ltd.* case in the sense that what is required is not an abstract similarity of two treaties or of two irrelevant provisions but of the provisions at hand; however, it seems to go a step further by introducing some other elements of consideration for allowing such an interpretative *renvoi*.

²⁰⁴ And by association no issue of interpretation by analogy.

²⁰⁵ This argument is an intricate weave of both the temporal and subject-matter (teleological) manifestations of the proximity criterion, see *infra*.

²⁰⁶ *Ungarische Erdgas* case, at 454.

²⁰⁷ which will be analyzed *infra*

²⁰⁸ *Eastern Bank Ltd* case and *Ungarische Erdgas* case.

merely of a temporal nature but also of the subject-matter of regulation, and of identity of contracting Parties.

2.2. Interpretative Renvoi Vindicated in Case-Law: A Daedalus' Maze

2.2.1 Application of Interpretative Renvoi not Accompanied by any Legal Justification

In the clear majority of the cases, however, the tribunals had recourse to *interpretative renvoi*. This by no means simplifies the analytical procedure. On the contrary, it complicates it, since not all courts have followed a uniform approach and even in the case-law of one singular court the practice seems to vary.

In the *Advisory Opinion on Polish Nationals in Danzig*, the PCIJ had to elucidate the relationship between the Convention of Paris of 9 November 1920, between Poland and Danzig and the 1919 Treaty of Versailles. The Court concluded that

[a]s between Danzig and Poland, the Convention of Paris is the instrument which is directly binding on Danzig; but in case of doubt as to the meaning of its provisions, recourse may be had to the Treaty of Versailles, not for the purpose of discarding the terms of the Convention, but with a view to elucidating their meaning.^{209, 210, 211}

In the *Case of Rights of Minorities in Upper Silesia (Minority Schools)* the PCIJ was called to interpret a German-Polish Convention relating to Upper Silesia of May 15th 1922. Nevertheless, the Court found itself, while interpreting Article 131 of the said

²⁰⁹ *Treatment of Polish Nationals and other Persons of Polish Origin or Speech in the Danzig Territory*, Advisory Opinion of 4 February 1932, *PCIJ Series A/B, No. 44*, 4, at 32 (hereinafter *Polish Nationals in Danzig Advisory Opinion*).

²¹⁰ It is interesting, however, to note that in the exactly following page the Court seems to go back on its previous conclusion by saying that

The conclusion of the Convention does not in any way impair the legal value of Article 104 of the Treaty as an authentic expression of the mandate conferred on the Principal Allied and Associated Powers and of the objects of the Convention; from this point of view and to this extent, the article is enforceable in respect of the Free City.

Ibid., at 33.

²¹¹ However, an argument could be made that this is not a pure case of reference to other treaties but falls more under the auspices of Article 31(2)(b) of the VCLT, on the premise, of course, that the remaining Contracting Parties to the Treaty of Versailles had given their consent.

Convention, making cross-references to several other articles of that Convention.²¹² The conduct of the Court up to this point is, from an interpretative point of view, absolute text-book. However, the Court then moves on to examine another treaty; one concluded between Poland and the Free City of Danzig on October 24, 1921, *i.e.* one month before the negotiations between Poland and Germany, relating to Upper Silesia, started.²¹³ The critical point is that only Poland was a party to both these treaties, yet the Court dispenses with the *pacta tertiis nec nocent nec prosunt* rule by applying the *interpretative renvoi*.

Another example is offered by the *British Clearing Office v. the Hungarian Clearing Office* adjudicated by the Anglo-Hungarian Mixed Arbitral Tribunal. Hungary wished to limit the amount of reparations it ought to pay. According to a decision of the Reparations Commission concerning the Treaty of Trianon the quota to be paid by Hungary was 28.652%, a quota, which after the entry into force of the Treaty of Trianon would be reduced to either 45.733% of the said quota or 13.1034% of the total. Hungary was claiming that its obligation should be limited to these last percentages, even prior to the entry into force of the Trianon Treaty.²¹⁴ In order to respond to and eventually reject this Hungarian claim, the Arbitral Court invoked the relevant article of the Treaty of Saint-Germain.²¹⁵

2.2.2. Pre-VCLT Jurisprudence Revealing various Forms of Proximity as Factors of Determining ‘relevancy’

Unlike in the previous case, the tribunals in the following judgments were not merely satisfied in applying *interpretative renvoi* without any justification. On the contrary, the relevant passages of their judgments drags into the light the variety of criteria that they have used in order to substantiate the reference to anterior or posterior treaties and why they are relevant in the case at hand.

In the case of the *Aerial Agreement between the United States of America and Italy* the dispute arose from the interpretation of an Aerial Agreement between the

²¹² This practice is clearly in accordance with Article 31(1) of the VCLT within the meaning of the term ‘context’ and is also referred to by Vattel in the quote, mentioned earlier, which combines reference to the context of the treaty itself as well as to other treaties, *see supra* note 37.

²¹³ *Rights of Minorities in Upper Silesia (Minority Schools)*, (Germany v.. Poland), Judgment of 26 April 1928, *PCIJ Series A, No. 15*, 3, at 40 (hereinafter *Minorities in Upper Silesia* case).

²¹⁴ Spencer, *supra* note 187, at 76.

²¹⁵ *Id.*

aforementioned States. Another similar treaty, the Bermuda Agreement, had acted as the model upon which the US-Italian Agreement was based.²¹⁶ However, the critical point was that Italy was not a party to the Bermuda Agreement. The Court refused to take into consideration the *travaux préparatoires* of the Bermuda Agreement, basing its negation on the fact that Italy had not officially participated in the negotiations for the Bermuda Agreement.²¹⁷ Up to this point this seems to be in complete conformity with the mainstream theory regarding use of *travaux préparatoires* with respect to third parties.²¹⁸ The *pacta tertiis nec nocent nec prosunt* principle is satisfied and no other result would be obtained by the application of the criteria of publication and accessibility, for the simple fact that Italy had at no point ratified or acceded to the Bermuda Agreement. Were the court to have halted its reasoning at this point, this case would present no major importance for our analysis. However, the arbitral Court goes on to take into consideration the totality of the regime established by the Bermuda Agreement.²¹⁹ The reason it gives for using the Bermuda Agreement as an indispensable tool in its interpretation of the US-Italy Aerial Agreement is two-pronged:

- i) the Italian government knew the regime established by the Bermuda Agreement very well and
- ii) it knew that it would serve as a founding stone for the Aerial Agreement between itself and the U.S.²²⁰

Essentially, the Court establishes two tests for allowing itself to use anterior treaties. Firstly, that there is *familiarity* with the treaty used, irrespective of whether one of the Parties to the dispute was not a Party to the said treaty. The second basis that the Court puts forward is that of knowledge that the Bermuda Agreement would

²¹⁶ On the fact that treaties may serve as models for drafting purposes see Paul Reuter, 'Solidarité et Divisibilité des Engagements Conventionnels', in *International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne*, Yoram Dinstein and Mala Tabory (eds.) (Dordrecht: Nijhoff, 1989), 623, at 627; who states that: "Il est bien connu que les traités bien rédigés servent de modèle même pour des traités conclus par d'autres Etats".

²¹⁷ *Air Transport Arbitration* (US v. Italy), Award of 17 July 1965, 45 *ILR* 393, at 414-8 (hereinafter *US-Italy Air Transport Arbitration*).

²¹⁸ See Panos Merkouris, "Third Party Considerations and 'Corrective Interpretation' in the Interpretative Use of *Travaux Préparatoires*: – Is it Fahrenheit 451 for Preparatory Work?", in *Issues of Treaty Interpretation and the Vienna Convention on the Law of Treaties*, Malgosia Fitzmaurice, Olufemi Elias and Panos Merkouris (eds.) (Leiden: BRILL/Martinus Nijhoff, forthcoming 2010).

²¹⁹ And by the same token opening, indirectly, the floodgates for taking into consideration the *travaux préparatoires* that it had just earlier rejected.

²²⁰ *US-Italy Air Transport Arbitration*, at 414-8.

be the basis of the US-Italy Agreement. This simple statement is in reality a multi-layered legal argument. The essence of this argument is *intention of the parties and proximity*²²¹ between treaties. The fact that Italy was aware of the Bermuda Agreement functioning as the blueprint for its own Aerial Agreement, is a clear indication that the intention of the parties was heavily influenced by the former Agreement and thus, it should be taken into consideration in the court's interpretation of the US-Italy Agreement. On the other hand, the Court seems to feel that this is not enough but that *proximity* between the treaties must also exist. The Court is, perhaps intentionally, vague on this point. Nevertheless, it seems that the proximity which most influenced the Court's decision is not merely a temporal one, but also one relating to subject-matter, object and purpose. All these are indications of the intention that the posterior treaty reflects. Consequently, temporal proximity alone does not suffice. Two treaties may follow one immediately after the other; yet have absolutely no other links or even contradicting objects. The same applies to proximity as to subject-matter. Two treaties may have the same subject-matter, yet so much time has elapsed that the intention of the parties does not coincide any more. The greater the lapse of time separating the two treaties the less evident is the continuity of intention. It is, therefore, *the balancing of all these forms of proximity*, which yields the best result in identifying party-intention.

In this reasoning, what is striking is the clear absence of any consideration about the legal validity of the use of an anterior treaty, which a party of the treaty being interpreted has not signed, ratified or acceded. Italy for instance, was not a party to the Bermuda Agreement. The court seems satisfied that at least one of the parties, the US, was party to both of these treaties.

Another important case is the *Japanese House Tax* case. In that instance, the PCA came to a resolution of the dispute brought to it by treating three international treaties, signed by Japan with Great Britain²²², Germany²²³ and France²²⁴ respectively, as almost one and the same treaty.

The dispute at hand had arisen from the following facts. Japan had agreed to set aside, for perpetual lease to individuals or subjects of foreign nations, certain

²²¹ Not only temporal but also proximity relating to the subject-matter, object and purpose.

²²² On 16 July 1894.

²²³ On 4 April 1896.

²²⁴ On 4 August 1896.

pieces of land at various treaty ports. Furthermore, Japan agreed not to impose any further conditions on these lands. This meant that no taxes or charges²²⁵ could be imposed on such lands. The point in dispute, however, was whether this arrangement also covered houses and other buildings or improvements to the land.

The Court held that there existed no reason why such improvements should be exempt. The critical point in the juridical reasoning was that despite the differences in phraseology, the Court held that the provisions of all three treaties should be interpreted as being pretty much the same thing. This predisposition is self-evident in the way the Court interprets the 1896 Treaty between Germany and Japan. The aforementioned treaty lacked certain protective exceptions, which were incorporated in the 1894 Treaty between Japan and Great Britain. The Court attached absolutely no significance to this differentiation and easily dispensed with it through the following *dictum*: "... and it cannot be presumed that the German Government intended to renounce the advantages allowed in favour of Great Britain by the new treaty".²²⁶

At first glance this *dictum* seems to be in conformity with the standard form of interpretative process; the reference to the 'intention' of Germany is reflective of one of the three main schools of interpretation and incorporated in Article 31 of the VCLT. However, the intention of Germany is based not on actions or omissions of Germany itself but on the provisions of a completely different treaty, between Japan and Great Britain, to which Germany was not a party and that was signed 2 years earlier than the Germano-Japanese treaty. It is, thus, the reference to an anterior treaty, of both *temporal and subject-matter proximity* that is the decisive criterion.²²⁷

The references to various forms of proximity in determining the relevancy of a treaty in the interpretative process were continued in the *Muscat Dhows* case. In that case, the PCA was called to interpret the term 'protected', which was employed in the General Act of the Brussels Conference, of 2 July 1890. In order to do this, the Court

²²⁵ Other than those clearly specified in the leases.

²²⁶ *Japanese House Tax* (France, Germany and Great Britain v. Japan), Award of 22 May 1905, PCA, reproduced in James B. Scott (ed.), *The Hague Court Reports* (New York: OUP, 1916), at 84 (hereinafter *Japanese House Tax* case); accessible at <http://www.pca-cpa.org/upload/files/Japanese%20House%20Tax%20English%20Sentence.pdf> (last accessed on 25 January 2010).

²²⁷ Another notable element is that the court seems to qualify the reference to an anterior treaty as of primordial importance and delegates a secondary function to another interpretative tool, the principle '*ut res magis valeat quam pereat*'. The Court mentions only as a reinforcing argument the fact that any different interpretation would be in clear contradiction (and would, thus, render useless) the clause assuring a most-favored nation treatment to Germany.

reasoned not only that the term in question had been the subject of restrictions, but also that the definition of the term given by the treaty of 1863²²⁸ and the Madrid Convention of 30 July 1880, limited this term to only four categories. From these treaties, the Court deciphered a common intention of the Powers to renounce the creation of categories of ‘protected persons’ in the oriental States, which by analogy included Turkey and Morocco.²²⁹

What is of interest is that whereas in the previous cases, the treaties referred to seemed to be temporally quite close to the treaty being interpreted, in this case the element of temporal proximity starts being stretched to numbers that surpass a mere decade. The treaty to be interpreted was concluded in 1890, whereas the treaties taken into consideration spanned from 1863 to 1880. This means that a period of 27 years had elapsed between the most antecedent treaty and the treaty in question.

A further extension of the maximum amount of time permitted for allowing recourse to an anterior treaty is offered in the *Arone Kahane successor v. Francesco Parisi and the Austrian State*. In this case, the tribunal used the Treaty of Berlin of 1879 to interpret the Treaty of Saint-Germain. These two treaties were separated by a time-gap of approximately 40 years.²³⁰ Of course, this relative slack in the temporal proximity criterion is compensated by the fact that all the parties to the Treaty of Saint Germain were equally Signatories to the Treaty of Berlin. Once again, various forms of proximity seem to be taken into consideration. In a form of balancing act, the shortcomings of one form of proximity²³¹ is compensated by the application of another form of proximity, that of shared parties.²³² What is of the utmost importance is that in this case, the court attached great significance to this interpretative method. It was not merely a supplementary means of re-affirming a previously arrived conclusion; on the contrary, it was of primordial importance in the interpretative process.²³³

The prevalence of considerations of proximity, especially with respect to the subject-matter of regulation, is conspicuous in *the Anglo Ottoman Tobacco Co. Ltd, v.*

²²⁸ Between France and Morocco.

²²⁹ *Muscat Dhows case* (France v. UK), Award of 8 August 1905, *RIAA* 11 (1961): 83-100.

²³⁰ *Arone Kahane successor v. Francesco Parisi and the Austrian State* (Romania v. Austria), Award of 19 March 1929, *Tribunaux Arbitraux Mixtes* 8 (1929): 943, at 960 (hereinafter *Arone Kahane case*).

²³¹ In this case temporal proximity.

²³² In the present case there was not merely proximity between the parties to the treaties, but actual identity.

²³³ Spencer, *supra* note 187, at 76.

the Bulgarian Government case. In rejecting a damages claim against the Bulgarian Government, the Anglo-Bulgarian Mixed Arbitral Tribunal referred to the jurisprudence of the Mixed Arbitral Tribunals relative to similar matters with respect to the Treaty of Versailles.²³⁴ Although it acknowledged that these cases were based on an interpretation of the Treaty of Versailles, it then went on to reject this consideration as immaterial since it

did not think, with respect to this matter, that there is reason to distinguish between the interpretation of the essential provisions of the Treaty of Neuilly and the corresponding stipulations of the Treaty of Versailles.²³⁵

In the Case *Compagnie d' Electricité de la Ville de Varsovie* the arbitrator interpreted the Franco-Polish Convention of 6 February 1922 by reference to the Treaty of Versailles.²³⁶ The issue in that particular dispute was whether the arbitration envisaged in articles 5 and 11 of the Franco-Polish Convention of 6 February 1922 was the same as that of article 16 of the same Convention. The arbitrator in that case relied heavily on considerations of similarity of the provisions and the goals aspired to between the Convention at hand and the Treaty of Versailles. In fact, the arbiter goes as far as to claim that “one is stunned by the near identity between the main and relevant texts and provisions”²³⁷ and that the “Convention of 6 February 1922 can be considered, as to what pertains to the present matter, as a partial reproduction of Part X of the Treaty of Versailles”.²³⁸

However, it has to be mentioned that serious criticisms have been raised with respect to the chain of thought followed in the aforementioned arbitration. It is true that certain provisions were almost identical, such as the ones mentioned by the arbitrator himself *e.g.* Article 11(b)(2) of the Convention and Article 299(b) of the

²³⁴ *Anglo Ottoman Tobacco Co. Ltd, v. the Bulgarian Government* (UK v. Bulgaria), Judgment of 14 October 1924, *Tribunaux Arbitraux Mixtes* 4 (1925): 671, at 672-3. (hereinafter *Anglo Ottoman Tobacco* case).

²³⁵ *Id.*

²³⁶ *Affaire de la Compagnie d' Electricité de la Ville de Varsovie* (France v. Poland), Award on Jurisdiction of 30 November 1929, *RIAA* 3 (1949): 1669-78 (hereinafter *Warsaw Electricity Company* case).

²³⁷ Author's translation; the authentic text goes as follows: “... on est frappé par la presque identité entre les textes des dispositions principales y relatives”, *Warsaw Electricity Company* case, at 1675.

²³⁸ Author's translation; the authentic text goes as follows: “... la Convention du 6 février 1922, peut être considérée, quant à la présente matière, comme une reproduction partielle de la Partie X du Traité de Versailles”, *Warsaw Electricity Company* case, at 1675.

Treaty of Versailles. Nevertheless, despite the similarities, it has been argued that it is exactly these discrepancies that were intentional in order to clearly disassociate the procedure of the Convention with that of the Treaty.²³⁹ For instance, Article 299(b)(2) of the Treaty of Versailles reads as follows: “the Mixed Arbitral Tribunal established according to Section VI shall grant the damaged party an equitable compensation”. Whereas the relevant provision of Article 11(b)(2) of the Franco-Polish Convention reads as follows: “an equitable compensation shall be granted to the damaged party *by an arbitrator chosen following an agreement between the High Contracting Parties*” (emphasis added). Notwithstanding the variety of opinions on the fallacies or not of this decision, the crucial point is that all of them converge to the same point; the importance of the similitude or *linguistic proximity* of the relevant provisions, as a method of identifying whether a treaty can be used for the purposes of an *interpretative renvoi*.

Up to this point, the cases analyzed had the common characteristic of anterior treaties being used in order to prove whether a certain meaning existed. In the *Advisory Opinion on Access to, or Anchorage in, the Port of Danzig, of Polish War Vessels* the PCIJ, once again, used other treaties as an interpretative tool. However, the allusion to other treaties in the case in question has an interesting twist. Whereas in the aforementioned cases the anterior treaties were invoked to clarify the meaning of a certain provision, in the present case the PCIJ in order to interpret the term ‘*port d’attache*’ used in the 1882 North Sea Fisheries Convention and the 1910 Brussels Convention on Collisions²⁴⁰ in an exclusionary manner. Both the intrinsic and extrinsic materials relevant to the 1920 Paris Treaty between Danzig and Poland seem to show that

the words ‘port d’attache’ were never used in their technical meaning either in the sense in which they are used in conventions relating to fishing vessels or merchant ships, such as the North Sea Fisheries Convention, 1882, or the Brussels Convention on Collisions of 1910.²⁴¹

²³⁹ Spencer, *supra* note 187, at 76.

²⁴⁰ A temporal gap of 38 and 10 years respectively.

²⁴¹ *Access to, or Anchorage in, the Port of Danzig, of Polish War Vessels*, Advisory Opinion of 11 December 1931, *PCIJ Series A/B, No. 43*, 127, at 141 (hereinafter *Access to Port of Danzig Advisory Opinion*).

The treaties are thus, not used to identify or confirm the meaning of a term, but rather in a sense of a quasi-mathematical interpretation ‘through a process of elimination’. It is probably for this reason that the Court does not feel itself obliged to establish the criteria of proximity²⁴² or of common parties to all the treaties.²⁴³ It seems that the Court felt that since the treaties are not a basis of a ‘positive’ interpretation but merely one stage of an ‘exclusory’ or ‘negative’ interpretation, the burden of proof regarding the evidentiary value of this material is greatly alleviated if not completely eradicated.

A final point that needs to be examined is the interpretation based not merely on anterior treaties but on the *travaux préparatoires* of anterior treaties. In the cases *Schreiber et Cie contre État tchécoslovaque* and *Maison Herman Wilhelm et Cie contre État tchécoslovaque* the issue was one of indemnity for companies situated in Hungarian territory. According to Article 250 of the Treaty of Trianon there were certain exceptions for companies situated on the territories of the ancient Austro-Hungarian Empire. The question was whether these territories referred only to the territories that had been transferred and not those that remained Hungarian. The Court found in favour of this interpretation in the following way. It tried to interpret Article 250 of the Treaty of Trianon by reference to Article 267 of the Treaty of Saint-Germain, of which it was an almost literal reproduction. However, this method proved fruitless as Article 267 was vague itself. Consequently, the Court referred to the *travaux préparatoires* of the Treaty of Saint-Germain and then applied the resulting interpretation to the Treaty of Trianon as well.²⁴⁴

The PCIJ, as well, lends support to this practice. In the *Case Concerning the Payment of various Serbian Loans issued in France* the PCIJ, instead of restricting itself to the preliminary documents referring to each and every loan, opted for taking them as one unity. In essence, the Court drew conclusions from similar provisions and terms used not only in the texts of the loan agreements themselves, but also in their

²⁴² The North Sea Fisheries Convention is set 38 years apart from the 1920 Paris Treaty; as for subject-matter proximity the court makes absolutely no allusion. For all that we know the selection of these treaties as reference points was simply because they had made use of the term in question *i.e.* “port d’attache” in their provisions.

²⁴³ The Court makes no reference.

²⁴⁴ *Schreiber et Cie contre État tchécoslovaque* (Hungary v. Czechoslovakia), Award of 29 July 1927 *Tribunaux Arbitraux Mixtes* 7 (1928) : 897, at 900 (hereinafter *Schreiber* case); *Maison Herman Wilhelm et Cie contre État tchécoslovaque* (Hungary v. Czechoslovakia), Award of 20 July 1929, *Tribunaux Arbitraux Mixtes* 9 (1930) : 583, at 586-7 (hereinafter *Herman Wilhelm* case).

travaux préparatoires.²⁴⁵ What this means is that the preparatory documents of one loan agreement were used to make deductive inferences with respect to the interpretation of other loan agreements.

The criteria used in the aforementioned case-law vary not only in substance but in their degree of influence. In some cases, an identity, or at least high level of similarity between the relevant provisions, was required²⁴⁶; in others it was the subject-matter of regulation which was the main factor of consideration.²⁴⁷ The amount of time separating the treaties in question was also taken into account, but never as a factor of decisive importance,²⁴⁸ the same applied to the total or partial overlap of the parties both to the dispute and to the treaties in question.²⁴⁹ Although there was a degree of dependency that each court showed to each and every one of these criteria a preliminary general conclusion might be that rarely, if ever, was any of these criteria the sole element of consideration, but always a combination of two or more of them²⁵⁰ and in a complementary relationship. The shortcomings of one element could be compensated through the cumulative application of another.²⁵¹

In this context the *Employment of Women during the Night Advisory Opinion* must be mentioned. In that case, the PCIJ refused to take into consideration the 1913 Convention of Berne for the interpretation of the 1919 Convention of Washington because:

[t]he text of the [Washington] Convention as adopted made no reference to the Berne Convention...The Washington Convention cannot therefore be said, by reason of the work on which the 1919 Conference was engaged, to be so intimately linked with the Berne Convention as to require that the terms of the Washington Convention should bear the same meaning as the terms of the Berne Convention.²⁵²

²⁴⁵ *Case Concerning the Payment of Various Serbian Loans Issued in France* (France v. Serbia), Judgment of 12 July 1929, *PCIJ Series A, No. 20*, 3, at 30-2 (hereinafter *Serbian Loans* case).

²⁴⁶ *Warsaw Electricity Company* case, at 1675; *Schreiber* case, at 900; and *Herman Wilhelm* case, at 586-7.

²⁴⁷ *Serbian Loans* case, at 30-2; *Japanese House Tax* case.

²⁴⁸ *Access to Port of Danzig Advisory Opinion*, at 141 *et seq.*; *Arone Kahane* case, at 960 *et seq.*

²⁴⁹ *Minorities in Upper Silesia* case, at 40; *US-Italy Air Transport Arbitration*, at 414-8; *Polish Nationals in Danzig Advisory Opinion*, at 32 *et seq.*

²⁵⁰ *Japanese House Tax* case; *US-Italy Air Transport Arbitration*, at 414-8; *Arone Kahane* case, at 960 *et seq.*

²⁵¹ *Japanese House Tax* case; *Arone Kahane* case, at 960 *et seq.*

²⁵² *Interpretation of the Convention of 1919 concerning Employment of Women during the Night*, Advisory Opinion of 15 November 1932, *PCIJ Series A/B, No. 50*, 364, at 377 (hereinafter *Employment of Women during the Night Advisory Opinion*).

Thus, the PCIJ seems to have upheld a different standard than what has been witnessed in the above jurisprudence. The fact that the Berne Convention was not explicitly mentioned in its Washington counterpart can be interpreted in one of the following ways; either this requirement is of a higher value than those identified *supra*, or reference is a form of proving proximity. Although the latter would serve the construction we have made so far, it is logically fallacious. If direct reference were a form of proximity, lack of which barred even a *prima facie* consideration of other treaties, this would mean that in essence it would be the only form of proximity that a court should check. In such a case, the other forms of proximity that have been invoked in all the aforementioned cases, such as temporal proximity and subject-matter proximity, would be rendered useless and of merely ornamental value. *Mutatis mutandis*, the same result would occur even for the other requirement of shared parties. If a treaty A was directly mentioned in the text of another treaty B, then *renvoi* to treaty A would be covered by the intention of the parties to have such a *renvoi*²⁵³. On the other hand, if no direct reference was made, there would be no possibility of further research since the lack of direct reference in treaty B would *ipso facto* bar the quest for any other indications of an intention of *renvoi*. Consequently, the stance adopted by the PCIJ in the *Employment of Women during the Night Advisory Opinion* leads to an *argumentum ad absurdum*, since it would lead to the existence of only one criterion, that of direct reference, a criterion which can scarcely be suggested to be supported by international jurisprudence.^{254,255}

One must distinguish between Article 31(3)(c) interpretation, which is based on extraneous rules, and interpretation using ‘rules of international law’ that are, however, already incorporated in the interpreted treaty. A classical example of this is the *Canada – Pharmaceuticals* case, where the Panel in interpreting Article 30 of the

²⁵³ Since the *renvoi* is incorporated in the text, it is logical that there is no need to search any further for indications of an intention for such a *renvoi*.

²⁵⁴ This position of the PCIJ seems also to be self-contradictory, as in the *Access to Port of Danzig Advisory Opinion* the same Court adopted a very liberal approach (compared to the one indicated by the majority of the jurisprudence) and made use of other treaties without any direct reference existing in the 1920 Paris Convention. For an analysis of the reasons for this stance, see *supra*. So in a matter of only one year the Court has gone from one extreme (that of expansive interpretation) to the other (that of a very restrictive interpretation).

²⁵⁵ Furthermore, it should be noted that Judge Anzilotti in his Dissenting Opinion felt that the Court erred in not taking into consideration the meaning of the terms in question as used by other treaties that shared with the Washington Convention not only subject-matter proximity but also temporal proximity. In this spirit he made a special reference to the Berne Convention, which also had the added characteristic of sharing with the Washington Convention many of the Signatory Parties.

TRIPS Agreement²⁵⁶ referred to Article 9(2) of the Berne Convention.^{257,258} However, the Berne Convention is already incorporated in the TRIPS Agreement by virtue of Article 9(1) of the TRIPS Agreement^{259,260} Based on the above considerations, the *Employment of Women during the Night Advisory Opinion* does not fall within the scope of our analysis *i.e.* Article 31(3)(c) and its requirement for a direct reference and incorporation does not affect the validity of the relevancy-requirements that the rest of the jurisprudence has revealed.

2.2.3. Atypical Cases of *Interpretative Renvoi*

In the previous analysis, the relevant case-law accepting or rejecting reference to anterior treaties was presented. However, some cases cannot fall within such a simple categorization. They are too atypical. At the same time, they are also very typical and characteristic of the main problematic areas of *interpretative renvoi* adding, in some cases, further twists; the most notorious being, reversing the usual understanding of the interpretative time-line. They allow for recourse not merely to anterior treaties but to posterior ones as well.

The first case to be examined is more of a missed opportunity, if nothing else. The Advisory Opinion of the PCIJ regarding the *Jurisdiction of the European Commission of the Danube between Galatz and Braila* is a bit of a conundrum. The issue here was that of the interpretation of Article 6 of the Definitive Statute. During the Danube Conference, the delegates of the Commission²⁶¹ were allegedly called to draft a document, later on named “Interpretative Protocol”, in order to clarify the Commission’s position on the interpretation to be placed on Article 6 of the Definitive Statute.

²⁵⁶ 1994 Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement), 33 *ILM* 1197.

²⁵⁷ 1971 Berne Convention for the Protection of Literary and Artistic Works, 1161 *UNTS* 30.

²⁵⁸ *Canada – Patent Protection of Pharmaceutical Products*, Panel Report adopted on 7 April 2000, WTO, WT/DS114/R, para. 7.29 (hereinafter *Canada-Pharmaceuticals* (PR)).

²⁵⁹ “Members shall comply with Articles 1 through 21 of the Berne Convention”. More extensively on the *Canada-Pharmaceuticals* case and the interpretative issues it raised *see* Susy Frankel, ‘WTO Application of the ‘Customary Rules of Interpretation of Public International Law’ to Intellectual Property’, *Virginia Journal of International Law* 46 (2006): 365-431, at 394-406.

²⁶⁰ In support *see* French, who considers this as a method of incorporation of extraneous rules, which is separate and distinguishable from Article 31(3)(c); French, *supra* note 10, at 292-5.

²⁶¹ From Great Britain, France, Italy and Romania and who had been invited in a clearly advisory capacity.

However, the Court rejected that the Interpretative Protocol bears any major significance in the case at hand on several grounds:

i) according to the Court the Interpretative Protocol was

not an international agreement between the Parties to the Definitive Statute; it is not annexed thereto, whilst many interpretations of the articles of the Statute were inserted in the Final Protocol, which has the same validity and duration as the Convention to which it refers. The Interpretative Protocol is not even mentioned in the Statute, which Roumania signed without any reservations, and can in no sense be considered as a part of it²⁶²

Consequently, the Court in essence rejected that the Interpretative Protocol forms a *res unum* with the rest of the Statute and thus did not fall under Article 31(2) of the VCLT. Neither did it fall under Article 31(2)(a) or (b) as it was not signed by all Parties nor was it accepted by all Parties as an instrument relating to the treaty.

ii) The Court also rejected the notion that the Interpretative Protocol was a decision of the European Commission, which modified the terms of the Definitive Statute.²⁶³

Based on the above, the Court felt itself being left with only one option. It considered the Interpretative Protocol as part of the preparatory work.²⁶⁴ However, one option seems to have been left unexplored. Since the interpretative Protocol was signed by people representing the European Commission and since the Court felt that this was not the Commission decision, nothing prevented the Interpretative Protocol from being considered as a treaty between States preceding the Definitive Statute and which should be taken into consideration for the interpretation of Article 6. This document satisfied not only the requirements for treaty-making capacity set by the VCLT, but also fell easily under Art. 31(3)(c) of the VCLT.²⁶⁵

²⁶² *Jurisdiction of the European Commission of the Danube between Galatz and Braila*, Advisory Opinion of 8 December 1927, *PCIJ Series B, No. 14*, 3, at 34 (hereinafter *Jurisdiction of the Danube Commission Advisory Opinion*)

²⁶³ *Id*

²⁶⁴ *Ibid.*, at 34-5.

²⁶⁵ A similar omission seems to exist with respect to an examination of Art. 31(4) of the VCLT but such an examination was left out probably because it would raise the issue of the possibility of a 'special meaning' applicable to only a fraction of the parties – a sort of 'regional special meaning'.

Perhaps, for the purposes of the examination of *interpretative renvoi*, the *North Atlantic Coast Fisheries* case is the most characteristic in its richness and complexity. In that case the PCA juggled all the possible manifestations of interpretation by reference to other treaties.

Firstly, while initially rejecting a US claim, on the basis of it not having any foundation of the 1818 Convention, which was being the object of interpretation, it then made a *volte-face* and accepted it on historical considerations.²⁶⁶

While therefore unable to concede the claim of the United States as based on the Treaty, this Tribunal considers that such claim has been and is to some extent, conceded in the relations now existing between the two Parties. Whatever may have been the situation under the Treaty of 1818 standing alone, the exercise of the right of regulation inherent in Great Britain has been, and is, limited by the repeated recognition of the obligations already referred to, by the limitations and liabilities accepted in the Special Agreement, by the unequivocal position assumed by Great Britain in the presentation of its case before this Tribunal, and by the consequent view of this Tribunal that it would be consistent with all the circumstances, as revealed by this record, as to the duty of Great Britain, that she should submit the reasonableness of any future regulation to such an impartial arbitral test²⁶⁷

The importance of this statement lies in the fact that the historical interpretation is being given priority over the text itself of the Treaty.²⁶⁸

Additionally, the Court made use of anterior treaties, but did not restrict itself to treaties signed by both the US and Great Britain like the 1974 Jay Treaty but also used treaties ratified only by Great Britain dating as back as 1686 and 1713, *i.e.* a temporal gap of 132 and 105 years respectively.²⁶⁹ However, this reference was made conditional upon the fact that the latter treaties aimed to regulate the same matters and had the same objects as the treaty being interpreted.²⁷⁰

The reference to the Jay Treaty is topical for one more reason. The analysis so far has shown that an interpretation by reference to anterior treaties usually entails that a dubious term, provision, or obligation is clarified through a similar one to be found in other treaties. The least common denominator in all of the above is the

²⁶⁶ Including amongst others, anterior treaties.

²⁶⁷ *North Atlantic Coast Fisheries Case* (Great Britain v. United States of America), Award of 7 September 1910, *RIAA* 11 (1961): 167-226, at 188 (hereinafter *North Atlantic Coast Fisheries case*)

²⁶⁸ This as will be analyzed *infra* is reinforced by other *dicta* in the decision as well as the Dissenting opinion of Judge Drago.

²⁶⁹ *North Atlantic Coast Fisheries case*, at 197.

²⁷⁰ *Ibid.*, at 187.

existence of an *in scripto* proof. However, the *North Atlantic Coast Fisheries* case, once more, breaks from tradition by giving credence not merely to a specific provision of an anterior treaty but to the absence of it. To be more specific, the US argued that despite the fact that the Treaty of 1818 contained no specific provision exempting the inhabitants of the US from the relevant regulation, such an absence should be understood as inferring such an exemption.²⁷¹ The Court, however, stated that it could not find in favour of this argument as “although such subjection was clearly contemplated by the Parties” it, nevertheless, failed to find its way within not only the Treaty of 1818 but also the Jay Treaty of 1794.²⁷² In essence, the Court interpreted the absence of a specific regulation in the 1818 Treaty by reference to a similar absence in the Jay Treaty of 1794. It seems that the Court felt that the *interpretative renvoi* had application not only to cases of *expressis verbis* provisions, but also in *sub silentio* ones.²⁷³

However, not all treaties brought forward by the disputing parties were accepted as relevant for the interpretative process. For instance, the PCA refused to consider the 1783 Treaty. However, the reasoning that the Court offers for this rejection is extremely pertinent to the present analysis. The Court rejected recourse to the 1783 Treaty because “the Treaty of 1818 was in different terms, and very different in extent, from that of 1783, and was made for different considerations”.^{274, 275} What the Court clarified with this *dictum* was that its rejection was based on a *lack of proximity* between the two treaties *both on a linguistic level, as well as on a subject-matter one*.

Bearing this in mind, it strikes one as extremely inconsistent that the same court a little further on, when addressing the interpretation of the terms “liberty to fish” of the 1818 Treaty, had absolutely no hesitation in using the very same Treaty of 1783 it previously rejected;

²⁷¹ *Ibid.*, at 184.

²⁷² *Ibid.*, at 185.

²⁷³ For a two-pronged critique of this stance of the Court, one being that the Treaties of 1818 and 1794 did not share the same subject-matter of regulation and the other being that interpretative reasoning cannot stem solely from silence, *see* Spencer, *supra* note 187, at 89-101.

²⁷⁴ *North Atlantic Coast Fisheries* case, at 184.

²⁷⁵ However, Spencer strongly disagrees with this finding of the Court, as a close examination of the relevant articles shows a striking similarity not only with respect to words and phrases but also as to what concerns the object of regulation; Spencer, *supra* note 187, at 94.

Because the term ‘liberty to fish’ was used in the renunciatory clause of the Treaty of 1818 because the same term had been previously used in the Treaty of 1783 which gave the liberty; and it was proper to use in the renunciation clause the same term that was used in the grant with respect to the object of the grant.²⁷⁶

This referral to the Treaty of 1783 was repeated a second time just a few paragraphs later when the Court found that

[b]ecause the practical distinction for the purpose of this fishery between coasts and bays and the exceptional conditions pertaining to the latter has been shown from the correspondence and the documents in evidence, *especially the Treaty of 1783*, to have been in all probability present to the minds of the negotiators of the Treaty of 1818” (emphasis added).²⁷⁷

It would appear that there is no easy way to resolve these apparently paradoxical findings of the Court. In one and the same case, reference to the 1783 Treaty was found to be both permissible and non-permissible. Despite this contradiction, however, the main point should not elude us. The final outcome may be fundamentally different, but the method of decision-making and the weight accorded to certain criteria were omnipresent in all of them. These were: i) subject-matter proximity and ii) linguistic similarity. It has to be noted, as well, that the Court when interpreting the term ‘bays’ took into account treaties that had been signed and ratified by only one of the parties to the dispute, Great Britain.²⁷⁸

Perhaps the most interesting point of the *North Atlantic Coast Fisheries* case was that the Court broke the temporal tradition within the framework of interpretative reference to other treaties. Up to this point only anterior treaties had been the subject of examination. The Court dispensed with this restriction and in interpreting the term ‘in common’ found that

²⁷⁶ *North Atlantic Coast Fisheries* case, at 195-6.

²⁷⁷ *Ibid.*, at 198.

²⁷⁸ so for instance the Court mentioned that

[c]onsidering, moreover, that in treaties with France, with the North German Confederation and the German Empire and likewise in the North Sea Convention, Great Britain has adopted for similar cases the rule that only bays of ten miles width should be considered as those wherein the fishing is reserved to nationals... [a]nd that though these circumstances are not sufficient to constitute this a principle of international law, it seems reasonable to propose this rule with certain exceptions, all the more that this rule with such exceptions has already formed the basis of an agreement between the two Powers

North Atlantic Coast Fisheries case, at 199.

[b]ecause the words ‘in common’ occur in the same connection in the Treaty of 1818 as in the Treaties of 1854 and 1871. It will certainly not be suggested that in these Treaties of 1854 and 1871 the American negotiators meant by inserting the words ‘in common’ to imply that without these words American citizens would be precluded from the right to fish on their own coasts and that, on American shores, British subjects should have an exclusive privilege.²⁷⁹

Another posterior treaty was used in order to interpret not only one but, in essence, two treaties. The United States contended that

the French right of fishery under the treaty of 1713 designated also as a liberty, was never subjected to regulation by Great Britain, and therefore the inference is warranted that the American liberties of fishery are similarly exempted.²⁸⁰

The Court, however, found that the 1713 Treaty could not be relied on, amongst others, due to the fact that the terms employed varied significantly.²⁸¹ This was further reinforced by the fact that “this distinction [between the French and American right] is maintained in the Treaty with France of 1904, concluded at a date when the American claim was approaching its present stage”.²⁸² The Court, in essence, used the 1904 Treaty to interpret not only the 1713 Treaty, which had been signed by identical Parties on a similar subject,²⁸³ but also by association the 1818 Treaty of which only one was Party common to both these Treaties.

The PCA may have been a pioneer in this respect, of referring both to posterior and anterior treaties, but its practice was not a solitary one. In two cases, the *Wilhelm Schumaker v. Etat Allemand et l’ Etat Serbe-Croate-Slovène* case and the *Dame Scheuhs v. l’ Etat Serbe-Croate-Slovène* case, the Mixed Germano-Yugoslav Arbitral Tribunal interpreted the expression ‘new State’ of article 297 of the Treaty of Versailles by reference to the posterior Treaties of Saint-Germain and Trianon.²⁸⁴ Similarly, the same Tribunal, in another case, interpreted a provision of the

²⁷⁹ *Ibid.*, at 184.

²⁸⁰ *Ibid.*, at 180.

²⁸¹ Once, again, a reference to the requirement of glossological proximity.

²⁸² *North Atlantic Coast Fisheries* case, at 181.

²⁸³ Two of the elements, but notice the colossal time-gap between them, 291 years.

²⁸⁴ *Wilhelm Schumaker v. Etat Allemand et l’ Etat Serbe-Croate-Slovène* (Germany v. Yugoslavia), Award of 1 October 1922, *Tribunaux Arbitraux Mixtes* 2 (1923): 602, at 608 (hereinafter *Schumaker* case); *Dame Scheuhs v. l’ Etat Serbe-Croate-Slovène* (Germany v. Yugoslavia), Award of 3 October 1922, *Tribunaux Arbitraux Mixtes* 2 (1923): 677, at 680 (hereinafter *Dame Scheuhs* case).

aforementioned Treaty of Versailles regarding access to the Yugoslavian nationality by once again referring to the later Treaties of Saint-Germain and Trianon.²⁸⁵

C. Interpretative Renvoi and Article 32 of the VCLT

The entire case-law analyzed begs the question of whether the obstacle of categorizing *interpretative renvoi* can be overcome. Interpretation is not a process that can be compartmentalized in clearly defined logical steps. The interaction and cross-fertilization between elements and schools of interpretation are nowhere more evident than in interpretation. It should come as no surprise then that Lord McNair admitted that the “there is no part of the law of treaties which the text-writer approaches with more trepidation than the question of interpretation”²⁸⁶.

Three are the main arguments that would support a categorization of the interpretative method of recourse to other treaties within the framework of Article 32 of the VCLT:

- i) that no other categorization is more suitable to the idiosyncrasies of *interpretative renvoi*,
- ii) that *interpretative renvoi* and *travaux préparatoires* share the common problem and solution of application to third parties and
- iii) that recourse to other treaties is used only in a supplementary fashion.

The first point will be analyzed in the next Section, so the remaining two will be the focus of the present analysis.

To reply to the question, of whether *interpretative renvoi* responds to ‘third party’ considerations in a similar fashion as the *travaux préparatoires* do, an understanding of the latter is necessary.

The use of *travaux préparatoires* with respect to third parties²⁸⁷ has been an issue of controversy from the very start. This problem is closely linked to the

²⁸⁵ *Marchinenfabrik u Mühlenbauaustalt v. Gabriel Radic* (Germany v. Yugoslavia), Award of 29 September 1922, *Tribunaux Arbitraux Mixtes* 2 (1923):653, at 655 *et seq.* (hereinafter *Gabriel Radic* case).

²⁸⁶ McNair, *supra* note 186, at 364.

²⁸⁷ *I.e.* when a Party to a treaty to be interpreted had not participated in the *travaux préparatoires*.

principle *pacta tertiis nec nocent nec prosunt*. Based on the consent-based structure of the international community, this principle would seem to be self-evident. The problems, however, begin when one tries to transpose this principle to *travaux préparatoires*.

The most famous case, which has lent support to not considering the *travaux préparatoires* when one of the litigant parties had not participated in them, is the *River Oder* case. In that case, the PCIJ considered as inadmissible and did not take into consideration the minutes of the Commission of the Peace Conference in Paris.²⁸⁸ Similar considerations were reiterated in the *Young Loan Arbitration*²⁸⁹ and acknowledged by several academics.²⁹⁰

However, it is the opposing side which seems to be supported by the majority of the jurisprudence. Of course, no one suggests that all the preparatory documents be allowed, irrespective of participation or not. Certain criteria have been proposed; essentially that the *travaux préparatoires* have been published and/or that they are generally accessible.²⁹¹ These criteria have been more or less applied by the international courts to such an extent²⁹² that the *River Oder* precedent seems to have been reduced to merely a historical curiosity.

²⁸⁸ This Commission prepared the articles of the Treaty of Versailles, which established the Commission of the River Oder.

²⁸⁹ *Young Loan Arbitration* (Belgium, France, Switzerland, United Kingdom and United States of America v. Germany), Award of 16 May 1980, 59 *ILR* 494, at 544-5 (hereinafter *Young Loan Arbitration*).

²⁹⁰ Sinclair, *supra* note 53, at 142-4; McNair, *supra* note 186, at 420-1; the issue was also raised by the Yugoslav Government in their Comments to the draft Articles of the VCLT.

²⁹¹ Comments by Lord McNair, in Institut de Droit International, *supra* note 85, at 450-2; these criteria have also been adopted by Professors Stone, Schwarzenberger and Sir Gerald Fitzmaurice, see Brijesh N. Mehrisch, 'Travaux préparatoires as an Element in the Interpretation of Treaties', *Indian Journal of International Law* 11 (1971): 39-88, at 43; in the case of the WTO the criterion of accessibility seems to apply even after accession but prior to the dispute coming before a Court; the reason for this is that in such an event the State would have the chance to either leave the WTO or at least make a declaration clarifying its position; Michael Lennard, 'Navigating by the Stars: Interpreting the WTO Agreements', *Journal of International Economic Law* 5 (2002): 17, at 49; in more detail see Merkouris, *supra* note 218.

²⁹² *United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan*, Appellate Body Report adopted on 5 November 2001, WTO, WT/DS192/AB/R, paras.78-9 (hereinafter *US-Cotton Yarn* (AB)); In the *US – Lamb Safeguards* case the Panel focused solely on the fact that the documents referred to were numbered but did not address the issue of accessibility of these documents; *United States – Safeguard Measures on Import of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, Panel Report adopted on 16 May 2001, WTO, WT/DS177/R & WT/DS178/R, para. 7.110 *et seq.* (hereinafter *US-Lamb Safeguards* (PR)); in the *US – Shrimp* case the Appellate Body relied on the *travaux préparatoires* of the International Trade Organization and the Havana Charter; *US-Shrimp* (AB), paras.152-7; The problem with this is that although these documents are numbered documents, nevertheless their accessibility is severely restricted; only certain governments,

The question that naturally arises is what the connection between this debate on the use of *travaux préparatoires* vis-à-vis third parties and the issue of judicial recourse to treaties other than the one being interpreted is. The case of the *Aerial Agreement between the United States of America and Italy* illuminates this nexus in the most lucid manner. As mentioned *supra*, that case established two tests for allowing use of anterior treaties; one of them being familiarity with the treaty used, regardless of whether one of the parties to the dispute was not a party to the said treaty. This test echoes the criterion for publication and accessibility for use of *travaux préparatoires* regarding third parties. It is this point that shows the common denominator in both cases;²⁹³ the actual or presumed knowledge of the *travaux préparatoires* or of the anterior treaty, respectively.

Although this case highlights the similarities between recourse to anterior treaties and *travaux préparatoires*, it is, nevertheless, an exception to the vast number of other cases where treaties were resorted to despite the fact that a party to the dispute was not a signatory party thereto and without any requirement or research being made into the issue of whether the element of ‘familiarity’ exists.²⁹⁴

Finally, the third point touches upon the very nature of the function of *interpretative renvoi*; whether it is ‘supplementary’ as within the limits of Article 32. The Court in the *Jurisdiction of the Danube Commission Advisory Opinion* treated the Interpretative Protocol as *travaux préparatoires*.²⁹⁵ Nevertheless, as mentioned in the relevant part, this fact alone cannot *ipso facto* lead us to an equation of the *interpretative renvoi* with the *travaux préparatoires*. Even more so, since the Court failed to even cursorily deal with the possibility of the Interpretative Protocol being indeed a treaty and falling within the ambit of Article 31(3)(c).

The *River Oder* case gives indeed the text primacy over reference to other treaties, but this is consistent with the approach of international courts to accord temporal primacy to the text and does not by itself delegate to *interpretative renvoi* a role of a supplementary means of interpretation. In a similar fashion one can understand the *dictum* of the *Advisory Opinion on Polish Nationals in Danzig*. The

researchers in Geneva and a few libraries would hold copies of these documents and in most cases in microfiche; see Lennard, *supra* note 291, at 51.

²⁹³ *I.e.* use of *travaux préparatoires* with respect to third parties on the one hand, and use of anterior treaties (even when one of the litigant parties is not a Party to them) on the other.

²⁹⁴ See *supra* analysis on *Japanese House Tax* case and *Minorities in Upper Silesia* case.

²⁹⁵ *Jurisdiction of Danube Commission Advisory Opinion*, at 34-5.

fact that recourse to anterior treaties cannot be used to discard the meaning of the text, but only to ‘elucidate’ it²⁹⁶ is not a function reserved only for supplementary means of interpretation but for each and every interpretative tool. Since the text is the starting point, the goal is to elucidate that exact meaning.²⁹⁷ Consequently, none of the aforementioned cases brings any serious argument in favour of categorizing *interpretative renvoi* as a supplementary means, whereas on the other hand there are a number of cases that indicate that this interpretative method is far from supplementary or secondary in function.²⁹⁸

A final interesting point²⁹⁹ that needs to be mentioned is that in the series of Articles in the *BYIL* on ‘The Law and Procedure of the International Court of Justice’, starting with Sir Gerald Fitzmaurice and continuing with Hugh Thirlway, reference to other treaties is analyzed under the Section ‘Ancillary and Other Interpretative Findings’, where one does not find an analysis of Article 32 but an analysis of Article 31(3)(c).

D. Bridging a Non-existent Gap: *Interpretative Renvoi* and Article 31(3)(c)

Equating the recourse to other treaties in the interpretative process with the supplementary means of Article 32 of the VCLT leaves something to be desired. The issue is whether a more suitable candidate can be found. Before a response to this query can be given with any degree of authority, one thing needs to be further established; what are essentially the criteria of selection of the *relevant* treaties in this process. If and only if these can be identified, will it be possible to reveal similarities and links with other established tools of treaty interpretation.

On a legal theory level, one of the first references to this kind of interpretative process can be found in Vattel. In his monograph *The Law of Nations*, when sketching

²⁹⁶ *Polish Nationals in Danzig Advisory Opinion*, at 32.

²⁹⁷ such ‘corrective interpretation’, by Article 32 no less, has been suggested by Judge Schwebel in: Stephen Schwebel, ‘May Preparatory Work be Used to Correct rather than Confirm the ‘Clear’ Meaning of a Treaty Provision?’, in *Theory of International Law at the Threshold of the 21st Century*, Jerzy Makarczyk, Krzysztof Skubiszewski (eds.) (The Hague: Kluwer Law International, 1996), 541-7, but so far does not seem to be supported by international jurisprudence.

²⁹⁸ See for instance the *Arone Kahane* case, at 960 *et seq.* where ‘*interpretative renvoi*’ was considered on an equal footing as textual interpretation.

²⁹⁹ Which supports the contention that reference to other treaties does not fall under Article 32 but under Article 31(3)(c).

the main tools of the judicial interpretative process, Vattel suggests that when called to interpret a term that has been expressed in an obscure or equivocal manner

[w]e ought to interpret his [the author's] obscure or vague expressions, in such a manner, that they may agree with those terms that are clear and without ambiguity, which he has used elsewhere, either in the same treaty, or in some other of the like kind.³⁰⁰

He later on goes to state that

as two articles of the same treaty, can be relative one to another, two different treaties can have the same relationship, and in such a case also one treaty explains the other.³⁰¹

This interpretative tool has been acknowledged³⁰² in doctrine.³⁰³ Various criteria have been proposed as to what makes an anterior³⁰⁴ treaty an important *niche* in the interpretative process. Marqués de Olivart sets the threshold extremely high, by supporting the view that for interpretative purposes only treaties that have been signed and ratified by the same States can serve by analogy.³⁰⁵ This approach seems extremely rigid and not supported by the relevant jurisprudence.

Stockton on the other hand, adopts a more liberal approach by arguing that

one can refer to terms employed in anterior Treaties concluded between the same parties, or between one of the parties and a third party, with the aim to look for the relevant principle or to elucidate the meaning of a phrase or stipulation.³⁰⁶

³⁰⁰ Vattel, *supra* note 37, at B.II, Ch.XVII, para. 284.

³⁰¹ *Ibid.*, para. 286.

³⁰² Although not set in a clearly defined theoretical framework.

³⁰³ Spencer, *supra* note 187, at 72; Spencer cites Phillimore as stating that this is an interpretative tool from which one can, generally, deduce with impartiality and certainty the intention of the contracting parties; Stockton moves along similar lines, but instead of characterizing this recourse as a source, he categorizes it in the notion of 'generally recognized principles of international law'. For more recent approaches to the issue *see infra* analysis.

³⁰⁴ Or even posterior in some cases.

³⁰⁵ Ramon de Dalman y Olivart, Marqués de Olivart, *Tratado de Derecho Internacional Público : Vol.I* (Madrid, 1903), at 412.

³⁰⁶ Author's translation based on the text cited in Spencer, which goes as follows:

On peut s'en rapporter aux termes employés dans des Traités antérieurs intervenes entre les memes parties, ou entre l'une d'elles et une tierce partie, afin de recherché le principe don't il s'agit ou pour élucider le sens d'une phrase ou d'une stipulation,

Spencer, *supra* note 187, at 85, citing Stockton.

Finally, there are the even more liberal approaches, like the one suggested by Fiore, who proposed that what is of essence, is that only what has been stipulated in another Treaty is relative and on an analogous subject-matter.³⁰⁷

The issue now is to see to what degree the relevant jurisprudence, adheres to any of the above theoretical proposals. The case-law analyzed *supra* reveals that four are the main elements of consideration with respect to recourse to other treaties that arise from the relevant jurisprudence:

- i) Terminological identity or similitude
- ii) Identity or relevancy of the subject-matter of regulation
- iii) Complete or partial overlap of Signatory Parties with the parties to the dispute³⁰⁸
- iv) Temporal Proximity

Each of these elements taken in tandem with one or more of the other elements appears always when recourse to other, anterior or posterior, treaties is contemplated by an international court or tribunal. However, to stop at this point and to declare that there are four criteria would leave us short of identifying the true nature of the issue and of responding accordingly to the question of what sort of interpretative tool the *interpretative renvoi* is.

Let it be noted that the key-word in element (i) and (ii) is *identity* and let us also recall that the arbiter in the *Warsaw Electricity Company* case was stunned by the “near identity”, (“*presque identité*”) of certain provisions.³⁰⁹ The same notion of ‘identity’ and ‘near identity’ is the crux of point (iii) and in a more generic way of point (iv) as well. The difference between similarity and identity is just a matter of degree. The more similar a treaty is with another, the closer they are to being identical. However, the term ‘identity’, by describing a specific *status* is unable to express this variation in degrees of similarity.

³⁰⁷ Spencer, *supra* note 187, at 85, citing Pasquale Fiore, *Il Nuovo Diritto Internazionale Pubblico*, (Milano, 1865), at 816.

³⁰⁸ In the majority of cases the critical parties were those that were parties to the dispute, not all the parties of the treaties in consideration.

³⁰⁹ *Warsaw Electricity Company* case, at 1675.

A different term is therefore needed. One that is more flexible and generic. Such a term is already incorporated, either explicitly or implicitly, in the description of all the four elements mentioned above. That term, the connecting criterion of all four elements, is the notion of *proximity*. Identity is merely the one end of the term *proximity*, which can cover the whole range of possible variations of similitude, relevancy, overlap and temporality. In essence, all the four elements are merely separate but inter-reactive manifestations of one and the same criterion: the *proximity criterion*. In that sense, we have terminological proximity, subject-matter proximity, shared signatory parties (or ‘actor’ proximity) and temporal proximity.

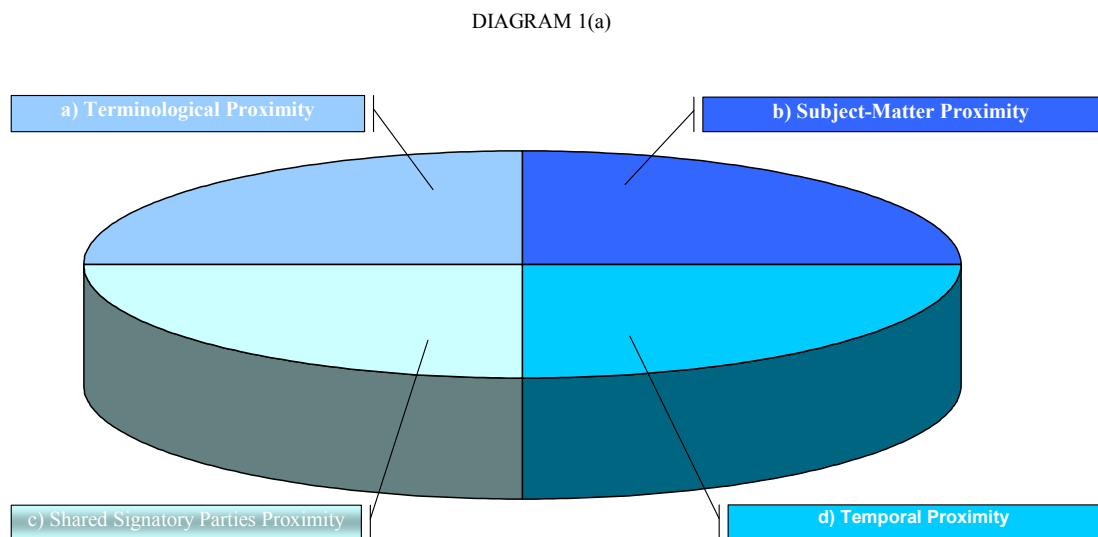


Diagram 1(a): Schematic Representation of the “Proximity Criterion” Thesis

In simpler terms, what the international court or tribunal is called to do in such cases is to examine how close/‘proximate’ the ‘relevant rule’ invoked by one of the parties under Article 31(3)(c) of the VCLT is to the treaty (or provision) being interpreted. In order to identify this proximity, the judges focus on four simple questions: i) HOW – How are the relevant provisions set out from the point of view of terms and language used? ii) WHAT – What do they regulate? iii) WHO – Who has

signed (or is bound) by the relevant treaties or customary law? and iv) WHEN – When did the treaties and/or customary law come into existence?

DIAGRAM 1(b)

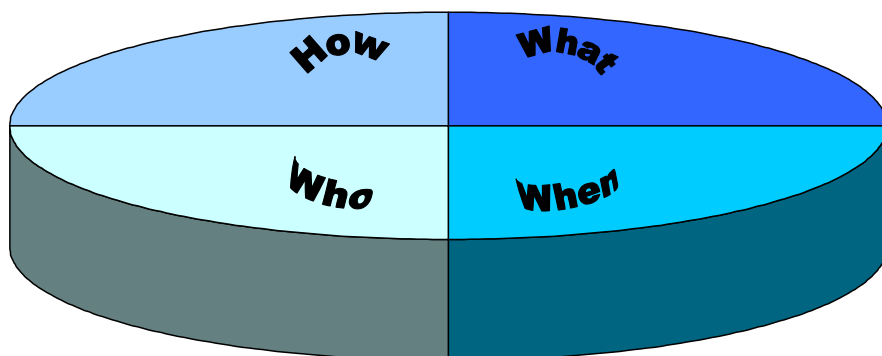


Diagram 1(b): The Four Questions that are Asked in Determining ‘Proximity’

Based on these questions what is sought is to identify how ‘proximate’ the treaty being interpreted and the ‘relevant rule’, invoked under Article 31(3)(c), are. Firstly, the judge examines the provision being interpreted and poses the four aforementioned questions. Having done that, he turns his attention to the ‘relevant rule’ being invoked under Article 31(3)(c). In order to determine whether this latter rule is truly a relevant one, for the purposes of Article 31(3)(c), he poses the same questions to this rule and examines how close (‘proximate’) the answers are to those of the provision being interpreted.

Let us consider that the treaty/provision being interpreted is depicted by the object of Diagram 1(b). The four parts of that pie represent the answers to the four questions posed. The ‘relevant rule’ invoked is then superimposed on this object, as shown in the following Diagram:

Diagram 2(a)

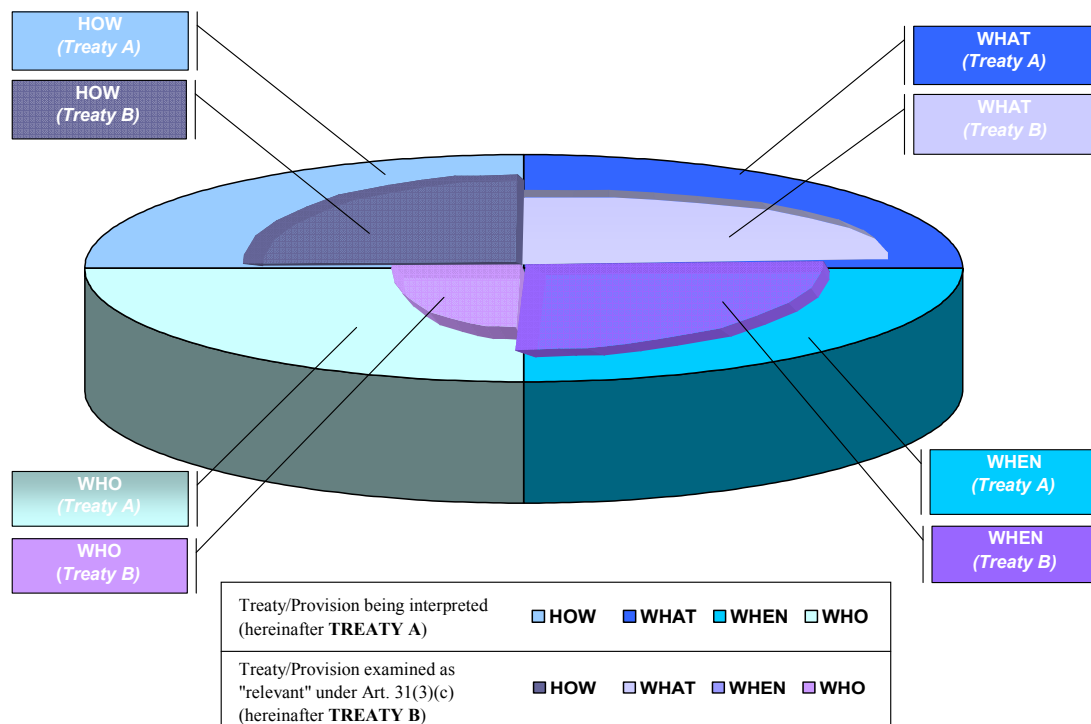


Diagram 2(a): How the ‘Proximity Criterion’ Works

The more similar the replies to the questions, *i.e.* the greater the apposite proximity, the greater the area that Treaty B will cover in each quadrant (in the above diagram, ‘Treaty B’ can be a treaty, a custom or a general principle of international law – the term ‘Treaty B’ has been used in order to highlight the juxtaposition with Treaty A). The greater the total area that Treaty B covers, the greater its relevancy for the purposes of Article 31(3)(c). On the contrary, the greater the difference between the replies to the question, the closer the area is to the centre of the pie and the less ‘proximate’ the two treaties in question are.

Furthermore, as shown in Diagram 1(a), the four elements that international courts and tribunals examine in determining ‘relevancy’ are merely manifestations of one overarching criterion: the ‘proximity criterion’. This reasoning is not the result of a wish for simplification nor is it of mere theoretical value. Four different and distinguishable criteria would require a further elaboration of the reasons of their interaction and of the way that one compensates for the shortcomings of the other. On

the contrary, the construction based on one simple criterion with different manifestations, is much more coherent in explaining this interrelationship. Since all four elements are merely manifestations of the same criterion it is only natural that all will be part and parcel of the consideration by the relevant court when deciding to resort to *interpretative renvoi* or not. The more one element tends to ‘identity’, the lesser the level of ‘proximity’ that will be required from the other elements. The process is reminiscent of the principle of physics, according to which water poured in interconnected bottles will always find a *position of balance amongst them*.

A jurisprudential demonstration of this has already been given *supra* in the relevant case-law,³¹⁰ But an example may clarify the manner in which the ‘proximity criterion’ can account for the variety of solutions adopted in international case-law. For instance, in the *Warsaw Electricity Company* case the Arbitral Tribunal considered provisions of the 1919 Treaty of Versailles as ‘relevant’ for interpreting a 1922 Franco-Polish Convention. If one applies the aforementioned process of the proximity criterion it is evident that: i) the two treaties in question did not have the same subject-matter; The Franco-Polish Convention was an economic treaty, whereas the Treaty of Versailles was a peace treaty (although it has to be noted that both aimed at bringing peace and stability after World War I); ii) only France was a common party to both these treaties. However, the lack of ‘close proximity’ with respect to these areas, is more than compensated by iii) the ‘temporal proximity’; the two treaties are separated by a gap of only 2 ½ years, and perhaps most importantly by iv) the almost near *identity* of the provisions of the two treaties. Applying this to Diagram 2(a) we arrive at Diagram 2(b).

³¹⁰ *Japanese House Tax case*; *US-Italy Air Transport Arbitration*; *Arone Kahane case*; *Access to Port of Danzig Advisory Opinion*.

Diagram 2(b)

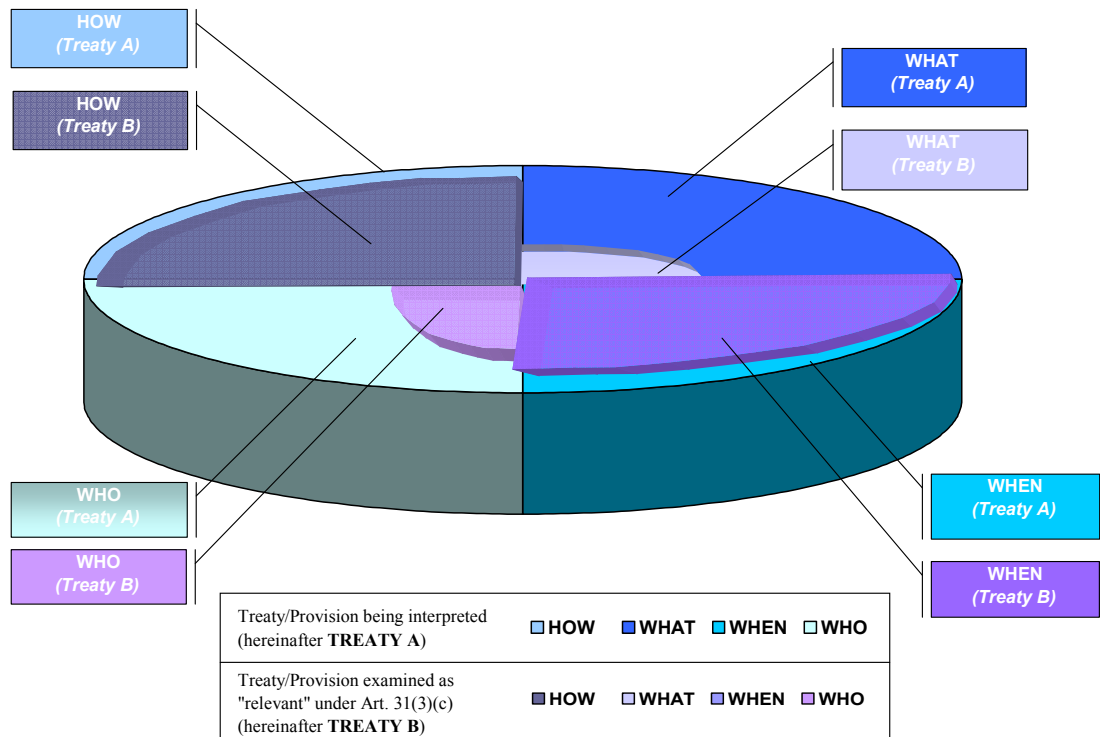


Diagram 2(b): How the ‘Proximity Criterion’ Works: The *Warsaw Electricity Company* Case

This Diagram shows that in the *Warsaw Electricity Company* case the fact that very little area is covered when the questions WHO and WHAT were asked, *i.e.* that very little ‘actor proximity’ and ‘subject-matter proximity’ existed between the treaties in question was not detrimental to the application of Article 31(3)(c). Any shortcomings were more than compensated for by the proximity expressed through the questions HOW and WHEN. Since the relevant provisions were *almost identical* and the relevant treaties were only 2 ½ years apart, in Diagram 2 (b) the area that Treaty B covers in the respective quadrants, almost entirely covers those of Treaty A.

In summation, the greater the area occupied the more chances there are that the treaties are relevant and should be considered. This rough representation offers, as well, an explanation why certain elements may, at times, cover for shortcomings of others. Covering the entire area of the circle is an impossibility, as in that case we would be talking about one and the same treaty. So the object is to cover a relatively

large area. If one element is near identical with that of the treaty being interpreted then the area it would cover in its quadrant would more than compensate for any discrepancies as to size and ‘proximity’ with respect to all the other elements.³¹¹ This construction would also allow for the possibility of reference to posterior treaties as well, since the ‘temporal proximity’ element is not restricted towards only one direction of the temporal line.

The above Diagrams are also helpful for one further reason. They show in a crystal-clear manner the similarities that the *interpretative renvoi* has with Article 31(3)(c). All elements correspond to an element of what constitutes Article 31(3)(c). Terminological and Subject-Matter Proximity are corollaries of ‘all relevant rules of international law’; Shared Signatory Parties (‘actor’) Proximity meets its counterpart in ‘the relations between the parties’; and finally, Temporal Proximity is nothing more than one way of addressing inter-temporal law considerations which, although not included *expressis verbis* in Article 31(3)(c), are nevertheless an inextricable part of its function.³¹²

The above analysis, shows that *interpretative renvoi* has nothing to do with Article 32 of the VCLT; on the contrary it is the logical predecessor of what was to become Article 31(3)(c) and still remains an essential part of it.

This is further reinforced by an additional consideration. Article 31(3)(c) is considered to enshrine the principle of systemic integration and as such is a tool of integration, its elements should reflect the entirety of the interpretative process, albeit in a micro-cosmic level. Returning to the previous Diagrams, one can then identify in each of the quadrants and elements of *interpretative renvoi*³¹³ all schools of interpretation.

³¹¹ This reasoning is again reinforced by the relevant jurisprudence as analyzed *supra*.

³¹² See Chapter II.

³¹³ And, by association, Article 31(3)(c).

DIAGRAM 3

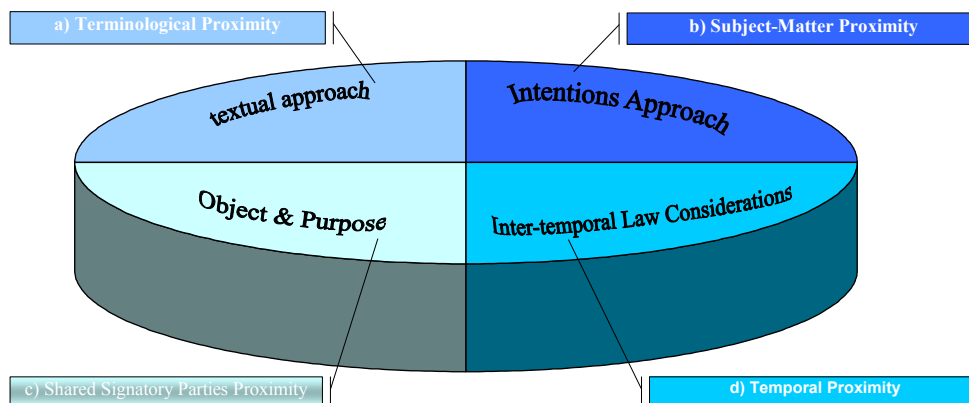


Diagram 3: Schematic Representation of the ‘Proximity Criterion’ Thesis Cross-Sectioned with the Schools of Thought on Interpretation

Consequently, it is beyond doubt that *interpretative renvoi* is a pre-VCLT manifestation of Article 31(3)(c).

Two more points need to be addressed, in order to have a complete picture of the role of *interpretative renvoi* in the modern framework of interpretation:

- i) whether reference to posterior treaties falls also under Article 31(3)(c) and
- ii) whether *interpretative renvoi* comes up in post-VCLT cases

As to the point of the use of posterior treaties, it is true that there are arguments both in favour and against recourse to posterior treaties when applying this form of ‘historical interpretation’.³¹⁴ One side argues that it is not prudent for the judges to seek inspiration and solutions from posterior treaties because, in this way, they imbue the former with an intention that was not there and of which the original drafters were not aware.³¹⁵ As an additional reinforcement to this line of reasoning a

³¹⁴ The term ‘historical interpretation’ is used at this point to highlight that, especially in the present context, that term is more of an oxymoron as the interpreter takes an examining look into the future and not into the past, that is why the present author suggests that the term ‘*interpretative renvoi*’ is more relevant to the subtleties of this method.

³¹⁵ Spencer, *supra* note 187, at 100.

dictum of the PCIJ in the *Interpretation of the Treaty of Lausanne Advisory Opinion* is usually mentioned:

The facts subsequent to the conclusion of the Treaty of Lausanne can only concern the Court in so far as they are calculated to throw light on the intentions of the Parties *at the time of the conclusion of that Treaty* (emphasis added).³¹⁶

The other side argues that

[a]s a general rule a Treaty of a former date may be very safely construed by referring it to the provisions of like Treaties made by the same nation on the same matter at a later time.³¹⁷

The reason being that there is a presumption of continuity of intention and, thus, the intention present at the former treaty continues in one form or another to permeate the treaties that follow.³¹⁸ It is interesting to note that each theory has as its starting point the treaty which it attacks. The side which calls for an anterior-treaty restricted approach starts from the intention prevalent in the posterior treaties as having no correlation with the previous treaties, whereas the side that argues that all treaties, even posterior ones, should be examined in the interpretative process, starts from the intention of the former treaty and works up the details of its theory through a *presumption of continuity* of will.

Regardless of which side should be given prevalence,³¹⁹ the essence here is that this debate is resonant of the debate on intertemporal law. As will be shown in Chapter II, an express reference to intertemporal considerations was intentionally

³¹⁶ *Interpretation of Article 3, Paragraph 2, of the Treaty of Lausanne*, Advisory Opinion of 21 November 1929, PCIJ Series B, No. 12, 3, at 24 (hereinafter *Interpretation of the Treaty of Lausanne Advisory Opinion*).

³¹⁷ *North Atlantic Coast Fisheries* case, Dissenting Opinion of Dr. Luis M. Drago, at 209.

³¹⁸ This argument seems to reflect Vattel's axiom that while we have no proof that a person has changed his mind he is presumed that his thoughts retain a sort of continuity and identity (essentially creating a burden of proof that is imposed on the person claiming change), *see* Vattel, *supra* note 37; Of course, such continuity is not *ad infinitum*. Allowance should be made for a gradual dissipation of the 'common intention' the more years pass in between the relevant treaties; again, we see here the temporal element.

³¹⁹ Although it has to be noted that as mentioned *supra* the construction of the 'proximity criterion' allows for recourse to treaties in both directions of the timeline.

omitted from the text of the VCLT³²⁰ and only echoes remain in the wording of Article 31(3)(c). This is an additional consideration in favour of the presented argument *i.e.* that reference to other treaties is more an application of Article 31(3)(c), rather than a supplementary means of interpretation.

One of the most important advantages of the *proximity criterion*, apart from it revealing how the term ‘relevant’ is identified, is that it can explain the variety of approaches both of pre-VCLT and post-VCLT jurisprudence, which brings us to the second point raised *supra*. The fact that none of the manifestations of the *proximity criterion* is of absolute validity, means by implication that each must be taken with a grain of salt. The term ‘parties’ does not always mean parties to the treaty nor does it always mean parties to the dispute. The more flexible interpretation of the term ‘parties’, as was shown by the relevant jurisprudence, is by no means prohibited. It *can* mean parties to the dispute,³²¹ as seems to have been implied by the Panel in the *EC-Biotech* case,³²² but whether this interpretation of Article 31(3)(c) or the more restrictive one will depend on consideration of the other manifestations of the *proximity criterion*. This would explain the difference of approach in *EC-Biotech* and *US-Shrimp*. It would also explain the *Oil Platforms* case, where a treaty was considered to which *only one party* to the dispute was bound.³²³

As to whether reference to other treaties is still witnessed in modern jurisprudence, the case-law mentioned in the beginning of Section IV.A of this Chapter where treaties were recognized as ‘rules’ within the meaning of Article 31(3)(c), is more than sufficient as a response.³²⁴

³²⁰ Both as a separate Article and within the context of Article 31(3)(c); *see infra* Chapter II.

³²¹ Or even one of the parties to the dispute.

³²² *EC-Biotech* case, para. 7.72.

³²³ *Oil Platforms* case, paras. 29-30.

³²⁴ Additionally to those mentioned *supra*, *see also*: *United States Diplomatic and Consular Staff in Tehran* (United States of America v. Iran), Judgment of 24 May 1980, *ICJ Rep. 1980*, 3, para. 52; In this case, the court referred to the textual identity and the number of bilateral treaties as evidencing the intention of the parties; this approach was also the basis of the US argument, *Pleadings*, at 153; *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, Panel Report adopted on 31 July 2000, WTO, WT/DS/161/R, WT/DS/169/R, para. 539 (hereinafter *Korea – Various Measures on Beef* (PR)); *United States – Tax Treatment for ‘Foreign Sales Corporations’ Recourse to Article 21.5 of the DSU by the European Communities*, Appellate Body Report adopted on 14 January 2002, WTO, WT/DS/108/AB/RW, para. 144, FN 123 (hereinafter *US-FSC (21.5)* (AB); this case referred to a multitude of bilateral agreements; *Arbitral Award of 31 July 1989* (Guinea-Bissau v. Senegal), Judgment of 12 November 1991, *ICJ Rep. 1991*, 53, paras. 50-1 (hereinafter *Arbitral Award of 31 July 1989* case); *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, Advisory Opinion of 20 December 1980, *ICJ Rep. 1980*, 73, (hereinafter *WHO Agreement Advisory Opinion*) Separate Opinion of Judge Mosler, at 126; where Judge Mosler examined the 1949 Agreement between

The *Müller and Others* case of the ECtHR deserves special attention. In interpreting Article 10 of the ECHR the ECtHR took into consideration the 1966 International Covenant on Civil and Political Rights (ICCPR)³²⁵ and held that:

Confirmation that the concept of freedom of expression is such as to include artistic expression is also to be found in Article 19 § 2 of the International Covenant on Civil and Political Rights, which specifically includes within the right of freedom of expression information and ideas ‘in the form of art’ (emphasis added).³²⁶

The use of the term ‘confirmation’ might be construed as implying that the ICCPR was taken into consideration as a *pari materia* treaty to the ECHR by virtue of Article 32 *i.e.* as a ‘supplementary means of interpretation’. However, the judgment itself is revealing on this issue. In the same paragraph just prior to referring to the ICCPR the ECtHR uses the term ‘confirmation’ when it is actually engaged in an interpretation based on the *context*

Confirmation, if any were needed, that this interpretation is correct, is provided by the second sentence of paragraph 1 of Article 10 (art. 10-1), which refers to ‘broadcasting, television or cinema enterprises’, media whose activities extend to the field of art (emphasis added).³²⁷

This would imply that the term ‘confirmation’ used immediately afterwards should put the reference to the context and to a treaty in *pari materia* on the same level and consequently within the same Article *i.e.* Article 31 and not Article 32.³²⁸

WHO and Switzerland (UNTS. 26: 333) which shared the same object and purpose; *Case Concerning the Delimitation of the Maritime Boundary between Guinea and Guinea-Bissau* (Guinea v. Guinea-Bissau), Award of 14 February 1985, *RIAA* 19 (1990):149-96, paras. 70 and 81 (hereinafter *Guinea – Guinea-Bissau Maritime Delimitation* case); *Case Concerning the Air Service Agreement of 27 March 1946 between the United States of America and France* (US v. France), Award of 9 December 1978, *RIAA* 18(1980): 417-93, paras. 67-8 (hereinafter *US – France Air Services* case); *US-Italy Air Transport Arbitration*, at 414-8; *Territorial Dispute* (Libyan Arab Jamahiriya v. Chad), Judgment of 3 February 1994, *ICJ Rep.* 1994, 6, Dissenting Opinion of Judge Ajibola, paras. 66-70 (hereinafter *Libya/Chad Territorial Dispute*); *Maritime Delimitation in the Area between Greenland and Jan Mayen* (Denmark v. Norway), Judgment of 14 June 1993, *ICJ Rep.* 1993, 38, para. 22 (hereinafter *Jan Mayen* case); *Rainbow Navigation v. Department of the Navy*, Award of 24 August 1990, 96 *ILR* 97, at 103.

³²⁵ 99 UNTS 171.

³²⁶ *Müller and Others v. Switzerland*, Judgment of 24 May 1988, 13 *EHRR* 212, para. 27.

³²⁷ *Id.*

³²⁸ Along similar lines see van Damme’s comments on the *EC-Poultry* (AB) case; van Damme, *supra* note 186, at 569-70 commenting on the *European Communities – Measures Affecting the Importation*

It is clear from the above, then, that the *proximity criterion* revealed by the pre-VCLT jurisprudence is still alive and well in current jurisprudence. Not only that but the flexibility it allows for, is essential considering the challenges that the 21st century poses to Article 31(3)(c).

V. Conclusion

In a thesis concerning the content and function of Article 31(3)(c) of the VCLT, no better place to start could exist than the text itself. Applying the process of interpretation as crystallized in Articles 31 and 32 of the VCLT³²⁹ to Article 31(3)(c) itself, the analysis focused first on the text itself and then sought additional support from the *travaux préparatoires*. Despite some interesting findings, however, the core issues of Article 31(3)(c) remained still clouded in mystery. For this reason an extensive analysis of the relevant jurisprudence, as a ‘supplementary means of interpretation’ (Article 32 VCLT), both post and pre-VCLT was undertaken.

It is this jurisprudence that shed light as to the proper understanding of Article 31(3)(c). Not only are all norms, irrespective of their source, included in Article 31(3)(c), but also the way in which ‘relevancy’, ‘applicability’ and ‘parties’ is determined is based on one singular criterion: the *proximity criterion*. Using this criterion the courts and tribunals each time examine if the norm proposed is relevant for the purposes of Article 31(3)(c). This is done by a combined application of the four different manifestations of the *proximity criterion*: i) terminological proximity ii) subject-matter proximity iii) shared signatory parties (‘actor’) proximity and iv) temporal proximity. A combined and balanced application of these four different manifestations of the *proximity criterion* not only would explain the variety of solutions adopted but is also the correct approach to Article 31(3)(c) as evidenced by international jurisprudence.

of Certain Poultry Products, Appellate Body Report adopted on 13 July 1998, WTO, WT/DS69/AB/R, para. 83 (hereinafter *EC-Poultry* (AB))

³²⁹ Which are customary international law.

Chapter II: Article 31(3)(c) and Intertemporality

I. Introduction

In the previous chapter it was shown that the wording used in Article 31(3)(c) raises many questions as to the scope of its application. As will be analyzed *infra*, from the wording of Article 31(3)(c) what was left out was a reference to temporal considerations and more generally to the overarching problem of intertemporality in the interpretative process. In this Chapter the link between Article 31(3)(c) and the intertemporal law doctrine will be examined.

The case that is most known as having brought forward the issue of intertemporal law is the *Island of Palmas case*, and the *dictum* made therein by Judge Huber. The relevant passage goes as follows:

a juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or falls to be settled.³³⁰

However, Judge Huber went on to qualify the above statement:

As regards the question which of different legal systems prevailing at successive periods is to be applied in a particular case (the so-called intertemporal law), a distinction must be made between the creation of rights and the existence of rights. The same principle which subjects the act creative of a right to the law in force at the time the right arises, demands that the *existence of the right, in other words its continued manifestation, shall follow the conditions required by the evolution of law* (emphasis added)³³¹

This passage from the *Island of Palmas case* is reflective of the antithesis between stability and change, which is inherent in any kind of system. However, it would be erroneous to presume that Judge Huber was the first to identify, at least within the international legal system, the issue of intertemporal law. Once again, both Grotius and Vattel in their respective seminal works, had the foresight to make references to this issue and its corresponding problems.

³³⁰ *Island of Palmas case* (Netherlands v. United States of America), Award of 4 April 1928, *RIAA* 2 (1949): 829, at 845 (hereinafter *Island of Palmas case*).

³³¹ *Id.*

Vattel opted for using the rules and the meaning of the terms, contemporary to the signing of the treaty.³³² Grotius, on the other hand tackled this issue by reference to a historical example; a treaty signed between the Romans and the Carthaginians after the war with respect to Sicily. According to a provision of this treaty: “The allies of each people shall be safe at the hands of the other people”. The question which arose was whether the term ‘allies’ should be interpreted as referring to allies at the time of the conclusion of the treaty or whether it should be interpreted in a broader sense so as to include all future allies. Both Grotius and Vattel solved this question by reference to the distinction between odious and favourable obligations and treaties and concluded that the term should refer only to the allies existing at the time of the conclusion of the treaty.³³³ In this sense, both affirmed the principle of contemporaneity *i.e* that the terms of a treaty should be understood and interpreted as they were at the time of the conclusion of the treaty.

The issue arose again in connection with the VCLT in two respects: firstly as a separate Draft Article dealing exclusively with intertemporal law³³⁴ and secondly when that failed, as an addition to Article 31(3)(c), which also failed.

³³²

Languages vary incessantly and the signification and force of words change with time. When an ancient act is to be interpreted, we should then know the common use of the terms at the time when it was written

Vattel, *supra* note 37, Book II, Chapter XVII, para. 272.

³³³ *Ibid.*, para. 284; Grotius, *supra* note 36, para. XIII.

³³⁴ Draft Article 56, *see infra* analysis.

II. Debating Intertemporality During the *Travaux Préparatoires* of the VCLT

A. Debate within the ILC

1. Early Considerations

Whereas, as was analyzed *supra* in Chapter I, during the discussions in the *Institut de Droit International* there was quite a bit of debate as to the written elements of Article 31(3)(c), almost nothing was mentioned about the problem of intertemporal law.³³⁵ This, however, was about to change when the ILC began its work on the law of treaties. As was already mentioned *supra* in Chapter I, the ILC used the discussions of the *Institut de Droit International* as a basis from which they could expand on a variety of debatable issues with respect to the law of treaties. Although the ILC focused once again on the same issues as their counterparts in the *Institut de Droit International* there was a shift as to the attention to be given to issues of intertemporality.

It was only when the ILC started dealing with the issue of interpretation that the connection between intertemporal law and Article 31(3)(c) became apparent. Intertemporal law considerations were not merely a problem on its own, but it seriously affected the principles of international law that were to be taken into consideration during interpretation. The response to the intertemporal questions would simultaneously offer solutions to whether the interpreter should look at the principles in force at the time of the conclusion of the treaty or at the time of the application of the treaty.

It is for this reason that the issue of intertemporal law that was only hinted at by Sir Hersch Lauterpacht and Verdross during the *Institut's* sessions³³⁶ now became a clear battling field. In more detail: Waldock basically adopted in his proposed Article 56 the formulation of Judge Huber in the *Las Palmas* case;³³⁷ essentially that:

³³⁵ Only fleeting references were made by Sir Hersch Lauterpacht; see Lauterpacht, in *Institut de Droit International*, *supra* note 99, at 405. It is, however, interesting to note that a few years after the conclusion of the Vienna Conference on the Law of Treaties the *Institut de Droit International* decided to address the issue of intertemporal law itself, and actually, during the Session of Wiesbaden, in 1975, adopted a Resolution on 'The Intertemporal Law Problem in Public International Law'. This resolution, addressed the problems of intertemporality as a self-standing issue and not solely as a problem of the interpretative process; The resolution is available at http://www.idi-ijl.org/idiE/resolutionsE/1975_wies_01_en.pdf (last visited 25 January 2010).

³³⁶ See *supra* note 335 and accompanying text.

³³⁷ *Island of Palmas* case, at 845.

Article 56 – Inter-temporal law

1. A Treaty is to be interpreted in the light of law in force at the time when the treaty was drawn up, [but]
2. Subject to paragraph 1, the *application* of a treaty shall be governed by the rules of international law in force at the time *when the treaty is applied* (emphasis added)³³⁸.

This intertemporal approach according to Waldock was reinforced by international jurisprudence.³³⁹ This juxtaposition of interpretation and application seems a little bizarre. Waldock followed the reasoning of Judge Huber’s construction; that the rule of intertemporal law results in another, no less important rule; *i.e.* that the continued manifestation of a right established by a treaty must follow the conditions required by the evolution of the law.³⁴⁰ Waldock actually hinted at the possibility of conflict between these two rules but avoided taking any sides. He merely mentioned that the second rule was as valid as the first one. He further pointed that the rule on the law of treaties, regarding a treaty becoming void due to the emergence of a new peremptory norm, was merely a particular application of this rule.³⁴¹

Trying to compromise the solutions followed in the arbitral courts in the cases of *Grisbadarna* and the *North Atlantic Coast Fisheries* and at the same time draw certain conclusions with regards to the problematic relation between interpretation and application, Waldock made the following construction: The reason why the courts opted for applying the principle of contemporaneity in those cases was that it was the will of the parties,³⁴² when signing the relevant treaties, to resolve once and for all

³³⁸ Sir Humphrey Waldock, *Third Report on the Law of Treaties*, (A/CN.4/167 and Add.1-3), in *YILC* (1964), Vol.II: 5-65, at 8-9; However, see Higgins’ criticism, who considers that the terms ‘appreciation’ and ‘manifestation’ of Judge Huber’s *dictum* cannot be equated with the terms ‘interpretation’ and ‘application’ of Draft Article 56; Rosalyn Higgins, ‘Some Observations on the Inter-Temporal Rule in International Law’, in *Theory of International Law at the Threshold of the 21st Century*, Jerzy Makarczyk (ed.) (The Hague: Kluwer Law International, 1996), 173-81, at 178.

³³⁹ *Grisbadarna case* (Norway v. Sweden), Award of 23 October 1909, *RIAA* 11 (1961): 147-66, at 159-160 (hereinafter *Grisbadarna case*); *North Atlantic Coast Fisheries case*, at 196; and the *Case Concerning Rights of Nationals of the United States of America in Morocco*, (France v. United States of America), Judgment of 27 August 1952, *ICJ Rep. 1952*, 176, at 189 (hereinafter *US Nationals in Morocco case*).

³⁴⁰ *Island of Palmas case*, at 845.

³⁴¹ Waldock, *supra* note 128, at 9.

³⁴² It seems that in deciding issues of intertemporal law, the founding fathers’ approach gains in importance, in comparison to the role it plays in other cases of interpretation; similar considerations have been expressed with regards to the interpretation of Security Council Resolutions; on interpretation of Security Council resolutions see: Efthymios Papastavridis, ‘Interpretation of Security Council resolutions under Chapter VII in the Aftermath of the Iraqi Crisis’, *ICLQ* 56 (2007): 83-117.

issues of delimitation and not for those boundaries to follow the evolution of delimitation principles of international law; for instance, the *thalweg* principle, the 10-mile bays etc.³⁴³

The proposed Article 56 started off an intense debate on several grounds. Some of the members of the ILC considered that talking about a distinction between interpretation and application was a *non sequitur* or at the very least a misnomer. According to Paredes, “interpretation and application coincided in time”.^{344,345} The

³⁴³ Waldock, *supra* note 128, at 10.

³⁴⁴ Paredes, (A/CN.4/SR.728), in *YILC* (1964), Vol. I, at 34.

³⁴⁵ The distinction between interpretation and application has always been a difficult one. Various definitions have been submitted:

The words ‘interpret’, ‘interpretation’ are often used loosely as if they included ‘apply, application’. Strictly speaking, when the meaning of the treaty is clear, it is ‘applied’, not ‘interpreted’. Interpretation is a secondary process which only comes into play when it is impossible to make sense of the plain terms of the treaty, or when they are susceptible of different meanings. The *Concise Oxford Dictionary* says: ‘Interpret: expound the meaning of (abstruse words, writings, etc.); make out the meaning of’.

McNair *supra* note 186, at 365; while the Commentary on the Harvard Draft Convention provided that:

Interpretation is the process of determining the meaning of a text; application is the process of determining the consequences which, according to the text, should follow in a given situation

‘Harvard Draft Convention on the Law of Treaties’, *AJIL* 29 (1935): 658, at 938 (Commentary to Article 19.- Interpretation of Treaties); Similarly see Charles de Visscher, *Problèmes d’ Interprétation Judiciaire en Droit International Public* (Paris : Pedone, 1963), at 27-8.

Some authors have argued that ‘interpretation’ and ‘application’ are two separate and distinguishable notions (see Helmut Coing, ‘Trois Formes Historiques d’ Interprétation du Droit: Glossateurs, Pandectistes, École de l’ Exégèse’, *Revue Historique de Droit Français et Étranger* 48 (1970): 531, at 540-2); others have claimed that the relationship between them is one of logical precedence. Interpretation logically precedes application. The former defines the content of a specific rule, whereas the latter deals with the consequences that flow from the now ‘fixed content’ of the rule in the case at hand (see Robert Kolb, *Interprétation et Création du Droit International ; Esquisses d’ une Herméneutique Juridique Moderne pour le Droit International Public* (Bruxelles : Bruylant, 2006); Yasseen, *supra* note 71, at 9-10; Gardiner, *supra* note 13, at 27 ; Serge Sur, *L’ Interprétation en Droit International Public* (Paris: Librairie Générale de Droit et de Jurisprudence, 1974), at 193); others finally have accepted that although in theory one may distinguish these two notions, in practice there is a wide variety of interaction between them, oscillating between clear distinction and total merger (see de Visscher, *supra* note 345, at 193; Maarten Bos, *A Methodology of International Law* (Oxford: North-Holland, 1984), at 112; Donald McRae, ‘Treaty Interpretation and the Development of International Trade Law by the WTO Appellate Body’, in *The WTO at Ten: The Contribution of the Dispute Settlement System*, Giorgio Sacerdoti, Alan Yanovich and Jan Bohanes (eds.) (Cambridge: CUP, 2006), 360, at 363; Jan Klabbbers, ‘Reluctant *Grundnormen*; Article 31(3)(c) and 42 of the Vienna Convention on the Law of Treaties and the Fragmentation of International Law’, in *Time, History and International Law*, Malgosia Fitzmaurice, Matthew Craven and Maria Vogiatzi (eds.) (Leiden: Martinus Nijhoff, 2007), 141, at 144; Waldock, *supra* note 128, at 8, para. 3). One of the most notable statements to that effect was the one made by Judge Shahabuddeen who argued that:

... since it is not possible to apply a treaty save with reference to some factual field (even if taken hypothetically) and since it is not possible to apply a treaty except on the basis of some interpretation of it, there is a detectable view that there is little practical, or even theoretical, distinction between the two elements of the formula ... It seems arguable that the two elements constitute a compendious

true issue was that of a modification of a treaty by subsequent law;³⁴⁶ and if one were to scratch a little bit further beneath the surface, one would find the primordial issue of *lex posterior*.³⁴⁷ For others, the issue was that of distinguishing between established rights and expectations of rights *i.e.* to know the rule in force *medius tempore*.³⁴⁸

Doubts were raised with regards to the customary nature of the second paragraph of the proposed Article³⁴⁹, or of the whole Article itself,³⁵⁰ but the greatest amount of criticism was with regards to whether Article 56 was more relevant to other parts of treaty law³⁵¹ or that due to its close connection with a multitude of other issues³⁵² its discussion should be postponed until those issues had been resolved.³⁵³

Another point raised was that the rule of intertemporal law applied to juridical facts, whereas a treaty was more in the nature of a juridical act and, thus, the intertemporal rule seemed not to be relevant with regards to the discussion of interpretation.³⁵⁴ Dissents were raised to this argument. For instance Bartos

term of art generally covering all disputes as to rights and duties having their source in the controlling treaty...

Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, Advisory Opinion of 26 April 1988, *ICJ Rep. 1988*, 12, Separate Opinion of Judge Shahabuddeen, at 59 (hereinafter *Headquarters Agreement Advisory Opinion*).

All the aforementioned serve in placing into the right perspective the awkwardness that the ILC members faced with the wording of Draft Article 56.

³⁴⁶ Verdross, (A/CN.4/SR.728), in *YILC* (1964), Vol. I, at 33.

³⁴⁷ *Id.*, although Verdross seems to make an exception for law-making treaties, “for such a treaty took a life of its own, independent of the will of the parties at the time of its conclusion”.

³⁴⁸ Luna, (A/CN.4/SR.729), in *YILC* (1964), Vol. I, at 37.

³⁴⁹ Pal, (A/CN.4/SR.729), in *YILC* (1964), Vol. I, at 35, in more detail, Pal considered that the rule in paragraph 1 reflected custom but should always be put to the test of the will of the parties, whereas the 2nd paragraph did not reflect accurately the principle underlying Huber’s judgment since in the *Island of Palmas* case, the issue revolved around a right conferred by law and not by a treaty, whereas in the *North Atlantic Coast Fisheries* case, the treaties in question did not cover the issue in dispute. Consequently the second paragraph was a misrepresentation of the existing jurisprudence, according to Pal; *contra see* Tabibi, (A/CN.4/SR.729), in *YILC* (1964), Vol. I, at 35.

³⁵⁰ Amado, (A/CN.4/SR.729), in *YILC* (1964), Vol. I, at 38, for reasons of the wording used by Waldock; Amado considered that this wording actually pushed Article 56 beyond the scope of Huber’s dictum; *contra* Rosenne (A/CN.4/SR.729), in *YILC* (1964), Vol. I, at 35 citing McNair, *supra* note 186, at 468 and Charles Rousseau, *Principes Généraux de Droit International Public*, Vol. I (Paris: Pedone, 1944), at 498, and El-Erian, (A/CN.4/SR.729), in *YILC* (1964), Vol. I, at 38.

³⁵¹ See for instance Luna that suggested that the first paragraph would be more appropriate in the section on interpretation whereas the second one “should be linked to the whole problem of the transformation and duration of treaty rules”, Luna, (A/CN.4/SR.729), in *YILC* (1964), Vol. I, at 37; Lachs, (A/CN.4/SR.729), in *YILC* (1964), Vol. I, at 39.

³⁵² *E.g.* modification by subsequent practice, treaty or custom, emerging *jus cogens* norms etc.

³⁵³ Elias, (A/CN.4/SR.729), in *YILC* (1964), Vol. I, at 36; Tunkin, (A/CN.4/SR.729), in *YILC* (1964), Vol. I, at 38; El-Erian, (A/CN.4/SR.729), in *YILC* (1964), Vol. I, at 39.

³⁵⁴ Jiménez de Aréchaga, (A/CN.4/SR.728), in *YILC* (1964), Vol. I, at 33; Aréchaga was a proponent of the principle of ‘*tempus regit actum*’, and referring to the *Grisbadarna* and *North Atlantic Coast Fisheries* cases came to a different conclusion than that of *Special Rapporteur* Waldock, by means of stating that “the rule had been applied not to the treaties as juridical acts, but to certain concepts

considered that a single treaty could simultaneously have two different aspects. It could be a fact as indicated in the Statute of the ICJ itself. But it could also be a legal act as well as a normative rule of law.³⁵⁵ In more detail, a treaty is a legal act concluded between two or more parties and, thus, the will of the parties is the dominant feature. Consequently, it is the law at the time of the drawing up of the treaty that should prevail; this is³⁵⁶ indicated in Article 36(2)(a) of the ICJ Statute as well. A treaty, however, can also be a source of international law, a “normative rule of law” as indicated by Article 38(1)(a) of the Statute. In this case

[w]hereas the will of the parties remained fixed at the time at which it was expressed, normative rules were dynamic and evolved with time, as did the whole system of positive international law.³⁵⁷

In any event, it was the will of the parties that should be the decisive factor; this will, however, acted in a constraining way for both legs of the proposed Article 56. With regards to the first paragraph, Jiménez de Aréchaga stated that the

will of the parties should not be prevented by crystallizing every concept as it had been at the time when the treaty was drawn up as proposed in paragraph 1

but also that

[there have been instances] in which the rule proposed in paragraph 2 was not in fact applied because the intention of the parties had been to reach a definitive settlement.³⁵⁸

contained in them that had undergone a process of historical evolution”, see Jiménez de Aréchaga, (A/CN.4/SR.728), in *YILC* (1964), Vol. I, at 34.

³⁵⁵ Bartos, (A/CN.4/SR.729), in *YILC* (1964), Vol. I, at 35.

³⁵⁶ Always according to Bartos.

³⁵⁷ Bartos, (A/CN.4/SR.729), in *YILC* (1964), Vol. I, at 36; both these ideas led Judge Huber to his construction in the *Island of Palmas* case, although he seems to have preferred the unity of the act and the autonomy of the will, a fact which Bartos attributes to the general tendency of the jurists at the time, Tsuruoka also was in favour of this balance between the autonomy of the will and the stability of the conventional international law on the one hand, and the retention of a certain flexibility of customary international law on the other, see Tsuruoka, (A/CN.4/SR.729), in *YILC* (1964), Vol. I, at 36; similarly see Luna, (A/CN.4/SR.729), in *YILC* (1964), Vol. I, at 37.

³⁵⁸ Jiménez de Aréchaga, (A/CN.4/SR.728), in *YILC* (1964), Vol. I, at 34; of a similar mind was Paredes, (A/CN.4/SR.728), in *YILC* (1964), Vol. I, at 34; and Tsuruoka, (A/CN.4/SR.729), in *YILC* (1964), Vol. I, at 36.

It is clear from the above quotes that de Aréchaga considered the will of the parties as the decisive criterion on how to resolve issues of intertemporality.

Perhaps the issue that touched upon the very core of the nature of the international legal system *per se*, was that of whether there should be a hierarchical relationship between paragraphs 1 and 2 of the proposed Article 56. Paragraph 1 stated that “1. A treaty is to be interpreted in the light of the law in force at the time when the treaty was drawn up”.³⁵⁹ Paragraph 2, on the other hand, provided that: “2. Subject to paragraph 1, the application of a treaty shall be governed by the rules of international law in force at the time when the treaty is applied.”³⁶⁰

Those supporting the idea that the will of the parties was the decisive factor were of the mind that the rules at the time of the drawing up³⁶¹ of the convention should apply, unless the will of the parties was evidently to the contrary. The clear exception to this rule³⁶² was the case of a change occurring in the field of *jus cogens* norms. In such cases it would be reasonable to presume that the parties, had they been aware of such a change would not have willed to act in contradiction to the *jus cogens* norm that had arisen.³⁶³

Others believed that the second paragraph of the proposed article should prevail³⁶⁴ and that it expressed the primary rule, whereas the first paragraph was merely the exception to that rule.³⁶⁵ Finally, there were also members that believed that the provisions should not be viewed under the prism of a hierarchical relationship but were more of a complementary nature.³⁶⁶

To further complicate matters, it was not just the content of the provision which was debatable. The wording itself raised some critical questions. Certain members of the ILC considered the title of Article 56 *i.e.* “The Inter-temporal law” an

³⁵⁹ Waldock, *supra* note 128, at 8.

³⁶⁰ *Ibid.*, at 9.

³⁶¹ Or negotiation.

³⁶² Which was also dictated by the legal construction of a hypothetical or supposed common will.

³⁶³ Paredes, (A/CN.4/SR.728), in *YILC* (1964), Vol. I, at 34; Luna, (A/CN.4/SR.729), in *YILC* (1964), Vol. I, at 37.

³⁶⁴ And in fact that the paragraphs should be reversed to show the primacy of the second paragraph of the proposed Article 56; *see* Castrén, (A/CN.4/SR.729), in *YILC* (1964), Vol. I, at 35.

³⁶⁵ *Id.*

³⁶⁶ Rosenne, (A/CN.4/SR.729), in *YILC* (1964), Vol. I, at 36; Briggs, (A/CN.4/SR.729), in *YILC* (1964), Vol. I, at 38; Lachs, (A/CN.4/SR.729), in *YILC* (1964), Vol. I, at 35.

unfortunate one.³⁶⁷ Another instance of criticism was that Waldock's Article 56 used the terms "in force at the time when the treaty was *drawn up*" (emphasis added)³⁶⁸. This was felt to be too restrictive from a temporal point of view. Therefore, a re-phrasing of paragraph 1 was suggested. It was felt that the wording "at the time when the treaty was negotiated" should be used instead as it covered a much larger time period and therefore, would be more helpful in finding the true will of the parties.³⁶⁹ Another member of the ILC suggested that the adoption of the text was the critical date.³⁷⁰ Furthermore, in the wording of paragraph 1 "a treaty is to be interpreted", the term "treaty" was found to mean "individual words and phrases rather than the meaning of the treaty as a whole".³⁷¹ Finally, although Waldock based his Article 56 on Huber's *dictum* in the *Island of Palmas* case, he used different terms. The latter had used the term "appreciate", whereas the former used the term "interpret".³⁷²

However, it was not only with respect to Article 56 *per se* that the issue of intertemporal law was debated. The issue of intertemporality started slowly making its appearance in the debate surrounding the principles of treaty interpretation. For instance, in the 765th meeting of the ILC, although initially the main point was diverted to whether rules/canons of interpretation were at all desirable³⁷³ the debate quickly returned to more practical elements. Pessou suggested a redrafting of the proposed article on treaty interpretation so as to read in the following manner: "In the light of the context and of the general principles of application the provisions of a treaty shall be interpreted...".³⁷⁴ The precise meaning of this wording was not clarified³⁷⁵ but from the context it can be deduced that it was an effort to address in a single sentence both the issues of general principles of law and the issue of intertemporality by referring to the rules of 'application'.

³⁶⁷ Reuter, (A/CN.4/SR.729), in *YILC* (1964), Vol. I, at 35; Bartos, (A/CN.4/SR.729), in *YILC* (1964), Vol. I, at 36; Lachs, (A/CN.4/SR.729), in *YILC* (1964), Vol. I, at 39.

³⁶⁸ Waldock, *supra* note 128, at 8.

³⁶⁹ Paredes, (A/CN.4/SR.728), in *YILC* (1964), Vol. I, at 34; *contra see* Bartos, (A/CN.4/SR.729), in *YILC* (1964), Vol. I, at 36, where he suggests that the "drawing up" of the text is the critical date. Acceptance can be considered as the critical date only in those instances where between the drawing up and the acceptance a considerable amount of time has passed (this would probably include also the cases of accession, although Bartos himself does not make the distinction).

³⁷⁰ Rosenne, (A/CN.4/SR.729), in *YILC* (1964), Vol. I, at 36.

³⁷¹ *Id.*

³⁷² *Ibid.*, at 38.

³⁷³ Briggs, de Luna and Rosenne, (A/CN.4/SR.765), in *YILC*, (1964), Vol. I, at 275-8.

³⁷⁴ Pessou, (A/CN.4/SR.765), in *YILC* (1964), Vol. I, at 278.

³⁷⁵ As this proposal was not followed.

On the contrary, the issue turned, once again, on the temporal element. One group, following Mr. Tunkin's suggestion, considered that the wording of the text³⁷⁶ should return to that adopted by the *Institut de Droit International*, with the understanding that the principles referred to were the ones contemporary to the process of interpretation and not the ones prevailing at the time of the conclusion of the treaty.³⁷⁷ This proposal was based on the hypothetical situation of the emergence of a future peremptory norm (*jus cogens*).³⁷⁸

The other group³⁷⁹ favoured the wording adopted by the Special Rapporteur.³⁸⁰ They considered that interpretation should be based on the "legal order in force at the time of the conclusion of a treaty"³⁸¹ and that in any case the issue raised by Tunkin had been or could be covered by the articles dealing with the issue of emergence of a *lex posterior* of customary nature,³⁸² which would also cover the case of emergence of a later norm of *jus superveniens*.³⁸³ It is highly interesting that at this point the debate continued to focus on the subsequent evolution of international law, but only with respect to the norms with the highest normative value, *i.e.* *jus cogens* norms. The members of the ILC seemed reluctant to touch upon the issue of subsequent development *via* general or even regional custom. It was only during the 770th meeting of the ILC when the issue of intertemporality was, once again, raised that a new proposition was brought to the forefront. According to it there should not be a rigid rule dictating which set of rules/principles should be used. On the contrary the decisive criterion should be the *intention of the parties* as expressed in the text, the

³⁷⁶ *I.e.* the text that dealt with the rules on interpretation, not Article 56 which was solely devoted to regulating the issue of intertemporal law.

³⁷⁷ Tunkin, Verdross and Bartos, (A/CN.4/SR.765), in *YILC* (1964), Vol. I, at 278-9. It is quite striking that Mr. Bartos, while agreeing with Mr. Tunkin and Mr. Verdross, went a bit further by suggesting that the process of interpretation should have as its starting point not the text but the principles of international law. He based this on his belief that the "exegetical method in international law" had serious shortcomings, *see* (A/CN.4/SR.765), in *YILC* (1964), Vol. I, at 279, para. 64.

³⁷⁸ Tunkin, (A/CN.4/SR.765), in *YILC* (1964), Vol. I, at 278.

³⁷⁹ Comprising of Mr. Yasseen, Mr. Pal and the Chairman.

³⁸⁰ Yasseen, Pal and the Chairman, (A/CN.4/SR.765), in *YILC* (1964), Vol. I, at 279-82.

³⁸¹ Yasseen, (A/CN.4/SR.765), in *YILC* (1964), Vol. I, at 279.

³⁸² At that time Article 73 of the draft articles proposed by the *Special Rapporteur*, Sir Waldock.

³⁸³ Yasseen and the Chairman, (A/CN.4/SR.765), in *YILC* (1964), Vol. I, at 281-2, although the Chairman tried to compromise the two groups by advocating in favour of the non-inclusion of any reference to temporal elements within the article (which he considered that deserved, due to their complexity, an article of their own; an opinion which he reiterated in the following meeting; *see* (A/CN.4/SR.766), in *YILC* (1964), Vol. I, at 291) and only in his personal opinion did he consider that the rules applicable were those contemporary at the conclusion of the treaty.

relevant documentation and the subsequent practice or as deduced from the same sources.³⁸⁴

Prompted by the aforementioned debate, Waldock redrafted Article 31(3)(c) (then Draft Article 70) in order to read “*1.(b) in the light of the rules of international law [in force at the time of its conclusion]*”.³⁸⁵ This redrafting, however, instead of being a step forward to reaching a compromise, spawned a heated debate on several topics. The issue of whether the phrase in brackets should be included or not prompted the same responses.³⁸⁶

The discussions resumed in 1966, but in the meantime, the Governments presented their take on the topics under discussion. Intertemporal law was one that evoked the most numerous and diverse responses.

Some Governments were of the opinion that it was the intention of the parties that should decide the question,³⁸⁷ some that the temporal elements were to be judged on the basis of “good faith”,³⁸⁸ others remained firm to their position that only the

³⁸⁴ Sir Humphrey Waldock and Mr. de Luna, (A/CN.4/SR.770), in *YILC*, (1964), Vol. I, at 317.

³⁸⁵ Sir Humphrey Waldock, (A/CN.4/SR.769), in *YILC* (1964), Vol. I, at 309.

³⁸⁶ Against its inclusion was, once again, Mr. Tunkin, (A/CN.4/SR.769), in *YILC* (1964), Vol. I, at 311. The Chairman was increasingly finding himself leaning towards the complete omission of this subparagraph, for he considered that the technical or not terms used by those drafting a treaty were bound to evolve through time and it would be extremely confusing and dangerous to try and set in stone rules of what principles should the interpreter refer to; (A/CN.4/SR.769), in *YILC* (1964), Vol. I, at 311-2. This position was shared by Mr. Rosenne, who considered that the reference to international law was already incorporated in the definition of a treaty as “an agreement governed by international law”, whereas Mr. Verdross had no objection to its deletion, as long as this was the opinion of the majority and since they considered that its content was self-evident; (A/CN.4/SR.769), in *YILC* (1964), Vol. I, at 310 and 312, respectively. In favour of its retention were Mr. Yasseen, who quoted the *North Atlantic Coast Fisheries* case; Mr. Briggs, who considered that should this reference be omitted then mentioning the rules of international law in Article 70 would be utterly “out of place”, and in such a case he would prefer the paragraph 1 (b) to be omitted altogether; Mr. de Luna, who quoted several international decisions to make his point (*i.e.* the *Georges Pinson* case, at 422; the *River Oder* case; the *German Interests in Upper Silesia* case; and the *Ambatielos* case (Greece v. the United Kingdom), Judgment on Merits of 19 May 1953, *ICJ Rep. 1953*, 10 [hereinafter *Ambatielos* case]; de Luna, (A/CN.4/SR.770), in *YILC* (1964), Vol. I, at 317; Sir Humphrey Waldock considered that the purpose of Article 70 was exactly that; to establish the meaning of a term in a treaty at the time of its conclusion. He felt that the interpretation of Article 70 and the interpretation that Mr. Tunkin advocated were two completely separate issues. The second one dealt with interpretation based on subsequent practice and development of law, a scenario that the Special Rapporteur felt had already been sufficiently addressed by the redrafted Article 69A, which tackled the issue of modification of a treaty by subsequent events (*e.g.* treaty, practice and customary law); Yasseen, Briggs, Amado and Sir Waldock, (A/CN.4/SR.769), in *YILC* (1964), Vol. I, at 310, 311-312, 312 and 311, respectively.

³⁸⁷ Kenya, (A/CN.6/20/SR.850), para. 40 and Syria, (A/CN.6/20/SR.845), para. 9.

³⁸⁸ The Netherlands, in *ILC*, *supra* note 134, at 322-3.

rules in force at the time of the conclusion of a treaty were relevant,³⁸⁹ while other delegations considered that the evolutionary interpretation should be opted for.³⁹⁰

As is evident from the above, the question that returned again and again in the discussions of the ILC was what the critical time was³⁹¹ and which were the relevant customs and/or rules to be taken into consideration;³⁹² time and customs/rules.

2. In dubio pro deletione³⁹³

All the above show the complexities and intricacies of the issue of intertemporality. In 1966, when the ILC resumed its work on the law of treaties what is immediately striking both in the discussions at the ILC as well as in the Sixth Report of the *Special Rapporteur* Waldock,³⁹⁴ is the disappearance of the former Article 56 that dealt specifically with the issue of intertemporal law. It seems that the concerns regarding a specific provision for intertemporal law that had been expressed in the meetings in 1964 prevailed.³⁹⁵ It was considered that the two legs of intertemporal law, as expressed in draft Article 56, had already been dealt with in other areas and other draft articles on the law of treaties. In more detail, the first limb of Article 56 *i.e.* that “1. A treaty is to be interpreted in the light of law in force at the time when the treaty was drawn up”, was considered to be already incorporated in the proposed rules of interpretation, whereas the second leg³⁹⁶ *i.e.* that “2. Subject to paragraph 1, the application of a treaty shall be governed by the rules of international law in force at the time when the treaty is applied” was considered to touch upon the issue of modification of treaties by subsequent practice, subsequent agreement, by the emergence of new customary law or even more by the emergence of a new peremptory norm, which were dealt with in Draft Article 68.³⁹⁷

³⁸⁹ UK, (A/CN.6/20/SR.843), para. 25.

³⁹⁰ In support of this the Greek delegation referred to the Articles of Agreement of the International Monetary Fund, where the term “exchange control” was interpreted in the light of the evolution that had taken place since the Fund had been established in 1944, (A/CN.6/20/SR.845), paras. 41-2.

³⁹¹ The time of the conclusion of the treaty or the time of the application of the treaty.

³⁹² General principles of international law, general custom, regional custom or even treaty-based rules.

³⁹³ This is the author’s paraphrasing of the *in dubio pro reo* principle of Criminal Law, which means “in case of doubt favour the accused”; see *supra* note 138; Bearing that in mind, the title translates to: *in case of doubt favour deletion*.

³⁹⁴ Sir Humphrey Waldock, *Sixth Report on the Law of Treaties* (A/CN.4/186 and Add.1-7), in *YILC* (1966), Vol. II : 51-103.

³⁹⁵ (A/CN.4/SR.728) in *YILC* (1964), Vol. I, at 33 *et seq.*

³⁹⁶ Which had raised certain objections by members of the ILC.

³⁹⁷ Draft Article 68 went as follows:

Despite the deletion of the relevant provision (Article 56), nevertheless, the debate on intertemporal law persisted in the ILC discussions. It is characteristic that the Governments of the UK and the US, in their comments to the proposed articles, suggested that Draft Article 68(c),³⁹⁸ unlike modification by means of subsequent practice and agreement between the parties, was not a rule of customary international law³⁹⁹ or that it would cause too many difficulties in its application.⁴⁰⁰ Therefore, both Governments suggested that it should be deleted.

The Government of Israel, on the other hand, did not make any such suggestion; it nevertheless highlighted a very interesting point. In the first form of the article on intertemporal law, the second leg followed the first one. After the deletion of Draft Article 56 which dealt with intertemporal law, the regulation of intertemporal law considerations now existed in two separate Articles. The second leg of Draft Article 56, *i.e.* that “the application of a treaty shall be governed by the rules of international law in force at the time when the treaty is applied”, was incorporated in Draft Article 68(c), whereas the first leg, *i.e.* that “[a] treaty is to be interpreted in the light of law in force at the time when the treaty was drawn up” was now incorporated in Draft Article 69 (which would become Article 31 of the VCLT). Summing up, the second limb of Draft Article 56 was now in Draft Article 68, whereas the first limb was now at a later article, Draft Article 69. Israel considered that this reversal in order might have implications to the relevant hierarchy, or at least to the relationship between these two approaches. Therefore, the Government of Israel proposed that the initial order should be restored.⁴⁰¹

Article 68. Modification of a treaty by a subsequent treaty, by subsequent practice or by customary law

The operation of a treaty may also be modified:

- (a) By a subsequent treaty between the parties relating to the same subject matter to the extent that their provisions are incompatible;
- (b) By subsequent practice of the parties in the application of the treaty establishing their agreement to an alteration or extension of its provisions; or
- (c) By the subsequent emergence of a new rule of customary law relating to matters dealt

ILC, *Report of the International Law Commission covering the work of its sixteenth session, 11 May-24 July 1964 – Draft Articles on the Law of Treaties (A/5809)*, in *YILC* (1964), Vol. II: 173, at 198.

³⁹⁸ *I.e.* that a treaty may be modified “(c) By the subsequent emergence of a new rule of customary law relating to matters dealt”.

³⁹⁹ UK argument, *supra* note 134, at 346.

⁴⁰⁰ US argument, in ILC, *supra* note 134, at 359.

⁴⁰¹ Israel, in ILC, *supra* note 134, at 300-1.

Waldock also recognized the problems arising from the drafting of Article 31 (then Article 69). He, actually, acknowledged that it was poorly drafted for several reasons. Firstly, rules of interpretation should precede those of modification and/or application.⁴⁰² Secondly, it reflected the ambivalence and uncertainty of the ILC, on how to deal with the underlying fundamental issues of Article 68. The issue was more than just modification; it was, in essence, an issue of conflict and of hierarchy of norms and sources in international law. The same problem had been addressed by the ILC in its discussions on successive treaties on the same subject-matter. In that case the issue was of a conflict between two treaties and of the possibility of a hierarchical structure. Here the question was one of conflict between two different sources of international law; treaty and custom.

For these reasons Waldock proposed that paragraph (c) of Draft Article 68 should be removed and that the ILC should discuss on how better to include it within the ambit of Article 31 (then Draft Article 69) that outlined the rule of interpretation.⁴⁰³ Bearing also in mind the comments of the Governments and of the Sixth Committee, he redrafted Article 31 so as to read: “1. A treaty shall be interpretedin the light of....(b) the rules of international law”.⁴⁰⁴

Having already decided to steer clear away from the drafting of an article specifically referring to issues of intertemporal law, the ILC now focused on whether any reference should exist within the textual body of Article 31 (then Draft Article 69).⁴⁰⁵ A stark contrast is immediately evident in the arguments put forward. Although there were some voices still advocating in favour of the retention of the wording “in force at the time of its conclusion”,⁴⁰⁶ they were a clear minority. Others

⁴⁰² Waldock, *supra* note 394, at 90-1; the way it stood at the time the rule on interpretation was incorporated in Article 69, which followed the rule on modification, which was incorporated in Article 68.

⁴⁰³ Waldock, *supra* note 394, at 90-1, paras. 13-5.

⁴⁰⁴ Sir Humphrey Waldock, (A/CN.4/SR.869), in *YILC* (1966), Vol. I, Part II, at 184.

⁴⁰⁵ *Id.*

⁴⁰⁶ Mr. Bartos, was of the opinion that the rules referred to in sub-paragraph (b) of the article were those in force at the time of the conclusion of the treaty. Mr. Bartos seems, however, to consider these rules as ‘principles’, since immediately afterwards he lapses again into the ‘*jus cogens*’ argument, the difficulties and errors of which have already been analyzed *supra*. Mr. Bartos considered that truly such “rules” could develop and change, but then the new rules would be *jus cogens* norms and thus the issue would be not one of interpretation but of a treaty being null and void; Bartos, (A/CN.4/SR.870), in *YILC* (1966), Vol.II, Part II, at 192; The Chairman, was also in favour of the retention of the 1964 wording, and insisted on the distinction between

supported the existence of a reference to intertemporal law, but with the *intention of the parties being the decisive criterion*.⁴⁰⁷ However, the vast majority, despite their personal opinions on the subject, were of the mind that the issue was so complex and difficult that it was best left out from the draft articles and that intertemporal linguistics should only be implied.⁴⁰⁸

Mr. Jiménez de Aréchaga differs slightly from the aforementioned members of the ILC in the sense that he applauded the abandonment of any reference to intertemporal law not due to its complexity but because he considered that it was already tacitly incorporated in other notions of the text⁴⁰⁹. Similarly to Mr. El-Erian and Mr. Ago he felt that it was the *intention of the parties that was the decisive criterion*, but unlike the latter he allowed for the parties to have intended that certain terms should be allowed to evolve through time. He felt that the 1964 draft “prevented

the interpretation of rules, the purpose of which was to discover what existed, and free scientific research, which was concerned with the evolution or modification of rules of law by other sources of the legal order

The Chairman, (A/CN.4/SR.871), in *YILC* (1966), Vol. II, Part II, at 197; Ago supported the 1964 draft text, because he considered that the role of interpretation was to identify the will of the parties at the time when the treaty was concluded. Consequently, for him, the Commission should not let itself be confused by considerations of intertemporal law, when the solution was simply identifying the intention of the parties; Ago, (A/CN.4/SR.870), in *YILC* (1966), Vol. II, Part II, at 189.

⁴⁰⁷ El-Erian, (A/CN.4/SR.871), in *YILC* (1966), Vol. II, Part II, at 195-6.

⁴⁰⁸ Verdross and Rosenne, (A/CN.4/SR.870), in *YILC* (1966), Vol. II, Part II, at 186 and Tsuruoka, (A/CN.4/SR.871), in *YILC* (1966), Vol. II, Part II, at 196; Mr. de Luna, although accepting the eradication of any intertemporal reference, felt that the commentary should address the question and opt for the ‘intention of the parties’ solution. In this he was in agreement with the comments made by the Government of the Netherlands. To support his argument, he quoted the case: *Interpretation of Paragraph 4 of the Annex following Article 179 of the Treaty of Neuilly* (Bulgaria v. Greece), Judgment of 12 September 1924, *PCIJ Series A, No. 3*, (hereinafter *Interpretation of the Neuilly Treaty* case); and the Joint Dissenting Opinion of Judges Basdevant, Winiarski, McNair and Read in the case: *Conditions of Admission of a State to Membership in the United Nations*, Advisory Opinion of 28 May 1948, *ICJ Rep. 1948*, 57 at 82 (hereinafter *Admission to the United Nations Advisory Opinion*); de Luna, (A/CN.4/SR.870), in *YILC* (1966), Vol. II, Part II, at 185-6; similarly Mr. Reuter, who made a distinction between “fixed concepts” and “variable concepts”; (A/CN.4/SR.870), in *YILC* (1966), Vol. II, Part II, at 188 and (A/CN.4/SR.871), in *YILC* (1966), Vol. II, Part II, at 195; Mr. Castrén also supported the eradication of intertemporal references as he was in complete disagreement with the wording “in force at the time of its conclusion”; Castrén, (A/CN.4/SR.870), in *YILC* (1966), Vol. II, Part II, at 188; this wording, on the contrary, found Mr. Tunkin in complete accord; Tunkin, (A/CN.4/SR.870), in *YILC* (1966), Vol. II, Part II, at 190; Mr Briggs, although agreeing to the non-inclusion of any intertemporal reference came up, as an alternative, with a redrafting of the text so as to read: “the rules of international law in force at the time of its conclusion as well as those rules in force at the time of its interpretation”. However, this wording seems to be merely a vicious circle, since it offers no solution to the problem but simply regurgitates the available set of rules. It is, most likely, for this reason that this proposal was not followed up; Briggs, (A/CN.4/SR.870), in *YILC* (1966), Vol. II, Part II, at 187; Finally, the *Special Rapporteur*, conceded to the absence of any intertemporal provisions, but expressed his personal opinion on the subject which was that the intention of the parties should be the relevant criterion. He felt that the question was essentially not one of intertemporal law, since “the evolution of the law affected the application of the agreement, but not its meaning”; Sir Humphrey Waldock, (A/CN.4/SR.872), in *YILC* (1966), Vol. II, Part II, at 199.

⁴⁰⁹ *See infra*.

the free operation of the will of the parties by crystallizing every concept as it had existed” at the time of the conclusion of the treaty⁴¹⁰.

What is striking, however, is his last comment. Having advocated in favour of the intention of the parties he concludes that the temporal element should be considered as “implicitly covered by the concept of good faith”.⁴¹¹ This means that the notion of ‘good faith’ applied correctly would lead the interpreter to investigate the will of the parties and through this medium reach the correct decision regarding intertemporality. It is the first time that the triptych of intertemporality, ‘will of the parties’ and ‘good faith’ are presented as three different emancipations of the same thing.

Irrespective of whether they applauded or lamented the abandonment of any direct reference to intertemporal law within Article 31 (then Draft Article 69) of the VCLT, the general consensus amongst the members of the ILC seems to have been that the decisive criterion for resolving issues of intertemporality would always be the *intention of the parties*.

In conclusion, the form in which Article 31(3)(c) was finally adopted⁴¹² was stripped down to the bare minimum and the solution that the ILC opted with respect to the problem of intertemporal law was merely to *delete* any specific reference to it. This happened in two ways. Not only the Draft Article 56, which dealt exclusively with intertemporal law was omitted, but also the same fate was reserved for the insertion of any reference to temporal elements within Article 31(3)(c); *i.e.* in the form of the wording “[rules of international law] in force at the time of its [*i.e.* the treaty’s] conclusion”.⁴¹³

B. Final Comments in the 6th Committee and the Vienna Conference on the Law of Treaties

This approach of the ILC *i.e.* eradicating any specific reference to intertemporal law was commended by various Governments. It was felt that opting for vagueness

⁴¹⁰ Jiménez de Aréchaga, (A/CN.4/SR.870), in *YILC* (1966), Vol. II, Part II, at 191.

⁴¹¹ *Id.*

⁴¹² And as it appears today.

⁴¹³ See *supra* note 402 and accompanying text.

instead of a rigid rule for the issues of intertemporality was the right tactic.⁴¹⁴ The Netherlands also argued that the issues of progressive development of law and intertemporality that tantalized the ILC for the whole length of the discussions were easily resolvable without any need for specific provisions. The reason for that was that both intertemporal law and the rules of interpretation were merely expressions of the principle of good faith.⁴¹⁵ Consequently the application of ‘good faith’ could always guide the judge to the appropriate solution in each case.

Apart from these considerations the *travaux préparatoires* of the VCLT, from this point onwards, essentially repeat in a condensed form all the arguments already analyzed. The only interesting point to be mentioned is that Czechoslovakia’s delegate tried to revive the debate on intertemporal law by expressing that Czechoslovakia considered the rules in force at the time of the application of the treaty as the appropriate solution.⁴¹⁶ To this the *Special Rapporteur* simply replied that the issue of intertemporal law presented immense difficulties and the Commission after having struggled with them had decided to abandon the issue as it would mean, otherwise, entering the slippery slope of the relationship between customary law and treaty law.⁴¹⁷

From the above analysis of the *travaux préparatoires* it is evident that the issue of intertemporal law was one that caused serious headaches to the members of both the ILC and the *Institut de Droit International*. So complex was the issue that finally the ILC selected not only to scrap Draft Article 56 on intertemporal law, but also any similar reference within the wording of Article 31(3)(c). Despite this, the discussions in these two *fora*, offer some useful information, in the sense that irrespective of the variety of opinions and solutions expressed the common

⁴¹⁴ UAR, (A/CN.6/SR.911), para. 27.

⁴¹⁵ The Netherlands, (A/CN.6/21/SR.903), para. 15.

⁴¹⁶ Czechoslovakia, in *Vienna Conference I*, *supra* note 46, at 182, paras. 53-4.

⁴¹⁷ Sir Humphrey Waldock, in *Vienna Conference I*, *supra* note 46, at 184, para. 74; *see, however*, Jacobs, who argues that the fact that the suggested wording ‘at the time of the conclusion of the treaty’ was deleted from Article 31(3)(c) implies that this provision includes “subsequent developments *not initially envisaged by the parties*” (emphasis added); Francis G. Jacobs, ‘Varieties of Approach to Treaty Interpretation: With Special Reference to the Draft Convention on the Law of Treaties Before the Vienna Diplomatic Conference’, *ICLQ* 18 (1969): 318, at 331. Such an absolute – no exceptions allowed – interpretation of Article 31(3)(c) does not seem to be supported by the jurisprudence, *see infra*. Greig, based on a contextual interpretation of Article 31(3)(c), considers that since 31(3)(a) and (b) refer to future events, despite the lack of any temporal indication in paragraph (c), it should be read as covering both rules of international law at the time of the conclusion of a treaty and rules of international law at the time of the interpretation of the treaty, Donald Greig, *Intertemporality and the Law of Treaties*, (London: British Institute of International and Comparative Law, 2001), at 46.

denominator to any and all of them was that *the intention of the parties should be the decisive criterion*.

III. Intertemporal Law: Between Stability and Change

In his series of Articles in the *BYIL* on ‘The Law and Procedure of the International Court of Justice’ Sir Gerald Fitzmaurice identified several principles of interpretation. Amongst them was the *principle of contemporaneity*,⁴¹⁸ which he described in the following way:

The 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 concluded⁴¹⁹

Several years later and continuing the tradition of these articles, Thirlway considered it necessary, based on the jurisprudence of the time, to supplement this with a qualification:

Provided that, where it can be established that it was the intention of the parties that the meaning or scope of a term or expression used in the treaty should follow the development of the law, *the treaty must be interpreted so as to give effect to that intention* (emphasis added).⁴²⁰

This is indicative of the whole debate on intertemporal law; the tug of war between ensuring stability of a system and providing enough flexibility for it to evolve and survive. This dual approach is also reflected on the international jurisprudence where

⁴¹⁸ Also known as “*contemporanea expositio*”; see Markus Kotzur, ‘Intertemporal Law, *Max Planck Encyclopedia of Public International Law* (2009), para. 11, accessible at: www.mpepil.com (last accessed on 25 January 2010).

⁴¹⁹ Sir Gerald Fitzmaurice, ‘The Law and Procedure of the International Court of Justice 1951-4: Treaty Interpretation and Other Points’, *BYIL* 33 (1957): 203, at 212; see also on the principle of contemporaneity Sir Gerald Fitzmaurice, ‘The Law and Procedure of the International Court of Justice 1951-54: General Principles and Sources of Law’, *BYIL* 30 (1953): 1, at 5-8; Hugh Thirlway, ‘The Law and Procedure of the International Court of Justice 1960 – 1989: Supplement 2006: Part Three’, *BYIL* 77 (2006): 1, at 65 *et seq.*

⁴²⁰ Thirlway, *supra* note 11, at 57; Thirlway also employed the term ‘*intertemporal renvoi*’ to describe the situation that arises when the intention of the parties is deemed to have been “to subject the legal relations created to such law as might from time to time thereafter become effective”; Hugh Thirlway, ‘The Law and Procedure of the International Court of Justice: 1960-1989, Part One’, *BYIL* 60 (1989): 1, at 135.

some tribunals have expressly recognized the principle of contemporaneity⁴²¹ while others have opted for a more ‘evolutive/dynamic’ interpretation.^{422,423} When adopting a dynamic interpretation the courts and tribunals apart from basing their decision on the intention of the parties, have also frequently referred to the nature of certain terms or whole treaties as ‘generic’.⁴²⁴ A ‘generic term’ is a “known legal term, whose

⁴²¹ *Minquiers and Ecrehos* (France v. United Kingdom), Judgment of 17 November 1953, *ICJ Rep.* 1953, 47, at 56 (hereinafter *Minquiers and Ecrehos* case); *US Nationals in Morocco* case, at 189; *Aegean Sea Continental Shelf* case, Dissenting Opinion of Judge de Castro, at 63, para. 4; *Case Concerning Right of Passage over Indian Territory (Merits)* (Portugal v. India), Judgment of 12 April 1960, *ICJ Rep.* 1960, 6, at 37 (hereinafter *Right of Passage* case); *Case Concerning a Boundary Dispute between Argentina and Chile Concerning the Frontier Line between Boundary Post 62 and Mount Fitzroy* (Argentina v. Chile), Award of 21 October 1994, *RIAA* 22 (2000): 3 at 43, para. 130 (hereinafter *Mount Fitzroy* case); *Kasikili/Sedudu Island* (Botswana v. Namibia), Judgment of 13 December 1999, *ICJ Rep.* 1999, 1045, para. 25 (hereinafter *Kasikili/Sedudu Island* case); *Decision regarding Delimitation of the Border between Eritrea and Ethiopia* (Eritrea v. Ethiopia), Decision of 12 April 2002, *RIAA* 25 (2006):83, at 110, para. 3.5 hereinafter *Eritrea/Ethiopia Delimitation* case); *Land and Maritime Boundary between Cameroon and Nigeria* (Cameroon v. Nigeria ; Equatorial Guinea intervening), Judgment of 10 October 2002, *ICJ Rep.* 2002, 303, para. 59; *Land, Island and Maritime Frontier Dispute* (El Salvador v. Honduras; Nicaragua intervening), Judgment of 11 September 1992, *ICJ Rep.* 1992, 350, para. 392 (hereinafter *Land, Island and Maritime Frontier Dispute* case); *Grisbadarna* case, at 159; *North Atlantic Coast Fisheries* case, at 196; *Western Sahara*, Advisory Opinion of 16 October 1975, *ICJ Rep.* 1975, 12, para. 126 (hereinafter *Western Sahara Advisory Opinion*); *Temple of Preah Vihear (Merits)* (Cambodia v. Thailand), Judgment of 15 June 1962, *ICJ Rep.* 1962, 6, Dissenting Opinion of Judge Sir Percy Spender, at 128 (hereinafter *Temple of Preah Vihear* case); *Dispute Regarding Navigational and Related Rights* (Costa Rica v. Nicaragua), Judgment of 13 July 2009, *ICJ Rep.* 2009, Separate Opinion of Judge Skotnikov, para. 5, accessible at: <http://www.icj-cij.org/docket/files/133/15327.pdf> (last accessed on 25 January 2010) (hereinafter *Dispute Regarding Navigational and Related Rights*).

⁴²² *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276*, Advisory Opinion of 21 June 1971, *ICJ Rep.* 1971, 16, at 31, para. 53 (hereinafter *Namibia Advisory Opinion*); *Aegean Sea Continental Shelf* case, para. 77; *Gabcikovo–Nagymaros Project* case, para. 112; *Jan Mayen* case, at 38 *et seq.*; *Case Concerning the Delimitation of Maritime Boundary between Guinea-Bissau and Senegal* (Guinea Bissau v. Senegal), Arbitral Award of 31 July 1989 *RIAA* 20 (1993): 119, paras 80-5; *Iron Rhine Arbitration*, paras. 79-81; *Dispute Regarding Navigational and Related Rights*, Declaration of Judge *ad hoc* Guillaume, paras. 9-16, accessible at: <http://www.icj-cij.org/docket/files/133/15330.pdf> (last accessed on 25 January 2010); *Prosecutor v. Furundzija*, Judgment of the Appeals Chamber of 21 July 2000, ICTY, IT-95-17/1-A, Declaration of Judge Patrick Robinson, para. 276, accessible at: <http://www.icty.org/x/cases/furundzija/acjug/en/fur-aj000721e.pdf> (last accessed on 25 January 2010); *Tyrer v. the United Kingdom*, Judgment of 25 April 1978, 2 *EHRR* 1, para. 31; *Matthews v. the United Kingdom*, Judgment of 18 February 1999, 28 *EHRR* 361, para. 39.

⁴²³ More generally on dynamic interpretation see Malgosia Fitzmaurice, ‘Dynamic (Evolutive) Interpretation of Treaties: Part I’, *Hague Yearbook of International Law* 21 (2008): 101-53; Richard Bernhardt, ‘Evolutive Treaty Interpretation, Especially of the European Convention on Human Rights’, *GYIL* 42 (2000): 11 *et seq.*; George Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (Oxford: OUP, 2007), at 58-79; Catherine Brölmann, ‘Limits of the Treaty Paradigm’, in *Interrogating the Treaty: Essays in the Contemporary Law of Treaties*, Malgosia Fitzmaurice and Matthew Craven (eds.) (Nijmegen: Wolf Legal Publishers, 2005), 29, at 34-6; see also Malgosia Fitzmaurice, ‘The Tale of two Judges: Sir Hersch Lauterpacht and Sir Gerald Fitzmaurice – Human Rights and the Interpretation of Treaties’, *Revue Hellénique de Droit International* 61 (2008):125-70, analyzing the differences and similarities of the take on dynamic interpretation of two of the most influential figures in treaty interpretation, Sir Gerald Fitzmaurice and Sir Hersch Lauterpacht.

⁴²⁴ *Iron Rhine Arbitration*, paras. 79-80; *Nationality Decrees Issued in Tunis and Morocco*, Advisory Opinion of 7 February 1923, *PCIJ Series B., No. 4*, at 24 (hereinafter *Nationality Decrees in Morocco* case); *Namibia Advisory Opinion*, at 31; *Aegean Sea Continental Shelf* case, paras. 74-7; *Gabcikovo –*

content the Parties expected would change through time”⁴²⁵ a term whose “meaning was intended to follow the evolution of the law”⁴²⁶.

One point that needs to be made with respect to this latter definition is that it focuses on the aspect of the *evolution of the law*. However, Georgopoulos argues that with respect to ‘generic terms’ a distinction should be made between ‘*renvoi mobile*’ and ‘*ouverture du texte*’. In the former case, a norm anticipates the evolution of the law and is connected to it. As the law changes so does the content of that norm (An example of such a case would be the *Aegean Sea Continental Shelf* case). In the latter case, a treaty provision changes alongside the factual situation contemplated by the treaty (An example of this second category would be the *Gabcikovo – Nagymaros Project* case).⁴²⁷ Nevertheless and despite the merit of this distinction, the effects in both scenarios seem to be identical.⁴²⁸

Irrespective of which solution is opted for, *i.e.* principle of contemporaneity or dynamic/evolutive interpretation, there is general consensus in jurisprudence and doctrine alike that the application of the intertemporal rule has at least one limit; *jus cogens* norms.⁴²⁹ Paragraph 3 of the Resolution of the *Institut de Droit International* addresses this aspect of intertemporal law in a most poignant manner.

3. States and other subjects of international law shall, however, have the power to determine by common consent the temporal sphere of application of norms, ... subject to any imperative norm of international law which might restrict that power.⁴³⁰

Nagymaros Project case, para. 112; *US-Shrimp* (AB), para. 130; *Dispute Regarding Navigational and Related Rights* case, accessible at: <http://www.icj-cij.org/docket/files/133/15321.pdf> (last accessed on 25 January 2010).

⁴²⁵ *Kasikili/Sedudu Island* case, Declaration of Judge Higgins, para. 2.

⁴²⁶ *Aegean Sea Continental Shelf* case, para. 77.

⁴²⁷ Théodore Georgopoulos, ‘Le Droit Intertemporel et les Dispositions Conventionnelles Evolutives – Quelle Thérapie contre la Vieillesse des Traités ?’, *RGDIP* 108 (2004): 123, at 132-4.

⁴²⁸ Thirlway, *supra* note 419, at 67.

⁴²⁹ Markus Kotzur, ‘Intertemporal Law’, *Max Planck Encyclopedia of Public International Law* (2009), para. 13, accessible at www.mpepil.com (last accessed on 25 January 2010); Edward McWhinney, ‘The Time Dimension in International Law, Historical Relativism and Intertemporal Law’, *Essays in International Law in Honour of Judge Manfred Lachs*, Jerzy Makarczyk (ed.) (The Hague: Martinus Nijhoff, 1984), 179, at 183; Georgopoulos, *supra* note 427, at 146; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment of 26 February 2007, *ICJ Rep. 2007*, Joint Declaration of Judges Shi and Koroma, para. 2, accessible at: <http://www.icj-cij.org/docket/files/91/13685.pdf> (last accessed on 25 January 2010) (hereinafter *Application of the Genocide Convention* case); *similarly South-West Africa(Second Phase)* (Liberia and Ethiopia v. South Africa), Judgment of 18 July 1966, *ICJ Rep. 1966*, 6, Dissenting Opinion of Judge Tanaka, at 293-5 (hereinafter *South-West Africa cases (Second Phase)*).

⁴³⁰ Institut de Droit International, *Resolution of Session of Wiesbaden, 1975 – The Intertemporal Problem in Public International Law*, *Annuaire de l’Institut de Droit International* 56 (1975): 536.

The analysis of the heated debate that intertemporal law sparked during the *travaux préparatoires* of the VCLT, combined with the above brief presentation of the various approaches to intertemporal law in doctrine and jurisprudence, has offered a useful insight as to the complexities of intertemporal law, while simultaneously functioning as a guide towards a legally sound solution. The main problems of intertemporal law can be broken down in two main categories, the understanding of each of which, will lead us cumulatively to the final conclusion. These categories are: i) temporal – exoteric *i.e.* the alleged conflict between intertemporality and principle of non-retroactivity and ii) systemic *i.e.* the relationship of intertemporal considerations with the various schools of interpretation as a way of determining the correct approach to the problems raised by intertemporality.

A. Intertemporality and the Notion of Retroactivity

An issue that needs to be explored in order to come to any sort of conclusion regarding the problem of intertemporality in the interpretative process is whether the second leg of the intertemporal law doctrine as stated by Huber *i.e.* that “the existence of [a] right, in other words its continued manifestation, shall follow the conditions required by the evolution of law”⁴³¹ violates the principle of non-retroactivity. Firstly, however, what needs to be established is whether non-retroactivity is a principle of international law. Should this be the case, then and only then can one proceed to examine whether intertemporality violates it and if so that the only logical solution is that the principle of contemporaneity⁴³² should be adopted.

1. Non-retroactivity as a Principle of International Law

The Statute of the ICJ in article 38 states the sources of international law that the Court can resort to. Amongst them, one can find “the general principles of law, recognised by civilised nations”.⁴³³ This provision has been the focal point of the

⁴³¹ *Island of Palmas* case, at 845.

⁴³² As outlined by Sir Gerald Fitzmaurice in his articles on ‘Law and Procedure of the international Court of Justice’; *see* Fitzmaurice, *supra* notes 419.

⁴³³ Art. 38(1)(c) of the ICJ Statute.

writings of renowned publicists⁴³⁴ who all accept non-retroactivity as one of these principles. However, such “teachings of the most highly qualified publicists”⁴³⁵ do not suffice in order to qualify non-retroactivity as a principle of international law. Further evidence is required both at a domestic level as well as in international jurisprudence and such evidence is more than abundant.

The principle of non-retroactivity has been crystallized and incorporated in a multitude of national constitutions and codes. However, perhaps more revealing is that the status of non-retroactivity as a principle of international law has been recognized in a multitude of international judicial decisions in various *fora*. In the *Chamizal* case, in his individual opinion the Mexican commissary invoked the “universal maxim of the irretroactivity of the laws”.⁴³⁶ This followed the *Grisbadarna* case and was reaffirmed in the *Clipperton Island* case,⁴³⁷ although it has to be

⁴³⁴ Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, (Cambridge: Grotius, 1987); Lord McNair, ‘The General Principles of Law Recognised by Civilised Nations’, *BYIL* 33 (1957): 1, at 1-19; Alfred von Verdross, ‘Les Principes Généraux du Droit dans la Jurisprudence Internationale’, *RCADI* 52 (1935/II) : 191, at 195-251; Paul Reuter, ‘Le Recours de la Cour de Justice des Communautés Européennes à des Principes Généraux de Droit’, in: *Mélanges Offerts à Henri Rolin: Problèmes de Droit des Gens*, Henri Rolin and Jean A. Salmon (eds.) (Paris: Pedonne, 1964), 263-283.

⁴³⁵ Art. 38(1)(d) of the ICJ Statute.

⁴³⁶ *The Chamizal case* (Mexico v. United States of America), Award of 15 June 1911, *RIAA* 11 (1961): 309, at 343 (hereinafter *Chamizal* case); although it has to be pointed out that the Commission, despite accepting non-retroactivity as a principle, argued that declaratory (interpretative) treaties or conventions were an exception to that rule, a point which has also bearing on our own problematic regarding an alleged clash between intertemporality and non-retroactivity. In more detail the commission stated:

On behalf of Mexico it has been strenuously contended that this convention was intended to operate in the future only, and that it should not be given a retroactive effect so as to apply to any changes which had previously occurred. Reference was made to a number of well known authorities establishing the proposition that laws and treaties are not usually deemed to be retrospective in their effect. *An equally well-known exception* to this rule is that of laws or treaties which are intended to be declaratory, and which evidence the intention of putting an end to controversies by adopting a rule of construction applicable to laws or convention which have been subject to dispute. The internal evidence contained in the convention of 1884 appears to be sufficient to show an intention to apply the rules laid down for the determination of difficulties which might arise through the changes in the Rio Grande, whether these changes had occurred prior to or after the convention, and they appear to have been intended to codify the rules for the interpretation of the previous treaties of 1848 and 1853 which had formed the subject of diplomatic correspondence between the parties. While it is perfectly true that the convention was to be applied to disputes which might arise in the future, it nowhere restricts the difficulties to future changes in the river. It expressly declares that, by the treaties of 1848 and 1853, the dividing line had followed the middle of the river, and that henceforth the same rule was to apply.

Chamizal case, at 325.

⁴³⁷ *Clipperton Island Arbitration* (Mexico v. France), Award of 28 January 1931 *RIAA* 2 (1949): 1105-11.

acknowledged that the commission in the *Chamizal case* was more direct in its affirmation of the non-retroactivity principle.⁴³⁸

The ICJ also has had to deal with the issue of non-retroactivity and found the following in the *Ambatielos case*:

These points raise the question of the retroactive operation of the Treaty of 1926 and are intended to meet what was described during the hearings as ‘the similar clauses theory’, advanced on behalf of the Hellenic Government. The theory is that where in the 1926 Treaty there are substantive provisions similar to substantive provisions of the 1886 Treaty, then under Article 29 of the 1926 Treaty this Court can adjudicate upon the validity of a claim based on an alleged breach of any of these similar provisions, even if the alleged breach took place wholly before the new treaty came into force. The Court cannot accept this theory for the following reasons : (i) To accept this theory [*i.e.* the ‘similar clauses theory’] would mean giving retroactive effect to Article 29 of the Treaty of 1926, whereas Article 32 of this Treaty states that the Treaty, which must mean all the provisions of the Treaty, shall come into force immediately upon ratification. Such a conclusion might have been rebutted if there had been any special clause or any special object necessitating retroactive interpretation. There is no such clause or object in the present case. It is therefore impossible to hold that any of its provisions must be deemed to have been in force earlier.⁴³⁹

It is interesting to note that the ICJ adopts an almost identical stance as the commission in the *Chamizal case*. On the one hand, it acknowledges the status of non-retroactivity as a principle of international law; on the other hand, however, it qualifies it by stating that an exception to this rule can exist only if there is “any special clause or any special object necessitating retroactive interpretation”.⁴⁴⁰

The ECmHR and the ECtHR have also had their fair share of cases establishing the non-retroactivity principle most notably in the *De Becker case*, where the Commission in no unclear terms stated that:

Considérant que le jugement du Conseil de guerre et l’arrêt de la Cour militaire de Bruxelles, qui ont entraîné l’application de l’article 123 *sexies* au requérant, remontent respectivement au 24 juillet 1946 et au 14 juin 1947, soit à une date antérieure au 14 juin 1955, date d’entrée en vigueur de la Convention européenne de Sauvegarde des Droits de l’Homme et des Libertés fondamentales à l’égard de la Belgique; que la question pourrait

⁴³⁸ See in more detail: Paul Tavernier, *Recherches sur l’ Application dans le Temps des Actes at des Règles en Droit International Public: Problèmes de Droit Intertemporel ou de Droit Transitoire*, (Paris: Librairie Générale de Droit et de Jurisprudence, 1979), at 116-7; Paul Fauchille, “Le Conflit de Limites entre le Brésil et la Grande-Bretagne et la Sentence du Roi d’ Italie”, *RGDIP* 12 (1905) : 25 *et seq.*

⁴³⁹ *Ambatielos case* (Greece v. United Kingdom), Judgment on Preliminary Objections of 1 July 1952, *ICJ Rep.* 1952, 28, at 40 (hereinafter *Ambatielos case (Preliminary Objections)*).

⁴⁴⁰ *Id.*

dès lors se poser de savoir si le grief précité n' est pas irrecevable *ratione temporis*; qu' il est vrai que ce chef d' irrecevabilité ne figure point parmi ceux qu' énumèrent les articles 26 et 27 de la Convention; que l' article 66 de la Convention se borne à déterminer quand se produit l' entrée en vigueur de la Convention, sans préciser à partir de quelle date cette entrée en vigueur déploie ses effets; que l' existence du chef d' irrecevabilité *ratione temporis* derive cependant du principe de la non-rétroactivité des traits et conventions, lequel se range parmi les principes de droit international généralement reconnus; que, dans une série de décisions, la Commission a déjà reconnu qu' en vertu de ce principe la Convention ne régit, pour chaque Partie contractante, que les faits postérieurs à son entrée en vigueur à l' égard de cette Partie.⁴⁴¹

Finally the jurisprudence of the Court of Justice of the European Communities needs to be mentioned as well, where the General Advocate Maurice Lagarange in his concluding remarks on the *Algera and others* case, when dealing with the non-retroactivity of acts of a legislative or regulatory character, as a principle of law, clearly stated that: “it is sufficient that these acts do not have a retroactive effect, in accordance with the general principles”.⁴⁴²

This synopsis of the main jurisprudence and publications on the matter, indicates that non-retroactivity is accepted as a general principle of law recognized by civilized nations (Article 38(1)(c) of the ICJ Statute), albeit with a very important caveat founded on the will of the drafters; that there is no “special clause or ... special object necessitating retroactive interpretation”.⁴⁴³

⁴⁴¹ Author's translation:

Considering that the judgment of the Council of war and the judgment of the military Court of Brussels, which have involved the application of article 123 *sexies* to the applicant, go back respectively at July 24, 1946 and the 14 June 1947, that is to say on a date prior to June 14, 1955, date of entry into force of the European Convention for the Protection of Human Rights and Fundamental freedoms with regard to Belgium; that the question could consequently arise to know if the above mentioned objection is not inadmissible *ratione temporis*; that it is true that this claim of irreceivability does not appear among those which articles 26 and 27 of Convention enumerate; that article 66 of Convention is restricted to determine when the coming into effect of the Convention occurs, without specifying starting from which date this coming into effect produces its effects; that the existence of the claim of inadmissibility *ratione temporis*, however, derived from the principle of the non-retroactivity of treaties and conventions, [a principle] which lines up among the principles of international law generally recognized; that, in a series of decisions, the Commission already recognized that under the terms of this principle the Convention does not govern, with respect to each Contracting party, any other facts other than those posterior to its coming into force with regard to this Party.

De Becker v. Belgium, Decision No. 214/56 of 9 June 1958, ECmHR, accessible at: <http://cmiskp.echr.coe.int/tkp197/view.asp?action=open&documentId=824138&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649> at 11 (last accessed on 25 January 2010).

⁴⁴² *Algera and others v. Common Assembly*, Judgment of 12 July 1957, Court of Justice of the European Communities, 3 *Rep. CJEC* 133, at 133-78.

⁴⁴³ *Id.*

2. Conflict between the Non-retroactive Principle and Max Huber's Statement on Intertemporal Law

2.1. The Doctrinal Perspective

Max Huber's solution to the intertemporal problems posed during the interpretative process was to make a sharp distinction between the "creation of a right" and "its continued manifestation".⁴⁴⁴ This "mediatory solution", as it has been characterized by Tavernier,⁴⁴⁵ has been severely criticized as being inconsistent with the principle of non-retroactivity on two grounds: a doctrinal one and a more practical one. Consequently, these authors argue, such a contradiction can lead to the only logical conclusion that Huber's legal construction is erroneous and should be dispensed with.

Beginning with the doctrinal critique, Professor Tavernier argues that the two legs of Huber's construction are not homogenous.⁴⁴⁶ In order to establish this, he argues that, if one reads the decision of the *Island of Palmas case*, one would⁴⁴⁷ conclude that both parties, *i.e.* the United States of America and the Netherlands, were in total agreement regarding both legs of Huber's construction.⁴⁴⁸ However, such a meeting of the minds existed only with respect to the first leg, *i.e.* that "a juridical fact must be appreciated in the light of the law contemporary with it". Regarding the second leg, *i.e.* that the "existence of the right, in other words its continued manifestation, shall follow the conditions required by the evolution of law", Huber's *dictum* seems to have been more in line with the Dutch position rather than the American one.⁴⁴⁹ Consequently, Tavernier criticizes Huber's solution⁴⁵⁰ for being nothing more than a mediator's solution, similar to the one proposed by Pope Leon XIII when he acted as a mediator in the *Caroline Islands case*^{451,452} and not one with

⁴⁴⁴ *Island of Palmas Arbitration*, at 845.

⁴⁴⁵ Tavernier, *supra* note 438, at 267.

⁴⁴⁶ *Ibid.*, at 267 *et seq.*

⁴⁴⁷ erroneously, according to Tavernier.

⁴⁴⁸ *Island of Palmas case*, at 845.

⁴⁴⁹ *Id.*; see also Tavernier, *supra* note 438, at 267; Robert Y. Jennings, *The Acquisition of Territory* (Manchester: MUP, 1963), at 28.

⁴⁵⁰ finding also support in Waldock, *supra* note 128, at 6; in Lauterpacht, who remarked that the distinction made in the *Island of Palmas case* was not accepted by everybody, Hersch Lauterpacht, *The Function of Law in the International Community*, (Oxford: OUP, 1933), at 283-5; and in Baade, who argued that although the first leg of the *dictum* was generally accepted, the same could not be said for the second one, Hans W. Baade, 'Intertemporales Völkerrecht', *Jahrbuch für Internationales Recht* 7 (1958): 229-56.

⁴⁵¹ known as *Carolinas*

sound legal foundations. Another point of criticism is that the first leg adopts an ‘objective’ viewpoint *i.e.* that of the act under consideration, whereas the second leg opts for a ‘subjective’ viewpoint *i.e.* removing itself from dealing with the act and opting for following the evolution of the law.⁴⁵³ This shift in focus, moving from the characterization of the fact to the evolution of the law, is according to Tavernier one more indication of the lack of homogeneity between these two rules and their intrinsic fallacy.

The same author, concludes that, in essence, the distinction between ‘creation of a right’ and ‘its continued manifestation’ proposed by Judge Huber, has a

‘self-destructive’ effect, which limits its field of application and its effect on judicial settlements removes its reason of being [*raison d’être*], which is to establish an equilibrium between the past and the present.⁴⁵⁴

This ‘self-destructive effect’ is expressed, in Tavernier’s analysis, by the inutility of Huber’s rules. If one has to examine the validity of a right based on contemporary law, then it becomes immaterial to know if the right was validly created based on the anterior law. As Tavernier puts it:

either the new law does not permit the continued manifestation of such a right or it permits it. In both these cases the previous juridical order is of little importance.⁴⁵⁵

Furthermore, Tavernier tacitly bases his argument on the following premises: i) that the requirements for creation and maintenance of a right are identical in each and every instance and ii) (which flows from premise (i)) that the requirements of creation of a right remain frozen through time. Perhaps, the simplest example to highlight that these premises do not lend themselves to application in each and every case is that of acquisition of territory. Prior to its prohibition, use of force was one of

⁴⁵² Tavernier, *supra* note 438, at 267; on the *Caroline Islands* case see: Carlos Manuel Corral Salvador, *La Mediación de León XIII en el Conflicto de las Islas Carolinas*, (Madrid: Universidad Pontificia Comillas, 1995).

⁴⁵³ Tavernier, *supra* note 438, at 267-8.

⁴⁵⁴ *Ibid.*, at 267 (author’s translation). The original text goes as follows: “Son effet ‘autodestructeur’ limite son champ d’application et son effet sur l’ordonnement juridique supprime sa raison d’être qui est d’établir un équilibre entre le passé et le présent”.

⁴⁵⁵ *Ibid.*, at 271.

the means of acquiring territory. *Ergo*, it created a valid right. After the prohibition, the prior acquisition in no way can be overturned by application of the modern law.⁴⁵⁶ Contemporary law is restricted to function merely as the guideline of whether the right already acquired⁴⁵⁷ continues to manifest itself and the criteria for this are completely different from the criteria of acquisition of territory.^{458,459}

Tavernier seems to read the *Island of Palmas case* as stating that the past fact of discovery is not sufficient for the creation of a title and consequently, that the effects that would have manifested themselves through a sovereignty based on discovery are not recognized as valid.⁴⁶⁰

However, a different reading is also possible and seems to be closer to the true intentions of Huber.⁴⁶¹ The law of the 16th century (for the *Palmas case*) regulated the conditions for the acquisition of the territory, whereas the contemporary law determines the conditions during which it perishes. In such a case the ‘continued manifestation’ would mean that for the relevant critical periods, the apposite to those periods laws would apply, being assimilated, thus, to a finding of an absence of extinction.⁴⁶² Consequently, since each period of time has its corresponding law, there is absolutely no overlap and most certainly no retroactive effect. From the above, intertemporal law, at least from a doctrinal point of view, does not seem to conflict with the principle of non-retroactivity.

⁴⁵⁶ As would be required by Tavernier’s construction.

⁴⁵⁷ By means which were at the critical period legal, irrespective of their current illegality.

⁴⁵⁸ For instance exercise of governmental authority etc.

⁴⁵⁹ This is also reinforced by the relevant jurisprudence on the matter: for instance *Legal Status of Eastern Greenland* (Denmark v. Norway), Judgment of 5 April 1933), *PCIJ Series A/B, No. 53*, 21 (hereinafter *Status of Eastern Greenland case*) and the *Minquiers and Ecrehos case*.

⁴⁶⁰ Tavernier, *supra* note 438, at 275. To reinforce this interpretation Tavernier also mentions India’s claim to the UN Security Council with respect to the Goa affair *i.e.* that the occupation of Goa by Portugal (which occurred during the 15th – 16th century, a time during which the acquisition of territories through conquest was legal) was illegal because it was contrary to resolution 1514 (XV) of the UN General Assembly; see Maurice Flory, ‘Les Implications Juridiques de l’ Affaire de GOA’, *Annuaire Française de Droit International* 8 (1962):476-91; and Jennings, *supra* note 449, at 31.

⁴⁶¹ Jennings, *supra* note 449, at 29.

⁴⁶² on the issue of the non-conflict between Huber’s rules and the principle of non-retroactivity see: Baade, *supra* note 450, at 229-56.

2.2. The Practical Perspective

Greig tackles the issue of the relationship between intertemporality and non-retroactivity not so much from a doctrinal point of view⁴⁶³ but from a more practical one.⁴⁶⁴

As analyzed *supra*, the principle of non-retroactivity is a principle of international law. Not only that but it has also been incorporated in provisions of the VCLT itself. For instance, Article 28 which states:

Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of entry into force of the treaty with respect to that party.⁴⁶⁵

In the present examination, the most pertinent provision is Article 4 of the VCLT VCLT which attempts to strike a balance between, on the one hand the principle of non-retroactivity and on the other hand the effectiveness and application of those rules that already constituted customary international law.⁴⁶⁶ Article 4 goes as follows:

Without prejudice to the application of any rules set forth in the present Convention to which treaties would be subject under international law independent of the Convention, the Convention applies only to treaties which are concluded by States after the entry into force of the present Convention with regard to such States.⁴⁶⁷

It is with respect to this provision that Greig raises some important questions. If one follows the wording of Article 4, this leads inexorably to the logical conclusion that for treaties concluded prior to the date of entry into force of the VCLT and which are the object of interpretation, the VCLT rule on interpretation⁴⁶⁸ would not apply as

⁴⁶³ As was done by Tavernier.

⁴⁶⁴ Greig, *supra* note 417.

⁴⁶⁵ Article 28 of the VCLT.

⁴⁶⁶ As allowed by the Nicaragua judgment, where it was clearly stated that the fact that a rule of customary international law is codified in a treaty text, that does not mean that it absorbed by the latter. On the contrary, both these rules continue to exist and evolve in their own way; see *Nicaragua* case, paras. 176-8.

⁴⁶⁷ Article 4 of the VCLT.

⁴⁶⁸ Enshrined in Articles 31 and 32 of the VCLT.

such *i.e.* as VCLT provisions, but only to the extent that it constituted the customary international law contemporary to the treaty being interpreted.

It is exactly this that, according to Greig, raises concerns. In the *Kasikili/Sedudu Island* case the issue was that of interpretation of an 1890 treaty between Britain and Germany, which defined their spheres of influence and which in time became the boundary between Botswana and Namibia. Greig raises two points with respect to this decision:

i) The Analysis of the Court's Use of Articles 31 and 32 of the VCLT

The Court in the *Kasikili/Sedudu Island* case stated that although Botswana and Namibia were not parties to the VCLT they both considered Article 31 was applicable “inasmuch as it reflects customary international law”.⁴⁶⁹ The objection raised by Greig is that it is not up to the States to determine which rules are to apply to a particular dispute, but for the Court itself to identify them, as was clearly stated in the Nicaragua case:

The Court notes that there is in fact evidence, to be examined below, of a considerable degree of agreement between the Parties as to the content of the customary international law relating to the non-use of force and non-intervention. This concurrence of their views does not however dispense the Court from having itself to ascertain what rules of customary international law are applicable. The mere fact that States declare their recognition of certain rules is not sufficient for the Court to consider these as being part of customary international law, and as applicable as such to those States. Bound as it is by Article 38 of its Statute to apply, *inter alia*, the Court may not disregard the essential role played by general practice. Where two States agree to incorporate a particular rule in a treaty, their agreement suffices to make that rule a legal one, binding upon them ; but in the field of customary international law, the shared view of the Parties as to the content of what they regard as the rule is not enough. The Court must satisfy itself that the existence of the rule in the *opinio juris* of States is confirmed by practice.⁴⁷⁰

However, it has to be noted that the ICJ, immediately after the aforementioned statement in the *Kasikili/Sedudu Island* case, reiterated that on numerous occasions it has itself identified that Articles 31 and 32 reflect customary international law.⁴⁷¹

⁴⁶⁹ *Kasikili/Sedudu Island* case, para. 18.

⁴⁷⁰ *Nicaragua* case, para. 184.

⁴⁷¹ *Kasikili/Sedudu Island* case, para. 18; citing *Libya/Chad Territorial Dispute* case, para. 41; *Oil Platforms* case, para. 23.

ii) The Court did not take into Consideration the Intertemporal Issues

Greig also criticizes the court for failing to consider all the intertemporal implications with respect to using Article 31 as custom in the *Kasikili/Sedudu Island* case. Despite the fact that both Judge Oda⁴⁷² and Judge Higgins⁴⁷³ also expressed concerns regarding the various aspects of intertemporality, none doubted the identity of the content of customary Article 31 during the late 19th century and its content in later periods; which is exactly the point that Professor Greig is making. Despite the valid questions that Greig raises the relevant jurisprudence and the literature of the period seem to suggest that the content of Article 31 had not undergone any earth-shattering changes.⁴⁷⁴

B. Intertemporality through the Prism of the three Schools of Interpretation

As was explained above, despite appearances intertemporality does not clash with the principle of non-retroactivity either on the doctrinal level or on the practical one. Having established therefore the legal validity of the intertemporal law doctrine, the next point of inquiry will be whether any school of interpretation is most suited in addressing the problems of intertemporality and may offer the greatest level of legal certainty when dealing with intertemporal law issues.

A lot of literature has been written on what should be the correct approach to the problem of intertemporal law⁴⁷⁵. These can be grouped as follows:

⁴⁷² *Kasikili/Sedudu Island* case, Separate Opinion of Judge Oda, para. 4.

⁴⁷³ *Kasikili/Sedudu Island* case, Separate Opinion of Judge Higgins, para. 4.

⁴⁷⁴ *Van Bokkelen* case, Award of 24 May 1888, *Moore International Arbitrations* 2 (1898):1807, at 1849; *Samoan Claims* (Germany, Great Britain and United States of America), Award of 14 October 1902, *RIAA* 9 (1959):15-27, at 25; the *Chamizal* case.

⁴⁷⁵ Tavernier, *supra* note 438; Greig, *supra* note 417; Anthony D'Amato, 'International Law, Intertemporal Problems', in *Encyclopedia of Public International Law: Volume II*, Rudolf Bernhardt and Rudolf L. Bindschedler (eds.) (Amsterdam: North-Holland, 1992), 1234; Kotzur, *supra* note 418, para. 11; Higgins, *supra* note 338, at 173-81; Fitzmaurice (1957), *supra* note 419, at 225-7; Fitzmaurice (1953), *supra* note 419, at 5-8; Thirlway, *supra* note 420, at 128-143; Thirlway, *supra* note 11, at 57-60; Hugh Thirlway, 'The Law and Procedure of the International Court of Justice 1960-1989: Supplement 2005: Parts One and Two', *BYIL* 76 (2005): 1, at 67-77; Taslim Olawale Elias, 'The Doctrine of Intertemporal Law', *AJIL*, 74 (1980): 285-307; de Visscher, *supra* note 345, at 66-9; Sinclair, *supra* note 53, at 124-6 and 138-40; Sur, *supra* note 345, at 207-10; Yoshifumi Tanaka, 'Navigational Rights on the San Juan River: A Commentary on the *Costa Rica v. Nicaragua* Case', accessible at http://www.haguejusticeportal.net/Docs/Commentaries%20PDF/Tanaka_Navigational_Rights_EN.pdf (last accessed on 25 January 2010), at 8-10; ILC Study Group, *supra* note 16, paras. 475-8; Ulf Linderfalk, 'Doing the Right Thing for the Right Reason – Why Dynamic or Static Approaches Should be Taken in the Interpretation of Treaties', *ICLR* 10/2 (2008): 109-41; French, *supra* note 10, at 295-

- *The categorically static approach* – using conventional language, or the ‘relevant rules of international law’, the interpreter of a treaty is allowed to draw only upon such language and such rules that were in existence when the interpreted treaty was concluded.
- *The categorically dynamic approach* – using conventional language, or the ‘relevant rules of international law’, the interpreter of a treaty is allowed to draw only upon such language and such rules that are in existence at the time of interpretation.
- *The flexible approach* – using conventional language, or the ‘relevant rules of international law’, the interpreter of a treaty will sometimes have to draw upon the language and rules that were in existence when the interpreted treaty was concluded, and sometimes upon the language and rules existing at the time of interpretation.⁴⁷⁶

International jurisprudence as well as the majority of the writers tends to favour the flexible approach.⁴⁷⁷ However, this does not by itself suffice to validate the legal basis of such an approach. What needs to be examined is whether there is a concrete

300; McLachlan, *supra* note 10, at 279-320; Fitzmaurice, *supra* note 423, at 101-53; Bernhardt, *supra* note 424, at 11 *et seq*; Letsas, *supra* note 423, at 58-79; Don Greig, ‘The Time of Conclusion and the Time of Application of Treaties as Points of Reference in the Interpretative Process’, in *Time, History and International Law*, Malgosia Fitzmaurice, Matthew Craven and Maria Vogiatzi (eds.) (Leiden: Martinus Nijhoff, 2007), 163; Georgopoulos, *supra* note 427, at 123-48; Sompong Sucharitkul, ‘The Intertemporal Character of International Law Regarding the Ocean’, in *Liber Amicorum Judge Shigeru Oda: Vol. II*, Ando Nisuke, Edward McWhinney and Rüdiger Wolfrum (eds.) (The Hague: Kluwer Law International, 2002), 1287-302; Yasseen, *supra* note 71, at 26-7 and 64-7; McWhinney, *supra* note 429, at 179-99; Eduardo Jiménez de Aréchaga, ‘International Law in the Past Third of a Century’, *RCADI* 159 (1978/I): 3, at 48-50; Institut de Droit International, ‘Travaux dans le problème dit du droit intertemporel dans l’ordre international’, *Annuaire de l’Institut de Droit International* 55 (1973): 1-116; Institut de Droit International, ‘Travaux dans le problème dit du droit intertemporel dans l’ordre international’, *Annuaire de l’Institut de Droit International* 56 (1975), at 339-74, 536-541; Carlos Fernández de Casadevante y Romani, *Sovereignty and Interpretation of International Norms* (Heidelberg: Springer, 2007), at 153-4; Bos, *supra* note 345, at 287-97; Carlos Fernández de Casadevante y Romani, *La Interpretación de las Normas Interacionales* (Pamplona: Aranzadi, 1996), at 225-6; Philip Jessup, ‘The Palmas Island Arbitration’, *AJIL* 22 (1928): 750 *et seq*.

⁴⁷⁶ Linderfalk, *supra* note 475, at 113.

⁴⁷⁷ Even the authors and decisions which could be presented as favouring the “categorically static approach”, have always qualified their comments in one way or another, showing that in reality they are based on the “flexible approach”. For instance Sir Gerald Fitzmaurice’s outlining of the principle of contemporaneity in the *Law and Procedure of the International Court of Justice* went as follows:

In a considerable number of cases, the rights of States (and more particularly of Parties to an international dispute) depend or derive from rights, or a legal situation, existing at some time in the past, or on a treaty concluded at some comparatively remote date . . . It can now be regarded as an established principle of international law that in such cases the situation in question must be appraised, and the treaty interpreted, in the light of the rules of the treaty interpreted, in the light of the rules of international law as they existed at the time, and not as they exist today. In other words, it is not permissible to import into the legal evaluation of a previously existing situation, or of an old treaty, doctrines of modern law that did not exist or were not accepted at the time, and only resulted from subsequent development or evolution of international law.

Sir Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice*, (Cambridge: Grotius Publications Limited, 1986), at 345-6; However, the last part of the quote is critical. “and *only* resulted from subsequent development” (emphasis added). Consequently, Sir Gerald Fitzmaurice does not argue, that, by definition, the past rules should apply, but that merely the development of law does not suffice. An added element is also required *i.e.* that of the intention of the parties.

justification why the flexible approach is more legally sound than the other approaches. The jurisprudence of international courts and tribunals is most revealing on the issue, for one more reason as well. The solutions offered by these courts tend to revolve around the three schools of interpretation as their main focal points: *i.e.* i) intention of Parties ii) object and purpose iii) text. The question which then poses itself is which of these schools of interpretation should be opted for in dealing with intertemporality.

1. Intention of Parties

In order to arrive to any sort of conclusion a re-examination of the relevant jurisprudence is mandatory.⁴⁷⁸ As has been mentioned *supra*, the most-cited case regarding intertemporal law is the *Island of Palmas case* and the *dicta* made by Judge Huber.⁴⁷⁹

The ripple effect of this *dictum* was immense. This can be understood not only by the subsequent jurisprudence⁴⁸⁰ and the surrounding publications⁴⁸¹ but also that an almost identical construction was adopted by the *Institut de Droit International* in 1975 in its *Resolution on Intertemporal Problems in Public International Law*.

4. Wherever a provision of a treaty refers to a legal or other concept without defining it, it is appropriate to have recourse to the usual methods of interpretation in order to determine whether the concept concerned is to be interpreted as understood at the time when the provision was drawn up or as understood at the time of its application. Any interpretation of a treaty must take into account all relevant rules of international law which apply between the parties at the time of application.⁴⁸²

In the *Namibia Advisory Opinion* the issue to be decided revolved around the UN General Assembly Resolution 21 which declared that South Africa had not fulfilled its

⁴⁷⁸ a more detailed analysis of the relevant jurisprudence, as well as elaboration of the links between intertemporality and dynamic interpretation can be found in: Fitzmaurice, *supra* note 423.

⁴⁷⁹ *i.e.* that “[A] juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or falls to be settled” and “the existence of the right, in other words its continued manifestation, shall follow the conditions required by the evolution of law”; *Island of Palmas case*, at 845.

⁴⁸⁰ See *supra* analysis.

⁴⁸¹ See *supra* note 475.

⁴⁸² Resolution of the *Institut de Droit International*, *supra* note 430; it has to be noted that Sir Gerald Fitzmaurice strongly objected to the second sentence and proposed its deletion. Despite some support of this proposition, it was eventually defeated on vote; *ibid.*, at 367-70.

obligations under the Mandate for South West Africa/Namibia and as a result its mandate was terminated. South Africa, however, did not withdraw from Namibia and the Security Council issued Resolution 276 declaring that South Africa's continued presence in Namibia was a violation of international law. The Court was, thus, seized in its advisory capacity to render an opinion on the correct interpretation of Namibia's Mandate and determine whether 'C' mandates, were different from 'A' and 'B' mandates⁴⁸³.

The Court made the following finding:

[m]indful as it is of the primary necessity of interpreting an instrument in accordance with the intentions of the Parties at the time of its conclusion, the Court is bound to take into account the fact that the concepts embodied in Article 22 of the Covenant – 'strenuous conditions of the modern world' and 'the well-being and development' of the peoples concerned - were not static, but were by definition evolutionary, as also, therefore, was the concept of the 'sacred trust'. *The Parties to the Covenant must consequently be deemed to have accepted them as such.* That is why, viewing the institutions of 1919, the Court must take into consideration the changes which have occurred in the supervening half-century, and its interpretation cannot remain unaffected by the subsequent development of law, through the Charter of the United Nations and by way of customary law (emphasis added).⁴⁸⁴

Consequently, the Court honed in on the intentions of the Parties and used them as the main criterion for determining which rules in time should be applied. Of course the decision of the Court was met with strong criticisms. For instance, Sir Gerald Fitzmaurice in his Dissenting Opinion criticized the Court for its decision since, according to him, no evidence of the intentions ascribed by the Court to the 'C' mandates at the time of the League of Nations, could be found.⁴⁸⁵ However, even this criticism is a reinforcement of the approach to be adopted with respect to intertemporality. The main point of the criticism by Sir Gerald Fitzmaurice was that no intention of the Parties was found,⁴⁸⁶ not that recourse to intention or that evolutive interpretation were *ipso facto* erroneous. Similarly, Thirlway criticized the Advisory Opinion on the grounds that no such intention was proven and that the Court merely based its decision on the fact that the notions under consideration were evolutionary

⁴⁸³ see Fitzmaurice, *supra* note 423, at 107, who also states that: "In the period of the development of the mandate system, 'C' mandates almost amounted to annexation".

⁴⁸⁴ *Namibia Advisory Opinion*, para. 53.

⁴⁸⁵ *Ibid.*, Dissenting Opinion of Sir Gerald Fitzmaurice, para. 85.

⁴⁸⁶ For an evolutive interpretation.

by nature and did not substantiate this finding with a specific intent.⁴⁸⁷ Once again, this critique reinforces the argument that the intention of the Parties is the pivotal criterion for deciding whether rules at the time of conclusion or the time of application of a treaty should be resorted to. What is also interesting is that if one accepts Thirlway's argument, then the Court's decision would seem to reinforce the clearly "textual based" solution to intertemporality proposed by Professor Linderdalk.⁴⁸⁸

Another example where the intention of the Parties was the critical element of the Court's decision-making process was the *Aegean Sea Continental Shelf* case. In this case the ICJ had to determine whether the term 'territorial status of Greece' had been used as a 'generic term' in Greece's reservations to its accession of the 1928 General Act for the Pacific Settlement of International Disputes. Turkey and Greece disputed rights over the continental shelf adjacent to their territories in the Aegean Sea. Greece argued that its reservation did not apply to disputes over the continental shelf, since that notion was unknown in 1928. The Court made the following statement:

the presumption necessarily arises that its meaning was intended to follow the evolution of the law and to correspond with the meaning attached to the expression by the law in force at any given time.⁴⁸⁹

In this case, despite the application of the notion of 'generic terms', the Court once again focused on the intention of the Parties as is evidenced by the wording "...intended to follow...".

This search for the intention of the parties has been consistently reaffirmed in jurisprudence,⁴⁹⁰ and most recently in the *Dispute Regarding Navigational and Related Rights* case between Costa Rica and Nicaragua. In that case the ICJ held that:

...where the parties have used generic terms in a treaty, the parties necessarily having been aware that the meaning of the terms was likely to evolve over time, and where the treaty has

⁴⁸⁷ Thirlway, *supra* note 420, at 137; *see also* Fitzmaurice, *supra* note 423.

⁴⁸⁸ Which will be analyzed *infra*.

⁴⁸⁹ *Aegean Sea Continental Shelf* case, para. 77.

⁴⁹⁰ *See* case-law mentioned *supra*.

been entered into for a very long period or is ‘of continuing duration’, the parties must be presumed, as a general rule, to have intended those terms to have an evolving meaning.⁴⁹¹

The *Dispute Regarding Navigational and Related Rights* case and the *Aegean Sea Continental Shelf* case are not the only examples of cases where the use of ‘generic terms’ has led to the Court identifying a ‘presumed intention’.⁴⁹² In all cases where the notion of ‘generic terms’ has been used in order to explain the adoption of a dynamic interpretation, the entire judicial reasoning is based on the understanding that the use of such ‘generic terms’ actually leads to a presumption,⁴⁹³ that the parties intended those terms to follow the evolution of law.⁴⁹⁴

Consequently, whether directly or indirectly, through the use of ‘generic terms’, the international courts and tribunals always look for the intention of the parties for guidance as to what solution should be given in case an intertemporal issue arises.

Finally, one more case needs to be mentioned from more recent jurisprudence, which also acts as an introduction to the solutions to intertemporal problems based on ‘object and purpose’ considerations; the main point of that case was the interpretation and the validity of the 1977 Treaty between Hungary and Czechoslovakia on the construction of a series of locks, in particular two hydroelectric power plants. The most relevant part of the decision stated:

...the Court wishes to point out that newly developed norms of environmental law are relevant for the implementation of the Treaty and that the Parties could, by agreement, incorporate them through the application of Articles 15, 19 and 20 of the Treaty. These articles do not contain specific obligations of performance but require the parties, in carrying out their obligations to ensure that the quality of water in the Danube is not impaired and that nature is protected, to take new environmental norms into consideration when agreeing upon the means to be specified in the Joint Contractual Plan” ... By inserting these evolving provisions in the Treaty, the Parties recognized the potential necessity to adapt the Project. Consequently, the Treaty is not static, and is open to adapt to emerging norms of international law. By means of Articles 15 and 19, new environmental norms can be incorporated in the Joint Contractual Plan. The responsibility to do this was a joint

⁴⁹¹ *Dispute Regarding Navigational and Related Rights* case, para. 66.

⁴⁹² Apart from this notion of ‘presumed intention’, Letsas considers a variety of diverse typologies of intention and how, if at all, they may be used for the purposes of intertemporality and dynamic interpretation; some of these are ‘abstract intention’, ‘concrete intention’, ‘intentions of principle’ and ‘intentions of detail’; in more detail see Letsas, *supra* note 423, at 70-1.

⁴⁹³ See case-law analyzed *supra* on generic terms; Additionally see *South-West Africa cases (Second Phase)* Dissenting Opinion of Judge Tanaka, at 294; *Petroleum Development Ltd v. Sheikh of Abu Dhabi*, Award of September 1951, 18 *ILR* 144.

⁴⁹⁴ Or of facts, if one follows Georgopoulos’ construction, see Georgopoulos, *supra* note 427, at 132-4.

responsibility. The obligations contained in Articles 15, 19 and 20 are, by definition, general and have to be transformed into specific obligations of performance through a process of consultation and negotiation. Their implementation thus requires a mutual willingness to discuss in good faith actual and potential environmental risks.⁴⁹⁵

This passage of the Court's decision is open to different interpretations. On the one hand, it can be argued that it follows the aforementioned mainstream approach of focusing on the intention of the parties⁴⁹⁶: "By inserting these evolving provisions in the Treaty, the Parties *recognized* the potential necessity to adapt the Project" (emphasis added). However, another interpretation is also possible, which brings us closer to the second school of interpretation *i.e.* 'object and purpose'.

2. Object and Purpose

The above passage of the *Gabcikovo-Nagymaros Project* case is not as clear-cut as to whether the main focal point was indeed the intention of the Parties.⁴⁹⁷ Firstly, not only the vague wording in the critical passage raises questions, but also subsequent passages. For instance:

By inserting these evolving provisions in the Treaty, the parties recognized the potential necessity to adapt the Project. Consequently, the Treaty is not static, and is open to adapt to emerging norms of international law ... In order to evaluate the environmental risks, current standards must be taken into consideration. This is not only allowed by the wording of Articles 15 and 19, but even prescribed, to the extent that these articles impose a continuing - and thus necessarily evolving - obligation on the parties to maintain the quality of the water of the Danube and to protect nature. ... Throughout the ages, mankind has, for economic and other reasons, constantly interfered with nature. In the past, this was often done without consideration of the effects upon the environment. Owing to new scientific insights and to a growing awareness of the risks for mankind for present and future generations - of pursuit of such interventions at an unconsidered and unabated pace, new norms and standards have been developed, set forth in a great number of instruments during the last two decades. Such new norms have to be taken into consideration, and such new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past.⁴⁹⁸

All these passages seem to indicate that it not only the intentions of the Parties at play, but also the nature of the obligations, or in more general terms the very "object and

⁴⁹⁵ *Gabcikovo-Nagymaros Project* case, paras. 111-2.

⁴⁹⁶ this is also reinforced by Judge Bedjaoui's Separate Opinion; *Gabcikovo-Nagymaros Project* case, *Separate Opinion of Judge Bedjaoui*, at 121-2.

⁴⁹⁷ see more analytically: Fitzmaurice, *supra* note 423; French, *supra* note 10, at 296.

⁴⁹⁸ *Gabcikovo-Nagymaros Project* case, paras. 112 and 140.

purpose” of a treaty that might give indications as to whether a specific provision should be understood as a ‘generic’ one or not. This is exactly what Judge Weeramantry argues in his Separate Opinion. Viewing the treaties as ‘living instruments’, he argues that there are specific areas of law and treaties which are by their very purpose and nature more prone to an evolutive interpretation. A characteristic passage from Judge Weeramantry’s opinion states:

Environmental concerns are live and continuing concerns whenever the project under which they arise may have been inaugurated. It matters little that an undertaking has been commenced under a treaty of 1950, if in fact that undertaking continues in operation in the year 2000. The relevant environmental standards that will be applicable will be those of the year 2000... Environmental rights are human rights. Treaties that affect human rights cannot be applied in such a manner as to constitute a denial of human rights as understood at the time of their application. A Court cannot endorse actions which are a violation of human rights by the standards of their time merely because they are taken under a treaty which dates back to a period when such action was not a violation of human rights⁴⁹⁹

In this context mention needs to be made of the opinion of Judge Higgins. According to Higgins the object and purpose are of primordial importance in ascertaining the intention of the parties⁵⁰⁰. Such an approach “allows one to see that ‘generic clauses’ and human rights provisions are not really random exceptions to a general rule” but “an application of a wider principle -intention of the parties, reflected by reference to the object and purpose -that guides the law of treaties”.⁵⁰¹ Similarly Engelen argues that in assessing the intention of the parties the rules of interpretation enshrined in Articles 31 and 32 of the VCLT should be applied in their entirety. In such a process good faith and object and purpose play a seminal role.⁵⁰² Based on the above, it is clear that the reason why international courts and tribunals may refer to the ‘object and purpose’ or the ‘nature’ of a treaty in order to establish whether that treaty (and its provisions) should be considered as evolutionary or static, is because these notions in

⁴⁹⁹ *Ibid.*, Separate Opinion of Vice-President Weeramantry, at 114; see also *Gabcikovo-Nagymaros Project* case, Dissenting Opinion of Judge Herczegh, at 178; for a more detailed analysis of the problems with the *Gabcikovo-Nagymaros Project* case see Afshin Al-Khavari, ‘The Passage of Time in International Environmental Disputes’, *Murdoch University Electronic Journal of Law* 10 (2003), accessible at: <http://www.murdoch.edu.au/elaw/issues/v10n4/akhavari104.txt> (last accessed on 25 January 2010).

⁵⁰⁰ Higgins, *supra* note 338, at 180.

⁵⁰¹ *Ibid.*, at 181.

⁵⁰² Franciscus A. Engelen, *Interpretation of Tax Treaties under International Law. A Study of Articles 31, 32 and 33 of Vienna Convention on the Law of Treaties and Their Application to Tax Treaties* (Amsterdam: International Bureau of Fiscal Documentation, 2004), at 291; for a more detailed analysis of the opinions of Higgins and Engelen, see Fitzmaurice, *supra* note 423.

the present context are *reflective of the intention of the parties*.⁵⁰³ Consequently, it is again the intention of the parties that is the key to any judgment on intertemporal issues.

3. Intertemporal Approach based Solely on the Text

Although in the interpretative process, the text itself is the point of departure⁵⁰⁴ in dealing with intertemporal law it has been only rarely raised as a valid approach. By this, the present author does not mean that the text has no use at all in addressing issues of intertemporality. What is meant is that the text has rarely been used *as the sole* justification, without being supplemented by references to the intention of the parties.

In this context, Professor Linderfalk argues that another way to solve the problems of intertemporality with greater legal certainty than that offered by the previously analyzed approaches is by simply adhering strictly to the text and the terms used. By making use of the science of linguistics he identifies three main groups of ‘referring expressions’:⁵⁰⁵

- i) ‘definite referring expressions’, which refer to one or more specific phenomena
- ii) ‘indefinite referring expressions’, which refer to one or more non-specific phenomena and
- iii) ‘generic referring expressions’, which refer to one or more phenomena as they change in time, *i.e.* the expression will follow the

⁵⁰³ See similarly Yasseen, who argues that the object and purpose of a treaty may assist in identifying the presumed intention of the parties; Yasseen, *supra* note 71, at 66-7.

⁵⁰⁴ as to whether this point of departure is merely chronological or an in-built form of hierarchical structure between the different schools of interpretation *see* Fitzmaurice and Merkouris, who opt for the former solution; Malgosia Fitzmaurice and Panos Merkouris, ‘Canons of Treaty Interpretation: Selected Case Studies From the World Trade Organization and the North American Free Trade Agreement’, in *Issues of Treaty Interpretation and the Vienna Convention on the Law of Treaties*, Malgosia Fitzmaurice, Olufemi Elias and Panos Merkouris (eds.) (Leiden: BRILL/Martinus Nijhoff, forthcoming 2010).

⁵⁰⁵ ‘referring expression’ is defined as an expression which is used by a person (‘utterer’) for the purpose of ‘reference’. ‘Reference’ in its turn is defined as the relationship between an expression and what the expression stands for in the world at the time that it is uttered; *see* Linderfalk, *supra* note 475, at 129.

changes that will occur in the meaning of those phenomena as time goes by.⁵⁰⁶

As Linderfalk points out the main difference between these three groups is that ‘definite referring expressions’ and ‘indefinite referring expressions’ “express propositions that are time-bound”, whereas “[w]here a generic expression is uttered, *no relationship is established between the time of the utterance and the time when the referent was assumed to exist*” (emphasis added).⁵⁰⁷ Based on this construction, the solution with respect to intertemporal problems would be the following:

In the interpretation of a singular or general referring expression, we have stronger reasons for the assumption that the parties to the treaty expressed their agreement in such a way that (a) the meaning of the treaty agrees with the conventional language that existed at the time of conclusion, and that (b) the treaty will have effects consistent with the international law then in force... [whereas]... In the interpretation of a generic referring expression, if the referent of that expression is assumed to be alterable, we have stronger reasons for the assumption that the parties expressed their agreement in such a way that (a) the treaty agrees with the conventional language that exists at the moment of interpretation, and that (b) the treaty will have effects consistent with the international law then in force. If, on the other hand, the referent of the expression is assumed to be constant, then obviously we have no reason to depart from the assumption adopted in the interpretation of singular and general referring expressions.⁵⁰⁸

4. Concluding Remarks on the Interrelationship between Intertemporality and the three Schools of Interpretation

In the previous parts an analysis was made of intertemporal law as a doctrine and its function within the interpretative process in order to understand better the complexities of the issue. For this reason it is only natural to wonder why any solution to the problem of intertemporality should be the same for the problems of intertemporality in interpretation.⁵⁰⁹ One could argue extensively, that this distinction is merely an exercise in semantics or that the two are merely sides of the same coin and consequently, intertemporal considerations are the same thing no matter which field they appear in. However, the most straightforward argument is the simple fact that in the *travaux préparatoires* of the VCLT, when Article 56 fell through, the ILC

⁵⁰⁶ *Ibid.*, at 130-1; An example of ‘generic referring expression’ is the term ‘territorial status of Greece’ which was the point of dispute in the *Aegean Continental Shelf* case.

⁵⁰⁷ *Ibid.*, at 132.

⁵⁰⁸ *Ibid.*, at 135.

⁵⁰⁹ *Ibid.*, at 128 *et seq.*; especially at 137-41.

discussed extensively whether it should be expressly incorporated in Article 31.⁵¹⁰ Despite the fact that they selected not to, the consensus was that implicitly intertemporal law was already part and parcel of Article 31(3)(c) of the VCLT. Consequently, any solutions to the intertemporal problems posed by the proposed Article 56 would by the same token apply to the identical problems raised by Article 31(3)(c).⁵¹¹

The analysis of the relevant jurisprudence confirmed that the ‘flexible approach’ was the one adopted constantly by international courts and tribunals. This is a logical corollary of the *pacta sunt servanda* principle that a State is bound only to the extent to which it has agreed. Consequently, both the ‘categorically static’ and the ‘categorically dynamic’ approach fail to take into account the possibly different intents of different drafters. They are so rigid that they cannot offer a viable solution to the problem of intertemporality.

This ‘flexible’ approach leaves, however, open the door to the problem of which school of interpretation is more accurate and offers greater legal certainty when dealing with intertemporality issues. The previous analysis indicated that all three schools of interpretation have been argued to offer valid solution to the intertemporal problem. So which is the one most suited for the challenges of intertemporal law? The answer is none. Not because they are all problematic, but because they all have the same starting point and are all reflective of the search for the same thing, *i.e.* the intention of the parties.

To elaborate on this: The majority of the jurisprudence and the writers, as evidenced by the previous analysis leaned towards searching for the intention of the parties in order to find out the rules of which period were applicable, those contemporary to the conclusion of the treaty or its interpretation.⁵¹² However, the same can be said for the proponents of the ‘object and purpose’ and the ‘text’. The object and purpose of a treaty as Higgins stated in her seminal work on

⁵¹⁰ See *supra* analysis of the VCLT *travaux préparatoires*.

⁵¹¹ A solution which was also endorsed during the ILC discussions on the Articles on Law of Treaties.

⁵¹² Additionally to the ones mentioned *supra see also*: Arechaga, (A/CN.4/SR.729), in *YILC* (1964), Vol.I, at 34, para. 10; Taslim O. Elias, *The Modern Law of Treaties* (Dobbs Ferry, NY: Oceana, 1974), at 77; Jiménez de Arechaga, *supra* note 475, at 48-9; Sinclair, *supra* note 53, at 139-40; Higgins, *supra* note 338, at 181; Yasseen, *supra* note 71, at 27 ; de Visscher, *supra* note 345, at 66-7 ; Georgopoulos, *supra* note 427, at 144-7 .

intertemporality are essential in ascertaining the intention of the parties⁵¹³ and thus ‘generic clauses’ are merely “an application of a wider principle - intention of the parties, reflected by reference to the object and purpose - that guides the law of treaties”.⁵¹⁴ Consequently, object and purpose as far as intertemporal law is concerned are just one more way to identify the true intentions of the drafters.

The same thoughts apply to Linderfalk’s construction. His categorization and proposed solutions based on the notion of ‘referring expressions’ may be valid and quite useful in judicial practice, however, what they also seek to identify is the intention of the parties. This is so for two reasons, which, in a matter befitting temporal considerations of law, have as a point of departure two diametrically opposed points in time:

i) *ex ante i.e. prior to the conclusion of the treaty* - whether a definite, indefinite or generic referring expression is selected, is not an automated process. On the contrary, it is based on the will of the utterer, which in the present case is the drafter of the treaty being interpreted. Consequently, the selection of one group over another is a clear indication of the true intent of the drafter.

ii) *ex post facto i.e. during the interpretation of a treaty* - not all terms are immediately evident as to which group they belong to. This will depend on the context and most importantly the intent of the utterer. Consequently, in order to categorise the terms in question in one group over the other, the interpreter has to, once again, seek the true intention of the parties.

Consequently, even Linderfalk’s construction although relying on the text, is also premised on finding the true intention of the parties.

Due to the above, all of the aforementioned approaches are essentially a *res unum*. They are tools to reach the same goal; the identification of the intention of the

⁵¹³ Higgins, *supra* note 338, at 180.

⁵¹⁴ *Ibid.*, at 181; the same is also argued by Engelen, *supra* note 502, at 291.

parties. The only difference being as to how many stages are interposed *i.e.* either directly or through reference to object and purpose or the text⁵¹⁵

One final issue needs to be raised. Based on the above considerations how should the term ‘rules of international law’ of Article 31(3)(c) be interpreted? It is to this exact point, that all our previous analysis has led us. The term ‘rules of international law’ is itself a ‘generic term’. Its correct interpretation therefore would require us trying to find the intention of the parties; whether they wanted it to be ‘rules at the time of the conclusion of the treaty’ or ‘rules at the time of the interpretation of the treaty’. The *travaux préparatoires*⁵¹⁶ clearly showed that no single solution was acceptable and therefore the members of the ILC decided to be silent on it and not to make any reference at all in the text. It is exactly this silence that indicates the ‘generic’ nature of Article 31(3)(c), *i.e.* that it was intended to be a generic term. Since no one single solution was possible, the only road was flexibility. This was the only solution. If the provision, which supposedly enshrines intertemporal elements, were in interpreting itself to select either the ‘static’ or the ‘dynamic’ approach, that would be a paradox, a self-contradiction. On the one hand, for itself it would have selected either the ‘dynamic’ or ‘static’ approach, and on the other, for all the rest treaties to which it would be applied it would have selected the flexible approach. Consequently, the only logical conclusion is that the ‘rules of international law’ are to be interpreted each time based on the treaty under consideration and the intentions of the parties. If the drafters wanted an evolutive interpretation, then also the ‘rules of international law’ would similarly be the ones contemporary to the interpretation. If not, then the relevant rules would be the ones contemporary to the conclusion of the treaty.⁵¹⁷

⁵¹⁵ Without this meaning that although indirect they are more complex and time-consuming. On the contrary, in some cases they may allow for a more expedited identification of the intention of the Parties.

⁵¹⁶ As analyzed *supra*.

⁵¹⁷ This issue also touches upon the problem of later supervening custom, which is analyzed *infra* in Chapter III, in the Sections on *lex posterior* and *lex specialis*. The solution adopted here, is in conformity with the analysis in that Section.

IV. Conclusion

In this Chapter the focus of analysis remained on the text of Article 31(3)(c). However, whereas in Chapter I the written elements were scrutinized, in Chapter II, the unwritten elements, those that were intentionally left outside the text of the provision were examined *i.e.* references to intertemporal law. The discussions in the ILC and the *Institut de Droit International* revealed that the topic of intertemporal law was such a complex issue that the deletion of any reference to it, both as an individual Draft Article and within Article 31(3)(c), was considered to be the optimal solution in order to safeguard the utility of Article 31 and facilitate the achievement of a consensus.

The relevant jurisprudence as well revealed that international courts and tribunals did not adopt a uniform approach, but oscillated between strict application of the *principle of contemporaneity* and that of dynamic/evolutive interpretation. Despite the seemingly irreconcilable differences between these approaches, the jurisprudence revealed that they share a common element; Regardless of whether the various decisions focused on the ‘intention’, the ‘object and purpose’ and/or the ‘text’, all these approaches were reflective of one singular and overarching criterion; the search for the intention of the parties. It is this intention that, as Higgins acknowledged, is they key to understanding and confronting intertemporal law. Since, therefore, any approach to intertemporal law requires a degree of flexibility based on the intentions of the parties, a similar approach to Article 31(3)(c) is prescribed. The question, whether the term ‘rules of international law’ should be understood as rules applicable ‘at the time of the conclusion of the treaty’ or ‘at the time of the interpretation of a treaty’ cannot be given *ex ante* a singular response.⁵¹⁸ The solution will depend each time on the interpreted treaty and the intention of its parties. In that sense the term ‘relevant rules’ of Article 31(3)(c) is a ‘generic term’.

⁵¹⁸ With the obvious exception of *jus cogens* norms, which as analyzed *supra* are a limit of intertemporal law.

Part II: Article 31(3)(c) and the Principle of Systemic Integration from a Systemic Point of View

In the first part of this thesis, the analysis focused on both the written and unwritten elements of Article 31(3)(c). The common element of these two chapters was that the starting point was the VCLT provision itself; starting from Article 31(3)(c) what was examined was the function, the limits and limitations of this provision and how these may reflect on the structure of the international system itself. However, such an analysis would be incomplete if it stopped at that point. It is not only Article 31(3)(c) that can affect our understanding of the system of international law; the reverse is also possible. For this reason, in the second part of the thesis, instead of using Article 31(3)(c) as point of departure for the ensuing analysis, it will be the system of international law that will serve this function.

Chapter III will examine whether the so-called principles of conflict resolution have any bearing at all in the interpretative process envisaged by Article 31(3)(c). Conflict of norms has always been considered an unavoidable,⁵¹⁹ yet not insurmountable, by-product of an incomplete system. The conflict-resolution tools that have been proposed and applied in international jurisprudence to address this systemic flaw will be scrutinized to reveal to what extent they can also apply within the stricter confines of Article 31(3)(c). Finally, in Chapter IV the analysis will be taken one step further⁵²⁰ and focus on one of the sources of international law *i.e.* custom. The question that will be addressed is whether this source of international law can be an object of interpretation and if this is answered in the affirmative what role can (or has) Article 31(3)(c) played in this process. By starting from the written elements of the provision itself, moving on the unwritten ones, then to resolution of conflicts and finally to the very sources of international law, no stone will have been left unturned and no aspect of Article 31(3)(c) unexamined.

⁵¹⁹ Wilfred Jenks, 'Conflict of Law-Making Treaties', *BYIL* 30 (1953): 401, at 429; Christopher Borgen, 'Resolving Treaty Conflicts', *George Washington International Law Review* 37 (2005): 57 *et seq.*

⁵²⁰ Perhaps *one step back* would be more accurate, considering that we are moving backwards from more specialized provisions to the sources of international law, with the proverbial *Kelsenian Grundnorm* being the absolute starting point.

Chapter III: Principles of Conflict Resolution within the Interpretative Process of Article 31(3)(c)

In Chapter 1 the analysis focused on the various disputed elements of Article 31(3)(c). Special care was taken to analyze the term ‘relevant’. The conclusion that was reached was that in order to determine *relevancy* the criterion to be used was the *proximity criterion*, the four manifestations of which corresponded to the three schools of interpretation and temporal considerations.⁵²¹

However, the question that logically arises, is whether this is the only stage of the interpretative process of Article 31(3)(c). The provision itself is silent on the matter. Neither do the *travaux préparatoires* shed any light. Therefore, we need to examine this question logically. The principle of systemic integration will be invoked, in case of a dispute.⁵²² Consider the following hypothetical situation. In a dispute between States A and B, the question is the interpretation of a particular provision of treaty *c*. Both States A and B, invoke Article 31(3)(c) VCLT. State A, proposes an interpretation of treaty *c* based on a rule or set of rules⁵²³ *a*. State B, on the other hand, offers a different interpretation based on a rule or set of rules *b*. In order for there to be a dispute on this issue of interpretation of treaty *c*, the interpretations have to be conflicting. If they were not conflicting then there would be no dispute. Essentially, rules *a* and *b* yield two different and *conflicting* interpretations of treaty *c*, interpretation *c*₁ and interpretation *c*₂, with $c_1 \neq c_2$ and $c_1 \cap c_2 = O$.⁵²⁴ Since, then, we are dealing with two *conflicting* interpretations based on the suggested application of 31(3)(c), to what extent do the principles of conflict resolution apply?

⁵²¹ See analysis of the proximity criterion at Chapter I.

⁵²² A dispute is a “disagreement on a point of law or fact, a *conflict* of legal views or of interests” (emphasis added); *The Mavrommatis Palestine Concessions* (Greece v. the United Kingdom), Judgment of 30 August 1924, PCIJ, *PCIJ Series A No. 2*, 6, at 11 (hereinafter *Mavrommatis Palestine Concessions* case); a case where a “claim of one party is *positively opposed* by the other” (emphasis added); *South-West Africa Cases (Preliminary Objections)* (Ethiopia and Liberia v. South Africa), Judgment of 21 December 1962, *ICJ Rep. 1962*, 319, at 328 (hereinafter *South-West Africa cases (Preliminary Objections)*); similarly see, *Case Concerning the Northern Cameroons (Preliminary Objections)* (Cameroon v. the United Kingdom), Judgment of 2 December 1963, *ICJ Rep. 1963*, 15, at 27 (hereinafter *Northern Cameroons case*); *Interpretation of Peace Treaties*, Advisory Opinion of 30 March 1950, *ICJ Rep. 1950*, 65, at 74 (hereinafter *Interpretation of Peace Treaties Advisory Opinion*); *Headquarters Agreement Advisory Opinion*, para. 35.

⁵²³ Customary or conventional makes no difference. We shall return to this point *infra*.

⁵²⁴ $c_1 \neq c_2$ means that *c*₁ is different from *c*₂ and $c_1 \cap c_2 = O$ means that *c*₁ and *c*₂ cannot apply in the same case simultaneously.

In a perfect system, structured in the form of the pyramid as put forward by Kelsen in his *Pure Theory of Law*⁵²⁵, “with a transcendental *Grundnorm* at the apex of the pyramid ... it [would] always be possible to determine the relationship between two or more norms”.⁵²⁶ Kelsen went as far as claiming that a legal system cannot have conflict of norms. A system founded on a *Grundnorm* cannot allow for two equally valid norms to contradict each other as this would threaten the unity of the system⁵²⁷ and would indicate that there was something flawed with the *Grundnorm* itself, which would be an *argumentum ad absurdum*.⁵²⁸

However, this is not the case with international law in its current form. As the ILC Study Group on Fragmentation of International Law pointed out

normative conflict is *endemic to international law*. Because of the spontaneous, decentralized and unhierarchical nature of international law-making – law-making by custom and by treaty – lawyers have always had to deal with heterogeneous materials at different levels of generality and with different normative force.⁵²⁹

It comes then as no surprise, especially if we take into account the proliferation of international courts and tribunals and the multiplicity of law-making processes⁵³⁰ that we have witnessed in the last few decades, that conflict of norms has, once again,

⁵²⁵ Hans Kelsen, *Pure Theory of Law*, (Berkeley, CA: University of California Press, 1970).

⁵²⁶ Anja Lindroos, ‘Addressing Norm Conflicts in a Fragmented Legal System: The Doctrine of *Lex Specialis*’, *NJIL* 74 (2005): 27, at 27.

⁵²⁷ See *contra* Errich Vranes, *Trade and the Environment: Fundamental Issues in International Law, WTO Law, and Legal Theory*, (Oxford: OUP, 2009), at 14.

⁵²⁸ Kelsen, *supra* note 525 ; similarly Paul Foriers, ‘Les Antinomies en Droit’, in *Les Antinomies en Droit*, Chaïm Perelman (ed.) (Bruxelles: Bruylant, 1965), 20, at 22-3; Charles Huberlant, ‘Antinomies et Recours aux Principes Généraux’, in *Les Antinomies en Droit*, Chaïm Perelman (ed.) (Bruxelles: Bruylant, 1965), 204, at 212. However, Kelsen later on changed his mind on the subject. The reason for this was that he acknowledged that conflict of norms is a conflict of will, *not a logical contradiction*; Hans Kelsen, ‘Derogation’, in *Essays in Jurisprudence in Honour of Roscoe Pound*, Ralph A. Newmann (ed.) (Indianapolis: Bobbs-Merrill, 1962), 339-61.

⁵²⁹ ILC Study Group, *supra* note 16, para. 486 (emphasis added); Pauwelyn offers a variety of additional reasons, such as the multitude of law-makers both at the international and the domestic level, the time factor, the move from a law on ‘co-existence’ to a law on ‘co-operation’, globalization, the emerging hierarchy of values and the proliferation of judicial settlement of disputes; Pauwelyn, *supra* note 51, at 13-24; see also Nele Matz-Lück (2009), ‘Treaties, Conflicts between’, *Max Planck Encyclopedia of Public International Law*, para. 2, accessible at www.mpepil.com (last accessed on 25 January 2010).

⁵³⁰ See Brown Chester, ‘The Proliferation of International Courts and Tribunals: Finding your Way through the Maze’, *Melbourne Journal of International Law* 3 (2002): 453-75; Thomas Buergenthal, ‘Proliferation of International Courts and tribunals: Is it Good or is it Bad?’, *Leiden Journal of International Law* 14 (2001): 267-75; Hugh Thirlway, ‘The Proliferation of International Judicial Organs: Institutional and Substantive Issues: The International Court of Justice and other International Courts’, in *Proliferation of International Organizations: Legal Issues*, Niels M. Blokker and Henricus G. Schermers (eds.) (The Hague: Kluwer Law International), 251-78.

come to the forefront of academic research.⁵³¹ In international law there is a presumption against conflict.⁵³² However, this is not a *panacea* to the issue of norm conflict. This presumption “may eliminate certain potential conflicts; it cannot eliminate the problem of conflict”.⁵³³ The same thing can be said about harmonization through interpretation, which has been considered a tool for conflict prevention or at least resolution.⁵³⁴ Nevertheless this tool has its limitations; as Pauwelyn very eloquently described it “[harmonization] may resolve apparent conflicts; it cannot resolve genuine conflicts”.⁵³⁵

The common problem that everybody dealing with conflict of norms faces is a definitional one; how do we define conflict.

⁵³¹ See Michael Akehurst, ‘The Hierarchy of the Sources of International Law’ *BYIL* 47 (1974): 273; Akehurst, in this article had submitted that “the problem of hierarchy of the sources of international law has seldom given risen to difficulties in practice”. To his credit, though, Akehurst had the foresight to interject that despite this “there is no guarantee that that state of affairs will continue”, at 274; Nguyen Quoc Dinh, ‘Evolution de la Jurisprudence de la Cour Internationale de la Haye Relative au Problème de la Hiérarchie des Normes Conventionnelles’, in *Mélanges Offerts à Marcel Waline, le Juge et le Droit Public*, Georges Vedel and Marcel Waline (eds.) (Paris: Librairie Générale de Droit et de Jurisprudence, 1974), Vol. I, 215; Maarten Bos, ‘The Hierarchy among the Recognized Manifestations (‘Sources’) of International Law’, *NILR* 25 (1978): 334; Emmanuel Roucouas, ‘Engagements Parallèles et Contradictoires’, *RCADI* 206 (1987/VI): 9; Wladyslaw Czapliński and Gennady Danilenko, ‘Conflict of Norms in International Law’, *NYIL* 21 (1990): 3; Seyed Ali Sadat-Akhavi, *Methods of Resolving Conflicts between Treaties*, (Leiden: Martinus Nijhoff: 2003); Pauwelyn, *supra* note 51; ILC Study Group, *supra* note 16. For earlier discussions on the issue see: Charles Rousseau, ‘De la Compatibilité des Normes Juridiques Contradictoires dans l’ Ordre International’, *RGDIP* 39 (1932): 139; Hans Aufricht, ‘Supersession of Treaties in International Law’, *Cornell Law Quarterly* 37 (1952): 655; Jenks, *supra* note 519.

⁵³² Aufricht, *supra* note 531, at 657; Jenks, *supra* note 519, at 427-9; Akehurst, *supra* note 531, at 275; Wolfram Karl, ‘Conflicts between Treaties’, in *Encyclopedia of Public International Law, Vol. VII*, Rudolf Bernhardt (ed.) (Amsterdam: North-Holland, 1984), 467, at 470; Sir Hersch Lauterpacht, *Second Report on the Law of Treaties (A/CN.4/87)*, in *YILC* (1954) Vol. II: 123, at 137-8; Pauwelyn, *supra* note 51, at 212 *et seq.*; Joost Pauwelyn, ‘Fragmentation of International Law’, *Max Planck Encyclopedia of Public International Law*, para. 37, accessible at www.mpepil.com (last accessed on 25 January 2010); see also the *Haya de la Torre* case where the solution and corresponding explanation given by the court seems to have been prompted by this ‘presumption against conflict’; *Haya de la Torre Case* (Colombia v. Peru), Judgment of 13 June 1951, *ICJ Rep. 1951*, 71, at 82 (hereinafter *Haya de la Torre case*); *Indonesia – Certain Measures Affecting the Automobile Industry*, Panel Report adopted on 23 July 1998, WTO, WT/DS54/R, WT/DS59/R, WT/DS64/R, para. 14.28 (hereinafter *Indonesia – Autos*); *Case Concerning Right of Passage over Indian Territory (Preliminary Objections)* (Portugal v. India), Judgment of 26 November 1957, *ICJ Rep. 1957*, 125, at 142 (hereinafter *Right of Passage (Preliminary Objections) case*); *Certain Expenses of the United Nations (Article 17, paragraph 2 of the Charter)*, Advisory Opinion of 20 July 1962, *ICJ Rep. 1962*, 151, at 168 and para. 42 (*Certain Expenses case*).

⁵³³ Jenks, *supra* note 519, at 429.

⁵³⁴ Matz-Lück, *supra* note 529, para. 20; Rousseau mentions that such ‘adaptation’ is an autonomous mechanism to harmonize diverging treaties; Rousseau, *supra* note 531; on the principle of harmonization see Georg Schwarzenberger, *International Law, vol. I: International Law as Applied by International Courts and Tribunals* (London: Stevens, 1957, 3rd ed.), at 474; Czapliński and Danilenko, *supra* note 531, at 13; Pauwelyn, *supra* note 51, at 240-4.

⁵³⁵ Pauwelyn, *supra* note 51, at 272.

I. Definition

The most cited definition of conflict is the one provided by Jenks: “A conflict in the strict sense of direct incompatibility arises only where a party to the two treaties cannot simultaneously comply with its *obligations* under both treaties”.⁵³⁶ All other cases are not conflicts, they are merely divergences. Jenks, concedes the fact that such a divergence may “prevent a party to both the divergent instruments from taking advantage of certain provisions of one of them ... [and that] from a practical point of view [this divergence may] be *as serious as a conflict*”⁵³⁷. Despite this, however, he maintained his strict definition, even though such divergences may end up with one agreement losing “much or most of its practical value”.⁵³⁸

Marceau suggests that definitions of normative conflict depend on one’s pre-conception of the international legal system and that “[i]f one believes that international commitments should be understood in the light of some coherent international order, one favours *narrow definitions* of conflict.”⁵³⁹ Similarly, narrow definitions have been adopted by a variety of authors⁵⁴⁰ and in international case-law.⁵⁴¹

On the other hand, wider definitions have also been proposed as being more attune to the reality and needs of the international legal system;⁵⁴² concerns which

⁵³⁶ Jenks, *supra* note 519, at 426.

⁵³⁷ *Id.*

⁵³⁸ *Ibid.*, at 427.

⁵³⁹ Marceau, *supra* note 51, at 1082 (emphasis added).

⁵⁴⁰ Joel Trachtman and Gabrielle Marceau, ‘TBT SPS, and GATT: A Map of WTO Law and Domestic Regulation’, in *The WTO Dispute Settlement System 1995-2003*, Federico Ortino and Ernst-Ulrich Petersmann (eds.) (The Hague: Kluwer Law International, 2004), 275, at 330-1; Karl, *supra* note 532, at 468; Wolfrum and Matz opt for a broader definition, than that of Jenks, yet still it does not incorporate scenarios of conflict between obligations and permissions; Rüdiger Wolfrum and Nele Matz, *Conflicts in International Environmental Law*, (Berlin: Springer, 2003), at 4-11.

⁵⁴¹ The panel in *Indonesia – Autos* in no unclear terms opted for the strict definition of conflict:

In international law for a conflict to exist between two treaties ... [their] provisions must conflict, in the sense that the provisions must impose mutually exclusive *obligations* ... there is conflict when two (or more) treaty instruments contain *obligations which cannot be complied with simultaneously* (emphasis added)

Indonesia – Autos at footnote 649 (however, see Pauwelyn who argues that the Panel was in error in this judgment; Pauwelyn, *supra* note 51, at 367); the Panel in *Turkey – Textiles* moved along similar lines; *Turkey – Restrictions on Imports of Textile and Clothing Products*, Panel Report adopted on 19 November 1999, WTO, WT/DS34/R, para. 9.88 (hereinafter *Turkey – Textiles*).

⁵⁴² Czapliński and Danilenko, *supra* note 531, at 12-3; Pauwelyn distinguishes between two types of conflict: i) those where one of the two norms is invalid or illegal (this would be the case of a rule conflicting with a *jus cogens* norm). This he calls an “inherent normative conflict”. The result of such a conflict is the disappearance of one of the two norms, and ii) the remaining genuine conflicts, the

have also found their way in international case-law.⁵⁴³ According to these authors the problem with a strict definition of conflict is that it does not allow for a conflict to arise between a prescriptive norm and a permission.⁵⁴⁴ It also “will often favour the most stringent obligation”,⁵⁴⁵ as was shown in the *Indonesia – Autos* and *Turkey – Textiles* cases.

Another criticism of the strict definition is that it does not take into consideration that the will of the states is not written in stone, it fluctuates with time. Such a definition does not allow for the scenario that States may wish at a later time to mitigate their obligations by establishing permissions.⁵⁴⁶ This also means that principles of conflict resolution such as *lex posterior* and *lex specialis*, would be restricted to a smaller set of rules and would be seriously hindered in identifying the true ‘current state of consent’ of the States.

Finally, Vranes argues in favour of a wide definition based on definitional considerations. There is a clear distinction between analytical/lexical and synthetic/stipulative definitions. An analytical definition examines the way a term is

“conflicts in the applicable law”. Both norms are and remain valid. The result of this conflict is simply giving priority in a specific case to one rule over another; Pauwelyn, *supra* note 51, at Chapters 6 and 7, and especially at 176-80. This leads him to conclude that “[c]onflict of norms is essentially governed by priority rules and state responsibility, not by rules invalidating either of the conflicting norms”; Pauwelyn, *supra* note 51, at 436; Aufricht, *supra* note 531, at 655-6; Jean Salmon, ‘Les Antinomies en Droit International Public’, in *Les Antinomies en Droit*, Chaïm Perelman (ed.) (Bruxelles: Bruylant, 1965), 285; ILC, *Commentaries on the Draft Articles Article on State Responsibility of States for Internationally Wrongful Acts* (2001) (A/56/10 Supplement 10), at 358; Jan Mus, ‘Conflicts between Treaties in International Law’, *NILR* 45 (1998): 208, at 209-11; Rousseau, *supra* note 531, at 133-92; Kelsen, *supra* note 528, at 349; Sadat-Akhavi, *supra* note 531, at 5-6, 35 and 38 (who argues i) that one of the norms in conflict at least should be a mandatory one and ii) that two norms having a ‘cancelling effect’ are not in conflict); ILC Study Group, *supra* note 16, para. 25; Against the suggestion that a conflict can arise only between rules that deal with the ‘same subject-matter’, the ILC Study Group argues that this would lead to a situation where

[e]verything would be in fact dependent on argumentative success in pigeon-holing legal instruments as having to do with ‘trade’, instead of ‘environment’ [and other similar situations].... The criterion of ‘subject-matter’ leads to a *reductio ad absurdum*

ILC Study Group, *supra* note 16, para. 22.

⁵⁴³ The *Lockerbie* case, where the ICJ dealt with an explicit right under the Montreal Convention and an obligation emanating from a UN Security Council Resolution. In that case the Court acknowledged the existence of a conflict between an *obligation and a right* since it made use of Article 103; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie* (Libyan Arab Jamahiriya v. United States of America), Preliminary Objections, Judgment of 27 February 1998, *ICJ Rep.* 1998, 115 (hereinafter *Lockerbie* case); see also *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, Panel Report adopted on 25 September 1997, WTO, WT/DS27/R, para. 7.159 and footnote 728 (hereinafter *EC – Bananas*).

⁵⁴⁴ Vranes, *supra* note 527, at 10; despite the fact that even Jenks himself had recognized that such ‘divergences’ may be as serious as a conflict; Jenks, *supra* note 519, at 426.

⁵⁴⁵ Marceau, *supra* note 51, at 1085.

⁵⁴⁶ Vranes, *supra* note 527, at 19.

being used in language, “it is an assertion concerned with past or present usage and possesses truth-value”, whereas a stipulative definition “establishes the meaning of a word; it thus takes the form of a command or proposal on the meaning of a given term. Therefore, it cannot be true or false”.⁵⁴⁷ Since, in the present case, we are dealing with a stipulative definition there is no need to opt for a strict definition. It would serve no purpose.⁵⁴⁸

Although a wider definition of conflict seems to be adopted by most academics and to be more in line with the need for unity in international law, no consensus exists. However, regardless of which of the two definitional approaches to conflict one might adopt, this does not affect the application of the principles of conflict resolution within Article 31(3)(c). In this case we do not have a conflict of norms as such, but a conflict of norms *on an interpretative level*. The norms do not conflict with each other directly, but within the process of Article 31(3)(c). Reference to norms A and B, leads to two *conflicting* interpretations⁵⁴⁹ of norm C, *i.e.* interpretations c_1 and c_2 respectively. These two interpretations cannot both be adhered to. One must give way to the other. *Ergo*, they are in conflict, a conflict which can be traced back to the very norms (in this case, norms A and B) which led to these interpretations. Furthermore, even if the norm being interpreted is a permissive one, this would not *ipso facto* render this case as one which is not a conflict, even if a strict definition of conflict has been adopted.⁵⁵⁰ The interpretation of a permissive norm is not a permissive norm itself. Interpretation is a statement on how a norm *must* be understood. Consequently, if norm C is of the form: “State A may do action B”, the interpretation of the aforementioned norm is a statement of the following form: “Norm C *must* be understood as meaning the following:”. Under this prism, even a strict definition of conflict poses no problems for the application of the principles of conflict resolution within Article 31(3)(c).

⁵⁴⁷ *Ibid.*, at 11.

⁵⁴⁸ *Ibid.*, at 20; on an extensive analysis of how conflict is to be understood, and a description of conflicts arising between obligations and permissions, contrary and contradictory conflicts, and how they are illustrated through the use of the ‘deontic square’ see Vranes, *supra* note 527, at 25-30.

⁵⁴⁹ It is no coincidence that the term ‘conflicting’ has consistently been used to describe the two different interpretations of the same norm, presented by the disputing parties; see Martti Koskenniemi, *From Apology to Utopia: the Structure of International Legal Argument* (Cambridge: CUP, 2005), at 337; *United States – Continued Existence and Application of Zeroing Methodology*, Appellate Body Report adopted on 19 February 2009, WTO, WT/DS350/AB/R, para. 273 (hereinafter *US-Zeroing*).

⁵⁵⁰ No problems would arise if the wider definitions of conflict are adopted.

The principles of conflict resolution that we will be examining are the ones that are generally accepted as the four most important in conflict resolution, *i.e. jus cogens* norms, conflict clauses, *lex posterior derogat priori* and *lex specialis derogat generali*.⁵⁵¹ The common element of all principles of conflict resolution is that the solutions they offer are influenced by considerations of the triad of: i) the contractual freedom of states, ii) the *pacta sunt servanda* principle and iii) the *pacta tertiis nec nocent nec prosunt*.⁵⁵² However, before we proceed with the analysis of each of these principles one further issue needs to be tackled.

The previous analysis showed that the definition of conflict does not pose any problems as the application of the principles of conflict resolution within Article 31(3)(c), but what about their nature? Article 31(3)(c) talks about ‘rules’. In Chapter 1, the analysis of the *travaux préparatoires* and the relevant jurisprudence showed that this covered general principles, custom and conventional rules, with some conditions for the last. *Jus cogens* norms clearly fall within Article 31(3)(c) and so do the conflict clauses. Although they are conventional rules, nevertheless, if the instrument in which they are incorporated is ‘relevant’ for purposes of Article 31(3)(c) then, by the same token, they also fall within Article 31(3)(c). Consequently, the only problematic principles are *lex posterior derogat priori* and *lex specialis derogat generali*.

Shwarzenberger felt strongly about these principles not being either principles or rules.

In view of the *self-eliminating character* of these maxims and counter-maxims it is hardly arguable that any of them epitomizes a rule of international customary law. This aspect of the matter alone debars any of these maxims from being accepted as a general principle of law recognized by civilized nations.⁵⁵³ ... These maxims are *neither legal rules nor principles*. They merely express *in the form of quasi-rules conclusions reached by means of the logical technique of treaty interpretation*. Yet this method, like any other method of treaty interpretation, derives such justification as it may claim from assisting in the application of the *jus aequum* rule to the task of determining the legal effects of treaties. (emphasis added)⁵⁵⁴

⁵⁵¹ Roucouas, *supra* note 531, at 56 *et seq.* and 76 *et seq.*

⁵⁵² Pauwelyn, *supra* note 51, at 327-8; Vranes, *supra* note 527, at 43.

⁵⁵³ However, on this point *see contra* Advisory Committee of Jurists, *Procès Verbaux of the Meetings of the Advisory Committee of Jurists: 16 June – 24 July 1920 with Annexes* (The Hague: van Langenhuisen, 1920), at 335-7 (hereinafter *Procès Verbaux*).

⁵⁵⁴ Schwarzenberger, *supra* note 534, at 472-3.

However, Schwarzenberger seems to stand relatively alone in his negation.⁵⁵⁵ First and foremost, in the preparatory work for the drafting of the PCIJ Statute it was felt by the Advisory Committee of Jurists that such maxims could be considered as examples of general principles of law.⁵⁵⁶ Ever since, the *lex posterior* and *lex specialis* have been the subject of various characterizations:

- i) general principles⁵⁵⁷
- ii) rules of interpretation⁵⁵⁸
- iii) principles of interpretation and/or conflict resolution⁵⁵⁹
- iv) ‘subordinate (or functionally equivalent) interpretative criteria’,⁵⁶⁰
- v) guidelines⁵⁶¹

⁵⁵⁵ Linderfalk rejects *lex specialis* as a customary rule of interpretation; Although he remains silent on the possibility of *lex specialis* as a customary rule of conflict resolution; Ulf Linderfalk, *On the Interpretation of Treaties* (Dordrecht: Springer, 2007), at 311-2; *contra* Anthony Aust, *Modern Treaty Law and Practice* (Cambridge: CUP, 2000), at 201; Mus, *supra* note 542, at 218; de Visscher, *supra* note 345, at 104-5; McLachlan, *supra* note 10, at 291; also Mavroidis and Howse seem to suggest that *lex specialis* may not form part of customary law, but that is not to say that it cannot be a general principle of law; Robert Howse and Petros Mavroidis, ‘Europe’s Evolving Regulatory Strategy for GMOs: the Issue of Consistency with WTO Law: Of Kine and Brine’, *Fordham International Law Journal* 24 (2000): 317, at 322-3.

⁵⁵⁶ *Procès Verbaux*, *supra* note 553, at 335-7.

⁵⁵⁷ Sinclair and Waldock in the Vienna Conference itself talked about the principle of *lex specialis*, while discussing the limits of article 30 VCLT, without any objections being raised; Sinclair, in United Nations, *United Nations Vienna Conference on the Law of Treaties, Second Session, Vienna, 9 April – 22 May 1969, Official Records* (New York, NY: United Nations, 1970), at 222 (hereinafter *Vienna Conference II*); Waldock, *Vienna Conference II*, at 253; Aufrecht, *supra* note 531, at 655; Czapliński and Danilenko, argue that when applied to conflict they are not “rules of interpretation but rather ... general rules of law accepted by all legal systems”; Czapliński and Danilenko, *supra* note 531, at 21; similarly Egbert Vierdag, ‘The Time of the ‘Conclusion’ of a Multilateral Treaty: Article 30 of the Vienna Convention on the Law of Treaties and Related Provisions’, *BYIL* 59 (1989): 75, at 96; Rousseau, also says that they are principles of international law, however he raises concerns as to their ‘transposability’ into the international legal system; Rousseau, *supra* note 531, at 156.

⁵⁵⁸ Malgosia Fitzmaurice and Olufemi Elias, *Contemporary Issues in the Law of Treaties* (Utrecht: Eleven International Publishing, 2005), at 322; McNair, *supra* note 186, at 219; Sinclair, *supra* note 53, at 93; Ilmar Tammelo, ‘Tensions and Tenebrae in treaty Interpretation’, in *Les Antinomies en Droit*, Chaïm Perelman (ed.), (Bruxelles: Bruylant, 1965), 337 *et seq.*

⁵⁵⁹ Quincy Wright, ‘Conflicts between International Law and Treaties’, *AJIL* 11 (1917): 579; Rousseau, *supra* note 531, at 150-6; Jenks, *supra* note 519, at 444-6; Akehurst, *supra* note 531, at 273; Czapliński and Danilenko, *supra* note 531, at 19-22; Sinclair, *supra* note 53, at 98; Karl, *supra* note 532, at 937-8; Aust, *supra* note 555, at 201; Patrick Daillier and Alain Pellet, *Droit International Public*, (Paris: Librairie Générale de Droit et de Jurisprudence, 2002), at 270; Wolfrum and Matz, *supra* note 540, at 152-8.

⁵⁶⁰ They are “no more than subordinate interpretative criteria (or at least functionally equivalent criteria in the search for the ‘correct’ sense of the conflicting rules”; Vranes, *supra* note 527, at 49.

⁵⁶¹ These guidelines are seen “as techniques of ‘second order justification’ that enable the solution of hard cases (*i.e.* cases where no ‘automatic’ decisions are possible) and that look either to the consequences of one’s decision or to the systemic coherence and consistency of the decision with the legal system (seen as a purposive system)”; ILC Study Group, *supra* note 16, para. 36 and note 35;

vi) presumptions⁵⁶²

vii) system rules⁵⁶³

viii) principles of legal logic⁵⁶⁴

Despite the different terms employed their common element is that the *lex posterior* and *lex specialis* principles are considered by all as either customary international law or as general principles. In either case, they clearly fall within the limits of the term ‘rules’ of Article 31(3)(c). This holds true even for those cases where terms other than ‘custom’ or ‘principle’ have been employed. For instance, Pauwelyn who argues that they are ‘principles of legal logic’, earlier had identified four categories of general principles of law. ‘Principles of legal logic’ were the fourth category amongst them and even more, the canons of treaty interpretation, which have consistently been recognized as customary international law in international jurisprudence, were classified in the same group.⁵⁶⁵

Having established that the principles of conflict resolution are ‘rules’ within the meaning of Article 31(3)(c), we can now proceed with the examination of the content of each principle, their problematic areas and their inherent limitations. These are essential for our theoretical construction,⁵⁶⁶ because whereas in classical

referring to Neil McCormick, *Legal Reasoning and Legal Theory* (Oxford: Clarendon Press, 1978), at 100-28.

⁵⁶² *Lex specialis* is a “presumption that the authority laying down a general rule intended to leave room for the application of more specific rules which already existed or which might be created in the future”; Akehurst, *supra* note 531, at 273; similarly see Nancy Kontou, *The Termination of Treaties in Light of New Customary International Law* (Oxford: Clarendon press, 1994), at 142.

⁵⁶³ *Lex posterior* as a ‘system rule’. A ‘system rule’ is a rule which is necessary for the proper functioning of a legal system; Sadat-Akhavi, *supra* note 531, at 211; see similarly Vranes who argues that they are dictated by the very structure of the international system itself, otherwise “the system’s legal structure would be led *ad absurdum*”. Vranes, *supra* note 527, at 46.

⁵⁶⁴ They are not

absolute and self-standing norms. They are more practical methods in the search for the ‘current expression of state consent. They deduce logical consequences from the fact that a norm is later in time or more specific ... In that sense they are rather ‘principles of legal logic’.

Pauwelyn, *supra* note 51, at 388.

⁵⁶⁵ Pauwelyn, *supra* note 51, at 126; citing Daniel P. O’Connell, *International Law, Vol. I* (London: Stevens, 1970), at 252-3.

⁵⁶⁶ As will be analyzed in more detail *infra* in Section XI.

normative conflict they would lead the judge to a *Zugzwang*,⁵⁶⁷ as he would be unable to find a solution, in the interpretative process this drawback does not apply.⁵⁶⁸

II. Hierarchy – *Jus Cogens*

The issue of identifying hierarchical relationships between identical or different sources of law is as old as society itself. Of course, in those first instances the issue was more a question of hierarchy between *jus divinum* and *jus hominum* rather than between different sources within the same human legal system.⁵⁶⁹ Cicero, as well, in *De inventione* argues that

First of all, therefore, it is requisite to show the nature of the laws, by considering which law has reference to more important, that is to say, to more honourable and more necessary matters. From which it results, that if two or more, or ever so many laws cannot all be maintained, because they are at variance with one another, that one ought to be considered the most desirable to be maintained, which appears to have reference to the most important matters.⁵⁷⁰

In international law the debate has focused on whether there is an *a priori* hierarchy between its sources as they are stated in Article 38(1) of the ICJ Statute.⁵⁷¹ Although Article 38 is not an official enumeration of the sources of international and it should by no means be considered as an exhaustive list, nevertheless, it has been used as an informal guideline.⁵⁷² All sources of international law, be they treaty, custom, or

⁵⁶⁷ *Zugzwang* is a term used in game theory to denote a position where one of the players has no good moves. Any move he makes will only worsen his position; In more detail on the notion of *Zugzwang* see Aaron Nimzowitch, *My System* (London: quality Chess Europe, 2007).

⁵⁶⁸ See *infra* Section XI.

⁵⁶⁹ The most famous example comes not from a legal treatise but from the ancient Greek tragedy of *Antigone*. There Antigone, whose brother Polyneices has been declared by Creon, king of Thebes, as a traitor has been declared a traitor and as punishment his dead body has been left unburied, prey for carrion animals. Antigone, secretly, tries to give her brother a semblance of burial and when she is revealed to have broken the explicit orders of the king she defends herself in a fiery monologue regarding the supremacy of divine law over the law of man; see Sophocles, *Antigone*, lines 450-470.

⁵⁷⁰ Cicero, *De Inventione, Liber II*, para. L.XLIX (translation by C.D. Yonge), accessible at: <http://fxylib.znufe.edu.cn/wgfljd/%B9%C5%B5%E4%D0%DE%B4%C7%D1%A7/pw/cicero/dnv2-7.htm#XLIX> (last accessed on 25 January 2010); This construction as we shall see comes very close to the contemporary notion of *jus cogens*.

⁵⁷¹ It has to be noted that the list of Article 38(1) of the ICJ Statute is not to be considered as an exhaustive one. In more detail see Fitzmaurice, *supra* note 57, at 153 *et seq.*; Clive Parry, *The Sources and Evidences of International Law* (Manchester: MUP, 1965), at 15; Maarten Bos, 'The Recognized Manifestations of International Law', *GYIL* 20 (1977): 9, at 18.

⁵⁷² See Hazel Fox, 'Time, History, and Sources of Law Preemptory Norms: Is there a Need for New Sources of International Law?', in *Time, History and International Law*, Malgosia Fitzmaurice, Matthew Craven and Maria Vogiatzi (eds.), (Leiden: Martinus Nijhoff, 2007), 119; Amanda Perreau-

general principles of law⁵⁷³ are considered to be on equal footing. No source is *a priori* superior to the rest;⁵⁷⁴ the main reason for this being that international law is ‘decentralised’⁵⁷⁵ and that it is a law of co-operation rather than subordination.⁵⁷⁶ Particularly notable is the *Institut de Droit International* 1995 Resolution on ‘Problems Arising from a Succession of Codification Conventions on a Particular Subject’. The relevant part is Conclusion 11 dealing with hierarchy of sources, where the members of the *Institut* stated in unequivocal terms that: “There is no *a priori* hierarchy between treaty and custom as sources of international law”.⁵⁷⁷

Despite the aforementioned, some authors recognize a sort of informal hierarchy, in the sense that treaties “enjoy priority over custom and particular treaties over general treaties”⁵⁷⁸, “the body of customary law has primacy over the general principles of law under Article 38(1)(c) of the ICJ Statute”⁵⁷⁹ and that the general principles of law play a ‘secondary’ role⁵⁸⁰ and can be overridden not only by custom as mentioned *supra* but by treaties as well.⁵⁸¹ This informal hierarchy, as the ILC Study Group pointed out, “follows from no legislative enactment but, emerges as a ‘forensic’ or a ‘natural’ aspect of legal reasoning”.⁵⁸² Irrespective of the

Saussine, ‘A Case Study on Jurisprudence as a Source of International Law: Oppenheim’s Influence’, in *Time, History and International Law*, Malgosia Fitzmaurice, Matthew Craven and Maria Vogiatzi (eds.), (Leiden: Martinus Nijhoff, 2007), 91.

⁵⁷³ Elements (a) to (c) within Article 38 of the ICJ Statute.

⁵⁷⁴ Ian Brownlie, *Principles of Public International Law*, (Oxford: Clarendon Press, 1998), at 3, who notes that the sources mentioned in Article 38 “are not stated to represent a hierarchy, but the draftsmen intended to give an order and in one draft the word ‘successively’ appeared”; see also Akehurst, *supra* note 531, at 274-5; Roucouas, *supra* note 531, para.72; Czapliński and Danilenko, *supra* note 531, at 7; Mark Villiger, *Customary International Law and Treaties: A Manual on the Theory and Practice of the Interrelation of Sources*, (The Hague: Kluwer Law International, 1997), para. 84 who very eloquently states that “an *a priori* hierarchy of sources is an alien concept”.

⁵⁷⁵ Pauwelyn, *supra* note 51, at 95.

⁵⁷⁶ *Id.*, citing Rousseau, *supra* note 531, at 150.

⁵⁷⁷ Institut de Droit International, *Resolution of 1 September 1995 on Problems Arising from a Succession of Codification Conventions on a Particular Subject*, *Annuaire de l’Institut de Droit International* 66 (1995/I): 245, at 248.

⁵⁷⁸ ILC Study Group, *supra* note 16, para. 85; although this falls more within the ambit of *lex specialis*, which we will analyze *infra*.

⁵⁷⁹ ILC Study Group, *supra* note 16, para. 85, citing Daillier and Pellet, *supra* note 559, at 114-6 and Georges Abi-Saab, ‘Cours Général de Droit International Public’, *RCADI* 207 (1987) : 1, at 188.

⁵⁸⁰ Albeit an important systemic one.

⁵⁸¹ Akehurst, *supra* note 531, at 279; Nguyen Quoc Dinh, Patrick Daillier and Alain Pellet, *Droit International Public* (Montreal: Wilson and Lafleur, 1999), para.60 and 220; Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, (London: Stevens, 1953), at 393; Georges Abi-Saab, ‘Les Sources du Droit International: Essai de Déconstruction’, in *Le Droit International dans un Monde en Mutation, Mélanges E. J. de Arechaga*, Manuel Rama-Montaldo (Montevideo: Fundación de Cultura Universitaria, 1994), 29, at 33-4; although this overriding is again nothing more than the application of the maxim *lex specialis derogat lege generali*.

⁵⁸² ILC Study Group, *supra* note 16, para. 85, citing Sir Robert Jennings and Sir Arthur Watts (eds.) *Oppenheim’s International Law*, (London: Longman, 1992, 9th ed.), at 26, footnote 2; Villiger, *supra*

aforementioned, however, the general consensus remains that there is no *a priori* hierarchy between the sources of international law.⁵⁸³

A more recent trend has been the proposition of a sort of ‘soft hierarchy’ of norms in environmental treaties. Emerging notions such as ‘Common Concern of Humankind’ (CCH) and ‘intergenerational equity’, according to this theory would give rise to obligations of an ‘integral’ nature.⁵⁸⁴ This would, thus, recognize to treaties under the regime of CCH and/or intergenerational equity a form of priority over other treaties of “a ‘lower’ order”.⁵⁸⁵ However, the authors themselves acknowledge that this “graduated normativity”⁵⁸⁶ based on the concept of integral obligations and “linking it to (emerging) concepts of international law, such as the CCH and intergenerational equity”, is “of course largely speculative as it has not been tested in practice”⁵⁸⁷ and would still not offer any easy solution in cases of conflict of environmental treaties of the same status.⁵⁸⁸

There is, nonetheless, an exception to this denial of an *a priori* hierarchy not in the form of a particular source of law but in the form of a particular set of norms *i.e.* *jus cogens* norms. These norms are considered to be hierarchically superior to other norms, not due to their source, but due to their content,⁵⁸⁹ and no derogation is possible.⁵⁹⁰ McNair felt that such rules are essential to each legal system since “it is difficult to imagine any society, whether of individuals or of States, whose law sets no limit whatever the freedom of contract”.⁵⁹¹ The roots of this notion of *jus cogens* norms can be traced back to “the Roman law distinction between *jus scriptum* and *jus*

note 51, at 161 and Elihu Lauterpacht (ed.) *International Law: The Collected Papers of Sir Hersch Lauterpacht, Vol. I*, (Cambridge: CUP, 1978), at 86-8.

⁵⁸³ Another attempt at an *a priori* hierarchy was the notion of ‘objective regimes’; see Sadat-Akhavi, *supra* note 531, at 192 and Pauwelyn, *supra* note 51, at 103 and cases cited therein.

⁵⁸⁴ On the notion of ‘integral’ and ‘interdependent’ obligations, their consequences and the history of the relevant debate *see infra* Section VII.

⁵⁸⁵ Fitzmaurice and Elias, *supra* note 558, at 343-4.

⁵⁸⁶ A term coined by Weil; Prosper Weil, ‘Towards Relative Normativity in International Law?’, *AJIL* 77 (1983): 413.

⁵⁸⁷ Fitzmaurice and Elias, *supra* note 558, at 343-4; similarly *see* Vaughan Lowe, ‘Sustainable Development and Unsustainable Arguments’, in *International Law and Sustainable Development: Past Achievements and Future Challenges*, Alan Boyle and David Freestone (eds.) (Oxford: OUP, 1999), 19-37. However, the importance of this method for interpretative reasons is substantial and we shall return to it *infra* in Section XI.

⁵⁸⁸ Fitzmaurice and Elias, *supra* note 558, at 345.

⁵⁸⁹ ILC, *supra* note 542, *Commentary of Article 40*, at 283, para.3; Pauwelyn, *supra* note 51, at 98.

⁵⁹⁰ The exact translation of *jus cogens* from Latin is ‘compelling law’, which points towards its hierarchical superiority with respect to other norms.

⁵⁹¹ McNair, *supra* note 186, at 213-4.

dispositivum and the maxim *jus publicum pactis mutari non potest*”,⁵⁹² although as Lachs points out the term ‘*jus cogens*’ as such was never used in antiquity.⁵⁹³

Vattel in His *Law of Nations* set out the main characteristics of these norms:

§ 7. Definition of the necessary law of nations.

We call that the *Necessary Law of Nations* which consists in the application of the law of nature to *Nations*. It is *Necessary* because nations are absolutely obliged to observe it. ...

§ 8. It is immutable

Since therefore *the necessary law of nations* consists in the application of the law of nature to states, — which law is immutable, as being founded on the nature of things, and particularly on the nature of man, — it follows that the *Necessary law of nations* is *immutable*.

§ 9. Nations can make no change in it, nor dispense with the obligations arising from it.

Whence, as this law is immutable, and the obligations that arise from it necessary and indispensable, nations can neither make any changes in it by their conventions, dispense with it in their own conduct, nor reciprocally release each other from the observance of it.

This is the principle by which we may distinguish *lawful* conventions or treaties from those that are not lawful, and innocent and rational customs from those that are unjust or censurable.

There are things, just *in themselves*, and allowed by the necessary law of nations, on which states may mutually agree with each other, and which they may consecrate and enforce by their manners and customs. There are others of an *indifferent nature*, respecting which, it rests at the option of nations to make in their treaties whatever agreements they please, or to introduce whatever custom or practice they think proper. But every treaty, every custom, which contravenes the injunctions or prohibitions of the *Necessary* law of nations is unlawful.⁵⁹⁴

These main elements of *jus cogens* norms were essentially incorporated in Articles 53⁵⁹⁵ and 64⁵⁹⁶ of the VCLT, although the ILC intentionally avoided giving a list of

⁵⁹² ILC Study Group, *supra* note 16, para. 361; *see also* Jochen Frowein, ‘Jus Cogens’, in *Encyclopedia of Public International Law*, Rudolf Bernhardt (ed.) (Amsterdam: Elsevier: 1997), at 65; Sinclair, *supra* note 53, at 110.

⁵⁹³ Manfred Lachs, ‘The Development and General Trends of International Law in our Time’, *RCADI* 169 (1980-IV):9, at 202.

⁵⁹⁴ Vattel, *supra* note 37, at ‘Preliminaries’, paras. 7-9 (emphasis in original)

⁵⁹⁵ Article 53 VCLT:

Article 53

Treaties conflicting with a peremptory norm of general international law (*jus cogens*)

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

⁵⁹⁶ Article 64 VCLT:

peremptory norms,⁵⁹⁷ and reaffirmed in international jurisprudence.⁵⁹⁸ Although during the discussions in the ILC, there was skepticism with respect to the notion of *jus cogens*⁵⁹⁹ nowadays “[t]he concept of peremptory norms of general international law is recognized in international practice, in the jurisprudence of international and national courts and tribunals in legal doctrine”⁶⁰⁰ and the debate has shifted from the validity of the concept to its scope and applicability.⁶⁰¹

Article 64

Emergence of a new peremptory norm of general international law (*jus cogens*)

If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.

Both Articles 53 and 64 seem to reflect the maxim *lex superior derogat legi inferiori*.

⁵⁹⁷ The reason being that the members of the ILC felt that “there is no simple criterion by which to identify a general rule of international law as having the character of *jus cogens*” and that it was the wiser choice to define the norm through its consequences and “to leave the full content of this rule to be worked out in State practice and in the jurisprudence of international tribunals”; ILC (1966), ‘Draft Articles on the Law of Treaties – Report of the International Law Commission on the Work of its Eighteenth Session’, *YILC*, Vol. II, at 248; or as McNair very elegantly put it: “it is easier to illustrate these rules, than to define them”; McNair, *supra* note 186, at 215.

⁵⁹⁸ The most notable example being the *Furundžija* case where the ICTY found that:

Because of the importance of the values [the prohibition of torture] protects, this principle has evolved into a peremptory norm or *jus cogens*, that is, a norm that enjoys a higher rank in the international hierarchy than treaty law and even “ordinary” customary rules. The most conspicuous consequence of this higher rank is that the principle at issue cannot be derogated from by States through international treaties or local or special customs or even general customary rules not endowed with the same normative force.

Prosecutor v. Anto Furundžija, Judgment of Trial Chamber II of 10 December 2008, ICTY, IT-95-17/1, para. 153. However, reference to peremptory norms has occurred in quite a few other cases as well: *OSPAR Arbitration*, para. 84. *Case Concerning the Application of the Convention of 1902 Governing the Guardianship of Infants* (Netherlands v. Sweden), Judgment of 28 November 1958, *ICJ Rep. 1958*, 55, Separate Opinion of Judge Moreno Quintana, at 106 *et seq.* (hereinafter *Guardianship of Infants* case); *North Sea Continental Shelf* cases, (Federal Republic of Germany v. Denmark and the Netherlands), Judgment of 20 February 1969, *ICJ Rep. 1969*, 3, Separate Opinion of Judges Padilla Nervo and Sørensen, at 97 and 248, Dissenting opinion of Judge Tanaka, at 182; *Case Concerning the Barcelona Traction, Light and Power Company, Limited (Second Phase)* (Belgium v. Spain), Judgment of 5 February 1970, *ICJ Rep. 1970*, 3, Separate Opinion of Judge Ammoun, at 304; *Regina v. Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No.3)*, 24 March 1999, House of Lords, 119 *ILR* 136; *Al-Adsani v. the United Kingdom*.

⁵⁹⁹ The most characteristic being that of France.

⁶⁰⁰ ILC, *supra* note 542, at 282.

⁶⁰¹ Anthony Aust, *Handbook of International Law* (Cambridge: CUP, 2005), at 11; however, *see contra* Weil who argues that the establishment of hierarchical relationships between peremptory norms and other “merely binding norms” essentially threatens the very normativity it aims to serve and might be detrimental to the structure of the international system; Weil, *supra* note 586, at 413.

III. Limitations of *Jus Cogens*

Based on the previous analysis, the effects of *jus cogens* norms seem to be pretty straightforward and their application would seem to raise no issues. Nevertheless, as we mentioned *supra*, none of the principles of conflict resolution, which we will be examining, is devoid of limitations and problems.

Firstly, the formulation adopted in Article 53 of the VCLT, as pointed by the ILC Study Group on Fragmentation, has “a disturbing circularity about it. If it is the point of *jus cogens* to limit what may be lawfully agreed by States – can its content simultaneously be made dependent on what is agreed between States?”⁶⁰²

Secondly, Sir Humphrey Waldock questioned whether when dealing with *jus cogens* norms the issue of conflict is raised at all. According to him “where a treaty was invalid for conflict with a rule of *jus cogens*, it was not a treaty for legal purposes and no question of a conflict between two treaties arose”.⁶⁰³ This, however, does not seem to be a true limitation of *jus cogens* norms, as tools of conflict resolution. This construction by Waldock focuses on the end result, of disappearance of the treaty, but the whole process which led to this consequence remains to be examined. A treaty cannot be rendered null and void *in abstracto*. This will be done by an international judge and through a process of legal reasoning. The judge will have to identify if a treaty is in conflict with a peremptory norm⁶⁰⁴ before applying Articles 53 or 64 of the VCLT. Consequently, identification of conflict is indispensable in order for the activation of Articles 53 and 64, which will then resolve the conflict by rendering the conflicting treaty void.

Third, Articles 53 and 64 of the VCLT regulate the situations of conflict between a peremptory norm and a treaty. Similar solutions are accepted to apply in cases of conflict with a customary norm.⁶⁰⁵ However, no such easy solution seems to be available in case of conflict between *jus cogens* norms.⁶⁰⁶ In this case, since no hierarchy would exist, the situation would seem to bear a striking resemblance with all the other cases of conflict between norms of equal standing. The judge would,

⁶⁰² ILC Study Group, *supra* note 16, para. 375; referring to Koskenniemi, *supra* note 549, at 323-5.

⁶⁰³ Waldock, (A/CN.4/SR.742), in *YILC* (1964), Vol. I, at 121, para. 23.

⁶⁰⁴ It has to be noted that both the title and the main text of Article 53 and the text of Article 64 include the word ‘conflict’ or a derivative of it.

⁶⁰⁵ ILC Study Group, *supra* note 16, para. 367.

⁶⁰⁶ *Id.*

thus, resort to application of the other principles of conflict resolution, *i.e. lex specialis* and *lex posterior*.⁶⁰⁷

Fourth, the superiority of *jus cogens* norms has not always been upheld by international tribunals. In the *Al- Adsani* case, the ECtHR held that the prohibition of torture had achieved the status of *jus cogens*. However, because the case involved not a claim of criminal liability of an individual for acts of torture, but was a civil suit the Court was

unable to discern in the international instruments, judicial authorities or other materials before it any firm basis for concluding that, as a matter of international law, a State no longer enjoys immunity from civil suit in the courts of another State where acts of torture are alleged.⁶⁰⁸

In this case the Court seems to have actually stripped *jus cogens* of its determining element *i.e.* its hierarchical superiority over all other norms.

⁶⁰⁷ This is not to say, of course, that this would be a perfect solution in all cases since these principles, as well, suffer from inherent limitations. *See infra* Sections VII, IX and X.

⁶⁰⁸ *Al-Adsani v. UK*, para. 61; *see also* Dissenting Opinion of Judge Bravo.

IV. Conflict Clauses

As was analyzed in the previous section, an *a priori* hierarchy of sources is a concept alien to the international legal system. The vast majority of the rules in force are *jus dispositivum*. In that sense and bearing also in mind, as Pauwelyn suggested, that the *raison d'être* of the techniques of conflict resolution is the quest for the identification of the intent of the parties, the relationship between norms and the solutions in case of conflict should be left to the discretion of the parties themselves.

The insertion of clauses to that effect, the so-called 'conflict clauses' has been considered as an indispensable tool for resolving conflicts between treaties and has been highly recommended both by the ILC⁶⁰⁹ and, more recently, by the *Institut de Droit International* in its 1996 Resolution.⁶¹⁰

The ILC defined conflict clauses as "clause[s] intended to regulate the relation between the provisions of the treaty and those of another treaty or of any other treaty relating to the matters with which the treaty deals".⁶¹¹ Such clauses can be found anywhere within the *corpus* of a treaty, usually as a separate article, but in some cases even within the preamble of a treaty,⁶¹² and as all techniques of conflict resolution

⁶⁰⁹ Waldock, *Third Report*, *supra* note 128, at 37, para. 10.

⁶¹⁰

[The *Institut de Droit International*, r]ecommends that the negotiators of any codification convention relating to the same subject matter as that of an earlier codification convention *should incorporate provisions in that convention regulating the relationship between it and the earlier convention*"; (emphasis added)

Institut de Droit International (1996-II), *Resolution on Problems Arising from a Succession of Codification Conventions on a Particular Subject*, *Annuaire de l' Institut de Droit International* 66 (1996/II): 435.

⁶¹¹ This was mentioned in the Commentary on Article 26 [Article 30 VCLT] of the VCLT; ILC, *Reports of the International Law Commission on the Second Part of its Seventeenth Session and on its Eighteenth Session* (A/6309/Rev.1), in *YILC* (1966), Vol. II: 169, at 214, para. 2; a similar definition had been presented by Sir Waldock in his Third Report: a conflict – clause is "a clause in a treaty for the purpose of determining the relation of its provisions to those of other treaties entered into by the contracting States"; Waldock, *Third Report*, *supra* note 128, at 37, para. 10; 1999 Hague Agreement Concerning the International Deposit of Industrial Designs, 2279 *UNTS* 156; and the 1980 Convention on Future Multilateral Co-operation in North-East Atlantic Fisheries, 1285 *UNTS* 129; Sadat-Akhavi, *supra* note 531, at 86.

⁶¹² The preamble according to Article 31 is part of the treaty. Sadat-Akhavi offers some examples of such conflict clauses *e.g.* the 1967 Hague Agreement Concerning the International Deposit of Industrial Designs, 828 *UNTS* 389; and the 1980 Convention on Future Multilateral Co-operation in North-East Atlantic Fisheries, 1285 *UNTS* 129; Sadat-Akhavi, *supra* note 531, at 86. Another example is the 2002 International Treaty on Plant Genetic Resources for Food and Agriculture, accessible at: <ftp://ftp.fao.org/docrep/fao/011/i0510e/i0510e.pdf> (last accessed on 25 January 2010).

they are a ‘last resort’ solution, *i.e.* to be used only when harmonization through interpretation has failed.⁶¹³

So important were these conflict clauses considered that their priority over general principles of conflict resolution (such as *lex posterior* or *lex specialis*) was established through Article 30(2) VCLT, which states that “[w]hen a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail”⁶¹⁴. This priority of the conflict clauses logically follows from the principles of contractual freedom of States and *pacta sunt servanda*. As Fitzmaurice and Elias, correctly, point out, such a reading of Article 30(2) VCLT is reinforced by the comments of the *Special Rapporteur* Sir Humphrey Waldock in his Third Report who stated

[t]hese clauses appear in any case of conflict to give priority to the other treaty and therefore be of decisive effect in the application of the two treaties. Accordingly, even if in particular instances the application of these clauses may not differ from the general rules of priority set out in paragraphs 3 and 4, it is thought that they should be made the subject of a special paragraph in the present article^{615 616}.

Conflict clauses can be categorized in three groups based on their temporal relationship with the treaties they refer to. Consequently, there are conflict clauses that establish a hierarchical relationship with respect to i) prior treaties ii) subsequent treaties iii) both prior and subsequent treaties. Each of these categories can be further divided in two sub-categories based on whether the conflict clause gives priority to the treaty which incorporates the conflict clause or whether the treaty to which reference is made through the conflict clause.⁶¹⁷

⁶¹³ A comment to that effect was made by the representative of the United States in the Vienna Conference on the Law of Treaties, who found support in the opinions expressed by Sir Waldock himself: in *Vienna Conference II*, *supra* note 557, at 56, paras. 52-3.

⁶¹⁴ Article 30(2) VCLT.

⁶¹⁵ Waldock, *Third Report*, *supra* note 128, paras. 38-40.

⁶¹⁶ Fitzmaurice and Elias, *supra* note 558 at 324.

⁶¹⁷ Various other categorizations have been proposed: *see* Fitzmaurice and Elias, *supra* note 558, at 325; Sadat-Akhavi, who considers that there are two categories, with each being further divided in three parts. Sadat-Akhavi’s construction gives precedence to the priority element, whereas the categorization proposed above focuses on the temporal element; Sadat-Akhavi, *supra* note 531, at 87 *et seq.*; Pauwelyn also suggests that there are three categories of conflict – clauses: i) those referring to pre-existing treaties, ii) those referring to future treaties and iii) those regulating conflict of norms within the same treaty; Pauwelyn, *supra* note 51, at 328 *et seq.*; Czaplinski and Danilenko consider that there are 4 categories; Czaplinski and Danilenko, *supra* note 531, at 13-8; whereas the ILC Study Group identified no less than seven types of conflict – clauses; ILC Study Group, *supra* note 16, at

Considering that both the ILC and the *Institut de Droit International* highly recommended the adoption and incorporation of conflict clauses in the text of treaties, and the fact that this conflict resolution technique actually allows the negotiating parties themselves to remain behind the steering wheel and clarify their intentions, it should come as no surprise that there is an abundance of examples of conflict clauses of all types. Below are examples of conflict clauses for each of the three main categories and their corresponding sub-categories:

A. Conflict – Clauses Referring to Earlier Treaties

i. Overriding Earlier Treaty (or Treaties)

Article 134 of the 1949 Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention)⁶¹⁸, Article 6(a) of the 1974 International Convention for the Safety of Life at Sea (SOLAS Convention)⁶¹⁹, Article 2(1) of the 1994 Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea⁶²⁰, Article 15 of the 1962 Brussels Convention on the Liability of Operators of Nuclear Ships⁶²¹, Article 103 of the 1992 North American Free Trade Agreement (NAFTA).⁶²²

ii. Giving Priority to Earlier Treaty (or Treaties)

Article 73(1) of the 1963 Vienna Convention on Consular Relations,⁶²³ Article 30 of the 1958 High Seas Geneva Convention,⁶²⁴ Article 311(2) of the 1982 UNCLOS,⁶²⁵ Article 4 of the 1994 European Energy Charter Treaty (not affecting WTO Agreements),⁶²⁶ Article 40 of the 1993 North American Agreement on Environmental Cooperation (not affecting existing international environmental

135-7. The reason why in the present thesis the author opted for focusing on the temporal element, is that this seems to be consistent not only with the temporal considerations expressed in Chapters 1 and 2 *supra*, but also because it would allow to better identify the possible interplay between the various conflict resolution techniques and in particular between conflict – clauses and *lex posterior*, which will be analyzed *infra*.

⁶¹⁸ 75 *UNTS* 135.

⁶¹⁹ 1184 *UNTS* 2.

⁶²⁰ 1836 *UNTS* 41.

⁶²¹ 57 *AJIL* 268.

⁶²² 32 *ILM* 289.

⁶²³ 596 *UNTS* 261.

⁶²⁴ 450 *UNTS* 82.

⁶²⁵ 1833 *UNTS* 396.

⁶²⁶ 2080 *UNTS* 100.

agreements),⁶²⁷ Article 2(2) of the 1985 South Pacific Nuclear Free Zone Treaty (not affecting the rights with regard to freedom of the seas),⁶²⁸ Article 2 of the 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects, (not detracting from obligations imposed under international humanitarian law),⁶²⁹ Article 12 of the 1986 Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency (not affecting reciprocal rights and obligations of States Parties under existing international agreements which relate to the matters covered by this Convention),⁶³⁰ Article 3(a) of the 2003 Convention for the Safeguarding of the Intangible Cultural Heritage (not affecting the Convention on the Protection of the World Cultural and Natural Heritage of World Heritage properties).⁶³¹

B. Conflict – Clauses Referring to Future Treaties

i. Overriding Subsequent Treaty (or Treaties)

Article 11 of the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal⁶³² and Article 311(3) of UNCLOS.

ii. Giving Priority to Subsequent Treaty (or Treaties)

Article 4(b) of the 1975 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character,⁶³³ Article 3(1) of the 1997 Convention on the Law of the Non-Navigational Uses of Watercourses.⁶³⁴

⁶²⁷ 32 *ILM* 1480.

⁶²⁸ 24 *ILM* 1440.

⁶²⁹ 1342 *UNTS* 137.

⁶³⁰ 25 *ILM* 1377.

⁶³¹ Accessible at: <http://www.tarihikentlerbirligi.org/i/belgeler/somutolmayanmiras.pdf> (last accessed on 25 January 2010).

⁶³² 1673 *UNTS* 125.

⁶³³ 69 *AJIL* 730.

⁶³⁴ 36 *ILM* 700.

C. Conflict – Clauses Referring to both Earlier and Subsequent Treaties

i. Overriding both Earlier and Subsequent Treaty (or Treaties)

Article 103 of the 1945 Charter of the United Nations,⁶³⁵ Article 8 of the 1949 North Atlantic Treaty⁶³⁶, Article 311(6) of UNCLOS, Article 20 of the 1886 Bern Convention for the Protection of Literary and Artistic Works (prior and later treaties remain applicable *only* if they accord broader rights protection).⁶³⁷

ii. Giving Priority to both Earlier and Subsequent Treaty (or Treaties)

Article 20 of the 1978 Hague Convention on the Law Applicable to Matrimonial Property Regimes,⁶³⁸ Article 23 of the 1979 Convention on the Elimination of all Forms of Racial Discrimination against Women (CEDAW)⁶³⁹ Article 35 of the 1989 Convention Concerning Indigenous and Tribal Peoples in Independent Countries (ILO Convention No. 169),⁶⁴⁰ Article 21 of the 1980 Convention on the Law Applicable to Contractual Obligations (Rome Convention);⁶⁴¹ Article 14(2) of the 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora.⁶⁴²

⁶³⁵ 1 *UNTS* XVI.

⁶³⁶ 34 *UNTS* 243.

⁶³⁷ 1161 *UNTS* 3.

⁶³⁸ 16 *ILM* 18.

⁶³⁹ 1249 *UNTS* 13.

⁶⁴⁰ 28 *ILM* 1382.

⁶⁴¹ 19 *ILM* 1492.

⁶⁴² 993 *UNTS* 243.

V. Limitations

Having recourse to conflict clauses can be a useful tool in the resolution of possible conflicts; however, as in the case of *jus cogens* norms it is not a *panacea* and is characterized by its own share of limitations. First and foremost amongst these is that conflict clauses do not become operational in cases where a State is a party to one treaty but not a party to the treaty containing the conflict clause.⁶⁴³ This limitation is dictated by the principle *pacta tertiis nec nocent nec prosunt*.

Additionally, there is such a multiplicity of possible permutations of conflict clauses, which makes it difficult to agree even on a common typology.⁶⁴⁴ This situation is compounded by the fact that “there are a number of different situations or variables that can exist”⁶⁴⁵ and which the conflict clauses need to address. To make matters even worse, even the solution that the conflict clause provides may not be so clear-cut as one would wish. Examples of such clauses can be found in the 2002 International Treaty on Plant Genetic Resources for Food and Agriculture,⁶⁴⁶ the 2000 Cartagena Protocol on Biosafety (Cartagena Protocol),⁶⁴⁷ the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal,⁶⁴⁸ and the 1992 Convention on Biological Diversity (CBD).⁶⁴⁹ Despite their vagueness, the ILC Study Group felt that such clauses “give recognition to the fact that it seems inadvisable to produce a general rule on treaty priority” and that they “emphasize the importance of harmonizing interpretation”.⁶⁵⁰ Nevertheless, it admitted that such solutions geared towards “mutual accommodation” may be of

⁶⁴³ Fitzmaurice and Elias, *supra* note 558, at 332; Pauwelyn, *supra* note 51, at 332.

⁶⁴⁴ See *supra* note 617, presenting the different typologies proposed by various authors.

⁶⁴⁵ Fitzmaurice and Elias, *supra* note 558, at 324.

⁶⁴⁶ *supra* note 612.

⁶⁴⁷ 39 *ILM* 1027.

⁶⁴⁸ 1673 *UNTS* 126.

⁶⁴⁹ 1760 *UNTS* 79; Article 22 of the CBD provides:

1. The provisions of this Convention shall not affect the rights and obligations of any Contracting Party deriving from any existing international agreement, except where the exercise of those rights and obligations would cause a serious damage or threat to biological diversity.

The construction of this conflict – clause is rather bizarre, as in the first paragraph priority is given to earlier treaties. However, an exception is provided for “where the exercise of those rights and obligations would cause a serious damage or threat to biological diversity”. This seems to leave the door open for an extensive abrogation from earlier treaties. As Wolfrum and Matz indicated “[t]his exemption to the rule is unusual and can lead to a *de facto* precedence of the Convention on Biological Diversity in respect to other instruments”. See Rüdiger Wolfrum and Nele Matz, ‘The Interplay of the United Nations Convention on the Law of the Sea and the Convention on Biological Diversity’, *Max Planck Yearbook on United Nations Law* 4 (2000): 445, at 475.

⁶⁵⁰ ILC Study Group, *supra* note 16, at 141, para. 277.

limited application and offer no real solution to a scenario of conflict.⁶⁵¹ On the contrary they may have an adverse effect; they may

create a danger of 'structural' bias – namely that what is understood as a 'mutually supportive' solution is determined in accordance with the priorities of the body whose task it is to interpret the conflict clause.⁶⁵²

To combat the uncertainty of the wording of certain conflict clauses, Waldock, during the discussions of Article 30, had drafted the following paragraph:

Whenever it appears from the *terms of a treaty, the circumstances of its conclusion or the statement of the parties* that their intention was that its provisions should be subject to their obligations under another treaty, the first mentioned treaty shall be applied so far as possible in a manner compatible with the provisions of the other treaty. In the event of a conflict, the other shall prevail.⁶⁵³

The reason for the aforementioned paragraph was that Waldock felt that cases could arise where the relationship between two or more treaties could have been discussed and agreed upon during the course of the *travaux préparatoires* but not included in the text of the treaty itself⁶⁵⁴. Although the ILC chose to discard the above paragraph, because it felt that it laid down a rule of interpretation that had no place within Article 30,⁶⁵⁵ the essence of what Waldock proposed, *i.e.* the search for the intention of the parties even outside the strict confines of the text, has been utilized in practice in order to clarify certain vague conflict clauses.⁶⁵⁶

Some types of conflict clauses bring nothing new to the table. For instance, the conflict clauses that ensure the priority of the later treaty are nothing more than an *ex abundante cautela* reaffirmation of the *lex posterior* principle.⁶⁵⁷ However, its diametrically opposite conflict clause is much more problematic. In the case of

⁶⁵¹ *Ibid.*, at 140-1, paras. 276-7.

⁶⁵² *Ibid.*, at 143, para. 282.

⁶⁵³ (emphasis added); Waldock, *Third Report*, *supra* note 128, at 34.

⁶⁵⁴ *Ibid.*, at 38, para. 12.

⁶⁵⁵ Comments by Luna, Lachs and Briggs, (A/CN.4/SR.742), in *YILC* (1964), Vol. I, at 121, para. 27, at 122, para. 38 and at 123, para. 49 respectively.

⁶⁵⁶ Sadat-Akhavi, mentions three cases where this was done by reference to the *travaux préparatoires*: i) the 1961 Single Convention on Narcotic Drugs, 520 *UNTS* 151 ii) the 1951 Universal Copyright Convention, 943 *UNTS* 178 iii) the 1974 Convention for the Unification of Certain Rules Relating to the Carriage by Sea of Passengers and their Luggage. See Sadat-Akhavi, *supra* note 531, at 206-7.

⁶⁵⁷ Fitzmaurice and Elias, *supra* note 558, at 323.

clauses that claim *ex ante* priority over all future treaties, shouldn't the *lex posterior* principle apply here as well? This would seem to be the case based on the contractual freedom of States, with Article 103 of the UN Charter being the natural exception since it is explicitly mentioned as such in Article 30(1) VCLT.⁶⁵⁸ Nothing prevents the parties to the original treaty from changing their mind and expressing this change of their intention through the conclusion of a subsequent treaty conflicting with the earlier one.⁶⁵⁹ Consequently, if in the subsequent treaty B no explicit clause exists stating that it is subject to the earlier treaty A⁶⁶⁰, then in case of conflict treaty B will prevail *despite treaty A's conflict clause* by virtue of the *lex posterior* principle⁶⁶¹. As Wolfram poignantly summarized the situation:

Clauses which claim priority over future treaty engagements *are futile*: They cannot be invoked against third States; they do not render conflicting treaties void; and they can always be overcome by the common will of the parties (emphasis added).⁶⁶²

The greatest limitation, however, of conflict clauses arises in case of conflict between the conflict clauses themselves. The most notable examples are Article 311(2) UNCLOS which provides that:

This Convention *shall not alter the rights and obligations* of States Parties which arise from other agreements *compatible with this Convention* and which do not affect the enjoyment by other States Parties of their rights or the performance of their obligations under this Convention. (emphasis added)

If we juxtapose this with Article 22(1) CBD,

⁶⁵⁸ "Subject to Article 103 of the Charter of the United Nations, the rights and obligations of States Parties to successive treaties relating to the same subject matter shall be determined in accordance with the following paragraphs."

⁶⁵⁹ Pauwelyn, *supra* note 51, at 336.

⁶⁶⁰ Or if we apply Waldock's solution, if no such intention can be found by reference to circumstances of the conclusion of the treaty, statements by the parties or *travaux préparatoires*.

⁶⁶¹ Unless an argument can be made that Treaty A is also *lex specialis*, in which case what we are essentially dealing with is a clash of two principles of conflict resolution, *lex posterior* and *lex specialis* and the solution to the above hypothetical conflict between treaties A and B, will depend on how we resolve the clash between these two principles of conflict resolution (this will be analyzed *infra*, immediately after the analysis of both *lex posterior* and *lex specialis*).

⁶⁶² Karl, *supra* note 532, at 471.

The provisions of this Convention *shall not affect the rights and obligations* of any Contracting Party deriving *from any existing* international agreement, *except where the exercise of those rights and obligations would cause a serious damage or threat to biological diversity* (emphasis added).

then it seems that in the event where the exercise of the rights under UNCLOS would cause ‘serious damage or threat to biological diversity’, these two provisions would seem to be *mutually exclusive*.⁶⁶³

It is not just conflict clauses in different instruments that may conflict. Conflict⁶⁶⁴ can arise in conflict clauses within the *same instrument*. A classical example is that of the preambular clauses 9-11 of the Cartagena Protocol.

Recognizing that trade and environment agreements should be mutually supportive with a view to achieving sustainable development,

Emphasizing that this Protocol shall not be interpreted as implying a change in the rights and obligations of a Party under any existing international agreements,

Understanding that the above recital is not intended to subordinate this Protocol to other international agreements

On the face of it, clauses 10 and 11 seem to blatantly cancel each other out. Clause 10 gives priority to existing agreements, whereas clause 11 claims that the Protocol is not subordinate to other international agreements. Safrin argues that these clauses can be read in three ways: i) as being completely ineffective, ii) that clauses 10 and 11 essentially neutralise each other,⁶⁶⁵ or iii) that the rights and obligations under earlier agreements are preserved.⁶⁶⁶ The first two solutions would seem to be contrary to the principle of effective interpretation and the third approach seems to be counter-intuitive, since a clause to the contrary exists as well. However, a closer reading of the clauses as a whole can reveal a form of *organic unity*.⁶⁶⁷ Clause 10 gives priority to earlier agreements, but this needs to be understood in the light of clause 9, the aim of which is to promote harmonization, be it through action or interpretation. Bearing

⁶⁶³ Fitzmaurice and Elias, *supra* note 558, at 334; also *see* their analysis on the correct interpretation of Article 237 UNCLOS based on a juxtaposition of the official English and French texts, in accordance with Article 33 of the VCLT; Fitzmaurice and Elias, *supra* note 558, at 335-6.

⁶⁶⁴ Or to be more exact, interpretative problems.

⁶⁶⁵ An interpretation that Pauwelyn supports; Pauwelyn, *supra* note 51, at 334.

⁶⁶⁶ Sabrina Safrin, ‘Treaties in Collision? The Biosafety Protocol and the World Trade Organization Agreements’, *AJIL* 96 (2002): 606, at 618-21.

⁶⁶⁷ Imperfectly worded, granted, but a unity nonetheless.

these in mind, clause 11 should be interpreted in line with the two previous clauses. Its reason is probably not to cancel out clause 10, but actually to appease any concerns regarding the status of the Protocol. What is meant through this clause is not that the Protocol supersedes other agreements, but to remind that despite the fact that it does not affect the rights and obligations of earlier agreements, this does not *ipso facto* diminish its status. It remains on par with the other agreements and the overarching principle should be that of eliminating any differences through a process of harmonizing interpretation as required by clause 9. In case of an inconsistency between the Protocol and an earlier treaty, clause 10 should not, automatically, become operational. First, an effort to find a harmonizing solution should be attempted and then and only if this fails should there be recourse to clause 10.⁶⁶⁸ Despite the solution proposed, this does not subtract from the fact that conflicts between conflict clauses in the same instrument may be difficult to be avoided through a process of interpretation and are almost impossible to resolve, because even the principles of conflict resolution themselves would not be able to lead to a result.⁶⁶⁹

Finally, fraught with difficulties is another type of conflict between conflict clauses, a ‘negative conflict’. Treaty A contains a provision that it does not affect the rights created by any other agreement. The later Treaty B has an identical clause. Essentially, Treaty A refers matters to Treaty B and *vice versa, ad infinitum*. This sort of scenario is known in private international law as *renvoi en turpie*.⁶⁷⁰ As comical as this scenario may seem, it has actually occurred. Article 90 of the 1980 UN Convention on Contracts for the International Sale of Goods⁶⁷¹ provides that “This convention *does not prevail* over any international agreement which has already been *or may be entered into* and which contains provisions concerning the matters governed by this Convention” (emphasis added). Article 23(a) of the 1986 Hague Convention on the Law Applicable to Contracts for the International Sale of Goods,⁶⁷²

⁶⁶⁸ For another example of a poorly drafted provision and the interpretative problems that these cause see Fitzmaurice and Merkouris, *supra* note 504, who analyze Article 17.6(ii) of the 1994 WTO Anti-Dumping Agreement; 1994 Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement), 1868 *UNTS* 201.

⁶⁶⁹ Being in the same instrument *lex posterior* would not apply, and *lex specialis* would be impossible to identify, unless clearly stated in the text or in the *travaux préparatoires* of the relevant instrument.

⁶⁷⁰ The scenario there is a case before a court of State A, the law of which states that the law of State B must be applied. However, the law of State B has an identical provision that refers back to the law of State A.

⁶⁷¹ 1489 *UNTS* 3.

⁶⁷² 510 *UNTS* 147.

on the other hand, states that it “does not prejudice the application of the United Nations Convention on Contracts for the International Sale of Goods”. This situation was characterized by von Mehren as a “negative conflict”.⁶⁷³ How should such a situation be resolved? Sadat-Akhavi, argues that the latter treaty mirroring the current state of consent should prevail, and thus, its conflict clause is the more relevant.⁶⁷⁴ The author of this thesis agrees with the end result of Sadat-Akhavi’s logical process but would like to frame it in a more theoretical perspective. Since the conflict clauses in such cases have failed, the solution is to apply the remaining principles of conflict resolution .i.e. the *lex posterior* and *lex specialis* principles. Such a ‘holistic approach’, where all the principles assist in addressing each other’s limitations, is not only logically sound but a prerequisite for these principles to effectively resolve as many conflicts as possible and will be seen repeatedly in our analysis.⁶⁷⁵

⁶⁷³ A. von Mehren, ‘Explanatory Report’, in *Actes et Documents de la Session Extraordinaire, 14 au 30 Octobre 1985*, Hague Conference on Private International Law (The Hague, 1987), at 755-6.

⁶⁷⁴ Sadat-Akhavi, *supra* note 531, at 97.

⁶⁷⁵ See all Sections of this Chapter.

VI. *Lex Posterior*

The principle of *lex posterior derogat priori i.e.* that the ‘later law supersedes the earlier law’, has often been cited as a principle of interpretation or conflict resolution in international law.⁶⁷⁶ Its roots have been traced by the ILC as back as the Justinian Codes⁶⁷⁷ and included in the seminal works of the early writers of international law.⁶⁷⁸ However, mention of this principle as a conflict resolution mechanism can be traced even further back in time to Cicero’s second book of his treatise *De Inventione* where he stated that: “Then comes the question also, which law was passed last; for the newest law is the most important”.⁶⁷⁹

The underlying reason for the use of the *lex posterior* maxim in resolving normative conflicts is that it is based on the contractual freedom of States⁶⁸⁰ and on the logical assumption that States may wish to change the existing law, in order to better adapt to a constantly changing environment. The ILC itself commented that: “a later expression of intention is to be presumed to prevail over an earlier one”⁶⁸¹ and felt so strongly on the subject that it effectively codified it in Article 30(3) VCLT⁶⁸². In order, thus, to understand the function and limitations of the *lex posterior* principle, both Article 30 and the *travaux préparatoires* will be revealing and will function as a starting point for our analysis.

Art. 30 of the VCLT goes as follows:

⁶⁷⁶ Wright, *supra* note 559, at 579; Jenks, *supra* note 519, at 445, Aufricht, *supra* note 531, at 675 *et seq.*; Karl, *supra* note 532, at 469; Pauwelyn, *supra* note 51, at 335-63, Czaplinski and Danilenko, *supra* note 531, at 19-22.

⁶⁷⁷ See ILC Study Group, *supra* note 16, para. 255, FN 291, citing *Papinian Digest* 50, 17, 80; *Paul. Digest* 32, 66, 5 and *Dig.* 1, 4, 1; Theodor Mommsen and Paul Kruger, Latin text (eds.) *The Digest of Justinian, Vol. IV*, (Philadelphia: University of Pennsylvania Press, 1985).

⁶⁷⁸ “Lastly it is to be observed that a subsequent law or treaty always repeals a former”; Grotius, *supra* note 36, Book II, Chapter XVI, Section XXIX;

§ 315. 4th Rule. 4. The dates of laws or treaties furnish new reasons for establishing the exception in cases of collision. *If the collision happen between two affirmative laws, or two affirmative treaties concluded between the same persons or the same states*, that which is of more recent date claims a preference over the older one: for it is evident, that since both laws or both treaties have emanated from the same power, the subsequent act was capable of derogating from the former. (emphasis added)

See also Vattel, *supra* note 37, Book II, Chapter XVII, para. 315.

⁶⁷⁹ The original Latin text goes as follows: “deinde, ultra lex posterius lata sit; nam postrema quaeque gravissima est”; Cicero, *supra* note 570, *Liber* 2.145, accessible at: <http://www.thelatinlibrary.com/cicero/inventione2.shtml> (last accessed on 25 January 2010).

⁶⁸⁰ One of the three main principles, which according to Pauwelyn permeate the entirety of the conflict resolution principles.

⁶⁸¹ ILC, *supra* note 611, para.10.

⁶⁸² Borgen, *supra* note 519, at 603; Mus, *supra* note 542, at 219-20.

Article 30

Application of successive treaties relating to the same subject matter

1. Subject to Article 103 of the Charter of the United Nations, the rights and obligations of States Parties to successive treaties relating to the same subject matter shall be determined in accordance with the following paragraphs.
2. When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.
3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.
4. When the parties to the later treaty do not include all the parties to the earlier one:
 - (a) as between States Parties to both treaties the same rule applies as in paragraph 3;
 - (b) as between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations.
5. Paragraph 4 is without prejudice to article 41, or to any question of the termination or suspension of the operation of a treaty under article 60 or to any question of responsibility which may arise for a State from the conclusion or application of a treaty the provisions of which are incompatible with its obligations towards another State under another treaty.

From a cursory reading it is evident that Article 30(3) and 30(4)(a) are a clear expression of the *lex posterior* principle as defined *supra*.⁶⁸³ Furthermore, the provisions of Article 30 that pertain to *lex posterior* are, essentially, of a residual nature;⁶⁸⁴ more specifically Article 30(1), (2) and (4) give priority to *jus cogens* norms and conflict clauses,⁶⁸⁵ the latter being in line with the *intent of the parties* functioning as the driving force in resolving any possible conflict and, to a greater extent, in establishing the hierarchy they wish in their conventional commitments.⁶⁸⁶

However, the fact that once it has been established that one treaty is posterior with respect to another that does not mean *ipso facto* that *lex posterior* becomes operational. The relevant provisions of Article 30 reveal that the *lex posterior* principle they codify and its scope of application is defined by three main elements:

⁶⁸³ Whereas Article 30(4)(b) reaffirms the *pacta tertiis nec nocent ne prosunt* principle.

⁶⁸⁴ Sadat-Akhavi, *supra* note 531, at 61-2; Pauwely, *supra* note 51, at 363.

⁶⁸⁵ Sir Humphrey Waldock who was in support of the introduction of this provision within Article 30 explained his reasoning:

These clauses appear in any case of conflict to give priority to the other treaty and therefore be of decisive effect in the application of the two treaties. Accordingly, even if in particular instances the application of these clauses may not differ from the general rules of priority set out in paragraphs 3 and 4, it is thought that they should be made the subject of a special paragraph in the present article.

Waldock, *Third Report*, *supra* note 128, at 38-40.

⁶⁸⁶ Note, however, that Article 30 relegates the scenarios where a treaty *subjects* itself to another treaty. It remains conspicuously silent as to the more problematic issue, of a treaty having a conflict clause, which supposedly overrides later conflicting treaties (*see analysis supra* in Section on conflict clauses). This would seem to suggest that the no exception exists in this case, and that the *lex posterior* principle becomes operational (thus, invalidating the earlier conflict clause) as has been suggested by various authors; *see supra*.

1. the succession of treaties (time – element)⁶⁸⁷
2. the parties of the successive treaties in question and
3. their subject – matter

With respect to how the wide range of non-existent, partial or complete overlaps of parties to successive treaties affect the application of the *lex posterior* principle, Sir Gerald Fitzmaurice in his *Third Report on the Law of Treaties* offered an exhaustive enumeration of the possible permutations.

- :
- (i) The two treaties have no common parties: no party to the one is also a party to the other,
 - (ii) The two treaties have common and identical parties: all the parties to the one are also parties to the other.
 - (iii) The two treaties have partly common and partly divergent parties: some parties are parties to both, some to the earlier only, and some to the later only....
 - (iv) Partially common parties, both or all of the parties to the earlier treaty being also parties (but not the only parties) to the later treaty (case of a later treaty to which both or all of the parties to the earlier agree).
 - (v) Partially common parties, but where some only of the parties to the earlier one are parties to the later, which has no other parties (case of a later treaty to which some only of the parties to the earlier agree, i.e. case of a separate and subsequent treaty on the same subject concluded between less than the full number of the parties to the earlier).⁶⁸⁸

The solutions given to each of these cases is essentially a mixture, or more precisely a complementary application, of the *lex posterior* and *pacta tertiis* principles. In the first case, neither treaty affects the other since they share no common parties by virtue of the *pacta tertiis* principle. In the second case, due to the complete identity of parties *lex posterior* becomes applicable. In the remaining cases, only when the parties in question are parties to both treaties does the *lex posterior* principle become relevant. In the other possible relationships between States – parties, the decisive convention is the one to which both are parties.⁶⁸⁹ It is evident, thus, that a specific overlap of parties needs to exist between the treaties in question in order for *lex posterior* to become a mechanism that the international judge can resort to.

The same can be said about the notion of subject – matter. Article 30 of the VCLT has the title “Application of successive treaties relating to *the same subject*

⁶⁸⁷ Since this is one of the main problematic areas of the *lex posterior* principle, it will be analyzed *infra* in the Section on limitations of *lex posterior*.

⁶⁸⁸ Fitzmaurice, *Third Report, supra* note 127, at 27.

⁶⁸⁹ Be that the earlier or the later one. This is in accordance with the *pacta tertiis* principle; see Fitzmaurice, *Third Report, supra* note 127, at 27.

matter” (emphasis added). During the debate that revolved around this topic the general consensus was that ‘same subject - matter’ should be understood narrowly. The Express Consultant, Sir Humphrey Waldock responding to a comment made by the UK delegation stated that:

[o]n the second point raised by the United Kingdom delegation concerning the words ‘relating to the same subject – matter’, [I concur] that those words should not be held to cover cases where a general treaty impinges indirectly on the content of a particular provision of an earlier treaty; in such cases the question involve[s] such principles as *generalia specialibus non derogant*.⁶⁹⁰

Contrary opinions, however, have been expressed by contemporary authors, such as Pauwelyn, who argues in favour of defining ‘same subject - matter’ by recourse to the notion of ‘continuing treaties’,⁶⁹¹ and the ILC Study Group that argued that the qualifying test for the notion of ‘same subject – matter’ should be “whether the fulfilment of the obligation under one treaty affects the fulfilment of the obligation of another”.⁶⁹² This last construction, however, seems a little bit too expansive, in the sense that such an interpretation of ‘same subject – matter’ would resolve all cases of conflict in favour of *lex posterior*, stripping, thus, *lex specialis* of any meaning and rendering it, in essence, ineffective. This, of course, is an *argumentum ad absurdum*. Consequently, a more narrow construction of ‘same subject – matter’ is required, which would respect the delicate balance between *lex posterior* and *lex specialis*.⁶⁹³

⁶⁹⁰ Comments made by Sir Humphrey Waldock, in *Vienna Conference II*, *supra* note 557, at 253, para. 41; this comment of Sir Humphrey Waldock was prompted by a fictional case raised by the UK delegation, according to which cases of conflict between a convention on a specific topic such as third liability in the field of nuclear energy (which contained provisions on recognition of foreign judgments) and a later more general convention on recognition and enforcement of judgments, should not be considered as having the same subject – matter. Such cases should be resolved by having recourse to other maxims such as *generalia specialibus non derogant*; Comments made by Sir Ian Sinclair, *ibid.*, at 222, para. 41.

⁶⁹¹ Pauwelyn, *supra* note 51, at 364; similarly *see* ILC Study Group, *supra* note 16, para. 255, that talks about “‘chains’ or clusters of treaties that are linked institutionally”.

⁶⁹² ILC Study Group, *supra* note 16, para. 254.

⁶⁹³ Such an approach is given support by the various comments during the VCLT *travaux préparatoires* mentioned *supra*; a more detailed analysis of the interaction and relationship between these two principles is provided *infra* in Section X.

VII. Limitations of the *Lex Posterior* Principle

Similarly to all the previous methods of conflict resolution, so does the *lex posterior* principle suffer from various limitations, a fact which led Sir Ian Sinclair to characterise it⁶⁹⁴ as a “particularly obscure aspect of the law of treaties”.⁶⁹⁵ Since *lex posterior* essentially deals with temporal elements, it comes as no surprise that the majority of limitations are of a *temporal hue*.

The *lex posterior* principle has been reaffirmed and employed in a wide variety of cases in international jurisprudence.⁶⁹⁶ However, this does not mean that in every case of conflict between two treaties, the later treaty will always prevail. On the contrary, there have been also quite a few cases where the *lex prior* principle *i.e.* that the temporally earlier rule overrides the later one, was employed to resolve a conflict.⁶⁹⁷ The major point of divergence between the *lex posterior* and the *lex prior* principles is their field of application. *Lex posterior* is not an exact opposite, an inversion of *lex prior* since the former requires a certain identity of parties *i.e.* in order for *lex posterior* to become operational the parties to the dispute must be parties to both the conflicting treaties,⁶⁹⁸ whereas the *lex prior* principle may apply even in cases where there is a divergence of the contracting parties.⁶⁹⁹

These *lex prior* considerations were raised in the context of another debate, which also constitutes another limitation of the *lex posterior* principle, the so – called AB/AC conflict *i.e.* a conflict which may arise between a treaty that has been signed and ratified by States A and B, and a later treaty, which has been signed by States A and C. The problem with this scenario is which obligation of State A should prevail,

⁶⁹⁴ When dealing with Article 30 of the VCLT.

⁶⁹⁵ Sinclair, *supra* note 53, at 94.

⁶⁹⁶ Most notable amongst them the *Mavrommatis Palestine Concessions* case; the *Jurisdiction of Danube Commission Advisory Opinion* and the *Oscar Chinn* case. The reason of the application of the *lex posterior* principle lies in the fact that the later treaty is considered to express the “correct common intent” of the parties; *see, however, contra* Vranes, who argues that this presumption is questionable; Vranes, *supra* note 527, at 57.

⁶⁹⁷ *Costa Rica v. Nicaragua*, Decision of October 7, 1916, Central American Court of Justice, *AJIL* 11 (1917): 181; *El Salvador v. Nicaragua*, Decision of 9 March 1917, Central American Court of Justice, *AJIL* 11 (1917): 674; *Customs Regime between Germany and Austria*, Advisory Opinion of 5 September 1931, *PCIJ Series A/B, No. 41*, 36, at 42; *Oscar Chinn case* (United Kingdom v. Belgium), Judgment of 12 December 1934, *PCIJ Series A/B, No. 63*, 64, Separate Opinion of Judge Eysinga, at 131 and Separate Opinion of Judge Schücking, at 148; a recent case for which an argument could be made that the Court applied the *lex prior* principle is the *Al-Adsani* case, where the ECtHR yielded in favour of the *earlier* customary rule of state immunity; *Al-Adsani v. UK*, para. 61.

⁶⁹⁸ Matz-Lück, *supra* note 529, para. 24; *see also supra* analysis.

⁶⁹⁹ Karl, *supra* note 532, at 469.

that which is owed towards State B or that which is owed towards State C; the earlier or the later treaty? It is, therefore, easy to understand how *lex prior* and the AB/AC conflict scenario, share common elements.

Vattel, in one of the first attempts to address this issue, came to the following conclusion:

*If there be a collision between two treaties made with two different powers, the more ancient claims the preference: for, no engagement of a contrary tenor could be contracted in the subsequent treaty; and if this latter be found, in any case, incompatible with that of more ancient date, its execution is considered as impossible, because the person promising had not the power of acting contrary to his antecedent engagements.*⁷⁰⁰

The issue re-emerged with great tenacity during the VCLT *travaux préparatoires* and in connection with the effects of conflict to the validity of the subsequent treaty. Vattel's take on the issue was supported by Sir Hersch Lauterpacht in his *First Report on the Law of Treaties*, who argued that in case of AB/AC conflict the earlier treaty will prevail, and the later would be null and void.⁷⁰¹ The superiority of the earlier treaty and the resulting nullity of 'contracts to break a contract' was a general principle of law, which "followed cogently" from the principle of good faith and requirements of international public policy,⁷⁰² while at the same time secured the unity of law.⁷⁰³ Of course, even Lauterpacht himself admitted the fact that an unqualified application of the *lex prior* principle could lead to absurd results⁷⁰⁴ and that is why he qualified the invalidity of the later treaty with two conditions.⁷⁰⁵

⁷⁰⁰ Vattel, *supra* note 37, Book II, Ch. XVII, para. 315.

⁷⁰¹ Sir Hersch Lauterpacht, *First Report on the Law of Treaties* (A/CN.4/63) reproduced in *YILC* (1953), Vol. II, at 156; Sir Lauterpacht had consistently been in support of this solution throughout his writings, see: Hersch Lauterpacht, 'Contracts to Break a Contract', in *International Law: The Collected Papers of Hersch Lauterpacht*, in Elihu Lauterpacht (ed.) (Cambridge: CUP, 1978), 340, at 374; Hersch Lauterpacht, 'The Covenant as the 'Higher Law'', *BYIL* 17 (1936): 54, 63-4.

⁷⁰² Lauterpacht, *First Report, supra* note 701, at 157.

⁷⁰³ Sir Hersch Lauterpacht, *Second Report, supra* note 532, at 136, para.7.

⁷⁰⁴ Lauterpacht, *First Report, supra* note 701, at 156-9.

⁷⁰⁵ *I.e.* that 1. the departure from the terms of the earlier treaty had to be of such a magnitude "as to interfere seriously with the interests of the other parties to that treaty or seriously impair the original purpose of the treaty" or 2. if the later treaty conflicted with treaties

partaking of a degree of generality which imparts to them the character of legislative enactments properly affecting all members of the international community or which must be deemed to have been concluded in the international interest.

Lauterpacht, *First Report, supra* note 701, at 156.

Lauterpacht's solution to the AB/AC conflict was criticised as too dogmatic and unsupported by international jurisprudence⁷⁰⁶ and was largely reversed by Sir Gerald Fitzmaurice in his *Second Report on the Law of Treaties*. In that Report Fitzmaurice argued that treaties can be grouped in two categories: i) the *reciprocating* type and ii) the *non – reciprocating* type. The latter category could then be further subdivided in i) *interdependent* type treaties and ii) *integral* treaties.⁷⁰⁷ With respect to multilateral conventions of the *interdependent* or *integral* type, any later treaty conflicting with them would be *ipso facto* null and void.⁷⁰⁸ Pertaining to treaties of the *reciprocating* type and more specifically in case of an AB/AC conflict, which is the issue at question, Sir Gerald Fitzmaurice favoured the priority of the earlier treaty. This was not a sentiment shared by all members of the ILC⁷⁰⁹ which led Fitzmaurice to recognize that there was no way of preventing a State from selecting which obligation it will comply with and which it will violate. This “does not mean that international law confers a ‘right of election’, but only that ... it may not be possible to prevent a *power* of election from being exercised”.⁷¹⁰ The third *Rapporteur*, Sir Humphrey Waldock, restricted the consequence of invalidity even further to conflicts with *jus cogens* norms.⁷¹¹ With respect as to how AB/AC type conflicts should be resolved, Waldock and the ILC were of the opinion that no strict rule could or should be adopted. This issue raised questions pertaining more to international state responsibility rather than the law of treaties.⁷¹² Consequently, it was felt that the ‘power of election’ was the *optimal solution*,⁷¹³ which is mirrored indirectly through Article 30(4)(b), but more directly *via* the silence of Article 30 on which treaty should prevail in case of an AB/AC conflict.

⁷⁰⁶ Jenks, *supra* note 519, at 444; Fitzmaurice, *Third Report, supra* note 127, at 41 *et seq.*; Sir Humphrey Waldock, *Second Report on the Law of Treaties* (A/CN.4/156 and Add. 1-3), in *YILC* (1963), Vol. II: 36, at 56 *et seq.*

⁷⁰⁷ Fitzmaurice, *Third Report, supra* note 127, at 27.

⁷⁰⁸ *Ibid.*, at 27-8.

⁷⁰⁹ For those who favoured the priority of the earlier treaty *see* comments made by: Jiménez de Aréchaga, (A/CN.4/SR.742), in *YILC* (1964), Vol. I, at 123, para. 46; Tunkin, (A/CN.4/SR.857), in *YILC* (1966), Vol. I, Part II, at 100, paras. 67-9; *Contra see* comments made by: the Chairman, and Ago, (A/CN.4/SR.857), in *YILC* (1966), Vol. I, Part II, at 102, para. 88 and paras. 90-1 respectively.

⁷¹⁰ Fitzmaurice, *Third Report, supra* note 127, at 42, para. 85; Zuleeg calls this *power of election* the “principle of political freedom”; Manfred Zuleeg, ‘Vertragskonkurrenz im Völkerrecht. Teil I: Verträge zwischen Souveränen Staaten’, *GYIL* 20 (1977): 246, at 267-8.

⁷¹¹ Waldock, *Second Report, supra* note 706, at 56 *et seq.*

⁷¹² Which prompted the insertion of paragraph 5 into Article 30 of the VCLT.

⁷¹³ *See* comments made by: Waldock, (A/CN.4/SR.858), in *YILC* (1966), Vol. I, Part II, at 103, para. 10; the Chairman and Ago, (A/CN.4/SR.857), in *YILC* (1966), Vol. I, Part II, at 102, paras. 88-9 and at 99, para. 49 respectively.

When applying the *lex posterior* principle, what is required is an ‘earlier’ treaty and a ‘later’ treaty. It would seem to go without saying that establishing which is which would be child’s play. However, this has proven to be one of the most complex issues with respect to the *lex posterior* principle. The reason is that we are predisposed to thinking of treaties as coming into existence in a singular point in time, which is common for all contracting parties. This assumption, however, “will often appear not to be correct, as it fails to take account of the complication in time of multilateral treaty – making through complex procedures”.⁷¹⁴

The problem is that various dates can and have been used in order to determine when a treaty is considered to have been concluded, e.g. the conclusion of the negotiations, the opening of the treaty for signature, the actual signature, the entry into force.⁷¹⁵ Of course, some conventions have a specific provision to that effect,⁷¹⁶ but the vast majority lacks such foresight. The matter is further complicated by the fact that the term ‘conclusion’⁷¹⁷ is used in a number of different provisions of the VCLT with different meanings.⁷¹⁸ Consequently, the notion of ‘conclusion’ of a treaty is a *generic* term, which will be interpreted each time depending on the context and object and purpose of each provision.⁷¹⁹

As to what concerns Article 30, the generally accepted formula for determining the timing of a treaty is the *date of adoption of a treaty*.⁷²⁰ This was the

⁷¹⁴ Vierdag, *supra* note 557, at 98.

⁷¹⁵ *Ibid.*, at 76 *et seq.*

⁷¹⁶ 1974 International Convention for Safety of Life at Sea (SOLAS Convention), Article 6, 1184 UNTS 278; 1962 Convention on the Liability of Operator of Nuclear Ships, Article 14, 37 AJIL 268; in some cases one can be deduced from the *travaux préparatoires*, as in the case of the 1951 Universal Copyright Convention, Article 17; in more detail *see* Sadat-Akhavi, *supra* note 531, at 78-9.

⁷¹⁷ And its derivatives.

⁷¹⁸ Vierdag, *supra* note 557, at 81-2; In order to overcome this obstacle Sir Gerald Fitzmaurice had proposed an article defining the term ‘conclusion’:

1. The conclusion of a treaty – which is not the same thing as bringing it into force, though the same act may do both – is the process of giving active assent to the text of the treaty as the basis of an agreement, but not necessarily a consent then there to be bound by it.
2. Conclusion is usually effected by signature (provided in full signature), but other acts may have a concluding aspect...

However, this proposal was not followed up during the negotiations of the VCLT.

⁷¹⁹ Vierdag, *supra* note 557, at 79-82.

⁷²⁰ This should not be confused with the question of when Article 30 of the VCLT would have for each party.

In that connection, the *date of entry into force of a treaty* for a particular party [would be] relevant for the purposes of determining the moment at which that party would be bound by the obligations under [Article 30] (emphasis added).

solution that seemed to prevail during the VCLT *travaux préparatoires*⁷²¹ and has ever since been upheld by a number of authors.⁷²² However, the date of adoption of a treaty is not a panacea. It may be a useful tool for identifying the timing of bilateral treaties, but it fails to give a satisfactory solution to all the conflicts that may arise from the wild permutations of modern treaty - making. This weakness is especially felt when it comes to multilateral conventions or conventions that are subject to periodic revisions.⁷²³ The classical example that Sir Ian Sinclair used in the Vienna Conference on the Law of Treaties goes as follows:

Supposing a multilateral convention was opened for signature in 1960, State A ratified it in 1961, and the convention entered into force in 1962. Then State A and B concluded a bilateral treaty on the same subject in 1963 which entered into force in 1964, after which State B acceded to the multilateral convention in 1965. Which of the treaties was the earlier and which was the later? In State A's view, the multilateral convention was the earlier but in State B's view it was the later.⁷²⁴

Sir Humphrey Waldock, in *Vienna Conference II*, *supra* note 557, at 253, paras. 39-40.

⁷²¹ Sir Ian Sinclair, in *Vienna Conference II*, *supra* note 557, at 222, para. 40; Delegation of Ceylon, in *Vienna Conference II*, *supra* note 557, at 56, para. 50; Sir Humphrey Waldock, in *Vienna Conference II*, *supra* note 557, at 253, para. 39;

⁷²² Sadat – Alkhavi, *supra* note 531, at 75-84; Matz-Lück, *supra* note 529, para. 25; Pauwelyn, *supra* note 51, at 370-81; Pauwelyn, however, in the case of multilateral treaties suggests a different perspective, *see infra*; *see, however, contra* Vierdag, who argued that this approach fails because it focuses on the treaty as a whole, whereas the real issue is that of conflicts between 'concrete treaty rights and obligations'. The approach adopted by Article 30 falls short of resolving such conflicts; Vierdag, *supra* note 557, at 110. In more detail Vierdag commented:

A multilateral [treaty] can be given a date, and it is in fact given a date. Usually this is the day on which its text was adopted or it was opened for signature. There will also be a date on which it entered or enters into force, albeit usually only for a number of the States that ultimately constitute its parties. *These dates have no direct relationship to the dates on which States parties to that treaty actually incur obligation or acquire rights under it.* These dates can be determined but do not necessarily correspond in time with the relevant dates of the treaty itself.

Since the regulation of Article 30 is predominantly based on 'successive' treaties, it does not solve questions of conflicts between earlier or later rights or obligations of States under different treaties ...

In so far as the rules contained in Article 30 approach the conflict as one between treaties, based on the time of treaties, they cannot solve conflicts between concrete treaty rights and obligations. These have their own time, which is not necessarily related to the time of the treaties involved. (emphasis added)

⁷²³ An even more problematic area in the application of the *lex posterior* principle would arise in a case where the norms that had to be 'time-labelled' came from different sources, *i.e.* one was treaty law and the other was customary law. Since *lex posterior* is of customary nature (apart from being codified in Article 30), its scope covers any kind of *lex* irrespective of its source. Ergo, it would apply equally to treaties, custom and principles; and herein lies the crux of the problem. Due to the inherent vagueness of custom as a source it would be extremely difficult to pinpoint exactly in time when the customary norm arose, and consequently which of the two conflicts *leges* was earlier and which later in time.

⁷²⁴ Sir Ian Sinclair, in *Vienna Conference I*, *supra* note 46, at 165.

In such a scenario, States A and B would come to diametrically opposed results as to which treaty is earlier and which later, despite the fact that they applied the same criterion. A similar ‘schizophrenic’ result would arise in the case of treaties that are subject to regular revisions.⁷²⁵ Let us take for instance treaty A, which was concluded in 1980 and treaty B, which was concluded in 1982. In this scenario treaty A is earlier compared to treaty B. However, what happens if treaty B is a technical treaty subject to periodic revisions and was indeed revised in 1985. The revised treaty B has now morphed from the ‘earlier’ treaty to the ‘later’ one.⁷²⁶

These flaws have prompted some authors to look for different solutions to the problem of ‘time – labelling’.⁷²⁷ Two are the most notable:

i) instead of the date of the *adoption of the treaty* the critical date should be the *date at which the consent of the states in question converged*.⁷²⁸ However, apart from the fact that this solution does not seem to be in line with the intentions of the drafters,⁷²⁹ it also does not solve the drawbacks of the *adoption of a treaty* date. In cases of conflicting multilateral conventions the end result would, once again, be a kaleidoscope of conflicting outcomes; for some States treaty A would be the earlier one, for others treaty B.

ii) a disapplication of Article 30, when the conflict concerns treaties of a ‘continuing’ or ‘living’ nature.⁷³⁰ Such treaties due to their continuing nature would fall outside the scope of Article 30 and thus, the remainder of the principles of conflict resolution would have to provide a solution to the conflict.⁷³¹ However, it seems that even without ‘carving out’ a special category of treaties, the judge would end up with

⁷²⁵ For instance the SOLAS Convention.

⁷²⁶ See also Pauwelyn, who citing *Argentina – Footwear*, wonders whether the fact that the 1947 GATT was incorporated in 1994 into the WTO Agreement, meant that with respect to the treaties concluded between 1947 – 1994, GATT had now been transformed from a *lex prior* into a *lex posterior*; Pauwelyn, *supra* note 51, at 376; for other relevant examples see Vierdag, *supra* note 557, at 98 *et seq.*; Matthias Buck and Roda Verheyen (2001), ‘International Trade Law and Climate – A Positive Way Forward’, accessible at: <http://library.fes.de/pdf-files/stabsabteilung/01052.pdf> (last accessed on 25 January 2010).

⁷²⁷ With Pauwelyn arguing in favour of shifting away from treating the treaty as an “*abstract instrument*” to assessing it as a “source of rights and obligations *resting on particular states*”; Pauwelyn, *supra* note 51, at 372; similarly see Vierdag, *supra* note 557, at 94.

⁷²⁸ Pauwelyn, *supra* note 51, at 374.

⁷²⁹ See *supra* analysis.

⁷³⁰ Such treaties, according to Pauwelyn, would be “part of a regulatory framework or legal system that was created at one point in time but continues to exist and evolve over a mostly indefinite period”; Pauwelyn, *supra* note 51, at 378. Such a definition would cover the most important universal and regional treaties, as well as those treaties that are subject to periodic revision.

⁷³¹ Pauwelyn, *supra* note 51, at 378-80.

the same solution. When the *lex posterior* principle cannot apply, resort can also be had to other principles of conflict resolution, such as the *lex specialis* principle; even more so, since these two principles do not exist in some sort of hierarchical relationship.⁷³² Consequently, the international judge would always be able to resort to *lex specialis* to resolve the conflict. No need exists for a special category of ‘continuing’ or ‘living’ treaties, since by *molecularizing* treaties in various categories we may end up complexifying an already complex situation.

A final issue with respect to the application of the *lex posterior* principle is the problem of the supervening custom *i.e.* whether a customary rule that emerges *after* the conclusion of a treaty should supersede the latter. During the VCLT *travaux préparatoires* an article to that effect was put to discussion, which provided that:

The interpretation at any time of the terms of a treaty ... shall take account of: (a) the emergence of any later rule of customary international law affecting the subject – matter of the treaty and binding upon all the parties.⁷³³

However, because it was felt that this principle essentially dealt with modification of treaties, it was later incorporated in the draft Article pertaining to modification:

The operation of a treaty may also be modified ... (c) by the subsequent emergence of a new rule of customary law relating to matters dealt with in the treaty and binding upon all the parties.⁷³⁴

Although originally the comments by the Governments seemed to favour such a provision,⁷³⁵ the objections raised by Greece that argued that it could not envisage how an *opinio juris* necessary for the creation of custom could be established when it so blatantly contradicted previous conventional commitments,⁷³⁶ and more importantly the United Kingdom that argued the aforementioned provision disregarded the principle that treaties should not be modified but with the consent of

⁷³² See *infra* Section X.

⁷³³ Waldock, *Third Report*, *supra* note 128, at 53.

⁷³⁴ ILC, *supra* note 397, at 198.

⁷³⁵ See Kontou, *supra* note 562, at 137.

⁷³⁶ Greece, *GAOR* (1966), 845th Meeting, at 38, para. 41.

the parties,⁷³⁷ seemed to sway the ILC in its direction.⁷³⁸ In the end the reference to supervening custom was deleted from the Articles of the VCLT, because it was felt that such an absolute rule did not admit of automatic application. In each case it should be examined whether the parties intended for their treaty to be a *lex specialis* not to be modified by any subsequently emerging customary norm.⁷³⁹

More recently the *Institut de Droit International* in its 1995 Resolution on ‘Problems Arising from a Succession of Codification Conventions on a Particular Subject’ avoided making any pronouncements on the issue of supervening custom.⁷⁴⁰ In an earlier draft of Conclusion 11, however, there was a specific reference to that effect *i.e.* that a later customary law could modify an earlier treaty,⁷⁴¹ which was left out in the end because it was too complex of an issue to be dealt with “as an ancillary point at the end of a Conclusion”.⁷⁴²

The issue of supervening custom essentially touches upon the topic of the relationship between the principles of *lex posterior* and *lex specialis*. Since this will be analyzed in more detail *infra*, for now what can be said is that a solution as to the effect of supervening custom will depend on the answer given to the existence or not of a hierarchy between *lex posterior* and *lex specialis*. Since this author argues that both principles stand on par, whether a supervening custom indeed supersedes an earlier treaty will depend on an *ad hoc* examination of which set of rules is more reflective of the current state of consent of the parties. This approach seems also to be implied by the four conditions that Kontou sets for the supervening custom;⁷⁴³ especially the fourth condition although referring to the notion of *lex specialis* is actually more of a safe guard against the automatic application of supervening

⁷³⁷ United Kingdom, *supra* note 134, at 345.

⁷³⁸ See Kontou, *supra* note 562, at 138 and references therein.

⁷³⁹ *Id.*

⁷⁴⁰ *Institut de Droit International*, *supra* note 577.

⁷⁴¹ *Ibid.*, at 248.

⁷⁴² Comments by Higgins, in *Institut de Droit International*, *supra* note 577, at 207.

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New customary law may be invoked as a ground of termination or revision of a prior treaty if: i) it is incompatible with the treaty provisions; ii) it is different from the customary international law in force at the time of the conclusion of the treaty; and iii) is binding upon all parties to the treaty, unless iv) the parties intended that the treaty should continue applying as special law

Kontou, *supra* note 134, at 146. Kontou also mentions the following cases as supporting her conclusions: *A-G v. Burgoa*, Case 812/79, ECJ, (1980), *ECR* 2787; *La Bretagne* Arbitration (1986), *RGDIP* 90 (1986): 716; *Fisheries Jurisdiction* case; *Fisheries Jurisdiction case (Merits)* (United Kingdom v. Iceland), Judgment of 25 July 1974, *ICJ Rep.* 1974, 3; *UK-France Continental Shelf Arbitration* (1989), 18 *ILM* 397.

custom.⁷⁴⁴ What this condition asks for is that the true intent of the parties is revealed, the reference to *lex specialis* is only incidental and should not be construed as a sort of hierarchy between *lex posterior* and *lex specialis*. Once again the guiding principle is the *intention of the parties*.

⁷⁴⁴ See also Pauwelyn, who argues that there must be a presumption in favour of the later custom. The burden of proof is then on the States to reverse this presumption and show that *their intention* was for the earlier rule to continue to apply; Pauwelyn, *supra* note 51, at 141; *contra* Villiger, who argues in favour of such an automatic application; Villiger, *supra* note 574, at para. 324.

VIII. *Lex Specialis*

Finally, we turn to the principle of *lex specialis derogat generali* i.e. that the more special law supersedes the more general one.⁷⁴⁵ As with previous methods of conflict resolution so was this identified by Cicero in *De Inventione*:

Then, too, it is right to consider which law comprehends the entire class of subjects to which it refers, and which embraces only a part of the question; which may be applied generally to many classes of questions, and which appears to have been framed to apply to some special subject. *For that which has been drawn up with reference to some particular division of a subject, or for some special purpose, appears to come nearer to the subject under discussion, and to have more immediate connection with the present action* (emphasis added).^{746,747}

As can be seen from this quote, Cicero not only identified the principle as such, but also its *raison d' être*. The principle of *lex specialis derogat generali* logically follows from the fact that a special law (if it is applicable) will have a closer connection and be more relevant to the case in question than a general one. It will more closely and accurately reflect the current state of will of the parties concerned.⁷⁴⁸ Thus, it will be more suitable to be applied compared to the general law. The same logical process led early authors to include the *lex specialis* principle in their works as a method of

⁷⁴⁵ Other formulations under which this principle has appeared are: ‘Generalibus specialia derogant’, ‘Generi per speciem derogatur’, ‘specialia generalibus, non generalia specialibus’; However, the *lex specialis* principle must not be confused with the *ejusdem generis* rule i.e. that in the process of interpretation a special meaning of a word will prevail over a more general one if that was the intention of the parties; see ILC Study Group, *supra* note 16, para. 56, FN 57, referring to McNair, *supra* note 186, at 393-9. The *ejusdem generis* rule has been codified in Art. 31(4) of the VCLT.

⁷⁴⁶ Translation by Yonge, *supra* note 570, The original Latin text goes as follows:

deinde, utra lex de genere omni, utra de parte quadam; utra communiter in plures, utra in aliquam certam rem scripta videatur; nam quae in partem aliquam et quae in certam quandam rem scripta est, propius ad causam accedere videtur et ad iudicium magis pertinere (emphasis added)

Cicero, *supra* note 570, at 2.146.

⁷⁴⁷ Earlier expositions of this principle can be found in ancient Greek philosophy; Lindroos and the ILC Study Group claim that its origins are found in the Corpus Juris Civilis of the *Digest of Justinian* but this is chronologically much later than the quote by Cicero; The relevant passage, is a gloss by Aemilius Papinianus which went as follows: “in toto jure generi per speciem derogatur et illud potissimum habetur, quod ad speciem directum est”, which translates to: “in the entirety of law, the special takes precedence over genus, and anything that relates species is regarded as most important”; Papinian Digest, 50, 17, 80 and Dig. 48, 19, 41, Mommsen and Kruger, *supra* note 677, see also, Theodor Schilling, *Rang und Geltung von Normen in Gestuften Rechtsordnung* (Berlin: Nomos, 1994), at 447.

⁷⁴⁸ See Pauwelyn, *supra* note 51, at 388; Kontou, *supra* note 562, at 142; Lindroos, *supra* note 526, at 37.

conflict resolution; The ‘holy trinity’ of early international law *i.e.* Vattel, Grotius and Puffendorf, all included in their seminal works reference to this principle.⁷⁴⁹

Similar considerations of reflection of the latest expression of consent are the basis of the *lex posterior* principle as well.⁷⁵⁰ However, a major difference between the *lex posterior* and *lex specialis* principles is that whereas the former has been codified in Article 30 of the VCLT the latter partakes of no such explicit inclusion. This, nevertheless, should not be construed as an indication by the VCLT drafters to acknowledge a hierarchy between these two principles.⁷⁵¹ Both Sir Humphrey Waldock and Sir Ian Sinclair expressly stipulated that Article 30 was never intended to be exhaustive and other principles of interpretation and conflict resolution were to apply in parallel.⁷⁵² Aust, on the other hand, posits that *lex specialis* is included within the ‘supplementary means’ of Article 32.⁷⁵³ The author of this thesis although in agreement with Aust in the sense that the *lex specialis* principle is incorporated within the provisions of the VCLT,⁷⁵⁴ deviates on the specific provision. Since the nature of

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Among those treaties, which, in the above named respects, are equal, the preference is given to such as are more particular, and approach nearer to the point in question. For where particulars are stated, the case is clearer, and requires fewer exceptions than general rules do.

Grotius, *supra* note 36, at Book II, Chapter XVI, Section XXIX.

[d]e deux Conventions ou deux Lois d’ ailleurs également obligatoires, il faut donner la preference à celle qui est la moins générale, qui approche le plus de l’ affaire dont il s’ agit

Samuel Puffendorf, *Of the Law of Nature and Nations*, Book V, Chapter XII

Of two laws or two conventions, we ought (all other circumstances being equal) to prefer the one which is less general, and which approaches nearer to the point in question: because special matter admits of fewer exceptions than that which is general; it is enjoined with greater precision, and appears to have been more pointedly intended.

Vattel, *supra* note 37, Vol. I, Book II, Chapter XVII, para. 316.

⁷⁵⁰ See *supra* Sections VI-VII.

⁷⁵¹ This will be analyzed separately *infra* in Section X.

⁷⁵² Sinclair, *Vienna Conference I*, *supra* note 46, at 96-7; Waldock, *Vienna Conference II*, *supra* note 557, at 253.

⁷⁵³ Aust, *supra* note 555, at 200-1.

⁷⁵⁴ A similar situation occurred with respect to the principle *ut res magis valeat quam pereat* (known also as principle of effectiveness). During the discussions in the ILC, the issue arose as to whether the principle *ut res magis valeat quam pereat* had to be expressly incorporated in the Article on treaty interpretation. The ILC eventually decided against such an inclusion

[not because it] consider[ed] that the principle expressed in the maxim *ut res magis valeat quam pereat* should not be included as one of the general rules [of interpretation ... [but because it] took the view that, in so far as the maxim *ut res magis valeat quam pereat* reflects a true general rule of interpretation, it is [already] embodied in [Article 31(1)] (emphasis added).

ILC Commentary, *supra* note 611; the same considerations, *mutatis mutandis*, can be said to have been the case with respect to the *lex specialis* principle.

the *lex specialis* principle is a customary one, it would seem that the apposite provision would be Article 31(3)(c).⁷⁵⁵

Apart from the general description of the principle as the application of the more special rule, no further specific definitions are available. To fill this *lacuna* two requirements have been proposed. In order for *lex specialis* to apply

i) there have to be two rules of international law dealing with the *same subject – matter* and

ii) an *inconsistency* must exist between the aforementioned rules.⁷⁵⁶

The term inconsistency was used by the ILC in its Commentary to Article 55 of the (then Draft) Articles on State Responsibility⁷⁵⁷ *in lieu* of conflict in order to avoid any negative connotations with Jenk’s strict definition of conflict. Inconsistency here is intended to be understood as conflict *lato sensu*. However, whereas the first requirement is self – evident,⁷⁵⁸ international jurisprudence is not consistent as to what may concern the second requirement. WTO Panels and the Appellate Body have habitually required the element of conflict in order for *lex specialis* to be applicable,⁷⁵⁹ whereas the ECtHR does not feel that the element of conflict is essential⁷⁶⁰ a sentiment which has been shared in certain cases by other international

⁷⁵⁵ This assertion and the reasons in support of it will be examined in more detail *infra*.

⁷⁵⁶ Fitzmaurice (1957), *supra* note 419, at 236-7; Karl, ‘Treaties, Conflicts Between’, *Encyclopedia of Public International Law, Vol. IV* (Amsterdam: Elsevier, 2000), at 936; ILC, *supra* note 542, at 358; Pauwelyn on the other hand also requires two elements, but instead of conflict his second element is ‘membership’ in the sense that “some treaty norms must be seen as *lex specialis* because they deal with the same subject matter as the opposing *lex generalis* does, but in a way that goes further, *either in terms of detail or in terms of objectives pursued under both treaties*”; Pauwelyn, *supra* note 51, at 390; for further attempts to provide criteria for establishing a relationship between a special and general rule see Vranes, *supra* note 527, at 64-5; and K. Larenz, *Methodenlehre der Rechtswissenschaft* (Berlin: Springer, 1979), at 251-2.

⁷⁵⁷ ILC, *supra* note 542.

⁷⁵⁸ In order for a rule to be more special with respect to a general rule, they need to have a common point of reference. A rule cannot be more special if it deals with a completely different subject – matter, in that case they would be just different rules, with no common elements.

⁷⁵⁹ *Brazil – Export Financing Programme for Aircraft*, Panel Report adopted on 20 August 1999, WTO, WT/DS46/R, para. 7.40 (hereinafter *Brazil-Aircraft*); *Turkey – Textiles*, para. 9.92; *Indonesia – Autos*, paras. 14.28 – 14.34.

⁷⁶⁰ *De Jong, Baljet and van den Brink v. the Netherlands*, Judgment of 22 May 1984, 8 EHHR 20; *Brannigan and McBride v. the United Kingdom*, Judgment of 26 May 1993, 17 EHHR 539; *Murray v. the United Kingdom*, 28 October 1994, 19 EHHR 193; *Nikolova v. Bulgaria*, 25 March 1999, 31 EHHR 64; *Brualla Gómez de la Torre v Spain*, 19 December 1997, 33 EHHR 1341; *Vasilescu v. Romania*, Judgment of 22 May 1998, 28 EHHR 241; *Kudla v. Poland*, Judgment of 26 October 2000, 35 EHHR 11; *Yankov v. Bulgaria*, 11 December 2003, 40 EHHR 36; *Følgero and Others v. Norway*, Judgment of 29 June 2007, 46 EHRR 47; *Bantayeva and Others v. Russia*, Judgment of 12 February 2009, (Application no. 20727/04).

tribunals.⁷⁶¹ It is for this reason that the ILC Study Group held the *lex specialis* principle as functioning in two ways:

[i.] where the specific rule should be read and understood within the confines or against the background of the general standard, typically as an elaboration, updating or a technical specification of the latter[or more narrowly]

[ii.] where two legal provisions that are both valid and applicable, are in no express hierarchical relationship, and provide incompatible direction on how to deal with the same set of facts ... instead of the (general) rule, one should apply the (specific) exception.⁷⁶²

Such an approach would also go a long way towards explaining the jurisprudence where the *lex generalis* has been used as a kind of ‘fall - back’ when the *lex specialis* fails to offer a clear solution. The reason for this discrepancy between the ILC Study Group approach and that requiring the element of conflict may be better understood through the prism of *lex specialis* as a multi – faceted principle; *i.e.* as a principle that is considered both a principle of interpretation as well as a principle of conflict resolution. Under the first guise no conflict is required, whereas as a *conflict – resolution* technique, conflict is an absolute prerequisite. Consequently depending on how one applies the *lex specialis* principle and in what context, the element of conflict may be mandatory or optional.

Returning to the two requirements mentioned *supra*, it is worth noting that the first element just requires two rules dealing with the same subject – matter. It makes no provision on the specific elements of these two rules. Consequently, and as has been upheld by jurisprudence, these rules do not necessarily have to exist in two different instruments. They can both exist within the same legal instrument,⁷⁶³ – an

⁷⁶¹ *Nicaragua* case, para. 274; *INA Corporation v. Iran*, Judgment of 12 August 1985, *Iran – USCTR* 8 (1985-I), at 378. In these cases the respective tribunals only examined whether the relevant rules dealt with the same subject – matter, not if there was a conflict between them. Maybe in these cases the conflict was considered as a given (*see* Akehurst, who suggests that “a special custom, by definition, is one which conflicts with the general custom”; Akehurst, *supra* note 531, at 78), but if so, if it is automatic the moment they deal with the same subject – matter then there would be no need for a second element as it would already be implied by virtue of the existence of the first element.

⁷⁶² ILC Study Group, *supra* note 16, paras. 56-7.

⁷⁶³ *Beagle Channel Arbitration* (the Argentine Republic v. the Republic of Chile), Award of 18 April 1977, 52 *ILR* 97, at 141, paras. 36-9; *Colleanu v. German State*, Award of 12 January 1929, Germano – Rumanian Mixed Arbitral Tribunal, *Annual Digest of Public International Law 1929-1930* 5 (1933-4), at 440. *Libor Cipra et Clastimil Kvasnicka v. Bezirkshauptmannschaft Mistelbach*, Judgment of 16 January 2003, ECJ, *Case C-439/01*, *ECR* 2003 I-745, paras. 27-40; *Rudolf Gabriel*, Judgment of 11 July 2002, ECJ, *Case C-96/00*, *ECR* 2002 I-06367, paras. 35-6 and 59; *Brazil – Export*, para. 7.40; *Turkey – Textiles*, para. 9.92; *Indonesia – Autos*, paras. 14.28-34.

interesting side point of this is that since the rules are within the same instrument, the *lex posterior* principle has no application, *ergo* only the *lex specialis* principle can resolve the possible conflict⁷⁶⁴ – or arise from two different sources of international law⁷⁶⁵ or even both be non – treaty based.^{766,767}

⁷⁶⁴ The same would apply for two different instruments sharing the same date of conclusion as was the case in: *Iran – United States, Case A/2, Iran – USCTR* 1 (1981): 101 at 104; and *Ambatielos Case (Preliminary Objections)*, at 35-44.

⁷⁶⁵ *E.g.* treaty and custom, *see Nicaragua case*, para. 274; *INA Corporation v. Iran*, at 378;

⁷⁶⁶ *Right of Passage case*, at 40-4.

⁷⁶⁷ Jennings and Watts point out that the *lex specialis* principle is not restricted to treaty law and that it functions as a “discretionary aid” which is “expressive of common sense and normal grammatical usage”; Jennings and Watts, *supra* note 582, at 1270, 1280: *see* however, Thirlway who expressed doubt as to whether *lex specialis* and *lex posterior* could operate with respect to custom; Hugh Thirlway, ‘The Sources of International Law’, in *International Law*, Malcolm Evans (ed.) (Oxford: OUP, 2003), at 136. However, both international jurisprudence and academic writing seem to set aside these doubts by Thirlway.

IX. Limitations of the *Lex Specialis* Principle

Whereas the notion of ‘two rules’ allows for the *lex specialis* principle to encompass all possible permutations of rules emanating from different sources of international law, the notion of ‘dealing with the same subject – matter’ proves to be more problematic. The same considerations as in the *lex posterior* principle apply *mutatis mutandis*. Should a broad or a restrictive interpretation of ‘same subject – matter’ be adopted? This question becomes more relevant with the proliferation of treaties and the blurring of the lines between various fields of international law. Lindroos offers the example of a vessel carrying oil that sails in the EEZ of a state. In such a case, freedom of navigation may conflict with environmental rights, and UNCLOS and IMO rules with an environmental treaty.⁷⁶⁸ Treaties begin to have far reaching effects in a variety of fields regulated by international law *e.g.* an environmental treaty may have provisions that deal also with trade, law of the sea and human rights. In such a diversified and constantly changing scene, any attempt to qualify *a priori* which rules or sets of rules deal with the ‘same subject – matter’ is doomed from the start.⁷⁶⁹ Such judgments can be rendered only on a case by case analysis.

The same can be said about attempts to define what is general and what is special.⁷⁷⁰ As the ILC correctly pointed out generality and speciality are *relational i.e.* a rule cannot be determined as special or general *in abstracto*. What is required is a point of reference and that point of reference is another rule.⁷⁷¹ Only when we have a set of rules opposed to one another can the process of identifying which is special and which is general have any meaning. Furthermore, the relationality covers two distinct areas: i) subject – matter and ii) the number of actors who are bound by it. These two areas may not always lead to identical results.⁷⁷² The situation is a complex one and it comes as no surprise that the general consensus is that all of the above point towards

⁷⁶⁸ Lindroos, *supra* note 526 at 48; *see also* ILC Study Group, *supra* note 16, paras. 116-8.

⁷⁶⁹ Which is the reason why Lindroos suggests that the *lex specialis* principle is well – suited for a limited amount of conflicts *i.e.* normative conflicts within the same instrument or within instruments that have an established relationship to each other; Lindroos, *supra* note 526 at 41. However, the fact that it is easy to apply in such cases the *lex specialis* principle does not mean that its scope of application should also be restricted to them. In fact, it is in the ‘hard cases’ that these principles of conflict resolution may assist the judge the most.

⁷⁷⁰ Jenks, *supra* note 519, at 447.

⁷⁷¹ ILC Study Group, *supra* note 16, para. 112; Lindroos, *supra* note 526, at 42.

⁷⁷² ILC Study Group, *supra* note 16, para. 112, citing Villiger, *supra* note 51, at 36; and Kontou, *supra* note 562, at 19-20; this is also reflected in Pauwelyn’s requirements for the application of *lex specialis*.

the fact that the *lex specialis* principle “does not admit of automatic application”,⁷⁷³ that “[n]o general, context – independent answers can be given to such questions”⁷⁷⁴ and, thus, can only be decided on an *ad hoc* basis. This, however, has not put a halt to efforts to define *ex ante facto* which rules are *lex specialis* compared to others, based on the source. For instance, it is considered that should a case arise where a treaty rule or custom deviates from a general principle of law, the judge would have to apply the treaty or custom, as being closer to the intention of the parties *i.e.* as a sort of *lex specialis*.⁷⁷⁵ Also a treaty is considered to be *lex specialis* with respect to custom.⁷⁷⁶ However, one must be careful not to consider such classifications as irrebuttable presumptions. True, in the majority of cases a treaty will be a *lex specialis* but that does not mean that no cases can arise where the reverse is true. Akehurst, for instance, posits the case of historic rights under the law of the sea, where customary law might actually be *lex specialis* compared to general treaty rules.⁷⁷⁷

Finally, to complicate matters even further, the fact that in a case a certain rule has indeed been found to be a *lex specialis* does not automatically mean that it will supersede the *lex generalis*. There have been a number of cases where it was actually the *lex generalis* that superseded the *lex specialis*.⁷⁷⁸ The common element in all those cases was that the decisive criterion was not so much an abstract notion of speciality

⁷⁷³ ILC Study Group, *supra* note 16, para. 58.

⁷⁷⁴ *Ibid.*, para. 119.

⁷⁷⁵ Comments by Baron Descamps, in *Procès-Verbaux*, *supra* note 553, at 337; Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (London: Stevens, 1953), at 393; Akehurst, *supra* note 531, at 279; Quoc Dinh, *supra* note 531, para. 60; H. Mosler, ‘General Principles of Law’, in *Encyclopedia of Public International Law, Vol. VII*, Rudolf Bernhardt (ed.) (Amsterdam: North-Holland, 1984), 89, at 97.

⁷⁷⁶ See *Amoco International Finance Corp. v. Iran*, Judgment of 14 July 1987, *Iran-USCTR* 15 (1987-II): 189, para. 112; *Nicaragua* case, para. 274; the ILC Study Group considered that the fact “[t]hat treaty rules enjoy priority over custom is merely an incident of the fact that most general international law is *jus dispositivum*” (emphasis added); ILC Study Group, *supra* note 16, para. 7; cases re-affirming this *jus dispositivum* character of general international law are: *North Sea Continental Shelf* cases, para. 472; *Case Concerning the Continental Shelf* (Tunisia v. Libyan Arab Jamahiriya), Judgment of 24 February 1982, *ICJ Rep. 1982*, 18, para. 24 (hereinafter *Tunisia/Libya Continental Shelf* case); Anzilotti goes a step further than the ILC by using the ‘number of actors’ element of identifying the relationality between two rules. Thus not only a treaty would prevail over custom, but a bilateral treaty would prevail over a multilateral one; Dionisio Anzilotti, *Cours de Droit International: Tôme I* (transl. by Gilbert Gidel) (Paris: Sirey, 1929), at 103; see, however, *contra*: Georges Scelle, *Cours de Droit International Public* (Paris: Domat-Montchrestien, 1948), at 642; Oscar Schachter, ‘Entangled Treaty and Custom’, in *International Law at a Time of Perplexity Essays in Honour of Shabtai Rosenne*, Yoram Dinstein and Mala Tabory (eds.) (Dordrecht: Nijhoff, 1989), 717, at 721.

⁷⁷⁷ Akehurst, *supra* note 531, at 275.

⁷⁷⁸ *Minorities in Upper Silesia* case, at 30-1; see also cases presented by Sadat-Akhavi, *supra* note 531, at 114-31.

but more tangible considerations of *intention of the parties, relevancy and importance*.⁷⁷⁹

⁷⁷⁹ ILC Study Group, *supra* note 16, para. 58.

X. The Relationship between the *Lex Posterior* and *Lex Specialis* Principles: Antagonism or Complementarity?

Principles of conflict resolution resolve conflicts between norms. But what happens when those principles themselves are in conflict? What happens if the solution arrived at by application of the *lex posterior* principle is diametrically opposed to that arrived through *lex specialis*? In essence, this problem can be summed up in the question of whether between the *lex specialis* and *lex posterior* principles there exists a hierarchical relationship.

This issue has not been the object of extensive academic research and is usually only referred to *in passim*. International tribunals have adopted the same prophylactic approach. In the few cases where *lex specialis* and *lex posterior* are mentioned in the same context, the tribunals have opted for by-passing the issue, by finding that the rule selected was both *lex specialis* and *lex posterior*.⁷⁸⁰

In such a *terra incognita* it comes as no surprise that all possible solutions have been put forward and supported in academic writings. There are those who argue that the special rule should prevail over the later rule in all instances. This is based on the adages *generalia specialibus non derogant* and *lex posterior generalis non derogat priori speciali*. The first author to argue in favour of the supremacy of the *lex specialis* principle was Grotius who held that:

When there is any accidental collision between one part of a written document and another, Cicero, in the second book of his treatise ON INVENTION, has given rules for deciding which of them ought to have the preference. Though his arrangement is not very accurate, yet it is by no means to be neglected. To supply therefore this defect of accuracy, the rules may be *digested in the following order*. . . . Among those treaties, which, in the above named respects, are equal, the preference is given to such as are more particular, and approach nearer to the point in question. For where particulars are stated, the case is clearer, and requires fewer exceptions than general rules do. . . . *Lastly* it is to be observed that a subsequent law or treaty always repeals a former. (emphasis added)⁷⁸¹

⁷⁸⁰ *Mavrommatis Palestine Concessions* case, at 31; *Polish Postal Service in Danzig*, Advisory Opinion of 16 May 1925, *PCIJ Series B* No.11, 5; *Jurisdiction of Danube Commission* Advisory Opinion; *Affaire des Chemins de Fer Zeltweg-Wolfsberg et Unterdrauburg-Woellan* (Austria v. Yugoslavia), Award of 6 August 1934, *RIAA* 3 (1949): 1795, at 1803; see also claims made by Libya in the *Lockerbie* case, Oral Statement of Libya, public sitting held on 17 October 1997, (CR97/20), accessible at: <http://www.icj-cij.org/docket/files/89/5287.pdf> (last accessed on 25 January 2010); and Japan in the *Southern Bluefin Tuna* cases, para. 38(c).

⁷⁸¹ Grotius, *supra* note 36 Book II, Chapter XVI, Section XXIX.

Grotius placed in a hierarchical order first the *lex specialis* principle and then the *lex posterior*. Several authors share this position with Grotius,⁷⁸² which seems to have been reaffirmed in international case-law.⁷⁸³ However, such an absolute priority of the *lex specialis* principle raises some serious concerns. This would seem to create a hierarchy that is inconsistent both with the VCLT and its *travaux préparatoires*, an inconsistency further reinforced by the fact that out of the two principles it was *lex posterior* that was *explicitly* mentioned in Article 30 of the VCLT.⁷⁸⁴

Unlike Grotius, Vattel adopted a different order of principles of conflict resolution in which *lex posterior* donned the fourth place, whereas *lex specialis* was just below it as rule number five.⁷⁸⁵ A similar approach seems to have been implicitly held by the *Special Rapporteur* on the Law of the Non-Navigational Uses of International Watercourses,⁷⁸⁶ although the final outcome seems to indicate that the majority felt that such a proposed hierarchy was not valid.⁷⁸⁷ A more moderate approach has been suggested by Pauwelyn, who argues that the *lex posterior* principle “is and should remain the rule of first resort”, but in those hard cases where Article 30 does not apply⁷⁸⁸ or to which it cannot offer a solution, *lex specialis* would then be activated.⁷⁸⁹ The idea behind this construction is that due to the restrictive interpretation of the notions of ‘same subject - matter’ and ‘successive treaties’ there would be little room for both principles to apply concurrently. However, if such a case should arise, Pauwelyn argues that “in the event that Art. 30 ... does apply, the fact

⁷⁸² Kontou, *supra* note 562, at 143-4; Aufricht, *supra* note 531, at 698; W. Malgaud, ‘Les Antinomies en Droit’, in *Les Antinomies en Droit*, Chaïm Perelman, (ed.) (Bruxelles: Bruylant, 1965), 7, at 12-3; Wolfrum and Matz, *supra* note 540, at 445-80; Waldock, *Vienna Conference II*, *supra* note 557, at 253; Schilling, *supra* note 747, at 455-8; Antonio Cassese, *International Law in a Divided World* (Oxford: Clarendon Press, 1986), at 180; Maarten Bos, ‘The Hierarchy among the Recognized Manifestations (‘Sources’) of International Law’, in *Estudios de Derecho Internacional: Homenaje al Professor Miaja de la Muela* (Madrid: Editorial Tecnos, 1979), 363, at 365-6; Comments by Roberto Ago, (A/CN.4/SR.866), in *YILC* (1966), Vol. I, Part II, at 167, para. 50.

⁷⁸³ *INA Corporation v. Iran* case, at 379; *Phillips Petroleum Co. Iran v. Iran*, Award of 29 June 1989, Case No. 39, *Iran-USCTR* 21 (1989-I): 79, para. 107.

⁷⁸⁴ However, some authors suggest that *lex specialis* is *implicitly* incorporated in Article 30, Roucouas, *supra* note 531, at 111-2; or Article 31 (the present author), or Article 32, Aust, *supra* note 189, at 200-1.

⁷⁸⁵ Vattel, *supra* note 37, Book II, Chapter XVII, paras. 315-6.

⁷⁸⁶ Robert Rosenstock, *First Report on the Law of the Non-Navigational Uses of International Watercourses*, (A/CN.4/451), in *YILC* (1993), Vol. II Part I: 179, at 182.

⁷⁸⁷ Comments of the Chinese Delegation, (A/C.6/51/SR.13), at 7, para. 8.

⁷⁸⁸ E.g. in the case of ‘continuing’ treaties.

⁷⁸⁹ Pauwelyn, *supra* note 51, at 407-8; similarly see P. Eeckhout, ‘Review: Conflict of Norms in Public International Law: How WTO Relates to other Rules of International Law’, *Journal of International Economic Law* 8 (2005): 583-9.

that the earlier norm is *lex specialis* should not prevent the later *lex generalis* from prevailing”.⁷⁹⁰

Finally, there is the middle ground of not accepting any sort of hierarchy as existing between these two principles of conflict resolution. The question of preferring one principle over another will be judged on a case by case basis,⁷⁹¹ or as Jenks described the situation “[neither of these principles] can be regarded of absolute validity. There are a number of principles which must be weighed and reconciled in the light of the circumstance of the particular case”.⁷⁹² This solution seems to be the one most in line with the nature of the principles of conflict resolution.⁷⁹³ As the previous analysis illustrated in the problematic areas of each principle, no clear-cut solutions could be given. Each case would have to be decided on its own merits; the guiding principles always being the search for the solution that best reflects *the intention of the parties*. It would seem extremely odd then if in this case an all encompassing singular solution was the right path. If an absence of hierarchy is accepted, then these principles would function in a complementary fashion and in the remote case of their conflict this would be decided based on the specific details of each case. Under this light, it would be easy also to comprehend the case-law which sometimes has opted in favour of *the lex specialis* and others in favour of the *lex posterior*.

⁷⁹⁰ Pauwelyn, *supra* note 51, at 409 (emphasis added); citing in support Quoc Dinh, *supra* note 531, at 270, para. 273.

⁷⁹¹ If at all, *see* for instance the *Gorham case* where the US – Mexican General Claims Commission *equally rejected* to consider both of the principles; *Sarah Ann Gorham v. United Mexican States* (US v. Mexico), Award of 24 October 1930, *RIAA* 4 (1951): 640, at 643.

⁷⁹² Jenks, *supra* note 519, at 407.

⁷⁹³ And has been adopted by a number of authors: Salmon, *supra* note 542, at 312; Vranes, *supra* note 527, at 51; Lindroos, *supra* note 526, at 41; ILC Study Group, *supra* note 16, para. 233.

XI. Principles of Conflict Resolution within the Interpretative Process of Article 31(3)(c)

In the first Section of this Chapter the question that was examined was whether the notion of conflict could be applied *mutatis mutandis* within the confines of the interpretative process and in particular within Article 31(3)(c). Irrespective of whether a strict definition of conflict, as suggested by Jenks, or a wider one, as advocated for instance by the ILC Study Group, Pauwelyn and Vranes, was to be adopted the conclusion remained the same. Conflict could arise within the process of interpretation, not as conflict of norms *eo nomine* but as conflict of norms *on an interpretative level*. The reason being that even in the case of a strict definition of conflict, the ruling revolves around the interpretation of a norm.⁷⁹⁴ The ruling on the interpretation of such a norm should not be understood as being of the same type. Even if a norm A says “State B *may* do the following action”, the ruling on the interpretation of such a norm should be understood as: “Norm A *must* be taken as meaning the following”. Consequently, there is a conflict.

Furthermore in every case where the issue of interpretation is raised, two (or more) *conflicting interpretations* need to be at the apex of the dispute. If they were not conflicting then there would be no dispute. It is no coincidence that the term *conflicting* has been extensively used to describe these interpretations.⁷⁹⁵ But whereas Articles 31 and 32 *in toto* have created a system through which one can select an interpretation through a variety of tools, Article 31(3)(c) offers one more possibility, when the two conflicting interpretations are based on the relevancy of two different instruments or sets of instruments. This is not to say that the principles of conflict resolution do not have a place within the remaining structure of Articles 31 and 32. They still have, but not as principles of *conflict resolution* but as interpretative criteria.⁷⁹⁶ Article 31(3)(c), however, allows for the application of the principles of conflict resolution *as such*, *i.e.* as principles of *conflict resolution*.⁷⁹⁷ The reason being

⁷⁹⁴ be it an obligation, a prohibition, an exception or a permission.

⁷⁹⁵ See *supra* note 549.

⁷⁹⁶ See for instance Aust, who categorizes them as supplementary means. Aust, *supra* note 189 at 249.

⁷⁹⁷ At this point it needs to be clarified that this construction may apply only in the case where two different sets of norms point towards two different and contradicting interpretations. If there is only one set, as has been the case up till now in international jurisprudence, then there is no issue of conflict since we have one set of norms the relevancy of which is to be determined, *via* the use of ‘the proximity criterion’ described in Chapter I. Consequently, the principles of conflict resolution as such, do not apply and the first leg of the juridical process described *infra* (see following pages and

that within this provision, we may be dealing apart from the interpreted provision, with other sets of norms as well. These norms support *conflicting interpretations* and thus by proxy, are conflicting themselves. This is the route of entry of principles of conflict resolution into Article 31(3)(c) and that is why our analysis focused on the principles of conflict resolution and not their “interpretative criteria” counterparts.

The next question was whether the principles of conflict resolution are ‘relevant rules’ within the meaning of Article 31(3)(c). In Chapter 1, the analysis of the *travaux préparatoires* proved beyond a doubt that, regardless of any ‘party-oriented’ uncertainties with respect to the inclusion of conventional rules,⁷⁹⁸ general principles and custom were never in doubt. In the first Section of this Chapter the nature of *lex posterior* and *lex specialis* was put under the microscope. *Jus cogens* norms and conflict clauses were left out because the former’s nature has never been in question while the latter, as long as the treaty in which it is incorporated falls within Article 31(3)(c), it will also be taken into consideration. The perusal of international jurisprudence and the writings of acclaimed publicists, showed that despite the diversity of characterizations attributed to them, they have been consistently considered as either being general principles or customary norms. By that token they fall within Article 31(3)(c).

Having established that the principles of conflict resolution *can* be used in the relevancy-identification process of Article 31(3)(c) we need to address why they *have to* be used. The ‘proximity criterion’, albeit a very useful tool in cases where there are two norms A and B, which support conflicting interpretations of norm C, is, in and of itself, an incomplete one. The ‘proximity criterion’ focuses on the relationship between i) norms A and C and ii) norms B and C. The common point of reference being norm C, which is logical since it is the norm being interpreted. Nevertheless, the insertion of the principles of conflict resolution allows us to change our vantage point and get a more complete picture of the interrelationships between the various norms.

Diagrams) is by-passed. However, the author feels that with the proliferation of treaties and international tribunals, it is only a matter of time for this situation to arise.

⁷⁹⁸ *I.e.* whether both parties to the dispute had to be parties to the treaty invoked, or if just one sufficed.

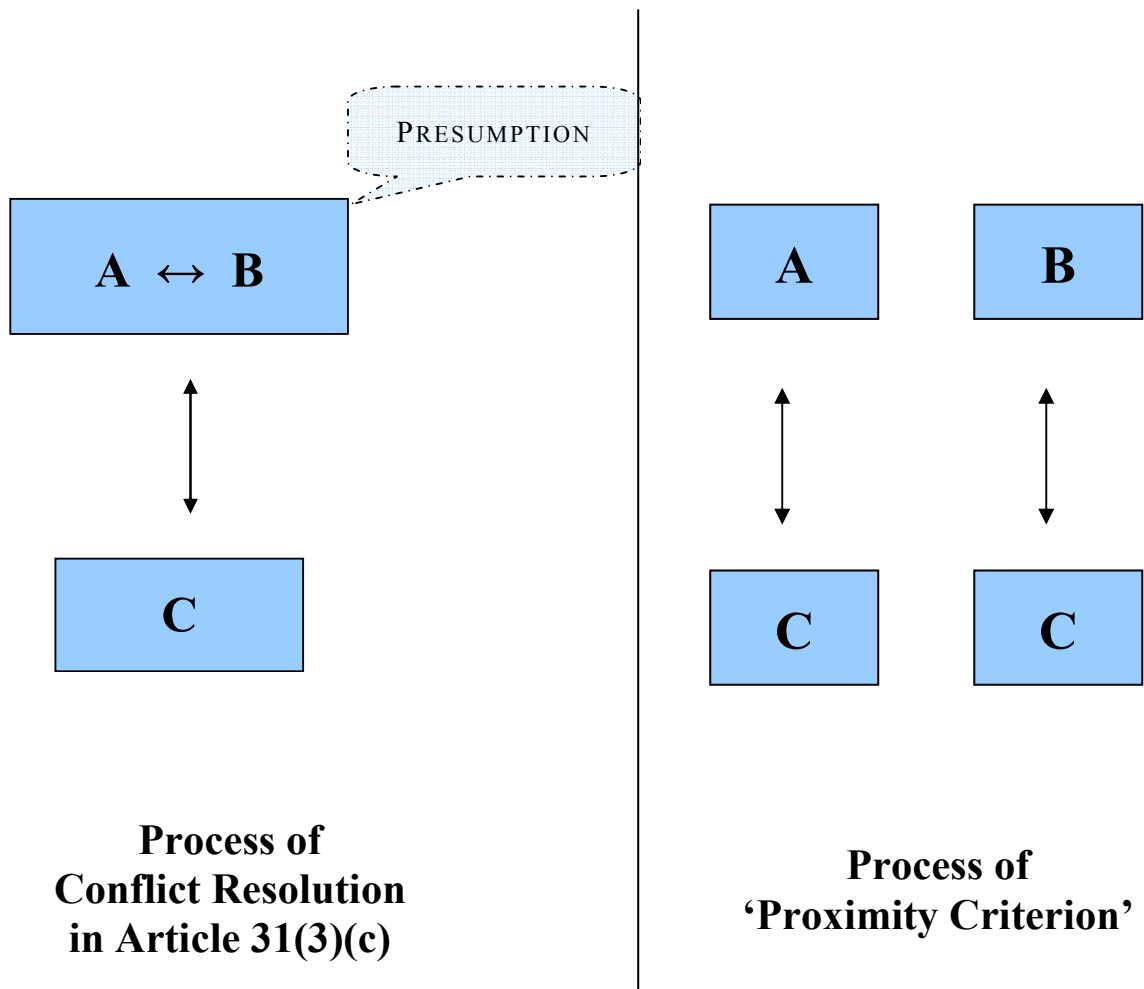


Diagram 4: Different Approach to Norm Interrelationship Examination

A final point that needs to be made is that apart from the aforementioned reasons there is one more that argues in favour of the inclusion of the principles of conflict resolution within the interpretative process of Article 31(3)(c); their similarities with the various manifestations of the 'proximity criterion'. In Chapter 1, the conclusion was that the variety of criteria used by the international courts and tribunals in determining 'relevancy' under Article 31(3)(c), were not self-standing, isolated criteria, but different manifestations of a singular criterion, the 'proximity criterion'. Similarly, Schwarzenberger has argued that the principles of conflict resolution, like *lex posterior* and *lex specialis*,⁷⁹⁹ derive their justification (if any) from assisting in the application of the *jus aequum* rule.⁸⁰⁰ The *jus aequum* rule is the common denominator in all cases of conflict resolution and the apposite maxim used

⁷⁹⁹ Although neither rules or principles, according to him.

⁸⁰⁰ Schwarzenberger, *supra* note 534, at 473.

in each case to resolve the conflict is just an *ad hoc* tool/manifestation that assists in the application of the former. Such an approach has a striking resemblance with our ‘proximity criterion’, and if applied to all principles of conflict resolution would result to the following:

DIAGRAM 5

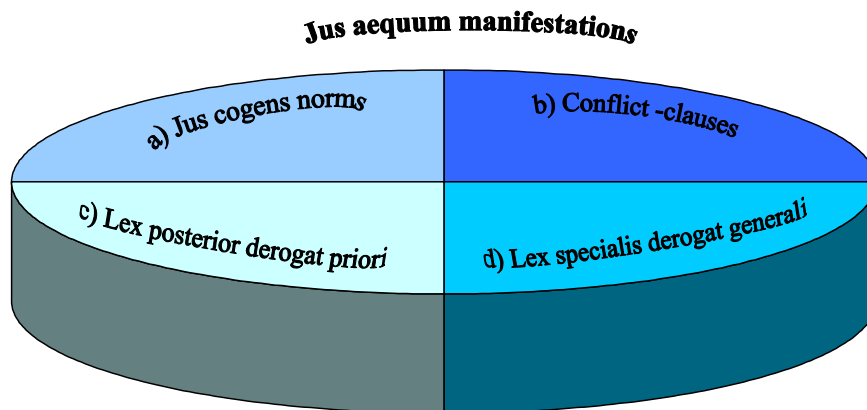


Diagram 5: Principles of Conflict Resolution as Different Manifestations of the *Jus Aequum* Rule

Furthermore, each manifestation of the *jus aequum* rule is driven by considerations that belong to one or more of the schools of thought on interpretation. All partake of the ‘intentions approach’ but are also imbued with considerations of another school as well, in this sense they can be considered as *interstitial norms*. So for instance, *lex posterior* is driven by the ‘intentions approach’ and by ‘temporal considerations’; *lex specialis*, by the ‘intentions approach’ and ‘object and purpose’; conflict clauses by the ‘intentions approach’ and the ‘textual approach’; while finally, *jus cogens* norms by the ‘intentions approach’ and the ‘object an purpose’ not just of the norms themselves but of the international community as a whole.

DIAGRAM 5

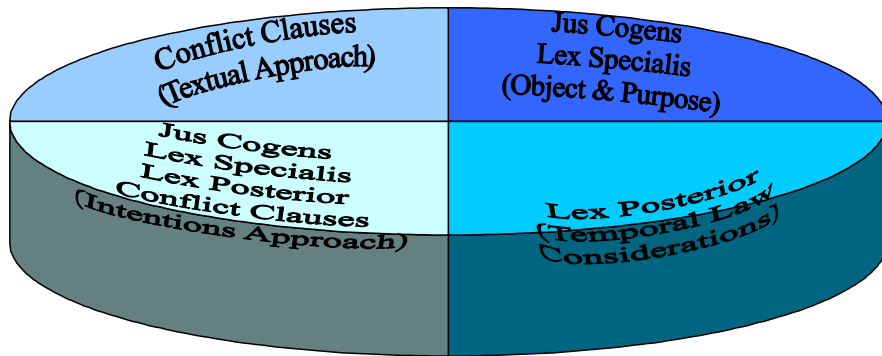


Diagram 6: Schematic Representation of the *Jus Aequum* Manifestations Cross-Sectioned with the Schools of Thought on Interpretation

What needs to be addressed now is how this affects the previous construction of ‘the proximity criterion’ of Chapter 1. Should we consider then that the principles override ‘the proximity criterion’? The answer is an emphatic ‘no’. The analysis of the principles revealed that each principle has inherent limitations *e.g.* time – label, AB/AC conflicts, conflicting conflict clauses, supervening custom, general posterior rule vs. special prior rule, and right of election to name but a few. The consequence being that in many cases of norm conflict the end result is, unfortunately, no resolution at all, just the recognition of the existence of a *lacuna*.⁸⁰¹

However, here we are no longer in the conflict resolution stage but in the interpretative stage and interpretation, as enshrined in Article 31-33, is designed to always lead to a result.⁸⁰² This is exactly the point where both the process of Article 31(3)(c) and the principles of conflict resolution benefit from the inclusion of the latter in that process. Article 31(3)(c) benefits by the application of the principles of

⁸⁰¹ Pauwelyn, *supra* note 51, at 419; citing Salmon, *supra* note 542, at 449 and Ulrich Fastenrath, *Lücken im Völkerrecht: zu Rechtscharakter, Quellen, Systemzusammenhang, Methodenlehre und Funktionen des Völkerrechts* (Berlin: Duncker & Humblot, 1991), at 227.

⁸⁰² Fitzmaurice and Merkouris, *supra* note 504.

conflict resolution in the sense that the results arrived at through their application can offer valuable insight for determining ‘relevancy’, whereas the principles themselves benefit since even in those ‘hard cases’ where the eventuality of a *lacuna* is looming over the whole process, the judge can always resort to ‘the proximity criterion’ to reach a decision on the ‘relevancy’ or not of a specific norm or set of norms.

These considerations actually outline the whole process of identifying ‘relevancy’. At a first stage, the judge will apply the principles of conflict resolution. The conclusions arrived at will not terminate the process, but will assist in the second stage in which the judge will apply the ‘proximity criterion’. Essentially, the principles of conflict resolution and ‘the proximity criterion’ apply in tandem.

It might seem bizarre, or even downright wrong, that the starting point of this process is the principles of conflict resolution, especially if one considers that in international law there is a *presumption against conflict*.⁸⁰³ Even more so, since interpretation precedes conflict resolution from a temporal point of view. The adjudicating body first attempts to harmonize the two diverging instruments through interpretation. Only when this is not possible does the issue of conflict resolution come up⁸⁰⁴.

However, what we have here is a *reversal* of the process. The reason for this is that the interpretative process, in the scenario mentioned *supra*, is actually predicated upon the fact that there is a conflict; a conflict between two sets of norms that lead to two conflicting interpretations. Additionally, the presumption against conflict is aimed at ensuring the unity of law. However, the fear of fragmentation does not apply in the present case, because the presumption of conflict not only does not promote the molecularization of the international system, it actually enhances its unity. Whereas in ‘normal’ conflict resolution, there will be instances where the judge will be faced with a *lacuna* and might end up giving a *non liquet* decision,⁸⁰⁵ in Article 31(3)(c) there is no such contingency. Even if the application of the principles of conflict resolution

⁸⁰³ *Right of Passage (Preliminary Objections)*, at 142; *Canada – Certain Measures Concerning Periodicals*, Appellate Body Report adopted on 30 July 1997, WTO, WT/DS31/AB/R, at 19 (*Canada-Periodicals*); *EC – Bananas* paras. 219-22; *Indonesia – Autos*, para 14.28 and FN 649; Lauterpacht, *Second Report*, *supra* note 532, at 133 *et seq.*; Pauwelyn, *supra* note 51, at 240-1; Jenks, *supra* note 519, at 427.

⁸⁰⁴ ILC Study Group, *supra* note 16 paras. 37-43; Sadat-Akhavi, *supra* note 531, at 26-7, Pauwelyn, *supra* note 51, at 240 *et seq.*

⁸⁰⁵ *See supra*.

fails to offer a result, the judge will always be able to resort to ‘the proximity criterion’.

The process can be represented schematically thus:

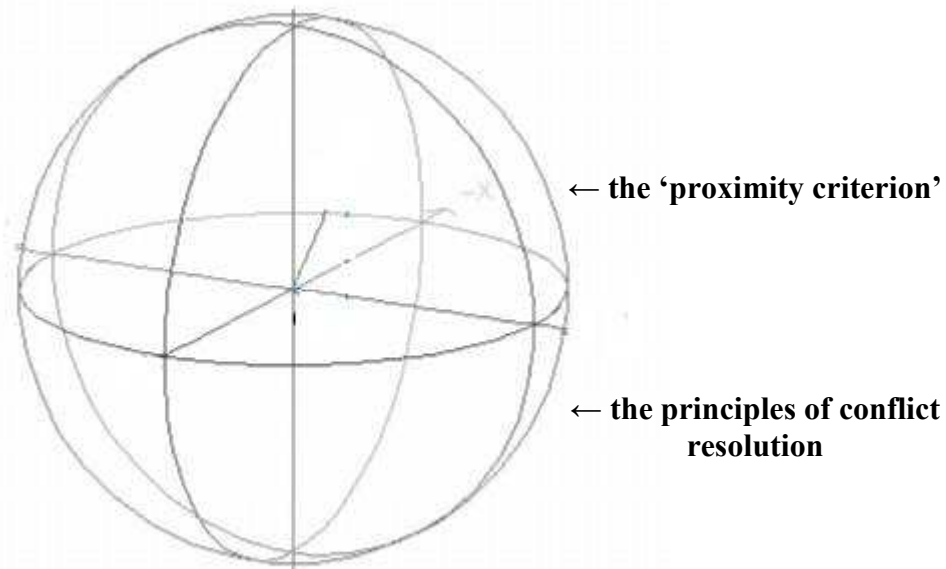


Diagram 7: The Process of Article 31(3)(c)

As was mentioned *supra*, the process of Article 31(3)(c) is a two stage process (the two hemispheres of the above sphere). This construction offers a complete evaluation of all the possible interrelationships between all the relevant norms. None of the two stages is complete without the other. But what is then the usefulness of any result that might be produced by the application of the first stage of the interpretative process of Article 31(3)(c)? It does not offer a final solution to the issue of ‘relevancy’, that is the job of the second stage, yet any conclusion on the interrelationship between norms A and B cannot be easily ignored. From this description it is easy to identify that the outcome of the first stage is the creation of a *legal presumption*. This presumption is not set in stone. On the contrary, it is a rebuttable one. The reason being that the principles focus on the intention of the parties with respect to norms A and B. This may offer some insight as to what the parties meant the relationship of these norms to be, or which norm best reflects the

current state of consent of the States, yet the decisive element here is the intent of the States with respect to norm C. Consequently, the presumption arrived at *via* the principles of conflict resolution can only be a rebuttable one and this is the point where the ‘proximity criterion’ comes into play. After the application of the conflict resolution principles a rebuttable presumption may be created.⁸⁰⁶ It is then up to the ‘proximity criterion’ to transform this presumption into a certainty or reverse it. In the case of reversal however, the burden of proof would be on the party invoking it to prove that actually the norm it is advocating for is the more ‘relevant’, or the only relevant in the process of Article 31(3)(c).

Recapitulating, in a scenario where two conflicting interpretations (c_1 and c_2) of a norm C have been proposed based on two different norms (or sets of norms) A and B, the relevant tribunal will decide which the most apposite/‘relevant’ one is by means of the following process:

i) Application of principles of conflict resolution. This examines the relationship between norms A and B. This examination may in turn lead to:

- a) a *temporary lacuna*,⁸⁰⁷ in those cases where the conflict resolution is unable to offer a solution, or
- b) a result of one norm superseding the other, which would create a *rebuttable presumption*.

ii) In both cases, the court would then have to apply the ‘proximity criterion’, with a view to reaching a definite conclusion as to which norm (if any) is more relevant for the purposes of Article 31(3)(c) in interpreting norm C. Based on the previous contingencies this would take the form of:

- a) filling the *temporary lacuna* by establishing which norm is more relevant.
- b) reaffirming the arrived at presumption, or
- c) reversing the rebuttable presumption.

⁸⁰⁶ The word ‘may’ is used because as was mentioned *supra* there are scenarios where even the principles of the conflict resolution may come at an impasse.

⁸⁰⁷ This *lacuna* is characterized as a temporary one because unlike in the normative conflict *per se*, in this case since we are still in the interpretative process, the judge can resort to the second stage, that of the application of the ‘proximity criterion’, which will yield a result in every case.

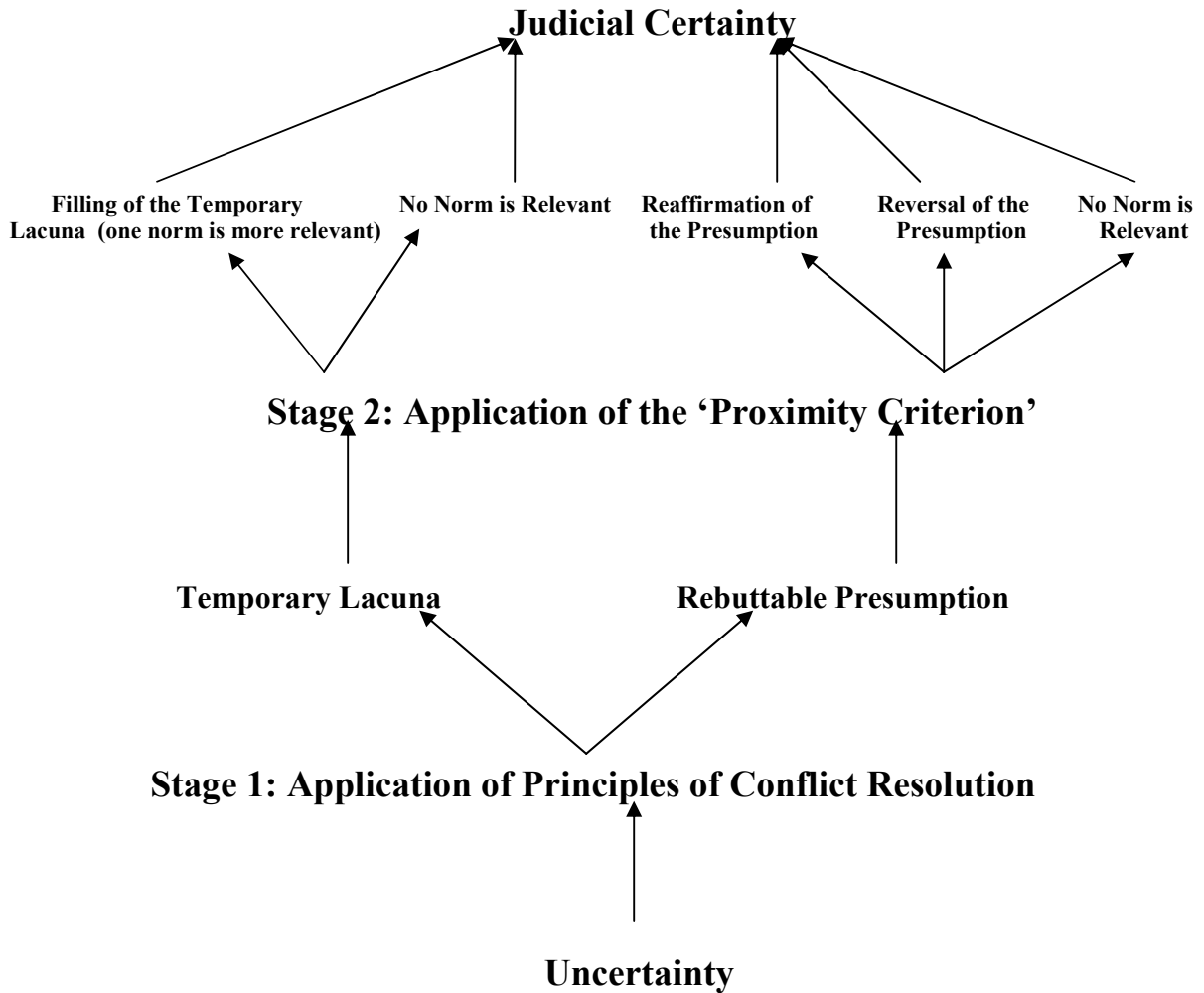


Diagram 8: Diagram of the various Permutations during the Application of Article 31(3)(c)

Transferring this to Diagram 7, the process of Article 31(3)(c) takes the following form:

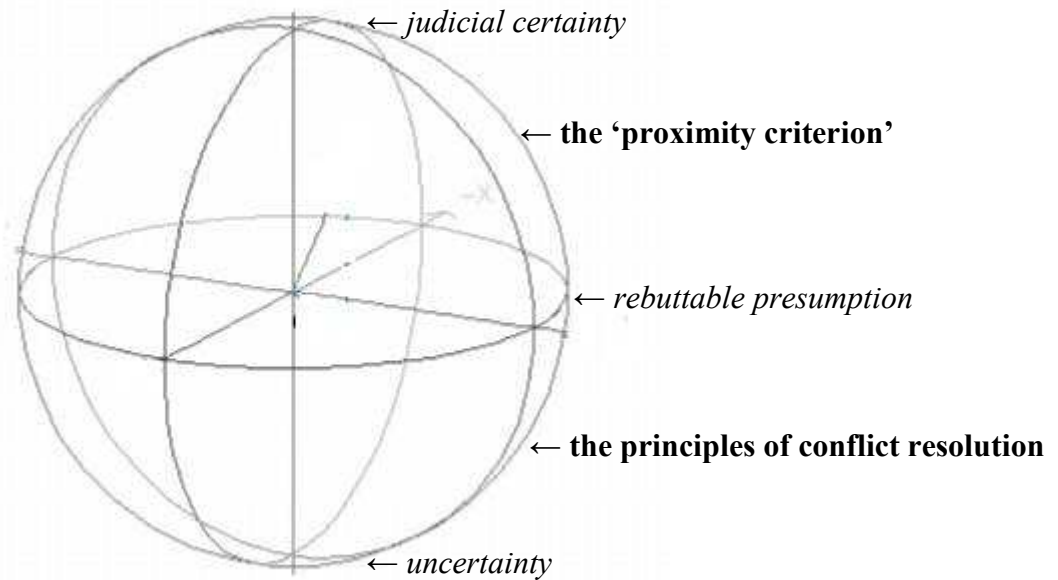


Diagram 9: Process of Article 31(3)(c) from Start to Finish (from Uncertainty to Judicial Certainty)

So far, no case has arisen in front of an international court or tribunal that would require the application of this construction. The reasons for this are simple: i) the proliferation of international courts and tribunals is a recent phenomenon; ii) only recently, as was shown in Chapter 1, have international courts and tribunals started referring explicitly to Article 31(3)(c); iii) there is still uncertainty as to how Article 31(3)(c) is to be properly applied; and iv) several conditions need to be simultaneously satisfied in one particular case, *i.e.* an issue of interpretation of a treaty needs to be at the heart of the dispute; two different instruments or norms need to be invoked by the two disputing parties; these must be invoked under Article 31(3)(c) and they must lead to conflicting interpretations of the treaty being interpreted.

However, due to the rate of increase of treaties being signed and of areas being regulated by international law such a scenario is becoming increasingly probable. Furthermore, it is becoming more and more common that treaties regulating one field of international law have ‘spill-over’ effects. A classical example of this is environmental law treaties and/or law of the sea treaties being invoked in trade disputes (*see* for instance, the *EC-Biotech* and the *US-Shrimp* cases analyzed *supra* in

Chapter 1). A hypothetical situation that could arise is the following: States A and B take a dispute on the interpretation of a trade treaty C in front of an international tribunal. In their pleadings, State A invokes under Article 31(3)(c) an environmental treaty A₁, which gives the disputed provision of the trade treaty C a certain interpretation, whereas State B invokes a different environmental treaty B₁, which gives the disputed provision the completely opposite interpretation.

The theoretical construction analyzed in this Chapter offers the judges a clear-cut step-by-step process, through which they can examine all the relationships between the treaties in question, *i.e.* treaties A₁, B₁ and C and come to an informed decision through a legally correct application of Article 31(3)(c). In more detail: At the first stage, the judges will apply the principles of conflict resolution (*jus cogens*, conflict clauses, *lex posterior* and *lex specialis*) to determine whether treaties A₁ and B₁ are in some sort of hierarchical relationship with each other. If the application of the principles of conflict resolution leads to a result, giving precedence to one of these treaties, let us say for example treaty A₁, this will create a rebuttable presumption regarding the ‘relevancy’ value of treaty A₁ with respect to treaty C. If, on the other hand, the principles of conflict resolution do not lead to a result, no such presumption will exist. In both cases, the judges will then move on to Stage 2 of the process, *i.e.* the application of the ‘proximity criterion’, as has been analyzed *supra* in Chapter 1.

In this Stage, both treaties A₁ and B₁ are examined, individually, with respect to treaty C, in order to verify whether they are ‘relevant’ as required by Article 31(3)(c). There can be the possible outcomes of this second Stage: The judges by applying the ‘proximity criterion’ may reaffirm the presumption arrived at after Stage 1, *i.e.* that treaty A₁ is the relevant one for the purposes of Article 31(3)(c). Another option could be the reversal of the presumption of Stage 1. This would happen if the judges, by examining the four different manifestations of the proximity criterion, and by asking the four main questions by which they identify ‘relevancy’ and ‘proximity’ (the How, What, Who, When questions of Diagrams 1(b) and 2(a)), come to the conclusion that treaty B₁ is much more relevant under Article 31(3)(c). Finally, a third outcome could be that the ‘proximity criterion’ demonstrates that neither treaty A₁ nor treaty B₁ are relevant and consequently Article 31(3)(c) can not be activated. In such a case the judges would have to resolve the interpretative issue through other provisions of Articles 31 and 32 of the VCLT.

XII. Conclusion

Irrespective of whether a broad or narrow definition of conflict is adopted, principles of conflict resolution fall within the notion of ‘rules’ of Article 31(3)(c). In this sense, they are ‘relevant rules’ that can be used to determine the ‘relevancy’ of other ‘rules’. The use of principles of conflict resolution in the process of Article 31(3)(c) is reinforced by the fact that unlike the limitations in the course of classical normative conflict resolution, within Article 31(3)(c) such limitations are no obstacle in the reaching of a judicial conviction. Whereas the application of principles of conflict resolution, due to their inherent limitations, may lead to a non result, *i.e.* to the identification of a *lacuna*, which the judge in order to avoid a *non liquet* decision would have to find a way to fill, in the interpretative process we do not face the same dilemma. After the application of the principles of conflict resolution we move on to the proximity criterion, which will give a definite, single result⁸⁰⁸ as to which interpretation is more relevant and closer to what the drafters intended.

Consequently this two staged – approach, starting from principles of conflict resolution and ending with the proximity criterion, takes into consideration all forms of relationship between the norms examined (A-C, A-B and B-C type relationships) offers the judge a clear and accurate image of the situation and will always lead to an interpretation of the relevant provision, thus ensuring greater harmonization and unity within the system of international law.

⁸⁰⁸ On how Articles 31-33 and their customary counterparts are designed to always lead to a singular result, *see* Fitzmaurice and Merkouris, *supra* note 504.

Chapter IV: Interpretation of International Customary Law by Reference to the Customary Law Equivalent of Article 31(3)(c)

I. Introduction

In the three previous Chapters the content and the process of Article 31(3)(c) was scrutinised. In Chapters I and II both written (Chapter I) and unwritten (Chapter II) elements of Article 31(3)(c) were examined to shed light as to its correct meaning. This examination led, amongst others, to the discovery of the ‘proximity criterion’ as the quintessential tool for the identification of ‘relevancy’ for the purposes of Article 31(3)(c).⁸⁰⁹ In Chapter III the focal point shifted from the provision itself to the system of international law and what was researched was how principles regulating the relationship between norms (and their possible conflicts) affected, if at all, the principle of systemic integration. The end result was a validation of the truly *systemic nature* of Article 31(3)(c), since the principles of conflict resolution were shown to be included⁸¹⁰ in the overall process envisaged by Article 31(3)(c). However, the common element that all these previous Chapters share is that they focus on interpretation of treaties, within the paradigm of *systemic interpretation*.

However, the scope of this thesis would not be complete without an examination of whether the principle of systemic integration is also applicable to customary international law. It is this *lacuna* that this final Chapter attempts to address. Is interpretation a process restricted only to written sources, and if not what are the methods of interpretation of customary international law and what role does Article 31(3)(c)⁸¹¹ play in them? In this way, the thesis will conclude with perhaps the most *systemic-related* analysis of all; an analysis of the very content and function of one of the mercurial sources of international law and what, if at all, influence on it does the principle of systemic integration have.

⁸⁰⁹ See Chapter I.

⁸¹⁰ In some situations, *i.e.* when various treaties are submitted, on the basis of Article 31(3)(c), in support of conflicting interpretations. In more detail, *see* Chapter III.

⁸¹¹ The author is aware that Article 31(3)(c) of the VCLT, as such, would not apply in cases of interpretation of customary law, since the VCLT applies only to the interpretation of treaties as its own title clearly states. However, for reasons of fluidity of the text, and bearing in mind that Article 31(3)(c) of the VCLT and its customary equivalent have the same content (*see supra* ‘Prolegomena’), although perhaps not the same field of application (as the author will prove in this Chapter), the term Article 31(3)(c) will still be used in this Chapter, denoting, however, not the VCLT Article *per se* but its customary equivalent.

Since the topic of interpretation of international customary law is not sufficiently researched the question is how to approach it. In this Chapter an investigation will be provided of the views expressed in doctrine and in the relevant jurisprudence regarding the interpretation of international customary law.

II. Is an Interpretation of Customary International Law Possible?

A. Identity, Identification and Pitfalls of International Customary Law

Before embarking on an analysis of whether customary international law can be interpreted we should consider the main characteristics of custom as a source of law. The essence of custom, its main problems⁸¹² and its origins were the subject-matter of

⁸¹² ILA, *Final Report of the Committee – Statement of Principles Applicable to the Formation of General Customary International Law* (London: ILA, 2000), accessible at <http://www.ila-hq.org/en/committees/index.cfm/cid/30> (last accessed on 25 January 2010); Rudolf Bernhardt, 'Customary International Law', in *Encyclopedia of Public International Law: Volume I*, Rudolf Bernhardt and Rudolf L. Bindschedler (eds.) (Amsterdam: North-Holland, 1992), 898; Michael Akehurst, 'Custom as a Source of International Law', *BYIL* 47 (1977): 1-53; Eduardo Jineez de Arechaga, 'La Costumbre como Fuente del Derecho Intenacional', in *Estudios de Derecho Internacional: Homenaje al Professor Miaja de la Muela*, Adolfo Miaja de la Muela (ed.) (Madrid: Editorial Tecnos, 1979), 375; Maarten Bos, 'The Identification of Custom in International Law', *GYIL* 25 (1982): 9; Julio Barberis, 'Réflexios sur la Coutume Internationale', *Annuaire Français de Droit International* 36 (1990): 9; Peter Haggemacher, 'La Doctrine des Deux Éléments du Droit Coutumier dans la Pratique de la Cour Internationale', *RGDIP* 90 (1986): 5; Alain Pellet, 'Article 38', in *The Statute of the International Court of Justice: A Commentary*, Andreas Zimmermann, Christian Tomuschat and Karin Oellers-Frahm (eds.) (Oxford: OUP, 2006), at 748-64; Bin Cheng, 'Custom: The Future of State Practice in a divided World', in *Essays in Legal Philosophy, Doctrine and Theory*, Ronald McDonald and Douglas Johnston (eds.), (The Hague: Martinus Nijhoff, 1983), 513-54; Hugh Thirlway, *International Customary Law and Codification: An Examination of the Continuing Role of Custom in the Present Period of Codification of International Law* (Leiden: A.W. Sijthoff, 1972), at 46-60; Photini Pazartzis, 'Le Rôle de la Pratique dans le Droit Coutumier', in *L' Influence des Sources sur l' Unité et la Fragmentation du Droit International* (Bruxelles: Bruylant, 2006), 81-102; Oscar Schachter, 'Entangled Treaty and Custom', in *International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne*, Yoram Dinstein and Mala Tabory (eds.) (London: Martinus Nijhoff, 1989), 717; Tiyanjana Maluwa, 'Custom, Authority and Law: Some Jurisprudential Perspectives on the Theory of Customary International Law', *African Journal of International and Comparative Law* 6 (1994): 387; Rudolf Bernhardt, 'Customary International Law: New and Old Problems', *Thesaurus Acroasium* 19 (1992): 203; Grigori Tunkin, 'Remarks on the Juridical nature of Customary Norms of International Law', *California Law Review* 49 (1961): 419-30; Bin Cheng, 'United Nations Resolutions on Outer Space: 'Instant' International Law Customary Law?', *Indian Journal of International Law* 5 (1965): 23-48; Gerald J. Postema, 'Custom in International Law: A Normative Practice Account', in *The Nature of Customary Law*, Amanda Perreau-Saussine and James B. Murphy (eds.) (Cambridge: CUP, 2007), 279; Michael Byers, *Custom, Power and the Power of Rules: International Rules and Customary International Law* (Cambridge: CUP, 1999), especially at 129-46; Gennady Danilenko, 'The Theory of International Customary Law', *GYIL* 31 (1988): 9-47; Arthur M. Weisburd, 'Customary International Law: The Problem of Treaties', *Vanderbilt Journal of Transnational Law* 21 (1988): 1-46; Serge Sur, *La Coutume Internationale* (Paris: Librairies Techniques, 1990); Charles de Visscher, 'La Codification du Droit International', *RCADI* 6 (1925/I): 325, at 349-66; Roger S. Clark, 'Treaty and Custom', in *International Law, the International Court of Justice and Nuclear Weapons*, Laurence Boisson de Chazournes and Philippe Sands (eds.) (Cambridge: CUP, 1999), 171; Koskenniemi, *supra* note 549, at 388 *et seq.*, especially 450 *et seq.*; Ian Brownlie, 'Some Problems in the Evaluation of the Practice of States as an Element of Custom', in *Studi di Diritto Internazionale in Onore di Gaetano Arangio-Ruiz Vol. I*, Gaetano Arangio-Ruiz (ed.) (Napoli: Editoriale Scientifica, 2003), 313; David P. Fidler, 'Challenging the Classical Concept of Custom: Perspectives on the Future of Customary International Law', *GYIL* 39 (1996): 198; Henri Torriente, *L' Influence des Conventions de Codification sur la Coutume en Droit International Public* (Fribourg: Éditions Universitaires Fribourg Suisse, 1989).

innumerable publications.⁸¹³ Perhaps, the main obstacle in comprehending custom lies in its inherent abstractness. Whereas conventional law, by definition can be found in written instruments, customary law does not partake in such identification. Custom, as many authors tend to mention, is vague.⁸¹⁴ Even the term used in connection with codification treaties, *i.e.* that they ‘crystallize customary international law’, seems to imply *per se* that customary law is by nature vague.⁸¹⁵

However, vagueness is not characteristic of customary international law alone. According to Hart all terms used in law have “a core of settled application and a fringe or penumbra of uncertainty”.⁸¹⁶ In this context saying that custom is vague does not *ipso facto* presuppose that conventional law is not. On the contrary, both customary and conventional law are characterized by a degree of vagueness and uncertainty. Consequently, the argument of vagueness cannot by itself substantiate a different approach to custom, at least for interpretative purposes, than the one adopted for conventional law.⁸¹⁷

However, it is not merely the element of vagueness that causes awkwardness when attempting to approach customary law; it is how one identifies custom, as well. Article 38 of the ICJ Statute describes custom as “evidence of a general practice accepted as law”.⁸¹⁸ This wording has been criticized by many authors as poor draftmanship. The problem is that it is not customary law that is the evidence of practice, it is the other way around; it is ‘general practice accepted as law’ that is an

⁸¹³ Grégoire Gianni, *La Coutume en Droit International* (Paris : Pedone, 1931), at 15 *et seq.* ; Jean Bodin Society for Comparative Institutional History, *La Coutume = Custom : Paris I-IV*, (Bruxelles : De Boeck Université, 1989/92)

⁸¹⁴ ILA, *supra* note 812, at 2-3; John Gilissen, ‘La Coutume : Essai de Synthèse Générale’, in *La Coutume = Custom : Fourth Part – The Contemporary World*, Jean Bodin Society for Comparative Institutional History (Bruxelles : De Boeck Université, 1989/92), 433, at 464 ; Theodor Bühler, ‘La Coutume en Droit International’, in *La Coutume = Custom : Fourth Part – The Contemporary World*, Jean Bodin Society for Comparative Institutional History (Bruxelles : De Boeck Université, 1989/92), 13, at 32 ; Charles de Visscher, *Les Effectivités du Droit International Public* (Paris : Pedone, 1967) ; at 73 ; Karol Wolfke, ‘Treaties and Custom: Aspects of Interrelation’, in *Essays on the Law of Treaties: A Collection of Essays in Honour of Bert Vierdag*, Jan Klabbers and René Lefeber (eds.) (The Hague: Martinus Nijhoff, 1998), 31, at 36; Frederick Schauer, ‘Pitfalls in the Interpretation of Customary Law’, in in *The Nature of Customary Law*, Amanda Perreau-Saussine and James B. Murphy (eds.) (Cambridge: CUP, 2007), 13, at 20;

⁸¹⁵ “crystallize ...3.make or become definite or clear”; Oxford Dictionaries, *supra* note 48.

⁸¹⁶ Schauer, *supra* note 814, at 20, referring to Herbert L.A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1994, 2nd edition), at 124-54.

⁸¹⁷ A point to which we shall return *infra*.

⁸¹⁸ Article 38(1)(b) of the ICJ Statute

evidence of the existence of customary international law.⁸¹⁹ This may have led the ICJ in the *North Sea Continental Shelf* case, to tweak the aforementioned definition a bit and state that the creation of customary international law postulates: “two constitutive elements: (1) a general practice of States and (2) the acceptance by States of the general practice as law”.⁸²⁰ Two elements, thus, evidence customary international law: i) a material one, *i.e.* practice and ii) a psychological one, *i.e.* *opinio juris*; and whereas ‘practice’ as a notion does not raise many issues,⁸²¹ *opinio juris*, on the other hand, has been at the epicentre of judicial and academic discourse on sources of international law for ages.⁸²²

⁸¹⁹ For a more detailed analysis of the critique regarding the poor draftmanship of Article 38 of the ICJ Statute see: Max Sørensen, *Les Sources du Droit International* (Copenhagen: Munksgaard, 1946), at 84; Rousseau, *supra* note 350, at 825; Schwarzenberger, *supra* note 534, at 39; Wolfke, *supra* note 814, at 6; Iain MacGibbon, ‘Customary Law and Acquiescence’, *BYIL* 33 (1957): 115, at 125; Olufemi Elias and Chin Leng Lim, *The Paradox of Consensualism in International Law* (The Hague: Kluwer Law International, 1998), at 5 and accompanying notes; generally on problems of Article 38 see Onuma Yasuaki, ‘Is the International Court of Justice an Emperor Without Clothes?’, *International Legal Theory* 8 (2002): 1; Krzysztof Skubiszewski, ‘Elements of Custom and the Hague Court’, *Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht* 31 (1971): 810, at 812.

⁸²⁰ *North Sea Continental Shelf* cases (Germany v. Denmark and the Netherlands), Judgment of 20 February 1969, *ICJ Rep.* 1969, 3, at 44 (hereinafter *North Sea Continental Shelf* cases).

⁸²¹ As to what constitutes state practice (see Mark E. Villiger, *Customary International Law and Treaties: A Study of their Interactions and Interrelations with Special Consideration of the 1969 Vienna Convention on the Law of Treaties* (Dordrecht: Martinus Nijhoff, 1985), at 4 *et seq.*; Villiger, *supra* note 574, at 16-28, paras. 16-33). Two prime examples are: if other treaties and/or international judicial decisions can be used as evidence of state practice in the process of identifying a customary norm. For other treaties see: Thirlway, *supra* note 475, at 102-5; Villiger, *supra* note 51 at 10; Karol Wolfke, *Custom in Present International Law* (London: Martinus Nijhoff, 1993), at 68-72; Skubiszewski, *supra* note 819, at 818-25; Steffen Hindelang, ‘Bilateral Investment Treaties, Custom and a Healthy Investment Climate : The Question of Whether BITs Influence Customary International Law Revisited’, *Journal of World Investment and Trade* 5 (2004): 789; Julio A. Barberis, *Les Éléments Constitutifs de la Coutume, en tant que Procédé Créateur de Droit, d’Après la Jurisprudence de la Cour Permanente de Justice Internationale et de la Cour Internationale de Justice* (Thésé, Institut Universitaire de Hautes Études Internationales, 1964), at 60-77; Richard Baxter, ‘Multilateral Treaties as Evidence of Customary International Law’, *BYIL* 41 (1965-1966): 275-300. Regarding international judicial decisions as evidence of State practice according to the Principles Applicable to the Formation of General Customary International Law that the ILA adopted in the 2000 London Conference

[a]lthough international courts and tribunals ultimately derive their authority from States, it is not appropriate to regard their decisions as a form of State practice

ILA, *supra* note 812, at 18-9; see, however, contrary opinion of Wolfke and qualified opinion of Villiger; *Ibid.*, at 19, note 42.

⁸²² *North Sea Continental Shelf* cases, Dissenting Opinion of Judge Tanaka, at 176; Dissenting Opinion of Judge Lachs, at 231; and Dissenting Opinion of Judge Sørensen, at 246-7; Maurice Mendelson, ‘The Subjective Element in Customary International Law’, *BYIL* 66 (1995): 177; Olufemi Elias, ‘The Nature of the Subjective Element in Customary International Law’, *ICLQ* 44 (1995): 501; Elias and Lim, *supra* note 819, at 3-21; Rodolfo Piza Escalante, ‘La ‘*opinio juris*’ como Fuente Autónoma del Derecho Internacional’, *Anuario Hispano-Luso Americano de Derecho Internacional* 8 (1987): 131; Raphael Walden, ‘The Subjective Element in the Formation of Customary International Law’, *Israel Law Review* 12 (1977): 344.

An indication of how difficult the notion of *opinio juris* is, can be found in the writing of Bin Cheng, who identifies no less than five different types of *opinio juris*,⁸²³ which in turn can combine with each other in order to describe any form of *opinio juris* that appears in domestic or international law and in any form of social organization.⁸²⁴ Another problem is this sort of circularity of *opinio juris* or what Byers calls the ‘chronological paradox’,⁸²⁵ *i.e.* that the states must believe that the rules their practice is creating already exist.

Debate exists also on the *gravitas* of each element relative to the other. The problems posed by the notion of *opinio juris* has led some authors to conclude that *opinio juris* is irrelevant⁸²⁶ or at least of limited importance as an autonomous element.⁸²⁷ There are also authors, however, that seem to consider *opinio juris* as the most important of the two elements, or at a minimum that a density of practice is not a *sine qua non* element.⁸²⁸ One of the most famous quotes in the context of this debate is one made by Haagenmancher who wrote that claiming that the two constitutive elements of custom are separate and identifiable is like Baron Munchausen’s claim that he could fly by lifting himself from his own wig!⁸²⁹ To make matters even worse, the tug of war between practice and *opinio juris* is not the only issue. Various other theoretical problems, such as the notion of regional custom and the position of new

⁸²³ The five different types of *opinio juris* are: i) *opinio individualis juris* ii) *opinio generalis juris* iii) *opinio imperialis juris* iv) *opinio juris consuetudinalis* and v) *opinio juris legalis*; see Bin Cheng, ‘*Opinio Juris: A Key Concept in International Law that is much Misunderstood*’, in *International Law in the Post-Cold War World: Essays in Memory of Li Haopei*, Sienho Yee and Wang Tieya (eds.) (London: Routledge, 2001), 56, at 60 *et seq.*

⁸²⁴ *Id.*

⁸²⁵ Byers, *supra* note 812, at 130-33.

⁸²⁶ Hans Kelsen, ‘Théorie du Droit International Coutumier’, *Révue Internationale de la Théorie du Droit* 13 (1939) : 253-74; Paul Guggenheim, ‘Les Deux Éléments de la Coutume en Droit International’, in *La Technique et les Principes du Droit Public : Études en l’Honneur de Georges Scelle : Vol. I*, Geroge Scelle, Suzanne Bastid (eds.) (Paris: Librairie Générale de Droit et de Jurisprudence, 1950), 275, at 280; Paul Guggenheim, ‘Les Principes de Droit International Public’, *RCADI* 80 (1952/I) : 5, at 70-2 ; it has to be noted, however, that both Kelsen and Guggenheim later abandoned this position ; see Hans Kelsen, *Principles of International Law* (New York: Holt, Rinehart and Winston, 1966, revised by Robert Tucker); Paul Guggenheim, *Traité de Droit International Public: Tome I* (Genève: Librairie de l’ Université, Georg, 1967)

⁸²⁷ Sørensen, *supra* note 819, at 88-111 ; Lazare Kopelmanas, ‘Custom as a Means of the Creation of International Law’ *BYIL* 18(1937) : 127, at 148; Charles de Visscher, *Theory and Reality in Public International Law* (Princeton: Princeton University Press, 1957), at 149, note 29;

⁸²⁸ *Fisheries Jurisdiction* (United Kingdom of Great Britain and Northern Ireland v. Iceland), Judgment of 25 July 1974, *ICJ Rep.* 1974, 3, Separate Opinion of Judge de Castro, at 100 (hereinafter *Fisheries Jurisdiction* case); Cheng, *supra* note 812, at 23-48; René-Jean Dupuy, ‘Coutume Sage et Coutume Sauvage’, in *Mélanges Offerts à Charles Rousseau: la Communauté Internationale*, Charles Rousseau and Suzanne Bastid (eds.) (Paris: Pedone, 1974), 75-87.

⁸²⁹ Haggemacher, *supra* note 812.

states with respect to existing custom⁸³⁰ and the notorious notion of ‘persistent objector’,⁸³¹ render an already messy situation even more complex, to the point that it has been claimed that any effort to solve all of these issues is like trying to “square the juridical circle”.⁸³² To add insult to injury the ICJ has not been consistent in the identification of custom, not always looking for practice and *opinio juris*.⁸³³

Despite the aforementioned problems and in an attempt to break the *circulus inextricabilis*⁸³⁴ (*i.e.* vicious circle),⁸³⁵ various constructions have been proposed: Stern’s distinction between “assentiment” and “sentiment”, *i.e.* between ‘consent’ or ‘will’ that something be a norm of customary law and ‘belief’ that it is a rule;⁸³⁶ MacGibbon’s argument that customary norms should be separated in those that create rights and those that create obligations. *Opinio juris*, according to him, is principally, if not exclusively, relevant only in the latter case;⁸³⁷ d’Amato is also in favour of the abandonment of the concept of *opinio juris* and usage and their substitution by ‘articulation’ and ‘act of commitment’;⁸³⁸ Kirgis proposes the adoption of a ‘sliding scale’, the less frequent and consistent the practice becomes, the stronger the demonstration of *opinio juris* should be;⁸³⁹ while van Hoof offers a detailed analysis of the ‘stages-theory’.⁸⁴⁰

⁸³⁰ Alexander Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (Oxford: OUP, 2008), at 92-100.

⁸³¹ Jonathan Charney, ‘The Persistent Objector Rule and the Development of Customary International Law’, *BYIL* 56 (1985): 1; Ted Stein, ‘The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law’, *Harvard International Law Journal* 26 (1985): 457; David Colson, ‘How Persistent must the Persistent Objector be?’ *Washington Law Review* 61 (1986): 957; J. Brock McLane, ‘How Late in the Emergence of a Norm of Customary International Law may a Persistent Objector Object?’, *ILSA Journal of International Law* 13 (1989): 1.

⁸³² Godefridus J. H. van Hoof, *Rethinking the Sources of International Law* (Deventer: Kluwer Law and Taxation Publishers, 1983), at 91.

⁸³³ Zimmermann, Tomuschat and Oellers-Frahm, *supra* note 812, at 759-60; Yasuaki, *supra* note 819, at 16.

⁸³⁴ Thirlway, *supra* note 812, at 48; Giuseppe Barile, ‘La Structure de l’ Ordre Juridique International: Règles Générales et Règles Conventionnelles’, *RCADI* 161 (1978/III): 9, at 48-51.

⁸³⁵ that is the result of the traditional approach to *opinio juris*.

⁸³⁶ Brigitte Stern, ‘La Coutume au Coeur du Droit International: Quelques Réflexions’, in *Melanges Offerts à Paul Reuter ; Le Droit International, Unité et Diversité*, Paul Reuter and Daneil Bardonnet (eds.) (Paris: Pedone, 1981), 479, at 486 ; ILA, *supra* note 812, at 30.

⁸³⁷ MacGibbon, *supra* note 819, at 127-8.

⁸³⁸ Anthony d’ Amato, *The Concept of Custom in International Law* (Ithaca, NY: Cornell University Press, 1971).

⁸³⁹ Frederic Kirgis, ‘Custom on a Sliding Scale’, *AJIL* 81 (1987): 146-51.

⁸⁴⁰ van Hoof, *supra* note 832, at 91 *et seq.*

B. Is Interpretation Restricted only to Written Sources?

1. Arguments that only Written Sources can be Interpreted

Irrespective of the problems and vagueness of custom, its status as a source of international law is unchallenged.⁸⁴¹ The question then that logically arises is once a customary norm has come into existence, and apart from the possibility of it being modified or terminated by subsequent practice and *opinio juris*, shouldn't its inherent vagueness⁸⁴² require *ipso facto* that its continued manifestation should be an object of interpretation? Vagueness and indeterminacy that exist even in written documents are the *raison d' être* of interpretation. It would seem counter-intuitive then to deny interpretation to norms emanating from a source of law that has those exact same characteristics.

Despite the great amount of research devoted to custom as a source of international law, very little has been written on the subject of interpretation of customary law. Bernhardt states that interpretation is only for written sources and although immediately afterwards he concedes that the contention that interpretation also encompasses norms of a customary nature is "a question of definition" however he feels that "it is neither usual nor advisable to use the notion of interpretation in connection with the clarification of norms of customary law".⁸⁴³ Similarly Tullio Treves again in the *Encyclopedia of Public International Law* argues that "the irrelevance of linguistic expression excludes interpretation as a necessary operation in order to apply them [*i.e.* customary norms]".⁸⁴⁴ Other authors have also expressed similar opinions.⁸⁴⁵

⁸⁴¹ Although its importance is considered by some authors to be declining in an evolving world where the regulation of international matters is achieved through an ever increasing number of treaties; see Mark E. Villiger, *Customary International Law and Treaties: A Manual on the Theory and Practice of the Interrelation of Sources* (The Hague: Kluwer Law International, 2nd edition, 1997), at 289-91; de Visscher, *supra* note 814, at 70-5.

⁸⁴² See *supra*.

⁸⁴³ Rudolf Bernhardt, 'Interpretation in International Law', in *Encyclopedia of Public International Law: Volume II*, Rudolf Bernhardt and Rudolf L. Bindschedler (eds.) (Amsterdam: North-Holland, 1992), 1416, at 1417.

⁸⁴⁴ Tullio Treves, 'Customary International Law', *Max Planck Encyclopedia of Public International Law*, para. 2, accessible at www.mpepil.com (last accessed on 25 January 2010).

⁸⁴⁵ Degan holds that interpretation concerns only written treaties, therefore even verbal treaties cannot be the object of interpretation; Vladimir D. Degan, *L'Interprétation des Accords en Droit International* (The Hague: Martinus Nijhoff, 1963), 162 (However, see *contra* Report on the Interpretation of Unilateral Acts, where even verbal acts can be interpreted); Jan H. Verzijl, *International Law in a Historical Perspective: Vol. I* (Leyden: Sijthoff, 1968), at 32; Maarten Bos has dealt more extensively with the issue. See Bos, *supra* note 345, at 106 *et seq.*; Maarten Bos, 'Theory and Practice of Treaty Interpretation', *NILR* 27 (1980): 3, at 6-10

Perhaps the only author who rejects the possibility of interpretation of customary norms and has provided a somewhat more extensive analysis of the issue is Maarten Bos. His main argument against the extension of the process of interpretation to unwritten sources lies in the fact that he considers that the mere fact of the identification of the customary rule delineates its content as well. According to him, in the case of customary international law “*content merges with existence*”.⁸⁴⁶ The same does not hold true for written texts, since the identification of a rule, is simply verifying whether the text is a treaty or not. If it is, then the content of a specific provision is a matter of interpretation.⁸⁴⁷ However, the practice of international courts and tribunals does not seem to reinforce this argument. International tribunals do not go through the process of identifying custom, by searching for practice and *opinio juris*, in each and every case.⁸⁴⁸ Furthermore, even if this were the case, the fact remains that the customary norm pronounced would be couched in vague terms.⁸⁴⁹ These vague terms, would then be subject to interpretation in order to identify whether a norm of customary international law can be applied in a certain case or not. Finally, the statement that “*content merges with existence*”,⁸⁵⁰ seems to be based on the premise that unlike treaties, which are living instruments, custom is like a series of still images, individual in time.

However, a norm of international customary law, once it has been identified by an international court or tribunal, does not cease to exist. Consequently, when the next tribunal attempts to apply the same norm, it usually does not go on about re-establishing that the norm in question is customary international law. It considers it as a given. However, that does not mean that it can immediately apply it either. In this context between the identification of a customary norm from one tribunal and its application from another there is an intermediate stage; that of interpretation of the norm by the latter tribunal. The reason for that is that not only are customary norms generally identified in vague terms but also that each case is unique. If a tribunal does not wish to identify the content of a customary norm (or if it can't, in cases where no State practice or *opinio juris* exists regulating the matter in question) then, if it is to apply that norm, the only explanation is that it has interpreted it. In summation, there

⁸⁴⁶ Bos, *supra* note 345, at 109.

⁸⁴⁷ *Id.*, and accompanying Figure I.

⁸⁴⁸ See *supra* relevant jurisprudence.

⁸⁴⁹ See *supra* analysis.

⁸⁵⁰ (emphasis in original), Bos, *supra* note 345, at 109.

exists extensive practice of international judicial organs, which based on a previous ‘vague identification’⁸⁵¹ apply customary international law, without identifying its content⁸⁵² but merely by interpreting it.⁸⁵³

Finally, another common element that all the aforementioned arguments share is that they reject interpretation of customary international law on the premise that interpretation is restricted only to written sources. However, this is not an obvious conclusion. There is no indication in law that the scope of interpretation is restricted to written documents. In fact there is quite an extensive practice to the contrary.⁸⁵⁴

2. Arguments that Interpretation Covers both Written and Unwritten Sources

The academic discourse on the issue of interpretation of customary international law is not dominated by the voices of those rejecting it. Although the opinions expressed in favour of interpretation of customary international law are, usually and similarly to the opinions rejecting the possibility of interpretation of customary international law, a bit laconic,⁸⁵⁵ they nevertheless illustrate that the subject is not as ‘open-and-shut’ a case as the previously mentioned authors professed.

An interesting point that needs to be raised here is that although not many authors tackle the issue of interpretation of customary norms directly, yet the expression ‘interpretation of custom’ or some version of it appears quite often in the writings of several authors,⁸⁵⁶ most notable amongst them Sir Hersch Lauterpacht,⁸⁵⁷

⁸⁵¹ Made by them or another tribunal.

⁸⁵² i.e. without researching the State practice and *opinio juris* on the matter.

⁸⁵³ See *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, *ICJ Rep. 1996*, 226, Dissenting Opinion of Judge Shahabuddeen, at 398 (hereinafter *Advisory Opinion on Nuclear Weapons*). Further relevant jurisprudence proving this point will be analyzed *infra*.

⁸⁵⁴ *Anglo-Iranian Oil Company case* (United Kingdom v. Iran), Preliminary Objections. Judgment of 22 July 1952, *ICJ Rep. 1952*, 93, at 104 (hereinafter *Anglo-Iranian Oil Company case*); *Nuclear Tests case* (Australia v. France), Judgment of 20 December 1974, *ICJ Rep. 1974*, 253, at 269 (hereinafter *Nuclear Tests case*); *Aegean Sea Continental Shelf case*, at 31-2.

⁸⁵⁵ See comments on Kolb by Fouad Zarbiev, ‘Book Review: Robert Kolb, *Interprétation et Création du Droit International ; Esquisses d’ une Herméneutique Juridique Moderne pour le Droit International Public*’, *Leiden Journal of International Law* 22 (2009) : 211, at 213.

⁸⁵⁶ “Interpretation of ‘fair and equitable standard’”, in Catherine Yannaca-Small, ‘Fair and Equitable Treatment Standard in International Law’, *OECD Directorate for Financial and Enterprise Affairs, Working Papers on International Investment* 3 (2004), accessible at: <http://www.oecd.org/dataoecd/22/53/33776498.pdf> (last accessed on 25 January 2010), at 26; “interpretation and application of [fair and equitable treatment]”, Stephan W. Schill, ‘Book Review: Ioana Tudor, *The Fair and Equitable Treatment Standard in the International Law of Foreign Investment*’, *EJIL* 20 (2009): 236; “Did the Tribunal Interpret the Minimum Standard of Treatment for Foreign Investors under International Law as the same Standard Applied by NAFTA Countries to their

Martti Koskenniemi⁸⁵⁸ and Serge Sur⁸⁵⁹. The fact that these authors mention the interpretation of customary international law *in passim* is perhaps, the greatest proof that interpretation of customary international law is possible and does occur.

Alongside the explicit mentions of interpretation of customary law, mention must be made of those statements where the acceptance of such an interpretation is the only logical inference from the authors' argumentation.⁸⁶⁰

All the above references are pertinent to the issue of interpretation of customary law. This should not be confused with *the interpretation of the practice leading to customary international law*. Whereas the former is the subject we are addressing for the purposes of this thesis, the latter is irrelevant. It does not refer to the interpretation of the rule as such, because at that stage it is still a *matter of the identification* of the rule. What is being interpreted are the various acts considered as

Own Domestic Investors”, Patrick Dumberry, ‘The Quest to Define ‘Fair and Equitable Treatment’ for Investors under International Law: The Case of the NAFTA Chapter 11 Pope & Talbot Awards’, *Journal of World Investment* 3(4) (2002): 657, at 686; “the interpretation of these standards”, Peter Muchlinski, *Multinational Enterprises and the Law* (Oxford: OUP, 2007), at 682.

⁸⁵⁷ Lauterpacht in his book *The Development of International Law by the International Court* has a whole Section entitled ‘Restrictive Interpretation of Custom and Regional International Law’; Sir Hersch Lauterpacht, *The Development of International Law by the International Court* (London: Stevens and Sons Limited, 1958), at 381-4, where he considers that in the *Asylum* case the ICJ restrictively interpreted the regional customary rule of granting political asylum, by reference to general principles of international law (*i.e.* state sovereignty and the principle of non-intervention). This was essentially a *systemic interpretation* of customary law, or an interpretation based on reference to ‘other relevant rules of international law’. This point will be further analyzed *infra*.

⁸⁵⁸ “Customary rules tend to be interpreted differently”, Koskenniemi, *supra* note 549, at 391.

⁸⁵⁹ Sur, *supra* note 345, at 189-90.

⁸⁶⁰ See Sir Gerald Fitzmaurice who argues that the absence of the precision of the relevant rule still leaves the matter to be judged by the ‘general and preponderant trend’ of the law on the subject. This is not only an inference of interpretation of a customary rule, but even more so one by reference to ‘any relevant rules of international law’, Sir Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice* (Cambridge: Grotius, 1986), at 151-2. In the context of international investment law although the ‘fair and equitable treatment’ is a rule of customary international law there is no agreement on its precise meaning. The logical inference from this is that for a Court to apply it in a given case it must give it a precise meaning, *i.e.* interpret it: see Yannaca-Small, *supra* note 856, at 25; Rudolf Dolzer and Magrete Stevens, *Bilateral Investment Treaties* (The Hague: Martinus Nijhoff, 1995); Mahmoud Salem, ‘Le Développement de la Protection Conventionnelle des Investissements Étrangers’, *Journal du Droit International* 113 (1986): 579-626; Muchlinski explicitly states that “the interpretation of these standards by arbitral tribunals has been considered [in previous sections of the book]”; Muchlinski, *supra* note 856, at 682.

state practice, the *gravitas* of which will evidence or not the existence of a customary norm.⁸⁶¹

However, a few references scattered across a variety of academic writings are not the only indication of academic acceptance of the interpretation of customary law. Kolb, Orakhelashvili and Bleckmann have devoted some analysis on the subject.⁸⁶² Despite the fact that their analysis focuses on different aspects of the interpretation of customary norms,⁸⁶³ the important fact is that all of them explicitly acknowledge that customary international law can be interpreted.

Furthermore, a negation of the interpretation of custom would lead to an *absurdum*. It is common knowledge that international customary law can be codified and incorporated in treaty instruments.⁸⁶⁴ According to the *Nicaragua* case the fact that a customary norm has been codified does not mean *ipso facto* that it ceases to exist; that it is subsumed by the conventional norm.⁸⁶⁵ The provisions of the codification treaties can, nevertheless, still be an object of interpretation. If we follow this line of reasoning to the bitter end then what we end up with is two norms with identical content,⁸⁶⁶ of which *only the one incorporated in a text* can be the object of interpretation. Since there is no hierarchy between these sources of law, *i.e.* treaty and custom, such a discriminatory approach does not seem to flow logically from the above premise. Consequently, logic dictates that customary international law can be interpreted.

⁸⁶¹ See Serge Sur, who clearly distinguishes between, on the one hand, the *interpretation of the practice* leading to the establishment of a customary norm and on the other hand, the *interpretation of the already established norm*; Sur, *supra* note 345, at 189-90; similarly, Alexander Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (Oxford: OUP, 2008), at 496; de Visscher who clearly states that he is referring to interpretation of practice, de Visscher, *supra* note 345, at 219 *et seq.*; see also Schauer who seems to use 'interpretation' to denote, depending on the relevant context, both interpretation of custom as such and interpretation of the practice which leads to custom; Schauer, *supra* note 814, at 13-34.

⁸⁶² Kolb, *supra* note 345, at 219 *et seq.*; Orakhelashvili, *supra* note 830, Ch. 15; Albert Bleckmann, 'Zur Feststellung und Auslegung von Völkergewohnheitsrecht', *ZAöRV* 37 (1977): 504

⁸⁶³ Both Kolb and Bleckmann focus more on providing a logical and/or theoretical basis for the interpretation of custom, whereas Orakhelashvili adopts Bleckmann's propositions and gives more emphasis to jurisprudential examples of interpretation of custom (without, however, categorizing them in the methods of interpretation of custom proposed by Bleckman).

⁸⁶⁴ See for instance Article 2(4) UN Charter, several provisions of the VCLT, the UNCLOS and even the Articles on State Responsibility.

⁸⁶⁵ *Nicaragua* case, para. 179.

⁸⁶⁶ At least at the time of the original codification.

3. The ICJ and PCIJ Statutes as the Definitive Argument in Favour of Interpretation of International Customary Law

However, what is striking is that in all these discussions regarding the possibility or not of interpreting international customary law, an examination of the *travaux préparatoires* of Articles 36 and 38 of the ICJ Statute and the corresponding Articles of the PCIJ Statute does not seem to have been undertaken. This is crucial, since it is exactly in this context that perhaps the most definitive argument in support of interpretation of customary law⁸⁶⁷ can be found. Article 38 of the ICJ Statute enumerates the sources of international law, so it would seem that this Article would be the best place to start researching the possibility of interpretation of customary law. However, the issue of interpretation within Article 38 did not come up either in the *travaux préparatoires* of the ICJ Statute or in those of the PCIJ Statute.

The next candidate is, of course, Article 36(2) of the ICJ Statute, which states that:

- ...the jurisdiction of the Court in all legal disputes concerning:
 - a. the interpretation of a treaty;
 - b. any question of international law;...⁸⁶⁸

A closer look at the wording of Article 36 shows a discrepancy between 36(2)(a) and 36(2)(b). The former refers to “interpretation or application of a treaty”, while the latter refers to “any question of international law”. It is only logical to presume that the former refers to international conventional law whereas the latter refers to international customary law. So the question that needs to be addressed is what the reason for this different wording was and if it should be construed as a negation of the possibility of customary law being interpreted.

The discussion on what would become Article 36 of the ICJ Statute was entrusted during the San Francisco Conference to Committee IV/1, which delegated the issue, further, to Subcommittee IV/1/D, and which, essentially, followed the

⁸⁶⁷ Second, perhaps, only to the extensive jurisprudence on the matter, *see infra* Section III.

⁸⁶⁸ 1945 ICJ Statute, 59 *Stat.* 1055

paradigm of the relevant Article in the PCIJ Statute.⁸⁶⁹ During the *travaux préparatoires* of that Committee the discussions revolved mainly around the issue of compulsory jurisdiction of the Court⁸⁷⁰ without much discussion on the wording of Article 36(2). For this reason and since the relevant part of the PCIJ Statute was adopted *verbatim*, the preparatory work of the PCIJ Statute needs to be examined as well.

Article 36 of the PCIJ Statute reads as follows:

- ...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;...

This was based on a draft prepared by Lord Phillimore which was, as to the relevant part, identically worded.⁸⁷²

During the discussions on the drafting of what would become Article 36 of the PCIJ Statute and in response to the original draft of Lord Phillimore and a later one by Baron Descamps, Mr. Ricci-Busatti submitted the following amendment:

Annex No. 3*bis*

Baron Descamps text as amended by M. Ricci-Busatti.

Article 1.

The Permanent Court of International Justice is competent to decide disputes between States concerning cases of a legal nature which deal with:

- a. the interpretation or application of a treaty;
- b. *the interpretation or application of a general rule of international law...*(emphasis added)⁸⁷³

The importance of Mr. Ricci-Busatti's amendment for the purposes of this Chapter cannot be overstated. Not only did it explicitly accept the notion of 'interpretation of

⁸⁶⁹ With only just two changes that did not affect the heart of the provision; see United Nations, *Documents of the United Nations Conference on International Organization (UNCIO), San Francisco, 1945: Vol. XIII* (London: United Nations Information Organizations, 1945-55), at 560.

⁸⁷⁰ An issue that was also at the heart of the discussions at the *travaux préparatoires* of the PCIJ Statute.

⁸⁷¹ 1920 PCIJ Statute, 6 *LNTS* 379.

⁸⁷² *Procés Verbaux*, *supra* note 553, at 252.

⁸⁷³ *Ibid.*, at 275.

international customary law’, but wished to place it in Article 36 which defined the jurisdiction of the PCIJ. The ensuing debate sheds even more light on this.

In explaining his amendment Mr. Ricci-Busatti said that he suggested this wording because he felt that the original one was defective and should be amended.⁸⁷⁴ In response to that Lord Phillimore and the President of the Advisory Committee during the 12th Meeting of 1 July 1920 stated that they felt that it was necessary to follow the wording of Article 13 of the Covenant of the League of Nations.⁸⁷⁵

The relevant part of Article 13 of the Covenant goes as follows:

...2. Disputes as to the interpretation of a treaty, as to any question of international law... are declared to be among those which are generally suitable for submission to arbitration (emphasis added)⁸⁷⁶

Consequently, both Lord Phillimore and the President of the Advisory Committee of Jurists did not comment on the validity *per se* of the content of Mr. Ricci-Busatti’s amendment. Their main concern was to simply follow an existing wording. This is reinforced by the fact that at a later stage the discussion returned again on the issue of the wording of para. 1(b). This time, in the 13th Meeting of 1 July 1920 both the President and Lord Phillimore agreed that “the amendments did not affect the heart of the question, but concerned rather the drafting”.⁸⁷⁷ In this sense they essentially agreed that the substance of the amendment proposed by Mr. Ricci-Busatti was correct, *i.e.* that a norm of customary law could be interpreted and that the PCIJ could deliver such an interpretation. However, despite their agreement with the essence of Mr. Ricci-Busatti’s amendment they felt that the original wording ‘any question of international law should be retained’, not due to its correctness or superiority to Mr. Ricci-Busatti’s proposal, but only because

⁸⁷⁴ *Ibid.*, at 265.

⁸⁷⁵ *Ibid.*, at 264-5.

⁸⁷⁶ Article 13 of the Covenant of the League of Nations; 1919 Covenant of the League of Nations, 1 *LNTS* 7; The Commentary of the Covenant, as well, focuses on the issue of compulsory jurisdiction and does not make any other comments regarding a possible interpretation of custom; House of Commons, *The Covenant of the League of Nations with a Commentary Thereon*, [Cmd. 151], 20th Century House of Commons Sessional Papers LIII (1919): 685, at 700 accessible at: http://gateway.proquest.com/openurl?url_ver=Z39.88-2004&res_dat=xri:hcpp&rft_dat=xri:hcpp:fulltext:1919-022455 (last accessed on 25 January 2010).

⁸⁷⁷ *Procès Verbaux*, *supra* note 553, at 283.

[c]onsideration must be taken also of the important part this expression [*i.e.* ‘any question of international law’] played in the Conferences of 1899 and 1907; as well as of legal conscience and world opinion which would be astonished not to find this term in the Committee’s plan. ... Definite previous documents must be followed as much as possible, and it must not be forgotten that the expression used in the project is contained in Article 13 of the Covenant.⁸⁷⁸

Some of the conventions, which preceded the Covenant of the League of Nations, that had this wording *i.e.* ‘any question of international law’ or some variation of it were: Articles 16 of the 1899 Hague Convention for the Pacific Settlement of International Disputes⁸⁷⁹ and Article 38 of the identically named 1907 Convention⁸⁸⁰; Article 1 of the 1903 Arbitration Treaty between Great Britain and France⁸⁸¹ and the 1908 Treaty between the United States and Great Britain.^{882,883}

Once again, Mr. Ricci-Busatti countered the considerations with respect to an ‘established wording’ by insisting that the wording of the Covenant was defective and that “the members of the Committee were not bound by the Covenant”.⁸⁸⁴ Similar feelings on the defective nature of the wording of Article 13 of the Covenant of the League of Nations and the superiority of Mr. Ricci-Busatti’s amendment were expressed by Mr. de la Pradelle and Mr. Hagerup.⁸⁸⁵

In the end, however, the concerns over retaining an established wording prevailed and the wording any ‘question of international law’ was adopted. Despite this outcome, the entirety of the debate within the Advisory Committee proves beyond doubt that all the members considered Mr. Ricci-Busatti’s construction as correct. Customary norms could be interpreted and applied. Not one single member raised an objection to this point. On the contrary the only reason why this amendment did not pass was because it was felt that the PCIJ Statute should reflect a continuity

⁸⁷⁸ *Id.*; Mr. Root also agreed with this explanation, and expressed the concern that should they adopt a different terminology, albeit a better worded one, they might inadvertently indicate that they wanted to express a different meaning than that of the drafters of the Covenant; *Ibid.*, at 283; de la Pradelle, opposed Ricci-Bussati’s amendment, not on its substance, but because he felt that “interpretation is included in application”. To this the President of the Advisory Committee of Jurists responded that it was a traditional expression; *see ibid.*, at 283.

⁸⁷⁹ 187 CTS 410.

⁸⁸⁰ 215 CTS 233.

⁸⁸¹ *Hertslet Treaties* XXIII, at 492.

⁸⁸² *Hertslet Treaties* XXV, at 1203.

⁸⁸³ *See generally*, with further examples of such treaties Sir Hersch Lauterpacht, *The Function of Law in the International Community* (Oxford: Clarendon Press, 1933), at 26-37; and James Scott (ed.), *Reports to the Hague Conferences of 1899 and 1907* (Oxford: Clarendon Press, 1917)

⁸⁸⁴ *Procès Verbaux*, *supra* note 553, at 284 .

⁸⁸⁵ *Id.*

and link with the wording of the Covenant,⁸⁸⁶ even if it was defective and inferior to Ricci-Busatti's amendment. In summation, the Advisory Committee of Jurists felt that both versions of Article 36 should be considered as having the same meaning and therefore, that the PCIJ could interpret and apply not only treaties but custom as well.

It is interesting to note that the application of Articles 31 and 32 of the VCLT⁸⁸⁷ to Article 36 of both ICJ and PCIJ Statutes would lead to the same result. Even if the textual interpretation, object and purpose and intention's approach of Article 31 fail to offer a solution as to whether Article 36 of the ICJ/PCIJ Statute refers to interpretation of custom, Article 32 clearly leads to such an affirmative interpretation. As to what pertains to the ICJ Statute, since its own *travaux préparatoires* offer no indication of the appropriate interpretation, the solution would be given by reference to the PCIJ Statute,⁸⁸⁸ which for all purposes is a 'relevant rule of international law'. Consequently, in a twist befitting a thesis analyzing Article 31(3)(c) and the principle of systemic integration, the fact that Article 36 of the ICJ Statute should be understood as giving the Court the power to interpret customary law⁸⁸⁹ is arrived at through an interpretation based on the principle of systemic integration (customary Article 31(3)(c)).

From the above analysis it is clear that the arguments restricting interpretation to written sources do not hold up to scrutiny. This is further reinforced by the fact that the most apposite international documents on the subject, the ICJ and PCIJ Statute, not only do not prohibit interpretation of customary international law, but actually consider it as within the powers of the Court. The analysis will now turn to the relevant jurisprudence to determine if it reinforces or contradicts the findings so far.

⁸⁸⁶ And other previous treaties.

⁸⁸⁷ Or to be exact: an application of the customary law equivalents of Articles 31 and 32. The reason for this being that the VCLT, by virtue of its Article 4, is not applicable either to the ICJ or to the PCIJ Statute.

⁸⁸⁸ And its own *travaux préparatoires*.

⁸⁸⁹ And by inference accepting that customary law can be interpreted.

4. International Jurisprudence Acknowledging or Applying an Interpretation of International Customary Law

A question that inescapably arises is that if the interpretation of international customary law was feasible and therefore applied by international courts and tribunals it would have been undoubtedly analyzed extensively in doctrine. Since, no such extensive analysis has occurred this would seem to indicate *prima facie* that courts have not indulged in this form of interpretation, regardless of its logical validity. As will be shown *infra* this could not be further from the truth. Not only is there no lack of judicial pronouncements on the issue, but actually there is a plethora of case-law, including some of the most famous and most-quoted judicial decisions.

Once our perception of custom has been broadened by the inclusion of the possibility of interpretation of customary law a whole new juridical landscape is revealed. Due to the restrictions of this thesis, an extensive analysis of all the jurisprudence containing references to interpretation of customary law would not be possible. For this reason our analysis will focus on landmark cases. If interpretation of customary law can be substantiated in these cases, which have otherwise been exhaustively analyzed, it would only be logical to presume that the same could be inferred *mutatis mutandis* for the remainder of the jurisprudence. Furthermore, the areas that these cases cover are *jus in bello*, *jus ad bellum*, law of the sea, law of treaties, state responsibility, and investment law. The reason is twofold: First, this diversity ensures that interpretation of customary law is a universal process, not restricted to any specific field of international law and second, several of the customary norms in this field have already been codified or incorporated in various treaties, a point that will be pertinent for the analysis of interpretation of customary law by means of the principle of systemic integration.⁸⁹⁰

Starting with one of the most influential cases of the ICJ, in the *Nicaragua* case the Court held that:

178. ...Rules which are identical in treaty law and in customary international law are also distinguishable by *reference to the methods of interpretation and application*.⁸⁹¹

⁸⁹⁰ See *infra* Section III.A.1 and III.B on the importance of codification treaties as 'relevant rules' (*i.e.* Article 31(3)(c)) for the purposes of interpretation of international customary law.

⁸⁹¹ *Nicaragua* case, para. 178.

accepting in this way, that there are methods of interpretation which are specifically tailored to the needs of international customary law.

In another celebrated case, the *North Sea Continental Shelf* cases, Judge Tanaka not only explicitly acknowledged interpretation of customary international law as a reality but also identified the methods by which it is realised.

Customary law, being vague and containing gaps compared with written law, requires precision and completion about its content. This task, in its nature being *interpretative*, would be incumbent upon the Court. *The method of logical and teleological interpretation can be applied in the case of customary law as in the case of written law* (emphasis added).⁸⁹²

On its own this quote should suffice to accept that customary law can be interpreted. What augments the importance of this *dictum* is that it was made in a case that is usually cited as having clearly identified the process of creation and identification of customary international law. Now it has been shown that the case is also important for laying out the foundations for our understanding of the process of interpretation of customary law.

Taking his cue from Judge Tanaka's Opinion, Judge Morelli makes use of this interpretative method:

It follows that failure to indicate the criterion according to which the continental shelf is apportioned would not constitute a true *lacuna*. ... Now if that rule did not indicate the criterion for apportionment, it would be an incomplete rule. But, unlike other incomplete rules which no doubt exist in the international legal system, this rule is one the incomplete nature of which would have a most particular importance, because it is the determination of the very subject-matter of the rights conferred by the rule that would be omitted. Such an omission would *totally destroy the rule*.

However this may be, I am of the view that a criterion for apportionment is really provided by the law: as will be seen, it is a criterion which it is possible to *deduce from the very rule* which confers on different States certain rights over the continental shelf (emphasis added).⁸⁹³

⁸⁹² *North Sea Continental Shelf* cases, Dissenting Opinion of Judge Tanaka, at 181.

⁸⁹³ *Ibid.*, Dissenting Opinion of Judge Morelli, at 200; The fact that in the *North Sea Continental Shelf* cases the Court did not prove the legal nature of the principles it mentioned, led Degan to conclude that the Court, in essence, decided *ex aequo et bono* (see Degan, *supra* note 845, at 114). However, the aforementioned quotes of Judges Tanaka and Morelli demonstrate that the Court felt that certain rules were custom so there was no need to re-confirm them through an exhaustive research of practice and

This reference to a deduction from the customary rule conferring rights to States over the continental shelf is a barely concealed process of interpretation.

The *North Sea Continental Shelf* cases is one example of a long line of law of the sea-related cases that interpret customary international law: In the *Gulf of Maine* case the Court held that

111. A body of *detailed rules is not to be looked for in customary international law* ... It is therefore unrewarding ... to look to general international law to provide a readymade set of rules that can be used for solving any delimitation problems that arise. *A more useful course is to seek a better formulation of the fundamental norm* (emphasis added).⁸⁹⁴

In the *Fisheries* case Judge Hsu Mo felt that:

The expression “to conform to the general direction of the coast” ... should not be given a *too liberal interpretation* ... It must be interpreted in the light of the local condition in each sector (emphasis added).⁸⁹⁵

while in the *Continental Shelf* case between Tunisia and Libya the Court considered that:

38. The present case however illustrates how the application of the principles and rules enunciated, and the factors indicated, by the Court in 1969 may lead to widely differing results according to the way in which *those principles and rules are interpreted* and applied, and the relative weight given to each of those factors in determining the method of delimitation. (emphasis added)⁸⁹⁶

.....

70. Since the Court considers that it is bound to decide the case on the basis of equitable principles, it must first examine what such principles entail ... *the term ‘equitable principles’ cannot be interpreted in the abstract* ; it refers back to the principles and rules which may be appropriate in order to achieve an equitable result.⁸⁹⁷

opinio juris. The way these general and all-encompassing rules and considerations were individualised for the purposes of the case at hand was nothing short of a clear process of interpretation.

⁸⁹⁴ *Delimitation of the Maritime Boundary in the Gulf of Maine Area* (Canada v. United States of America), Judgment of 12 October 1984, *ICJ Rep.1984*, 246, para. 111 (hereinafter *Gulf of Maine* case); a “better formulation” is nothing short of interpretation.

⁸⁹⁵ *Fisheries* case (United Kingdom v. Norway), Judgment of 18 December 1951, *ICJ Rep.1951*, 116, Separate Opinion of Judge Hsu Mo, at 154-5 (hereinafter *Fisheries* case).

⁸⁹⁶ *Tunisia/Libya Continental Shelf* case, para. 38.

⁸⁹⁷ *Ibid.*, para. 70.

In all these law of the sea-related cases the Court or the individual judges expressly or through their actual judicial reasoning acknowledged and made use of interpretation of customary international law. The same pattern was adopted in another well known case of the ICJ, the *Advisory Opinion on Nuclear Weapons*.⁸⁹⁸ In that case, it was operative para.2(E) of the Judgment that sparked a fiery debate amongst the judges and revealed that they too, following the previous jurisprudence, continue to interpret customary international law.

Commenting on this operative paragraph Judge Ranjeva expressed the opinion that:

Two consequences flow from this: firstly, this *law of armed conflict cannot be interpreted as containing lacunae* of the sort likely to warrant reserve or at least doubt. (emphasis added)⁸⁹⁹

... the second clause of operative paragraph 2 E introduces the possibility of an exception to the rules of the law of armed conflict by *introducing a notion hitherto unknown in this branch of international law: the “extreme circumstance of self-defence, in which the very survival of a State would be at stake”*. Two criticisms must be offered. Firstly, ... [a] *priori* nothing prohibits an *interpretation* giving precedence to the rules of self-defence, including nuclear self-defence, over the rules of humanitarian law, a difficulty which leads consequentially to the second criticism. Secondly, the criticism is addressed to the acceptance of this concept of “extreme circumstance of self-defence, in which the very survival of a State would be at stake”. ... If such a rule must exist, it can be *deduced only from the intention of the States authors* of and parties to these instruments. If an exceptional authorization had been envisaged, the authors of these instruments could have referred to it... (emphasis added).⁹⁰⁰

In this part of his Separate Opinion Judge Ranjeva accepts that the law of armed conflict, which at least in the part apposite to this case is customary international law, can be *interpreted* and also that the *jus ad bellum* rule of self-defence can be *interpreted* as prevailing over humanitarian law. Finally, he also raises the objection of the customary nature of the exception “extreme circumstance of self-defence, in which the very survival of a State would be at stake”. He fails to find any reference in the Court’s judgement to the practice and *opinio juris* supporting such an exception. The logical implication of this is that it is either an interpretation of self-defence as

⁸⁹⁸ A case which has been put under the microscope (*see* for instance all the articles included in: Laurence Boisson de Chazournes and Philippe Sands (eds.), in *International Law, the International Court of Justice and Nuclear Weapons*, (Cambridge: CUP, 1999)); yet all the references to interpretation of custom had somehow eluded detection so far.

⁸⁹⁹ *Advisory Opinion on Nuclear Weapons*, Separate Opinion of Judge Ranjeva, at 299.

⁹⁰⁰ *Ibid.*, at 299-300.

customary law or that the Court exercised *ultra vires a pouvoir de legiferer* that it clearly does not have. But even if it is an interpretation, Judge Ranjeva, concludes it is one which is illogical and detrimental to the unity of law:

The distinction proposed by the Court would certainly be difficult to apply and in the end would only render even more complicated a problem which is already difficult to handle in law.⁹⁰¹

Similarly Judge Shahabuddeen makes use of interpretation of customary international law.

[T]he principle limiting the right to choose means of warfare subsists. Notwithstanding an impression of non-use, it is capable of operation. In what way? *The principle may be interpreted* as intended to exclude the right to choose some weapons (emphasis added).⁹⁰²

An interesting point that Judge Shahabuddeen raises⁹⁰³ is that the Court does not have to identify in every instance a customary norm. Its existence has already been proven and is generally accepted. What is at hand here is the issue of application of that principle:

A useful beginning is to note that what is in issue is not the existence of the principle, but its application in a particular case. Its *application* does not require proof of the coming into being of an *opinio juris* prohibiting the use of the particular weapon; if that were so, one would be in the strange presence of a principle which could not be applied without proof of an *opinio juris* to support each application.⁹⁰⁴

only to conclude that an application is not possible without first interpreting the norm.

But how can the principle apply in the absence of a stated criterion? If the principle can operate to prohibit the use of some means of warfare, *it necessarily implies that there is a criterion* on the basis of which it can be determined whether a particular means is prohibited. What can that implied criterion be? As seems to be recognized by the Court,

⁹⁰¹ *Ibid.*, at 300.

⁹⁰² *Ibid.*, Dissenting Opinion of Judge Shahabuddeen, at 398.

⁹⁰³ and which seems to contradict Bos' rejection of 'interpretation of customary law'.

⁹⁰⁴ *Advisory Opinion on Nuclear Weapons*, Dissenting Opinion of Judge Shahabuddeen, at 398.

humanitarian considerations are admissible in the *interpretation of the law of armed conflict* (see paragraphs 86 and 92 of the Court's Advisory Opinion) (emphasis added).⁹⁰⁵

The general direction of this quote by Judge Shahabuddeen seems to reflect the debate on the difference between the notions of 'interpretation' and 'application' and the general understanding that, regardless of the degree of correlation between these two notions, interpretation logically precedes application.⁹⁰⁶

Judge Higgins in her turn refers to the various interpretations of the *principle of distinction* promoted by a variety of academics.⁹⁰⁷ However, this implicit acceptance of interpretation of customary law turns immediately afterwards to an explicit statement:

For this concept to have a separate existence, ... and *whichever interpretation of the term* is chosen, it may be concluded that a weapon will be unlawful *per se* if it is incapable of being targeted at a military objective only, even if collateral harm occurs. Notwithstanding the unique and profoundly destructive characteristics of all nuclear weapons, that very term covers a variety of weapons which are not monolithic in all their effects. To the extent that a specific nuclear weapon would be incapable of this distinction, its use would be unlawful (emphasis added).⁹⁰⁸

and continues:

In any event, humanitarian law too is very well developed. The fact that *its principles are broadly stated* and often raise further questions that require a response can be no ground for a *non liquet*. *It is exactly the judicial function* to take principles of general application, *to elaborate their meaning* and to apply them to specific situations. This is precisely the role of the International Court, whether in contentious proceedings or in its advisory function (emphasis added)⁹⁰⁹

To elaborate a meaning of a term is but another way of saying that a term should be interpreted. One cannot go from a broad statement to a specific one if not through

⁹⁰⁵ *Ibid.*, at 398-9.

⁹⁰⁶ *See supra* Chapter II, on the debate on the issue of differentiation between 'interpretation' and 'application'.

⁹⁰⁷ *Advisory Opinion on Nuclear Weapons*, Dissenting Opinion of Judge Higgins, para. 24.

⁹⁰⁸ *Id.*

⁹⁰⁹ *Ibid.*, para. 32.

interpretation. Consequently, Higgins accepts that the role of the ICJ is, amongst others, to interpret international customary law.⁹¹⁰

A final set of cases that need to be mentioned are the ones dealing with investment law. What lies at the apex of the majority of investment law cases is the customary norm of ‘fair and equitable treatment’. In the *Mondev* case the ICSID tribunal had no qualms in saying that it was not looking for practice and *opinio juris*. What it was looking for was finding the content of the existing vague customary norm.

113. Thus the question is not that of a failure to show *opinio juris* or to amass sufficient evidence demonstrating it. The question rather is: what is the content of customary international law providing for fair and equitable treatment and full protection and security in investment treaties?⁹¹¹

Consequently, if the Tribunal was not looking for the two constitutive elements of any customary norm, it was not aiming to identify the content of the norm. The only other way to reveal the content is through the medium of interpretation.

In the *Alex Genin* case the ICSID tribunal acknowledged that the term ‘fair and equitable treatment’

[u]nder international law ... is generally understood to ‘provide a basic and general standard which is detached from the host State’s domestic law’. *While the exact content of the standard is not clear*, the Tribunal understands it to require an ‘international minimum standard that is separate from domestic law, but that is, indeed, a minimum standard. (emphasis added)⁹¹²

Therefore, although the exact content was not clear, the tribunal in order to adjudicate had to define it and it promoted its own understanding/interpretation of that standard.

Finally, in the context of the WTO the *Biotech* case, as strange as it may sound, furnishes another example of interpretation of customary international law. WTO Panels and the Appellate Body do not apply Articles 31 and 32 of the VCLT as

⁹¹⁰ A conclusion to which we already arrived at *supra* through an interpretation of the ICJ and PCIJ Statutes.

⁹¹¹ *Mondev International Ltd. V. United States of America*, Award of 11 October 2002, ICSID ARB(AF)/99/2, ICSID Rep. 6 (2004): 192, para. 113 (hereinafter *Mondev* case).

⁹¹² *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil Genin v. Republic of Estonia*, Award of 25 June 2001, ICSID ARB/99/2 (hereinafter *Alex Genin* case), para. 367.

such, but as customary international law, by virtue of Article 3(2) of the DSU, which states:

The Members recognize that [the dispute settlement system] serves ...to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law.⁹¹³

Consequently, the entire judicial reasoning of the Panel in that case⁹¹⁴ was an interpretation of customary international through the use of the VCLT. Although the Panel seemed to apply the VCLT directly, it had no authority to do so. What it could apply was merely customary international law. The fact that customary international law and VCLT law on the issue of interpretation coincide is irrelevant. Consequently, the Panel's use of the VCLT falls under the customary law equivalent of Article 31(3)(c), *i.e.* 'any relevant rule of international law'. No rule could be more relevant than a treaty that incorporates the customary norm. Based on this analysis, the conclusion can be easily drawn that the *Biotech* case is yet another prime example of interpretation of customary law.

All the above cases, spanning various fields of international law demonstrate with absolute certainty that not only interpretation of customary norms is possible but that the international courts and tribunals have applied it consistently throughout their jurisprudence.⁹¹⁵

⁹¹³ 1994 DSU, 1869 *UNTS* 401.

⁹¹⁴ *Biotech* case, paras. 7.68-7.72.

⁹¹⁵ Even *in passim*; see *Certain Questions of Mutual Assistance in Criminal Matters* case, para. 40.

III. Methods of Interpretation of Customary International Law

A. Logical Extrapolation of the Possible Methods of Interpretation of Customary Law

Having established that customary international law can and has been interpreted by international judicial organs we shall now inquire into the methods of interpretation. Although Articles 31 and 32 of the VCLT apply only with respect to interpretation of treaties, nevertheless their customary counterparts have been applied in a variety of situations to interpret acts, which do not fall within the category of 'treaties'. They have been used in connection with interpreting unilateral acts,⁹¹⁶ optional clause declarations⁹¹⁷ and Security Council Resolutions.⁹¹⁸

The common denominator in all these cases, however, is that Articles 31 and 32 are not applied strictly, but always *mutatis mutandis* bearing in mind the specific nature of the acts to be interpreted.⁹¹⁹ This approach seems to be the germane one in the present context as well. Having as a starting point the content of Articles 31 and 32 and bearing in mind the schools of interpretation that fashioned them and the *sui generis* character of customary international law these are the methods that seem the most appropriate:

1. Textual/Grammatical Interpretation

With respect to a norm emanating from a non-written source, arguing that a textual/grammatical interpretation might be relevant would seem a *non sequitur*. However, things are not always as they seem. Bleckmann, suggests that a textual/grammatical interpretation might be applicable in the interpretation of customary norms.⁹²⁰ This statement can be understood in the following two ways:

⁹¹⁶ See Victor Rodríguez Cedeño, *Fourth Report on Unilateral Acts of States (A/CN.4/519)*, 30 May 2001.

⁹¹⁷ Malgosia Fitzmaurice, 'The Optional Clause system and the Law of Treaties: Issues of Interpretation in Recent Jurisprudence of the International Court of Justice', *Australian Yearbook of International Law* 20 (1999): 127-59.

⁹¹⁸ See Efthymios Papastavridis, 'Interpretation of Security Council Resolutions Under Chapter VII in the Aftermath of the Iraqi Crisis', *ICLQ* 56 (2007): 83-118.

⁹¹⁹ Cedeño, *supra* note 916, para. 153.

⁹²⁰ Bleckmann, *supra* note 862, at 526; Orakhelashvili concurs, but without any further comments; Orakhelashvili, *supra* note 830, at 498.

i) that the ordinary meaning of the norm is to be found in a variety of documents published by States or to which States have participated.⁹²¹ However, this approach is in error since it confuses *interpretation of custom* with *interpretation of practice evidencing custom*. Such documents may be useful for identifying custom but are of limited importance for interpreting it.

ii) The more appropriate way is to consider that textual interpretation actually refers to treaties that have incorporated the customary norm in one of their provisions (*e.g.* codification treaties), with the *proviso* of course that both custom and the treaty provision have the same content.⁹²² However, the problem with this construction is that although courts have tended to make use of it,⁹²³ it is not really a textual/grammatical interpretation. The customary norm and the codification treaty are two separate entities. Surely, the text of the codification treaty might assist in the interpretation of the customary norm, however, this is because they are *linked*, or to make it more obvious, they are *relevant* to each other based on their shared content. Consequently, interpretation of custom, by reference to the text of a codification treaty⁹²⁴ is not textual interpretation but a *systemic* one *i.e.* one based on the customary equivalent of Article 31(3)(c).

iii) A final attempt would be to consider that a grammatical interpretation could be based on the wording adopted in previous judgments and/or by various academics.⁹²⁵ However, in most cases the Court does that incidentally, while referring at the same time to the codification treaty.

Consequently, since the reference to codification treaties is a form of *systemic interpretation* and not a grammatical one, this form of interpretation although applicable is of limited value, for the additional reason that even the generally accepted wording of a customary norm is, by its nature, couched in such vague terms, *e.g.* ‘fair and equitable

⁹²¹ Bleckmann, *supra* note 862, at 526.

⁹²² See *Nicaragua* case, para. 179.

⁹²³ See *infra* Section III.B.

⁹²⁴ Or any treaty incorporating it (see Article 1105 NAFTA on the ‘fair and equitable treatment’).

⁹²⁵ See *Advisory Opinion on Nuclear Weapons*, Dissenting Opinion of Judge Higgins.

treatment’, that no legally substantial conclusion could be arrived at through a strictly grammatical interpretation of it.

2. Teleological Interpretation

This form of interpretation is applicable to the interpretation of customary law⁹²⁶ as it to any other act that can be interpreted. The reason is that a teleological interpretation identifies what exists in the nucleus of any act with a normative content, its *telos*, *i.e.* its object and purpose. Every norm has a *telos*, a purpose that defines its content and its function. In the same vein, all customary norms have arisen in order to address certain considerations and situations. Consequently, by identifying the *telos* of the customary norm a teleological interpretation can assist in clarifying the customary norm’s content in a way that will enable it to achieve its inherent *telos*.

A final point that needs to be mentioned is that in some cases the courts refer to the object and purpose of a whole area of international law.⁹²⁷ Such a case would seem to be an area where the *teleological interpretation* and the *systemic interpretation* converge. The reason being, that, in order for object and purpose of a whole sub-system of international law to be identified, account must be taken of all rules within that system. Consequently, an identification of the object and purpose of a whole area of international law is a direct product of reference to other ‘relevant rules of international law’, which reveal this shared object and purpose. Consequently, in such cases both a teleological and a systemic interpretation are being applied.

3. Systemic Interpretation

This form of interpretation, which is the customary equivalent of Article 31(3)(c) is the one which is the most apposite to the *sui generis* character of customary law. Since one of the elements of customary international law is *opinio juris* this presupposes that customary international law even in its *statu nascendi* takes into consideration other ‘relevant rules of international law’. Based on the principle *a maiore ad minus* this should still hold true in cases where the existing customary law

⁹²⁶ In agreement *see* Bleckmann, *supra* note 862, at 528.

⁹²⁷ *E.g.* state responsibility, maritime delimitation *etc.*; *see infra* Section III.B.

is being interpreted; even more so since due to its inherent vagueness interpretations *contra legem* are a constant danger.

All authors who have dealt with the issue of interpretation of customary international law acknowledge this is a relevant form of interpretation.⁹²⁸ According to Kolb, general principles form a basis for *interpreting both customary and conventional international law*.⁹²⁹ Based on the analysis of the first Chapter of this thesis⁹³⁰, one could extend this basis to include any kind of rule, be it customary or conventional. Bleckmann, names this kind of interpretation as ‘systematic’.⁹³¹ This method of interpretation seems to be identical with that of the principle of ‘systemic integration’. The term ‘systemic’, which has been adopted by the ILC, seems to be the more appropriate term for describing this method of interpretation because ‘systemic’ means “relating to a system as a whole”⁹³² and thus, denotes the focal point of the process of interpretation, whereas ‘systematic’ means “done or acting according to a fixed plan or system; methodical”⁹³³ and thus, denotes the manner in which an action is performed.⁹³⁴ For this reason, the term ‘systemic interpretation’ has been employed in the present thesis in order to describe this method of interpretation.

4. Intentions’ Approach is not Relevant

Having established the limited importance of the grammatical interpretation and the greater *gravitas* of the teleological interpretation, what remains to be seen is what the role of an interpretation based on the intention of the parties is. Whereas in conventional law, this method of interpretation has its significance, in the context of customary international law it has no relevancy. The reason for that is that a research of the intention of the parties belongs more within the framework of the identification of customary international law rather than its interpretation. It is weaved into the

⁹²⁸ Kolb, *supra* note 345, at 219, para. 87; Fitzmaurice, *supra* note 860, at 151-2; Bleckmann, *supra* note 862, at 526-8; Orakhelashvili, *supra* note 830, at 498.

⁹²⁹ Kolb, *supra* note 345, at 240, para. 93(b), citing in support of this Verdross, ‘*supra* note 86, at 227; Lauterpacht, *supra* note 857, at 158 *et seq.* and Wolfgang Friedmann, ‘The Uses of General Principles in the Development of International Law’, *AJIL* 57 (1963): 279, at 286.

⁹³⁰ Where it was shown that the term ‘relevant rules’ of the principle of systemic integration referred to all rules of international law irrespective of their source (*i.e.* general principles, custom and conventional law).

⁹³¹ Bleckmann, *supra* note 862, at 526.

⁹³² Oxford Dictionaries, *supra* note 48.

⁹³³ *Id.*

⁹³⁴ *E.g.* ‘working in a systematic manner’.

notion of *opinio juris* and consequently the intentions of the parties and the documents in which this intention is incorporated are, essentially, practice and *opinio juris*, evidencing the existence and content of a customary norm, not interpreting it. Therefore, this method of interpretation is not relevant for the purposes of interpreting custom.

5. Tanaka's Logical Interpretation is Identical with Systemic Interpretation

The identification of the methods of interpretation of customary norms will conclude with an analysis of the term 'logical interpretation' from Tanaka's quote:

the method of logical and teleological interpretation can be applied in the case of customary law as in the case of written law.⁹³⁵

The fact that Judge Tanaka refers to a 'method' and not 'methods' could be construed as saying that his idea of logical and teleological interpretation have the same content. However, it is this author's opinion, that it is more a reflection of the spirit of Article 31 VCLT which is entitled 'rule of interpretation' in order to indicate that no element of interpretation is superior to the others. Furthermore, the use of 'and' as an indication of accumulation would seem to point towards two distinct elements.⁹³⁶ Following this line of thought and based on Article 31 VCLT Tanaka's 'logical interpretation' would seem to correspond to either textual interpretation or systemic interpretation. However, as already analyzed *supra*, grammatical interpretation by reference to codification treaties is nothing more than another manifestation of systemic interpretation. Consequently, Tanaka's quote should be read as promoting a two-pronged approach as to the interpretation of customary law: a systemic one and a teleological one. This reinforces the conclusions to which the author has arrived so far.

⁹³⁵ *North Sea Continental Shelf* cases, Dissenting Opinion of Judge Tanaka, at 181.

⁹³⁶ However, a counterargument could be made based on the debate of whether there is a difference between object and purpose in the wording 'object and purpose' of Article 31 VCLT.

B. Jurisprudential Application of the Methods of Interpretation of Customary Law

Since the topic of this thesis is ‘Article 31(3)(c) and the Principle of Systemic Integration’, an extensive analysis of any other method of interpretation of customary law would exceed the scope of this thesis. However, a brief presentation of the relevant jurisprudence is necessary in order to substantiate the conclusions arrived at *supra* regarding the methods of interpretation of customary law.

1. Teleological Interpretation

As mentioned *supra*, Judge Tanaka in his Dissenting Opinion explicitly recognized the method of teleological interpretation as appropriate in the context of customary law:

The method of logical and teleological interpretation can be applied in the case of customary law as in the case of written law.⁹³⁷

Just prior to coming to this conclusion, Judge Tanaka had elaborated on this teleological interpretation

the rule with regard to delimitation by means of the equidistance principle constitutes an integral part of the continental shelf as a legal institution of *teleological construction*. For the existence of the continental shelf as a legal institution presupposes delimitation between the adjacent continental shelves of coastal States. The delimitation itself is a logical consequence of the concept of the continental shelf that coastal States exercise sovereign rights over their own continental shelves. Next, the equidistance principle constitutes the method which is the result of the principle of proximity or natural continuation of land territory, which is inseparable from the concept of continental shelf. *Delimitation itself and delimitation by the equidistance principle serve to realize the aims and purposes of the continental shelf as a legal institution. ...[one] cannot escape from the application of what is derived as a logical conclusion from the fundamental concept* (emphasis added).⁹³⁸

The Judgments in the *Frontier Dispute* case and the *Fisheries* case move along similar lines by interpreting relevant customary norms via references to the “obvious

⁹³⁷ *North Sea Continental Shelf* cases, Dissenting Opinion of Judge Tanaka, at 181.

⁹³⁸ *Id.*

purpose” of a norm⁹³⁹ and to “considerations inherent in the nature of the territorial sea”.⁹⁴⁰

This reference to a teleological interpretation is even more apposite in the context of human rights and humanitarian law. In the *Advisory Opinion on Nuclear Weapons*, Judge Guillaume explained his understanding of the exception “extreme circumstance of self-defence, in which the very survival of a State would be at stake”:

The right of self-defence proclaimed by the Charter of the United Nations is characterized by the Charter as natural law. But Article 51 adds that nothing in the Charter shall impair this right. The same applies *a fortiori* to customary law or treaty law. *This conclusion is easily explained, for no system of law, whatever it may be, could deprive one of its subjects of the right to defend its own existence and safeguard its vital interests.* Accordingly, international law cannot deprive a State of the right to resort to nuclear weapons if such action constitutes the ultimate means by which it can guarantee its survival. In such a case the State enjoys a kind of “absolute defence” (“*excuse absolutoire*”) similar to the one which exists in all systems of criminal law (emphasis added).⁹⁴¹

This brief presentation of some of the most important cases employing teleological interpretation has illustrated that this method of interpretation is not only employable but has already been employed in international jurisprudence. However, since the main focus of this thesis is Article 31(3)(c) and the principle of systemic integration, we shall now turn to the jurisprudence employing the method of systemic interpretation to customary international law.

2. Systemic Interpretation

2.1. Case-law where Systemic Interpretation was Applied

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[the principle of *uti possidetis*] ... is a general principle, which is logically connected with the phenomenon of the obtaining of independence, wherever it occurs. Its *obvious purpose* is to prevent the independence and stability of new States being endangered by fratricidal struggles provoked by the challenging of frontiers following the withdrawal of the administering power (emphasis added).

Frontier Dispute (Burkina Faso v. Republic of Mali), Judgment of 22 December 1986, *ICJ Rep. 1986*, 554, para. 20 (hereinafter *Frontier Dispute* case).

⁹⁴⁰

In this connection, certain *basic considerations inherent in the nature of the territorial sea*, bring to light certain criteria which, though not entirely precise, can provide courts with an adequate basis for their decisions, which can be adapted to the diverse facts in question (emphasis added).

Fisheries case, at 133.

⁹⁴¹ *Advisory Opinion on Nuclear Weapons*, Separate Opinion of Judge Guillaume, at 290, para. 8.

Judge Tanaka's construction of a method of 'logical and teleological interpretation' was shown *supra* to refer to systemic interpretation. As the present author also posited, due to the characteristic nature of customary international law the method of systemic interpretation seemed tailored to meet the challenges posed by any interpretation of customary law. It is this postulate that the following jurisprudence proves beyond doubt.

In the *Gulf of Maine* case the ICJ held that:

So far as conventions are concerned, only 'general conventions', including, *inter alia*, the conventions codifying the law of the sea to which the two States are parties, can be considered. This is not merely because no particular conventions bearing on the matter at issue (apart from the Special Agreement of 29 March 1979) are in force between the Parties to the present dispute, but mainly because it is in codifying conventions that principles and rules of general application can be identified. Such conventions must, moreover, be seen against the background of customary international law and interpreted in its light.⁹⁴²

and that

112. The Chamber therefore wishes to conclude this review of the rules of international law on the question to which the dispute between Canada and the United States relates by attempting a more complete and, in its opinion, more precise reformulation of the 'fundamental norm' already mentioned. For this purpose it will, *inter alia*, draw also upon the definition of the "actual rules of law . . . which govern the delimitation of adjacent continental shelves - that is to Say, rules binding upon States for all delimitations" which was given by the Court in its 1969 Judgment in the North Sea Continental Shelf cases⁹⁴³

In these passages not only did the Court affirm that the content of customary norms can be revealed by reference to other 'rules of international law'⁹⁴⁴ but also that codification treaties can assist in understanding the meaning of customary norms, and thus by inference, the former are 'relevant rules of international law' with respect to the latter, and further that those conventions themselves should be "seen against the background of customary international law and interpreted in its light"⁹⁴⁵ – a kind of reciprocal application of Article 31(3)(c) –.

⁹⁴² *Gulf of Maine*, para. 83.

⁹⁴³ *Ibid.*, para. 112.

⁹⁴⁴ *Id.*

⁹⁴⁵ *Ibid.*, para. 83.

So far, the opinions of Judge Tanaka and Judge Morelli in the *North Sea Continental Shelf* cases have been analyzed extensively. However, the following passage shows that even the judgment itself has something to offer to the concept of systemic interpretation of customary international law; it promotes a systemic interpretation of customary law relating to maritime delimitation by reference to the principles of justice and good faith.

... On a foundation of very general precepts of justice and good faith, actual rules of law are here involved which govern the delimitation of adjacent continent shelves-that is to say, rules binding upon States for all delimitations;-in short, it is not a question of applying equity simply as a matter of abstract justice, but of applying a rule of law which itself requires the application of equitable principles, in accordance with the ideas which have always underlain the development of the legal regime of the continental shelf in this field ...⁹⁴⁶

Moving away from the field of maritime delimitation, our analysis will now turn to the *Advisory Opinion on Nuclear Weapons*. In the previous Sections the *Advisory Opinion on Nuclear Weapons* played a pivotal role in substantiating the claim that interpretation of customary international law is a valid tool to be used by the international judiciary. In the present Section, with respect to the method of systemic interpretation for the purposes of interpreting customary law, the *Advisory Opinion* once again comes to the forefront with a multitude of relevant *dicta*, which if read in connection to each other offer new insight to the interpretative issues of this case. Let us consider Judge Guillaum's *dictum* that:

It may be wondered whether that is indeed the case [*i.e.* that the right of self-defence recognized by Article 51 of the Charter and the principles and rules of the law applicable in armed conflict are completely independent of each other] or whether, on the contrary, *the rules of the jus ad bellum may not provide some clarification of the rules of the jus in bello* (emphasis added)⁹⁴⁷

Judge Ranjeva's claim regarding "a combined interpretation of the relevant rules"⁹⁴⁸ and that:

⁹⁴⁶ *North Sea Continental Shelf* cases, para. 85.

⁹⁴⁷ *Advisory Opinion on Nuclear Weapons*, Separate Opinion of Judge Guillaume, at 290, para. 8.

⁹⁴⁸ *Ibid.*, Separate Opinion of Judge Ranjeva, at 296.

A priori nothing prohibits an interpretation giving precedence to the rules of self-defence, including nuclear self-defence, over the rules of humanitarian law, a difficulty which leads consequentially to the second criticism [*i.e.* the lack of any practice, state or judicial, confirming the existence of the exception “extreme circumstance of self-defence, in which the very survival of a State would be at stake”].⁹⁴⁹

Judge Fleischhauer’s *dictum* that:

The principles and rules of the humanitarian law and the other principles of law applicable in armed conflict, such as the principle of neutrality on the one side and the inherent right of self-defence on the other, which are through the very existence of the nuclear weapon in sharp opposition to each other, are all principles and rules of law. ... [*T*]hese principles and rules ... are of equal rank ... there is no rule giving prevalence of one over the other of these principles and rules. In view of their equal ranking this means that, if the need arises, the smallest common denominator between the conflicting principles and rules has to be found.

The same result [*i.e.* the legality of recourse to nuclear weapons as a last resort in a situation threatening the very existence of the victimized State] is reached if, in the absence of a conventional or a customary rule for the conciliation of the conflicting legal principles and rules, it is accepted that the third category of law which the Court has to apply by virtue of Article 38 of its Statute, that is, *the general principles of law recognized in all legal systems, contains a principle to the effect that no legal system is entitled to demand the self-abandonment, the suicide, of one of its subjects.* Much can be said, in my view, in favour of the applicability of such a principle in all modern legal systems and consequently also in international law (emphasis added).⁹⁵⁰

and finally Judge Koroma’s opinion that:

while throwing the regime of self-defence into doubt by creating a new category called the ‘survival of the State’, seen as constituting an exception to Articles 2, paragraph 4, and 51 of the United Nations Charter and to the principles and rules of humanitarian law...

The question therefore is not whether a State is entitled to exercise its right of self-defence in an extreme circumstance in which the very survival of that State would be at stake, but rather whether the use of nuclear weapons would be lawful or unlawful under any circumstance including an extreme circumstance in which its very survival was at stake - or, in other words, whether it is possible to conceive of consequences of the use of such weapons which do not entail an infringement of international law applicable in armed conflict, particularly international humanitarian law.⁹⁵¹

All of these quotes read together seem to reveal a common pattern. Despite the difference of approaches encapsulated in these *dicta* there is a common denominator. Despite the fact that some of the judges start by considering the notion of self-defence

⁹⁴⁹ *Ibid.*, at 301.

⁹⁵⁰ *Ibid.*, Separate Opinion of Judge Fleischhauer, at 308-9.

⁹⁵¹ *Ibid.*, Dissenting Opinion of Judge Koroma, at 560 and 562.

as the supreme principle, while others reserve this place for the principles of international humanitarian law, they all agree that regardless of the solution given to this problem the method is the same. Each of the two relevant norms of customary international law, *i.e.* self-defence and humanitarian law, should be interpreted by reference to each other, or both should be interpreted by reference to general principles of law. All norms, at least the ones relevant to this case, are of equal standing; consequently their content should be defined or in other words *interpreted* by taking into consideration the other norms in play.⁹⁵² Depending which norm one selects as a starting point, the others are ‘relevant rules of international law’ with respect to it. Therefore, all judges agree that *systemic interpretation* is the optimal solution.

This solution also echoes certain considerations raised in Chapter III of this thesis, where it was stated that there was a ‘presumption against conflict’. For that reason and in order to avoid making a finding of conflict, international courts and tribunals first attempt to bring the norms in balance through interpretation; *harmonization through interpretation*; this is essentially what the judges in the abovementioned *dicta* apply and the way they attempt it is through the use of the customary equivalent of Article 31(3)(c) and, thus, through a systemic interpretation.

Finally, in the *Mondev International LTD v. US* case the Tribunal stated that

[i]n the end the question is whether, at an international level *and having regard to generally accepted standards of the administration of justice*, a tribunal can conclude in the light of all the available facts that the impugned decision was clearly improper and discreditable, with the result that the investment has been subjected to unfair and inequitable treatment. This is admittedly a somewhat open-ended standard, but it may be that in practice no more precise formula can be offered to cover the range of possibilities (emphasis added).⁹⁵³

The reference to ‘generally accepted standards of the administration of justice’ is but another way of referring to general principles of international law, *i.e.* ‘other rules of international law’. This is reinforced by the fact that in a footnote the Tribunal commented that one may compare this with the rule stated in the Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens, Article 8(b), referring to a decision which “unreasonably departs from the principles of

⁹⁵² This would include also the general principles of law.

⁹⁵³ *Mondev* case.

justice recognized by the principal legal systems of the world”.⁹⁵⁴ What this passage boils down to is that ‘fair and equitable treatment’ is an open-ended principle, couched in vague terms, the interpretation of which must take into consideration other ‘relevant rules’.⁹⁵⁵ Similar considerations were repeated in the *Loewen Group, Inc and Raymond L. Loewen v. United States of America* case,⁹⁵⁶ and in the *TECMED S.A. v. The United Mexican States* case.⁹⁵⁷

2.2 The Curious Case(s) of Nicaragua and Tadic

The Nicaragua and Tadic cases also offer support to the claim that customary international law can be interpreted by reference to other ‘relevant rules of international law’. The reason that they are examined separately is because each of them has been a landmark case on its own right.

The attribution to a State of conduct, which it has authorised, is widely accepted in international jurisprudence.⁹⁵⁸

⁹⁵⁴ *Mondev* case, citing the Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens, Article 8 reproduced in L.B. Sohn and R.R. Baxter, ‘Responsibility of States for Injuries to the Economic Interests of Aliens’, *AJIL* 55 (1961): 515, at 551.

⁹⁵⁵ At another passage the Tribunal held that:

In holding that Article 1105(1) refers to customary international law, the FTC interpretations incorporate current international law, whose content is shaped by the conclusion of more than two thousand bilateral investment treaties and many treaties of friendship and commerce. Those treaties largely and concordantly provide for ‘fair and equitable’ treatment of, and for ‘full protection and security’ for, the foreign investor and his investments (emphasis added).

Mondev case, para. 125; in this context, the multitude of bilateral treaties, could function as ‘relevant rules of international law’. Despite the fact that each treaty is bilateral, their *relevancy* would be augmented from an interpretative point of view, due to their sheer number (provided of course that the solutions adopted share a common direction). This result could be arrived at as well through Diagrams 1 and 2 of the present thesis.

⁹⁵⁶ *The Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID case No. ARB(AF)/98/3 (hereinafter *Loewen Group* case).

⁹⁵⁷ Where the Tribunal interpreted the “fair and equitable treatment standard” as resulting from the good faith principle; *Técnicas Medioambientales Techmed S.A. v. the United Mexican States*, ICSID case No. ARB(AF)/00/2 (Award) (May 29, 2003); This does not mean that good faith was a self-standing source of obligation (such a construction has repeatedly been rejected by the ICJ, see *Nuclear Tests* case, at 268, para. 46 and at 473, para. 49; *Land and Maritime Boundary between Cameroon and Nigeria (Preliminary Objections)* (Cameroon v. Nigeria ; Equatorial Guinea intervening), Judgment of 11 June 1998, *ICJ Rep. 1998*, 275, para. 39, citing *Border and Transborder Armed Actions* (Nicaragua v. Honduras), Judgment of 20 December 1988, 69, para. 94) but merely a principle that could be used to shed light as to the content of ‘fair and equitable treatment’.

⁹⁵⁸ See e.g., *D. Earnshaw and Others v. United States* (the *Zafiro* case), Award of 30 November 1925, *RIAA* 6 (1955): 160-5; *Stephens v. United Mexican States* (*Stephens* case), Award of 1927 *RIAA* 4 (1951): 265-8, at 267; *Lehigh Valley Railroad Company, and others (USA.) v. Germany* (*Sabotage* cases), Award of 16 October 1930, *RIAA* 8 (1958): 84-468.

However, in the *Nicaragua* case the question the ICJ faced was

whether or not the relationship of the *contras* to the United States government was so much one of *dependence on the one side and control on the other* that it would be right to equate the *contras*, for legal purposes, with an organ of the United States government, or as acting on behalf of that Government (emphasis added).⁹⁵⁹

only to find that

... there is no clear evidence of the United States having actually exercised such a degree of control in all fields as to justify treating the *contras* as acting on its behalf For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State *had effective control* of the military or paramilitary operations in the course of which the alleged violations were committed (emphasis added).⁹⁶⁰

What is interesting is that, despite the importance of this case and that despite the fact that the ICJ was describing a rule, which for all intents and purposes, was customary international law, there is a remarkable absence of any inquiry into practice and *opinio juris*.⁹⁶¹

The Appeals Chamber of the ICTY also addressed these issues. In *Prosecutor v. Tadić*, the Chamber stressed that:

The requirement of international law for the attribution to States of acts performed by private individuals is that the State exercises control over the individuals. The *degree of control* may, however, vary according to the factual circumstances of each case. The Appeals Chamber fails to see why in each and every circumstance international law should require a high threshold for the test of control.⁹⁶²

⁹⁵⁹ *Nicaragua* case, para. 109.

⁹⁶⁰ *Ibid.*, at 62 and 64-65, paras. 109 and 115. See also the Concurring Opinion of Judge Ago, *ibid.*, at 189, para. 17.

⁹⁶¹ A point which the ICTY stressed in the *Tadic* case, para. 124; Furthermore, in order to demonstrate that the “effective control” interpretation was at variance with international jurisprudence, it cited a number of cases, where the “effective control” had not been the level of control required; *Tadic* case, paras. 125 *et seq.* citing: *Stephens* case, at 266-7; *Kenneth P. Yeager v. Islamic Republic of Iran*, Award of 2 November 1987, *Iran-USCTR* 17 (1987-IV): 92; *William L. Pereira Associates, Iran v. Islamic Republic of Iran*, Award of 17 March 1984, *Iran-UCTR* 5 (1984-I): 198 at 226. See also *Arthur Young and Company v. Islamic Republic of Iran, Telecommunications Company of Iran, Social Security Organization of Iran*, Award of 30 November 1987, *Iran-USCTR* 17 (1987-IV): 245; *Schott v. Islamic Republic of Iran*, Award of 14 March 1990, *Iran-USCTR* 24 (1990-I): 203, para. 59.

⁹⁶² *Prosecutor v. Dusko Tadić*, Judgment of the Appeals Chamber of 15 July 1999, IT-94-1-A, para. 117 (emphasis in original), accessible at <http://www.icty.org/x/cases/tadic/acjug/en/tad-aj990715e.pdf> (last accessed on 25 January 2010).

The Appeals Chamber held that the requisite degree of control by the Yugoslavian authorities over these armed forces required by international law for considering the armed conflict to be international was *overall control* going beyond the mere financing and equipping of such forces and involving also participation in the planning and supervision of military operations.⁹⁶³

Consequently, in the application of the same rule, with respect to attribution of acts of *de facto* agents,⁹⁶⁴ the ICJ adopted an ‘effective control’ test, while the ICTY an ‘overall control’ one. The fact that it is essentially the same rule that both these tribunals are applying, yet they managed to reach different results, combined with a lack, at least on the part of the ICJ, of any research in the practice and *opinio juris* surrounding this issue, leads us to conclude that what we are up against is two different interpretations of the same rule. This solution, apart from being based on the Judgments of the two tribunals, *i.e.* their statements, the overall construction of their argumentation, the end result of two different criteria and the lack of research into elements evidencing customary international law, is also elegant, straightforward and above all simple.⁹⁶⁵ It would not be the first or the last time that two tribunals arrive at two different interpretations.⁹⁶⁶

The ILC in its Commentary to Article 8 of the (then Draft) Articles on State Responsibility, tried to explain the divergence in the criteria adopted in the aforementioned judgements by distinguishing between the legal situations and the factual situation in each case. Whereas in the *Nicaragua* case the legal issue was state responsibility, in *Tadic* it was individual criminal responsibility and the case concerned international humanitarian law not responsibility of States.⁹⁶⁷

However, the ICTY had already included in its judgment a response to this:

⁹⁶³ *Ibid.*, para. 145 (emphasis in original).

⁹⁶⁴ In more detail on the complex issue of *de facto* agents see: André de Hoogh, ‘Articles 4 and 8 of the 2001 ILC Articles on State Responsibility, the *Tadic* Case and Attribution of Acts of Bosnian Serb Authorities to the Federal Republic of Yugoslavia’, *BYIL* 72 (2002): 255, at 280; Gregory Townsend, ‘State Responsibility for Acts of *de facto* Agents’, *Arizona Journal of International and Comparative Law* 14 (1997):635, at 650; Clauss Kress, ‘L’Organe *de facto* en Droit International Public’, *RGDIP* 105 (2001): 93, at 95 *et seq*; The Iran-US Claims Tribunal has dealt with the issue extensively as well: *Yeager* case, para.43; *Schering Corp. v. Iran*, Award of 13 April 1984, *Iran-USCTR* 5 (1984-I): 361, at 370; *Eastman Kodak v. Government of Iran*, Award of 11 November 1987, *Iran-USCTR* 17 (1987-IV) 153, paras.41,43 and 47; *Eastman and Kodak v. Government of Iran*, Award of 1 July 1991, *Iran-USCTR* 27 (1991-II): 3, para.32 and Concurring and Dissenting Opinion of Judge Brower, paras.1-4; *Sea-Land Service, Inc. v. Iran*, Award of 20 June 1984, *Iran-USCTR* 6 (1984-II): 149, at 159; *Foremost Tehran, Inc. v. Iran*, Award of 10 April 1986, *Iran-USCTR* 10 (1986-I): 229, at 241-2 .

⁹⁶⁵ Which according to *Occam’s razor* would mean that it is in all probability the correct solution.

⁹⁶⁶ See for instance the *Zeroing* cases in the WTO context.

⁹⁶⁷ ILC *supra* note 542, Commentary to Article 8, at 106-7, para. 5.

what is at issue is not the distinction between State responsibility and individual criminal responsibility. Rather, the question is that of establishing the criteria for the legal imputability to a State of acts performed by individuals not having the status of State officials.⁹⁶⁸

Furthermore, the ILC in the same Commentary, and despite its previous statement, acknowledged that the decision on which criterion should apply in the case of *de facto* agents was “a matter for appreciation in each case whether particular conduct was or was not carried out under the control of a State, to such an extent that the conduct controlled should be attributed to it”.⁹⁶⁹ Essentially, this is like saying that it is a matter of interpretation.⁹⁷⁰

Of course, identifying that the different tests adopted in the *Nicaragua* and the *Tadic* cases are a result of interpretation, has its own merit. Yet it does not qualify this interpretation automatically as a systemic one. In order to do that, attention must be paid to paragraph 116 of the *Tadic* Judgment, where the ICTY held that:

116. A first ground on which the *Nicaragua* test as such may be held to be unconvincing is based on the *very logic of the entire system of international law on State responsibility*. (emphasis added)⁹⁷¹

The crucial point of this quote is that the ICTY does not interpret customary law merely by reference to one or more other ‘relevant rules’ of international law; what it does is interpretation by reference to the whole body of norms of an area of international law. That area in the present case is the “entire system of international law on State responsibility”. As was alluded to earlier, such an interpretation is unique in the sense that it is the point where systemic and teleological interpretation of customary international law converge. In order to interpret the customary law at hand

⁹⁶⁸ *Tadic* case, para. 104.

⁹⁶⁹ ILC *supra* note 542, Commentary to Article 8, at 107, para. 5; citing also *Yeager* case at 103. See also *Starrett Housing Corp. v. Government of the Islamic Republic of Iran*, Award of 19 December 1983, *Iran-USCTR* 4 (1983-III): 122, at 143.

⁹⁷⁰ Judge Higgins, in her turn talked about “differences of perception”; see Speech by H.E. Rosalyn Higgins, President of the International Court of Justice, at the Meeting of Legal Advisers of the Ministries of Foreign Affairs, 29 October 2007, accessible at <http://www.icj-cij.org/presscom/files/7/14097.pdf> (last accessed on 25 January 2010)

⁹⁷¹ *Tadic* case, para. 116.

the ICTY, in one simple sentence, refers both to the entire set of norms, incorporated in the system of the law of State responsibility, and to the *telos* of the system itself.

After this hybrid teleological/systemic interpretation the ICTY, then, returns to more familiar methods of interpretation. By invoking another customary rule of international law (the one enshrined in Article 7 of the Articles on State Responsibility *i.e.* attribution to the State of an act of one of its organ even if the latter has acted *ultra vires*) it held that a similar reasoning should apply in the interpretation of the customary rule enshrined in Article 8.⁹⁷² Essentially the Court interpreted one customary rule by reference to another ‘relevant’ customary rule or to a whole set of ‘relevant rules’ of customary law.⁹⁷³

Despite the different approaches, adopted by the ICJ and the ICTY, in the interpretation of the relevant customary norm of State responsibility, Pauwelyn had predicted that since there is a ‘presumption against conflict’, the tribunals in order to avoid conflicting judgments would end up harmonizing their decisions. This would entail with respect to the ICJ and the ICTY, that the ICJ would, if given the chance, adopt the less strict test of ‘overall control’.⁹⁷⁴ The reality, unfortunately, proved Pauwelyn wrong. Both tribunals have remained firm in their respective interpretations of the appropriate level of control required for attribution to a State of acts of an individual or group under Article 8 of the Articles on State Responsibility. The ICTY

⁹⁷² The Court goes even a step further, arguing that the reasoning behind Article 7 is shared by the entirety of the law on State responsibility.

The rationale behind this provision [*i.e.* Article 7] is that a State must be held accountable for acts of its organs whether or not these organs complied with instructions, if any, from the higher authorities. Generally speaking, it can be maintained that the whole body of international law on State responsibility is based on a realistic concept of accountability, which disregards legal formalities and aims at ensuring that States entrusting some functions to individuals or groups of individuals must answer for their actions, even when they act contrary to their directives.

...

The same logic should apply to the situation under discussion [*i.e.* which is the appropriate ‘control’ for the purposes of the customary equivalent of Article 8]

Tadic case, paras. 121-2; this method of interpretation, as noted earlier, blurs the distinction between systemic and teleological interpretation of customary international law.

⁹⁷³ The entirety of the law on State responsibility.

⁹⁷⁴ See Pauwelyn, *supra* note 51, at 124.

in the *Aleksovski* case not only reaffirmed the “overall control” interpretation⁹⁷⁵ but also held that:

146. To the extent that it provides for greater protection of civilian victims of armed conflicts, this different and less rigorous standard is wholly consistent with the fundamental purpose of Geneva Convention IV, which is to ensure “protection of civilians to the maximum extent possible”.⁹⁷⁶

The implication of this paragraph is that apart from the systemic interpretation by reference to the entirety of the system of international law on state responsibility, which the ICTY applied in the *Tadic* case,⁹⁷⁷ in the *Aleksovski* case the customary rule on attribution of acts of *de facto* agents was interpreted by reference to Geneva Convention IV, as ‘a relevant rule’. The result of this *systemic interpretation* was that the “overall control” standard was found to be the appropriate one. This interpretation was recently, once again, reaffirmed in the *Celebici* case.⁹⁷⁸

The ICJ, on its part, affirmed the effective control in a series of recent judgments.⁹⁷⁹ Germane to the analysis of this Section is the *Serbia and Montenegro* case where the ICJ, after reviewing the ICTY’s reasoning, nevertheless rejected the ‘overall control’ test for several reasons⁹⁸⁰ the most important being:

406. It must next be noted that the “overall control” test has the major drawback of *broadening the scope of State responsibility well beyond the fundamental principle governing the law of international responsibility: a State is responsible only for its own conduct*, that is to say the conduct of persons acting, on whatever basis, on its behalf. ... In this regard the “overall control” test is unsuitable, for it stretches too far, almost to breaking

⁹⁷⁵ *Prosecutor v. Zlatko Aleksovski*, Judgment of the Appeals Chamber of 24 March 2000, IT-95-14/1-A, accessible at: <http://www.icty.org/x/cases/aleksovski/acjug/en/ale-asj000324e.pdf> (last accessed on 25 January 2010), para. 145.

⁹⁷⁶ *Ibid.*, para. 146.

⁹⁷⁷ *Tadic* case, para. 116.

⁹⁷⁸ *Prosecutor v. Hazim Delic*, Judgment of the Appeals Chamber of 20 February 2001, IT-96-21-A (*Celebici* case), accessible at: <http://www.icty.org/x/cases/mucic/acjug/en/cel-aj010220.pdf> (last accessed on 25 January 2010), paras. 41-2; which quoted the above paragraphs of the *Aleksovski* judgment.

⁹⁷⁹ *Armed Activities on the Territory of Congo* (Congo v. Uganda), Judgment of 19 December 2005), *ICJ Rep.* 2005, paras. 131-5, 146 and 160, accessible at: <http://www.icj-cij.org/doCKET/files/116/10455.pdf> (last accessed on 25 January 2010); and *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment of 26 February 2007, *ICJ Rep.* 2007, 91, paras. 377-415 (hereinafter *Application of Genocide Convention* case)

⁹⁸⁰ *Application of Genocide Convention* case, paras. 403-5.

point, the connection which must exist between the conduct of a State's organs and its international responsibility (emphasis added).⁹⁸¹

Consequently, the ICJ in its turn interprets the relevant rule of State responsibility by reference to a “fundamental principle governing the law of international responsibility”.

Despite the fact that no single, generally accepted, interpretation of the relevant customary rule on attribution has been found and that each tribunal remains firm in its own interpretation, this does not subtract from the value of the above analyzed jurisprudence. Not only have the *Nicaragua* and *Tadic* cases and the jurisprudence that they have spawned interpreted customary international law but perhaps most importantly the method they have applied is that of either *systemic interpretation* as such or the one which is on the fringe between *systemic and teleological interpretation* of customary international law.

2.3. Systemic Interpretation of the Rules on Interpretation

The *CCFT v. US* case merits separate examination not only due to the many issues it raises with respect to interpretation of customary international law, but perhaps most importantly because it attempts to interpret not just any customary norm but *the customary rules on interpretation* themselves.

The entire award is devoted to various issues of interpretation. Nevertheless it is Section I.VI which steals the limelight. The importance of that Section can be seen even from the title which goes as follows: ‘Decisions in Other Cases as Supplementary Means of Interpretation (Article 32 VCLT)’. The Tribunal in *CCFT v. US* is one of the very few courts that have expressly acknowledged judicial decisions as other supplementary means. The reasoning of the court is quite revealing:

50. On the other hand, Article 32 VCLT permits, as supplementary means of interpretation, not only *preparatory work* and *circumstances of conclusion* of the treaty, but indicates by the word ‘*including*’ that, beyond these two means expressly mentioned, other supplementary means may be applied. Article 38 [paragraph 1.d.] of the Statute of the International Court of Justice provides that judicial decisions are applicable for the interpretation of public international law as ‘subsidiary means’. Therefore, they must be

⁹⁸¹ *Ibid.*, paras. 403-6.

understood to be also *supplementary means of interpretation* in the sense of Article 32 VCLT.

51. That being so, it is not obviously clear how far arbitral decisions are of relevance to the Tribunal's task. It is at all events plain that the decisions of other tribunals are not binding on this Tribunal, and the Tribunal refers in this connection to paragraphs 73-76 of the Decision on Jurisdiction in *Bayindir Insaat Turizm Ticaret v. Islamic Republic of Pakistan* of November 14, 2005 (ICSID Case No. ARB/03/29). This does not, however, preclude the Tribunal from considering other arbitral decisions and the arguments of the Parties based upon them, to the extent that it may find that they throw useful light on the issues that arise for decision in this case. Such an examination will be conducted by the Tribunal later in this Award, after the Tribunal has considered the Parties' contentions and arguments regarding the various issues argued and relevant to the interpretation of the NAFTA provisions at stake.⁹⁸²

Before we proceed a few points need to be made with respect to the applicable law and the nature of Article 32. Since one of the parties to the dispute is the US, which has not ratified the VCLT, Articles 31 and 32 as such do not apply. Customary international law is applicable *ab initio*. Consequently, the Tribunal in the present case had to apply customary international law. However, since these principles are considered to be codified in Articles 31 and 32, the Tribunal adopts a common approach; it uses the text of the latter as a template for their interpretation of what is to be included in the notion of 'supplementary means'. This reference to the VCLT is, as has been analyzed *supra*, nothing short of a *systemic interpretation*. The VCLT as such is not applicable law in the present case, yet the Tribunal takes it into consideration in order to interpret what the content of the customary law equivalent of Article 32 is. Consequently, by the mere fact of invoking the VCLT, and using its wording, the Tribunal has started a *systemic interpretation*. We have left the realm of *identification of custom* (through practice and *opinio juris*) and entered that of *interpretation of custom*.

But the importance of this decision does not rest merely on this. The Tribunal goes on to interpret the meaning of 'supplementary means' as incorporated in Article 32. At this point a few comments need to be made regarding the nature of Article 32 (be it conventional or customary law). Article 32 deals with the so-called supplementary means of interpretation. However, the list of supplementary means,

⁹⁸² *In the Consolidated Arbitration under Chapter Eleven of the North American Free Trade Agreement (NAFTA) and the UNCITRAL Arbitration Rules between the Canadian Cattlemen for Fair Trade (CCFT) and the United States of America*, Award on Jurisdiction of 28 January 2008, paras. 50-1 (emphasis in original), (hereinafter *CCFT v. US* case), accessible at: www.naftaclaims.com/Disputes/USA/CCFT/CCFT-USA-Award.pdf (last accessed on 25 January 2010).

mentioned in Article 32 - *travaux préparatoires* and ‘circumstances of conclusion’ of a treaty - is clearly not a *numerus clausus*. The use of the term ‘including’ in the text of Article 32 is pretty straightforward. It was the clear intention of the drafters of the VCLT to allow the judge certain flexibility in the interpretative process. As can be seen from the *travaux préparatoires* of the VCLT, there was originally a huge debate as to whether rules of interpretation existed, let alone should be included in the VCLT.⁹⁸³ Some argued in favour of the existence of ‘principles’ of interpretation, not ‘rules’, while others feared that putting any such rules down in black-letter law, might make them too rigid, and eventually hinder the work of the judges.⁹⁸⁴ In this climate, one can understand the effort that the drafters put in ensuring a level of flexibility for the rules of interpretation they would end up with. Article 32 is but one more example of that effort. What is, nevertheless, strange is that the term ‘including’, although not an object of controversy, was not an object of discussion either. The entirety of the debate focused on the notion of *travaux préparatoires* and its various complexities.⁹⁸⁵ This, on the one hand, gives the judges a relative ‘clean slate’ to work with, on the other hand, though, it deprives the judges of any basic guideline with which to work.

In general, international courts and tribunals have been hesitant in making pronouncements on whether their own previous judgments or those of other courts can be used for interpretative purposes through an application of Article 32.⁹⁸⁶ It is exactly this situation, which makes the stance of the Tribunal in *CCFT v. US* all the more interesting. First, the Tribunal reiterates that the term ‘including’ clearly indicates that there are other supplementary means available to the judges, apart from *travaux préparatoires* and ‘circumstances of conclusion’ of a treaty. So far everything is pretty self-evident. It is logical also to infer that since the Tribunal focuses on the

⁹⁸³ ILC, (A/CN.4/SR.726) in *YILC* (1964), Vol.I: 20, para. 4, 15, 24, 28; ILC, (A/CN.4/SR.765 & 66), in *YILC* (1964), Vol. I: 275 *et seq.*; also see ILC, *Draft Articles on the Law of Treaties with Commentaries*, in *YILC* (1964), Vol.II: 176, at 199-201.

⁹⁸⁴ *Id.*

⁹⁸⁵ For a general overview, see Franciscus A. Engelen, *Interpretation of Tax Treaties under International Law: A Study of Articles 31, 32 and 33 of the Vienna Convention on the Law of Treaties and their Application to Tax Treaties* (Amsterdam: IBFD, 2004), 293 *et seq.*

⁹⁸⁶ This is not to say, of course, that they have refrained from quoting judgments of other courts, a phenomenon more known as *judicial cross-fertilization*. On this issue, see Francis G. Jacobs, ‘Judicial Dialogue and the Cross-fertilization of Legal Systems: the European Court of Justice’, *Texas International Law Journal* 38 (2003): 547-56; Anne-Marie Slaughter, ‘A Global Community of Courts’, *Harvard International Law Journal* 44 (2003): 191-219; Société Française pour le Droit International, *La juridictionnalisation du Droit International : Colloque de Lille* (Paris: Pedone, 2003).

term ‘including’ it feels that judicial decisions fall neither in the group of *travaux préparatoires* nor in that of ‘circumstances of conclusion’.⁹⁸⁷

The Tribunal then, in order to substantiate why judicial decisions are supplementary means within the meaning of Article 32, invokes the Statute of the ICJ. It is exactly this point that needs to be stressed. As was mentioned earlier, by focusing on the text of the VCLT, the Tribunal already started a *systemic interpretation* of the customary rules of interpretation themselves. By now interpreting Article 32⁹⁸⁸ by reference to the ICJ Statute, it applies a *systemic interpretation* once again.

Let us proceed now with an examination of the interpretative process *per se*. Although the Tribunal does not explain the reasoning behind the reference to the ICJ Statute, it must fall within the customary rules on interpretation. The only element that seems to fit the bill is Article 31(3)(c), or to be exact, its customary equivalent.⁹⁸⁹ The Tribunal is seeking to determine whether judicial decisions, can be supplementary means within Article 32. If we are to apply the essence of Article 31(3)(c) and refer to “all relevant rules of international applicable in the relations between the parties”, where better to start than with the UN Charter, which epitomises the notion of a treaty with global participation. The ICJ Statute is an integral part of the UN Charter⁹⁹⁰ and “[a]ll Members of the United Nations are *ipso facto* parties to the Statute of the International Court of Justice”.⁹⁹¹ This would resolve the issue of ‘applicable between the parties’, even if we were to apply the strictest criterion⁹⁹² set by the Panel in the *Biotech* case,⁹⁹³ since all States parties to the VCLT are parties to the UN Charter, and most importantly if the VCLT as a treaty were to apply. However, in the present case, as was mentioned *supra*, we are dealing with customary law, which might complicate things depending on the criterion applicable.

⁹⁸⁷ We shall return to the latter *infra*, when the *CCFT v. US* is juxtaposed with the relevant jurisprudence of the WTO.

⁹⁸⁸ Or its customary equivalent for the purposes of the present case.

⁹⁸⁹ Because as we analyzed *supra* we are now in the realm of customary law.

⁹⁹⁰ Article 92, UN Charter.

⁹⁹¹ Article 93, UN Charter.

⁹⁹² Which, however, does not seem to reflect either the true meaning of Article 31 as text or the current status of customary law. In more detail *see* Panos Merkouris, ‘Debating the Outoboros of International Law: The Drafting History of Article 31(3)(c)’, *ICLR* 9 (2007): 1-31.

⁹⁹³ Which applied an interpretation of Article 31(3)(c) in the sense that *all* parties to the treaty interpreted must be parties to the treaty used by means of Article 31(3)(c); in more detail *see supra* Section III.B.3. Similarly, the intertemporality issues of 31(3)(c) do not come into play here as the UN Charter precedes the VCLT.

Nevertheless, even in this case, the universal participation of the UN Charter is sufficient to satisfy even the *Biotech* case criterion.

The only issue then, which remains, is whether the ICJ Statute is ‘relevant’. The Tribunal seems to address the issue when it says:

Article 38 [paragraph 1.d.] of the Statute of the International Court of Justice provides that judicial decisions are applicable for the interpretation of public international law as ‘subsidiary means’. Therefore, they must be understood to be also *supplementary means of interpretation* in the sense of Article 32 VCLT.⁹⁹⁴

Article 38 of the ICJ Statute is generally accepted as outlining the main sources of international law, with 38(1)(a)(b) and (c) being the ‘formal’ sources and the rest the ‘material’ or ‘quasi-formal’ sources.⁹⁹⁵ Judicial decisions, mentioned at Article 38(1)(d) are supposed not to create but to evidence, or indicate the status of international law.⁹⁹⁶ It is this *relevance* that the Tribunal was hinting at.

The shortcomings of this equation between ‘subsidiary’ and ‘supplementary’,⁹⁹⁷ however, in no way diminish the importance of the case. The Tribunal in *CCFT v. US interpreted the customary rule on interpretation* relating to supplementary means, *i.e.* customary Article 32, through the customary Article 31(3)(c), on 2 levels:

- i. by using the text of the VCLT, which incorporates the customary rule on interpretation, and

⁹⁹⁴ *CCFT v. US*, para. 187.

⁹⁹⁵ The latter being a term coined by Sir Gerald Fitzmaurice, ‘Some Problems Regarding the Formal Sources of International Law’, in *Symbolae Verzijl: présentées au Professeur J. H. Verzijl à l’Occasion de son LXX-ième Anniversaire*, Jan H. Verzijl and Frederik M. van Asbeck (eds.) (The Hague: Nijhoff, 1958), 153-76 at 173.

⁹⁹⁶ Schwarzenberger, *supra* note 534, at 27 *et seq.*

⁹⁹⁷ Whether Article 32 was considered as ‘less important’ than Article 31 was hotly contested in the *travaux préparatoires* of the VCLT and was resolved in favour of the adoption of the term ‘supplementary’ (for a general overview of the debate *see* Engelen, *supra* note 502 Chapter 7, especially 321-6). This term was selected in order to emphasize and to more accurately represent the true function of Article 32, *i.e.* making complete the interpretation, either through confirmation or clarification, arrived at through Article 31 (ILC, *Report of the ILC on the Work of its 18th Session: Draft Articles on the Law of Treaties with Commentaries*, (A/6309/Rev.1), reproduced in *YILC* (1966), Vol. II: 218, at 220, para. 10; at 223, para. 19). On the contrary, in the *travaux préparatoires* of Article 38 of the PCIJ Statute, on which Article 38 of the ICJ Statute was based, the term ‘subsidiary’ was employed, exactly in order to stress the subordination of judicial decisions to the other sources of international law; to demonstrate that it was not on par with the other norm creating sources, but its function was more that of providing evidence as to the current status of law. Consequently, the terms ‘subsidiary’ and ‘supplementary’, functioning in two completely different contexts, do not have the identical meaning that the Tribunal claimed.

- ii. by using the ICJ Statute in order to interpret the term ‘supplementary means’ of the customary law Article 32.

The *EC – Chicken Classification* case,⁹⁹⁸ boasts being one of the very few cases, alongside *CCFT v. US*, to clearly state that judicial decisions can fall under Article 32. However, there is one big difference between them. Whereas *CCFT v. US* found that judicial decisions are neither *travaux préparatoires* nor ‘circumstances of conclusion’ of a treaty, thus allowing for a wider discretion as to the decisions that could be made reference to,⁹⁹⁹ the WTO Panel in *EC – Chicken Classification* considered the judicial decisions in question as falling under ‘circumstances of conclusion’ of a treaty of Article 32, which, in some cases as we will see *infra*, might create certain temporal restrictions as to the judicial decisions that can be used.

In more detail, the issue was whether in the interpretation of Heading 02.10 of the EC Schedule, the Panel could take into consideration the ECJ judgments in *Dinter*¹⁰⁰⁰ and *Gausepohl*¹⁰⁰¹. The Panel felt that this question had to be split in two parts: i) whether it was, theoretically, possible for judgments to be considered under Article 32 and ii) whether there were temporal constraints as to what judgments could be considered as ‘circumstances of conclusion’ of a treaty.¹⁰⁰² The Panel decided that judicial decisions were included in the notion of Article 32¹⁰⁰³ and that “there is no temporal limitation on what may qualify as ‘circumstances of conclusion’ under Article 32 and that ‘relevance’ is the more appropriate criterion”.¹⁰⁰⁴ However, this did not mean that there were absolutely no restrictions as to how far temporally distanced a judgment could be with respect to the treaty being interpreted, but that Article 32 itself indicates that “[any] instrument in question must be temporally proximate to the conclusion of a treaty in order for it to be taken into account...under Article 32”.¹⁰⁰⁵ In the end, the Panel considered only the *Gausepohl* and not the *Dinter* case, not because the latter was temporally too far¹⁰⁰⁶ but because it was not ‘relevant’ to the issue at hand.¹⁰⁰⁷

⁹⁹⁸ *European Communities - Customs Classification of Frozen Boneless Chicken Cuts*, Panel Report adopted on 30 May 2005, WTO, WT/DS269/R & WT/DS286/R (hereinafter *EC – Chicken Classification* (PR)).

⁹⁹⁹ However, always under the *provisio* that they shed some light to the issues raised in the case.

¹⁰⁰⁰ *Case C-175/82, Dinter v. Hauptzollamt Köln-Deutz* (1983), ECR 969.

¹⁰⁰¹ *Case C-33/92, Fleisch GmbH v. Oberfinanzdirektion Hamburg* (1993), ECR I-3047.

¹⁰⁰² *EC – Chicken Classification* (PR), para. 7.390.

¹⁰⁰³ *Ibid.*, para. 7.391 and FN 681.

¹⁰⁰⁴ *Id.*; and more analytically, para. 7.344.

¹⁰⁰⁵ *Ibid.*, para. 7.392.

¹⁰⁰⁶ Although it had been issued in 1983, the Panel thought that it still remained applicable; *Ibid.*, para. 7.393.

In summary, the Panel considered ECJ judgments to fall under Article 32, but within the notion of ‘circumstance of conclusion’ of a treaty and not within the non-defined other supplementary means. Furthermore, it elaborated a set of criteria: i) *relevancy* and ii) *temporal proximity* of the judgments to the treaty being interpreted. Out of these two criteria, the primary one is that of relevancy. Temporal proximity offers a threshold, but quite a flexible one, as long as relevancy is satisfied.

In summation the *EC-Chicken Classification* case similarly to the *CCFT v. US* case, had to apply customary rules of interpretation.¹⁰⁰⁸ However, instead it focused and used the text of the VCLT. As has already been repeated several times this is a form of *systemic interpretation*. Furthermore, the conclusions it came to as to whether judicial decisions fall under Article 32 and the criteria it elaborated are all manifestations and results of an interpretative process. Unfortunately, however, the Panel did not explain the process through which it arrived to these conclusions.

For similar reasons the *Biotech* case, as has been analyzed *supra* when interpreting customary Article 31(3)(c) through the use of the text of the VCLT was actually engaged in a process of *systemic interpretation*.

All of the aforementioned cases are characteristic in the sense that they not only engaged in a systemic interpretation of customary international law, but more importantly that the rules they attempted to interpret were the customary rules of interpretation themselves. Of course, amongst them *CCFT v. US* has a special place because, apart from the above, it set the bar even higher by applying the customary law equivalent of Article 31(3)(c) on two different levels.

¹⁰⁰⁷ *Id.*

¹⁰⁰⁸ By virtue of Article 3(2) DSU.

IV. Conclusion

In this final Chapter the scope of application of the principle of systemic integration (customary Article 31(3)(c)) was put to the test. The question put forward was whether customary Article 31(3)(c) could be applied in the interpretation not only of treaties but of customary international law. Since this is a relatively unexplored field this implied that in order to respond to this question another one had to be answered first: Whether interpretation of customary international law is even possible. This question was tackled from two different fronts. On the one hand, whether it was logical to consider interpretation as applicable to unwritten law and on the other hand, whether case-law existed to prove this point. Both were answered to the affirmative. Not only was the interpretation of customary norms a logical corollary of their status *qua* norms, but several cases had already interpreted customary international law

With respect to custom, the main focus of academics and international judiciary alike has mostly been on the elements evidencing custom and not on other related issues, to which interpretation of customary law belongs. Having established that such an interpretation is possible, the apposite methods were identified. The nature of custom renders the point of a grammatical/textual interpretation almost moot (especially since reference to treaties codifying customary norms is not a textual interpretation but a systemic one). The same conclusion is arrived at with respect to an interpretation based on the intentions of the parties. Consequently, only the methods of teleological and the systemic interpretation were found to be relevant for the purpose of interpreting customary international law, with the latter being found in a multitude of cases indicating that it is perhaps a method tailored to the unique characteristics and challenges of international customary law.

The final question that needs to be addressed is what does ‘interpretation of custom’ bring to the table; what does it benefit the judges and the system of international law to accept such an interpretation? Before answering this, certain points need to be made. Firstly, ‘interpretation of custom’, as was shown in the previous analysis, is not something hypothetical the existence of which may depend on its general acceptance or not. On the contrary, it is something that flows naturally and logically from the fundamental rules upon which the function of the international legal system is premised. Since, according to Hart, all terms used in law have “a core

of settled application and a fringe or penumbra of uncertainty” and since the most prominent tool for alleviating this uncertainty has always been the process of interpretation, to deny the existence of ‘interpretation of custom’ would be tantamount to recognizing that either customary international law is not ‘law’ or that the fundamental rules of the international legal system are inherently flawed and erratic.

Additionally, ‘interpretation of custom’ does not claim to solve, or even propose a solution to the problems relating to the nature and creation of customary international law. These are two different realms; ‘interpretation of custom’ deals with custom *after* its coming into existence; for the same reason, in the analysis *supra*, a clear distinction was made between ‘interpretation of custom’ and interpretation of acts that constitute practice leading to the formation or identification of custom.

Having said that, this does not mean that a more generalized recognition of ‘interpretation of custom’ may not benefit the international legal system. One need only bring to mind the situation with respect to Article 31(3)(c). As demonstrated in Part I, it was some sporadic references in recent cases, that ignited a sudden interest for this provision and an extensive discussion both on an academic (*see* for instance, the Report of the ILC Study Group) and on a judicial level (the ‘flowering of case-law’ as stated by Gardiner) and led to the acceptance of Article 31(3)(c) not as a panacea but as a useful interpretative tool for combating the fear of fragmentation of international law.

Similarly, an acknowledgment of the validity of ‘interpretation of custom’ may lead to a revitalization of the debate surrounding the function and importance of this source of international law, but perhaps more importantly, it can contribute to the betterment of the international judicial system. If the process of identification of custom is clearly separated from that of interpretation, this would be reflected both in the pleadings of the parties bringing a claim before international tribunals (be they individuals or States) and in the text of the judgments themselves; even more so since international judges are more at ease with the process of interpretation than with researching practice and *opinio juris* for the identification of custom.

Finally and in addition to the above, since, as demonstrated *supra*, systemic interpretation seems to be the method of interpretation most apposite to the special nature of customary law, this would further reinforce the unity of the international

legal system and reinvigorate this source of international law. If when interpreting custom the international judge would have to take into consideration all 'relevant rules', or as shown in the *Tadic* and *Nicaragua* cases entire areas of international law, the scenario of detrimental fragmentation of international law would become all the more unlikely.

Concluding Remarks

Throughout the analysis of this thesis the main goal was to provide a coherent and complete picture of Article 31(3)(c) and the principle of systemic integration. In order to better present the *sui generis* character of the principle of systemic integration the method opted for was focusing on the synthesis and antithesis which characterizes the application of the principle of systemic integration. Although a ‘norm’ and a ‘system’ are two distinct notions they affect each other, and Article 31(3)(c) is one point of convergence. For these reasons, the oscillation between norm and system permeated the analysis of this thesis. In Part I the starting point of analysis was the text of the provision, whereas in Part II the system of international law took the stage. However, both Parts aimed at casting new light on Article 31(3)(c).

Chapter I examined the wording applied in Article 31(3)(c) and especially the meaning of a number of vague terms, such as ‘relevant’, ‘rules’, ‘applicable’ and ‘parties’. Since this could be construed as interpretation the process prescribed by Articles 31 and 32 was followed. The text and context of Article 31(3)(c) was analyzed, without, however, revealing a clear meaning. For that reason, the *travaux préparatoires* and the relevant jurisprudence (as supplementary means of interpretation) were taken into consideration. It was only through these that a true understanding of Article 31(3)(c) was made possible.

Not only are all norms, irrespective of their source, included in Article 31(3)(c), but also the way in which ‘relevancy’, ‘applicability’ and ‘parties’ is determined is based not on a variety of contradicting criteria but on one overarching criterion: the *proximity criterion*. The analysis of the jurisprudence, both pre-VCLT and post-VCLT, revealed that this criterion had four different manifestations: i) terminological proximity ii) subject-matter proximity iii) shared signatory parties (‘actor’) proximity and iv) temporal proximity. Each and every time a court has applied Article 31(3)(c) it has done so through a balanced application of these four manifestations of the *proximity criterion*.

However, an understanding of Article 31(3)(c) does not merely entail identifying the content of the written terms of that provision. What was left unwritten is as important as the written elements. Therefore, Chapter II was devoted to an analysis of the issue of intertemporal law as it applies within Article 31(3)(c). The

discussions in the ILC and the *Institut de Droit International* demonstrated that the topic of intertemporal law was such a complex issue that the solution finally adopted was to delete any explicit reference to it. This meant that both a Draft Article 56, regulating the issue of intertemporal law, and a draft version of Article 31(3)(c) that included intertemporal law references were set aside. However, the discussions within the ILC revealed a crucial point with respect to intertemporal law. Irrespective of the various solutions proposed, ranging from strict application of the principle of contemporaneity to a more dynamic/evolutive interpretation, the general understanding of the ILC members was that the *intention of the parties* was the key element to resolving any issue of intertemporality. This conclusion was reinforced by the relevant jurisprudence.

Since therefore any approach to intertemporal law requires a degree of flexibility based on the intentions of the parties, a similar approach to Article 31(3)(c) is prescribed. The question of whether the term ‘rules of international law’ should be interpreted as rules applicable ‘at the time of the conclusion of the treaty’ or ‘at the time of the interpretation of a treaty’ does not admit of a single, all-encompassing approach. The solution will depend each time on the interpreted treaty and the intention of its parties.

With Chapters I and II the analysis starting with the text of Article 31(3)(c) concluded. Part II, in its turn, brought into focus more ‘systemic considerations’ and how these may affect or elucidate the understanding and application of Article 31(3)(c). To this effect, Chapter III examined the notion of conflict of norms and, in more detail, the principles of conflict resolution. Despite some controversy as to the exact nature of the latter, they were, nevertheless, found to fall within the notion of ‘rules’ of Article 31(3)(c), as defined already in Chapter I, and to apply in the case of conflicting interpretations which are all based on Article 31(3)(c).

Furthermore, whereas in the context of ‘normative conflict’ the aforementioned principles suffer from various limitations, the analysis in Chapter III clearly demonstrated that within the process of Article 31(3)(c) these limitations vanish. The reason for that is that in ‘normative conflict’ a failure of the principles of conflict resolution leads to a dead-end. Within Article 31(3)(c), however, the situation is fundamentally different. In the scenario of conflicting interpretations mentioned above, the ‘presumption against conflict’ is reversed and becomes a ‘presumption of

conflict'. Consequently, the interpreter will first resort to the principles of conflict resolution and then to the proximity criterion, as analyzed in Chapter I. Due to this two-staged approach, even if the principles of conflict resolution fail to offer a solution, the interpreter can still find refuge in the proximity criterion, which will never fail to resolve the interpretative issue.

In the final Chapter the scope of application of the principle of systemic integration was put to the test. The issue around which Chapter IV revolved was whether international customary law can also be an object of interpretation in a fashion similar to conventional law. This Chapter proved that not only is interpretation of customary law possible but that it has already taken place in a multitude of international judicial decisions, some of which are even considered landmark cases.

Having established that such an interpretation is possible, the apposite methods were identified. The very nature of customary international law renders a grammatical/textual interpretation almost impossible. As proven in Chapter IV, reference to treaties codifying customary law should not be considered as textual interpretation, but as systemic. The same conclusion was arrived at with respect to an interpretation based on the intentions of the parties. Consequently, only the methods of teleological and systemic interpretation were applicable within the context of interpretation of customary international law. Out of these two methods, it was demonstrated in Chapter IV, that the latter *i.e.* systemic interpretation, was the method best suited to address the complexities and unique problems that the interpretation of customary law entailed.

All the above Chapters offered, each separately, something new in the understanding of Article 31(3)(c) and the principle of systemic integration; and all of them combined clarified the process that Article 31(3)(c) represents. As a final conclusion, according to the author of this thesis, the principle of systemic integration integrates the whole of international law in the process of interpretation and allows it, as Klabbers said, to achieve “unity in fragmentation”.¹⁰⁰⁹ In this way, the present thesis by presenting in a lucid manner the place and function of Article 31(3)(c) within both the interpretative process of the VCLT and the system of international law

¹⁰⁰⁹ Klabbers, *supra* note 345, at 159.

as a whole conforms with Plato's metaphor. Since knowledge is the way out of the 'cave', this thesis has striven to release the interpreter ('the captive') from the 'chains' of an incomplete understanding of 31(3)(c), that so far have bound 'the captive' and forced him to gaze at shadows on the wall, without really comprehending the true nature behind them.

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