The Interpretative Practice of the International Court of Justice

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Abstract

This article provides an overview of the interpretative practice of the International Court of Justice on the occasion of its 75th anniversary. Whilst the jurisprudence of the nascent ICJ played an important role in the formulation of Articles 31 to 33 of the Vienna Convention on the Law of Treaties, we explore the extent to which the Court has followed the rubric of those articles over its existence, how the Court has understood the interpretative elements contained therein, and whether it has privileged certain elements over others. We argue that the Court has shown flexibility and context-specificity in its practice, both in terms of the interpretative approach adopted as well as the materials used.

Keywords

International Court of Justice – treaty interpretation – Article 31 - Article 33 – Vienna Convention on the Law of Treaties

1 Introduction*

The link between the practice of the International Court of Justice ('ICJ', the 'World Court', the 'Court') and the development of the rules of interpretation as enshrined in the Vienna Convention on the Law of Treaties ('VCLT')[1] is clear in the work of the International Law Commission, which almost exclusively relied on the jurisprudence of the nascent ICJ and its predecessor, the Permanent Court of International Justice ('PCIJ', the 'Permanent Court'), as the basis upon which to elaborate the rules that later became Articles 31–33 of the VCLT.[2] Indeed, in his Third Report, Sir Humphrey Waldock explicitly stated that draft articles on interpretation took inspiration from two sources, one of which was Sir Gerald Fitzmaurice's 1957 article in the *British Yearbook* on the interpretative practice of the International Court.

Yet, despite this close link between the World Court and the rules of the VCLT, understanding the interpretative practice of the Court is not as straightforward as it seems. Previous studies that focus on the interpretative practice of the ICJ – in particular those of Sir Gerald Fitzmaurice and Hugh Thirlway–provide thorough, detailed analyses of specific periods of the Court's jurisprudence.[3]

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1 Vienna Convention on the Law of Treaties (adopted 23 May 1969; entered into force 27 January 1980) 1155 UNTS 331 ('VCLT').

2 See, for example, UN ILC, 'Draft Articles on the Law of Treaties with Commentaries' in *Yearbook of the International Law Commission 1966, Vol. II, Part Two* (United Nations 1967) 187, at 217–226. Indeed, the ILC has in turn relied on the jurisprudence of the ICJ when studying topics related to Articles 31–33 VCLT; see for example, UN ILC, 'Draft Conclusions on Subsequent Agreement and Subsequent Practice in Relation to the Interpretation of Treaties, with Commentaries' in *Yearbook of the International Law Commission 2018, Vol. II, Part Two* (United Nations 2023), at 16; UN ILC, 'Final Report of the Study Group on the Most-Favoured Nation Clause' in *Yearbook of the International Law Commission 2015 Vol. II, Part Two* (United Nations 2020), at, in particular, Part IV.C; UN ILC, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Explansion of International Law' *Yearbook of the International Law Commission 2006 Vol. II, Part Two* (United Nations 2013), in particular at 180–181.

3 G.G. Fitzmaurice, 'The Law and Procedure of the International Court of Justice: Treaty Interpretation and Certain Other Treaty Points' (1951) 28 British Yearbook of International Law 1; G.G. Fitzmaurice, 'The Law and Procedure of the International Court of Justice: Treaty Interpretation and Certain Other Treaty Points' (1957) 33 British Yearbook of International Law 203; H. Thirlway, 'The Law and Procedure of the International Court of Justice,

However, since the publication of those works, the Court has seen one of its busiest periods, concluding 27 contentious cases and rendering one advisory opinion in the past ten years. To put this in context, Sir Gerald's first two articles (which covered treaty interpretation) analysed periods in which the Court concluded just 14 contentious cases and rendered seven advisory opinions.

Our intention in this article is thus to provide a synthesis of the ICJ's interpretative practice, to identify common strands in its approach to interpretation, and to analyse how this practice has evolved over time. Understanding this nuanced practice, and the important ways in which it diverges from or elaborates the rules of treaty interpretation in the VCLT, complements recent literature that addresses interpretation from a more theoretical and/or analytical perspective.[4]

In this article, we take stock of the Court's approach to treaty interpretation in cases and opinions rendered over the first 75 years of its operation; where relevant, we also note how the Court has interpreted other international legal acts, such as optional clause declarations and unilateral declarations. We focus on three issues: first, the extent to which the Court's practice manifests a particular understanding of the elements laid down in Articles 31 to 33 of the VCLT; second, what materials it draws on to apply those elements; and, third, whether the Court applies maxims or canons of interpretation that are not enumerated in the VCLT articles.

The following section (Section 2) contextualizes the Court's practice and that of its predecessor, the Permanent Court of International Justice, against the backdrop of known approaches or schools of interpretation. Section 3 discusses the mutually reinforcing relationship between the World Court's interpretative approach and the development of the VCLT rules, as well as the hybrid character of its approach. Section 4 proceeds to lay down the key

1960–1989, Part Three' (1991) 62 British Yearbook of International Law 1; H. Thirlway, *The Law and Procedure of the International Court of Justice: Fifty Years of Jusrisprudence, Vol. II* (Oxford University Press 2013), at Section 11; H. Thirlway, 'The International Court of Justice: Cruising Ahead at 70' (2016) 29 Leiden Journal of International Law 1103. Also noteworthy is Richard Gardiner's monograph on treaty interpretation, which, whilst not focused solely on the ICJ, analyses the jurisprudence of the Court in detail; R. Gardiner, *Treaty Interpretation* (2nd edn, Oxford University Press 2015).

4 See for example, M. Fitzmaurice and P. Merkouris, *Treaties in Motion: The Evolution of Treaties from Formation to Termination* (Cambridge University Press 2020), at Chapter 4; D. Peat, *Comparative Reasoning in International Courts and Tribunals* (Cambridge University Press 2019); F. Zarbiyev, *Le discours interprétatif en droit international contemporain* (Bruylant 2015); A. Bianchi, D. Peat and M. Windsor (eds), *Interpretation in International Law* (Oxford University Press 2015); D. Alland, '*L'interprétation du droit international public*' (2012) 362 *Receuil des cours* 47.

elements of the Court's approach to treaty interpretation. It shows how the VCLT operates as the indispensable point of reference of the ICJ's interpretative reasoning. Section 5 then takes note of rules, principles, or maxims that have appeared occasionally in the Court's jurisprudence without an apparent foothold in the rules of interpretation laid down in the VCLT. As an overall tendency, the Court's interpretative practice has evolved towards an increasing degree of sophistication and clarity, whilst maintaining elements of flexibility.

2 The International Court of Justice and Approaches or Schools of Interpretation

The practice of the ICJ and its predecessor institution, the PCIJ, do not fit squarely into a particular school of thought or approach to interpretation. In theoretical terms, these approaches or schools 'are not necessarily exclusive to one another, and theories of [...] interpretation can be constructed (and are indeed normally held) compounded of all [of them]'.[5] The circumstances of each case can, and do, have a significant impact on the interpretative approach of the Court. The ICJ, much like the PCIJ, is a court of general jurisdiction that has been called upon to resolve disputes as to the interpretation of a huge variety of rules of international law. The particular treaty at issue, the available interpretative materials, the arguments of the parties are factors that, among other considerations, have had an influence on the methods which the Court has employed to determine the content of treaty provisions in each case before it. By and large, the ICJ has maintained continuity with the PCIJ and strived to achieve consistency in its interpretative approach. Arguably, the catalysing event has been the gradual consolidation of the VCLT rules into the jurisprudence of the Court. To be sure, the VCLT rules on interpretation did not bring about any radical change, as they largely reflected the prior practice of the PCIJ and ICJ.[6] Nonetheless, they became 'the virtually indispensable scaffolding for the reasoning on questions of treaty interpretation'.[7]

With respect to the PCIJ's interpretative approach, Judge Manley O. Hudson remarked that '[it] has formulated no rigid rules; its formulations have been in such guarded form as to leave it open to the Court to refuse to apply them, and

5 Fitzmaurice, 'The Law and Procedure of the International Court of Justice' (1951), at 1.

6 Cf., e.g., the ILC's commentaries to its draft articles on interpretation (Arts 27–29) that contain almost exclusively references to PCIJ and ICJ judgments: UN ILC, 'Draft Articles on the Law of Treaties with Commentaries', at 217–226, footnotes 125–156.

7 Thirlway, *The Law and Procedure of the International Court of Justice*, at 1234.

it would be difficult to say that all of them have been consistently applied'.[8] Similarly, it is difficult to ascribe to the PCIJ a particular approach or school of interpretation. Hudson observes that 'numerous' judgments and opinions of the PCIJ referred to the 'intentions of the parties' as a guide for interpretation, but he cautioned that this was 'merely [...] a palliating description of a result which has been arrived at by some other method than ascertainment of intention'.[9] For instance, the PCIJ enunciated that 'there is no occasion to have regard to preparatory work if the text [...] is sufficiently clear', but this 'rule' was not applied vigorously in all cases.[10] Conversely, whilst the PCIJ focused on the 'natural', 'literal', 'grammatical', 'ordinary', 'normal', 'logical', or 'reasonable' meaning of the terms of the instrument in question, this did not entail the exclusion of other means of interpretation.[11] For the PCIJ, 'the context is the final test' of the meaning of the terms of an instrument.[12] Similarly, the Permanent Court referred to the 'nature', 'scope', 'object', 'spirit', 'tenor', 'function', 'role', 'aim', 'purpose', 'intention', 'system', 'scheme', 'general plan', and the 'principles' underlying treaties or treaty provisions in support of its interpretative findings.[13] In addition, on several occasions, the PCIJ accorded important weight to the legal, political, and social background of the treaty in question.[14] More generally, apart from the PCIJ's caution towards the use of *travaux préparatoires*, 'the jurisprudence of the [PCIJ] d[id] not establish any rigid timetable for the various steps in the process of interpretation'.[15]

8 M.O. Hudson, *The Permanent Court of International Justice, 1920–1942* (Macmillan 1943), at 643. This study is still cited as the most accurate and authoritative depiction of the PCIJ's interpretative practice, cf., e.g., Gardiner, *Treaty Interpretation*, at 65–66.

9 Hudson, *The Permanent Court of International Justice*, at 643–644.

10 Ibid., at 652–655; see, e.g., *SS 'Lotus'* (*France v Turkey*) [1927] PCIJ Series A No. 10, at 16 (as a principle of treaty interpretation); *Serbian Loans Issued in France and Brazilian Loans Issued in France* (*France v Kingdom of the Serbs, Croats and Slovenes*) [1929] PCIJ Series A Nos 20/21, at 30 (as a principle of a more general scope).

11 Hudson, *The Permanent Court of International Justice*, at 645–656; see *Factory at Chorzów* (*Germany v Poland*) (*Indemnity*) (*Jurisdiction*) [1927] PCIJ Series A No. 9 ('*Factory at Chorzów*'), at 24; *Interpretation of Article 3, Paragraph 2, of the Treaty of Lausanne* (*Frontier between Turkey and Iraq*) (*Advisory Opinion*) [1925] PCIJ Series B No. 12, at 23; but also *Interpretation of the Convention of 1919 Concerning Employment of Women During the Night* (*Advisory Opinion*) [1932] PCIJ Series A/B No. 50, at 373, 378 which seems to accord more weight to the text.

12 *Competence of the ILO in regard to International Regulation of the Conditions of the Labour of Persons Employed in Agriculture* (*Advisory Opinion*) [1922] PCIJ Series B No. 2, at 35.

13 Hudson, *The Permanent Court of International Justice*, at 650–652; see, e.g., *German Settlers in Poland* (*Advisory Opinion*) [1923] PCIJ Series B No. 6, at 25.

14 Hudson, *The Permanent Court of International Justice*, at 655–657.

15 Ibid., at 651.

The general direction of the jurisprudence of the ICJ followed that of the PCIJ. Prior to the adoption of the VCLT, Sir Gerald Fitzmaurice commented that 'the Court as a whole favours [...] the textual method, while some of its individual Judges are teleologists'.[16] The eminent commentator further observed that '[w]ith the exception of those who support the extreme teleological school of thought, no one seriously denies that the *aim* of treaty interpretation is to give effect to the intentions of the parties'.[17] The late Hugh Thirlway, reporting on the Court's interpretative practice until 1989, tentatively opined that 'at least in the case of multilateral treaties [...] it has been the "intention" or object of the text of the treaty which has been taken as a starting point'.[18] Yet, these observations were not unanimously shared by doctrine, still less some members of the Court. For instance, Judge Weeramantry, writing separately in 1991, concluded that 'a hierarchy cannot be established among [...] [the three principal schools of thought upon treaty interpretation]'.[19]

The Court's endorsement of VCLT rules on interpretation as expressions of customary international law – and thus as applicable with respect to all treaties – was certainly a turning point, at least for the ways in which the Court justified its interpretative practices. Hugh Thirlway observed in 2013 that the interpretative practice of the ICJ since 1991 has swung back again 'towards a more textual approach'.[20] For instance, in the *Land, Island and Maritime Frontier Dispute* case, the Court referred to 'the basic rule of Article 31 of the Vienna Convention on the Law of Treaties, according to which a treaty shall be interpreted "in accordance with the ordinary meaning to be given to the terms"'.[21] Judge Torres Bernárdez, writing separately, censured this finding in very strong terms:

> For treaty interpretation rules there is no 'ordinary meaning' in the absolute or in the abstract. That is why Article 31 of the Vienna Convention refers to 'good faith' and to the ordinary meaning 'to be given' to the terms of the treaty 'in their context and in the light of its object and purpose'.

16 Fitzmaurice, 'The Law and Procedure of the International Court of Justice' (1951), at 7.

17 Fitzmaurice, 'The Law and Procedure of the International Court of Justice' (1957), at 204 (emphasis in the original).

18 Thirlway, *The Law and Procedure of the International Court of Justice, Vol. II*, at 1234.

19 *Arbitral Award of 31 July 1989* (*Guinea-Bissau v Senegal*) (*Dissenting Opinion of Judge Weeramantry*) [1991] ICJ Rep 53, at 135 ('*Arbitral Award of 31 July 1989* (*Dissenting Opinion of Judge Weeramantry*)').

20 Thirlway, *The Law and Procedure of the International Court of Justice, Vol. II*, at 1234.

21 *Land, Island and Maritime Frontier Dispute* (*El Salvador/Honduras: Nicaragua intervening*) (*Judgment*) [1992] ICJ Rep 351 ('*Land, Island and Maritime Frontier Dispute*'), at para. 373.

> [...] I intend to remain faithful to the rules governing treaty interpretation as codified in the Vienna Convention, whose essential characteristic is that all its interpretative principles and elements form 'an integrated whole', including the 'ordinary meaning' element.[22]

From then onwards, the Court has avoided references to its own pre-1991 findings or any fragmentary quotation of the VCLT when stating the basic rule of interpretation, but rather reproduces faithfully the formulation of the VCLT.[23] Arguably, this subtle change aimed to dispel any impression of hierarchy between the elements of the basic rule of interpretation as reflected in Article 31(1) VCLT. Whilst the Court has to make certain interpretative choices when the case demands, it has no more of a theoretical predisposition towards one or the other school of interpretation than the VCLT rules.

3 The International Court of Justice and the Vienna Convention on the Law of Treaties

The VCLT rules of interpretation do not appear expressly in ICJ judgments until its judgment in *Arbitral Award of 31 July 1989*, that is, almost 10 years after the entry into force of the VCLT.[24] However, references to the VCLT provisions on interpretation can be found even before the VCLT's entry into force in 1980 in individual opinions of members of the Court.[25] In total, citations of the

22 *Land, Island and Maritime Frontier Dispute* (*Judgment*) (*Separate Opinion of Judge Torres Bernárdez*), at paras 190–191.

23 E.g., *Territorial Dispute* (*Libyan Arab Jamahiriya/Chad*) (*Judgment*) [1994] ICJ Rep 6 ('*Territorial Dispute* (*Libya/Chad*)'), at para. 41; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (*Qatar v Bahrain*) (*Jurisdiction and Admissibility*) [1995] ICJ Rep 6 ('*Qatar v Bahrain*'), at para. 33; *Oil Platforms* (*Islamic Republic of Iran v United States of America*) (*Preliminary Objections*) [1996] ICJ Rep 803 ('*Oil Platforms*'), at para. 23.

24 *Arbitral Award of 31 July 1989* (*Dissenting Opinion of Judge Weeramantry*), at para. 48. See also *Maritime Delimitation in the Indian Ocean* (*Somalia v Kenya*) (*Preliminary Objections*) [2017] ICJ Rep 3 ('*Somalia v Kenya*'), at para. 63 and judgments referred to therein; *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination* (*Ukraine v Russia*) (*Judgment*) [2019] ICJ Rep 558 ('*Application of ICSFT and ICERD*'), at para. 57.

25 *Barcelona Traction, Light and Power Company Limited* (*New Application, 1962*) (*Belgium v Spain*) (*Second Phase*) (*Separate Opinion of Judge Ammoun*) [1970] ICJ Rep 3 ('*Barcelona Traction*'), at para. 11; *Appeal Relating to the Jurisdiction of the ICAO Council* (*India v Pakistan*) (*Separate Opinion of Judge Dillard*) [1972] ICJ Rep 46, at para. 90; *Fisheries*

provisions of the VCLT on interpretation, i.e. Articles 31–33 VCLT, appear in more than 30 decisions and advisory opinions of the Court and more than 65 individual opinions.

The Court engages with the VCLT rules in its pronouncements in a variety of ways, as will be demonstrated in the following sections. In most cases, the VCLT rules are not applicable *qua* treaty rules, because one or both parties to the dispute are not parties to the VCLT or the treaty in question was concluded prior to the VCLT's entry into force.[26] This has not hindered the Court from referring to the VCLT rules on interpretation as reflecting customary international law and applying them as such in relation to pre-1969 or even 19th-century treaties.[27] Such a pragmatic approach has, however, not occurred instantaneously but rather incrementally and with an increasing degree of confidence over time. For instance, in the *Arbitral Award of 31 July 1989*, the Court, after reviewing its own approach to treaty interpretation, concluded cautiously: '[t]hese principles are reflected in Articles 31 and 32 of the Vienna Convention on the Law of Treaties, which may *in many respects* be considered as a codification of existing customary international law on the point'.[28] For some time after this initial pronouncement, the Court had been explicit in its endorsement of Article 31 VCLT, but less clear with respect to the other rules of interpretation contained in the VCLT.[29] Thus, for example, in *Oil Platforms*, the Court held that

> according to customary international law as expressed in Article 31 [VCLT], a treaty must be interpreted in good faith in accordance with the

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Jurisdiction (*Germany v Iceland*) (*Merits*) (*Separate Opinion of Judge De Castro*) [1974] ICJ Rep 175 ('*Fisheries Jurisdiction* (*Germany v Iceland*)'), at para. 10; *Aegean Sea Continental Shelf* (*Greece v Turkey*) (*Judgment*) (*Dissenting Opinion of Judge de Castro*) [1978] ICJ Rep 3 ('*Aegean Sea Continental Shelf*'), at para. 13.

26 Arts 4 and 28 VCLT.

27 On acknowledgment of the customary law status of Arts 31–32 VCLT see, e.g., *Jadhav* (*India v Pakistan*) (*Judgment*) [2019] ICJ Rep 418 ('*Jadhav*'), at para. 71; *Immunities and Criminal Proceedings* (*Equatorial Guinea v France*) (*Preliminary Objections*) [2018] ICJ Rep 292 ('*Immunities and Criminal Proceedings*'), at para. 91. For an analysis of the methodological pitfalls of considering the content of Arts 31–32 as immutable and applicable to even early 20th or even 19th century treaties (as in, for instance, the cases of *Kasikili/Sedudu Island* and *Navigational and Related Rights*) see Fitzmaurice and Merkouris, *Treaties in Motion*, at 147–158.

28 *Arbitral Award of 31 July 1989* (*Dissenting Opinion of Judge Weeramantry*), at para. 48 (emphasis added).

29 Cf. *Land, Island and Maritime Frontier Dispute* (*Judgment*), at para. 373; *Territorial Dispute* (*Libya/Chad*) (*Judgment*), at para. 41; *Qatar v Bahrain* (*Jurisdiction and Admissibility*), at para. 33; *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* (*Advisory Opinion*) [1996] ICJ Rep 66, at para. 19.

> ordinary meaning to be given to its terms in their context and in the light of its object and purpose. Under Article 32, recourse may be had to supplementary means of interpretation such as the preparatory work and the circumstances in which the treaty was concluded.[30]

The Court's stance became somewhat clearer in the early 2000s. In *Pulau Litigan and Sipadan*, the Court relied on its previous judgments to find that the VCLT rules of interpretation were applicable 'in accordance with customary international law, reflected in Articles 31 and 32 of that Convention'.[31] In *LaGrand*, the Court pronounced that Article 33(4) VCLT 'reflects customary international law'.[32] It was only in 2016 that the Court openly acknowledged that 'it is well established that Articles 31 to 33 of the Convention reflect rules of customary international law'.[33]

These pronouncements by the Court are indicative of the fact that the entrenchment of the VCLT rules on interpretation in the jurisprudence of ICJ was neither automatic nor spontaneous. Rather, it came about through an incremental process of carefully formulated *dicta* over a long period of time.

The Court normally explains the stages of its interpretative reasoning in reference to the elements of interpretation in the VCLT articles, and describes how it considers the various elements of interpretation to interact in any particular case.[34] The ICJ does not take a formulaic approach to these elements: in the majority of cases, the Court examines ordinary meaning before moving to assess the context of a provision and to determine the object and purpose of the treaty;[35] however, this is not always the case.[36] If its interpretative approach

30 *Oil Platforms* (*Preliminary Objections*), at para. 23.

31 *Sovereignty over Pulau Ligitan and Pulau Sipadan* (*Indonesia/Malaysia*) (*Merits*) [2002] ICJ Rep 625 ('*Sovereignty over Pulau Ligitan and Pulau Sipadan*'), at para. 37.

32 *LaGrand* (*Germany v United States of America*) (*Judgment*) [2001] ICJ Rep 466 ('*LaGrand*'), at para. 101.

33 *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea* (*Nicaragua v Colombia*) (*Preliminary Objections*) [2016] ICJ Rep 3 ('*Sovereign Rights and Maritime Spaces in the Caribbean Sea*'), at para. 35; *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast* (*Nicaragua v Colombia*) (*Preliminary Objections*) [2016] ICJ Rep 100 ('*Delimitation of the Continental Shelf between Nicaragua and Colombia*'), at para. 33; more recently, *Application of ICSFT and ICERD* (*Judgment*), at 106.

34 See, e.g., *Somalia v Kenya* (*Preliminary Objections*), at para. 65; *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization* (*Advisory Opinion*) [1960] ICJ Rep 150, at 158 ('*Constitution of the Maritime Safety Committee*').

35 See, e.g., *Immunities and Criminal Proceedings* (*Preliminary Objections*), at paras 92–96; *Jadhav* (*Judgment*), at paras 73–75.

36 See, e.g., *Somalia v Kenya* (*Preliminary Objections*), at paras 65 et seq.

differs from the elements identified in Articles 31–32 VCLT (for example, when it takes into account an argument made *a contrario*), the Court explicitly states the principle on which it relies.[37] The two sections that follow identify the Court's key interpretative elements both within and beyond the VCLT.

4 Key Elements of the Interpretative Process in the Practice of the International Court of Justice

The Court's approval of the VCLT rules is not limited to the incantation of these rules in the *motifs* of its decisions *qua* treaty rules or reflections of customary international law. The Court tends to explain its interpretative reasoning in reference to the elements of the rules laid down in Articles 31–33 VCLT and, generally, to lay out how these elements interact in each specific case. Yet, despite its numerous and frequent references to these rules (at least, since the early 1990s), the Court has generally been reticent to explicitly define particular concepts in the general rule of interpretation and the supplementary means of interpretation available under the VCLT rules. The sections that follow try to synthesize the Court's conception of these elements using examples from its jurisprudence.

4.1 *Ordinary Meaning*

The concept of ordinary meaning has been perhaps the most pervasive element of the Court's interpretative reasoning even well before the advent of the Vienna Convention rules. The methodology for the determination of the ordinary meaning of a treaty term and the position of ordinary meaning amongst the elements of the general rule of interpretation have drawn the attention of the Court in a variety of its decisions.

In terms of methodology, the Court has rarely explicated how it determines the ordinary meaning of a particular term. For the most part, the Court limits itself to recalling the terms used in a treaty provision followed by a categorical statement about the Court's understanding of the ordinary meaning of these terms.[38] On occasion, the Court may refer to sources other than the treaty in

37 *Sovereign Rights and Maritime Spaces in the Caribbean Sea* (*Preliminary Objections*), at para. 39; *Delimitation of the Continental Shelf between Nicaragua and Colombia* (*Preliminary Objections*), at para. 37.

38 E.g., *Arbitral Award of 3 October 1899* (*Guyana v Venezuela*) (*Jurisdiction*) [2020] ICJ Rep 455, at para. 72; *Immunities and Criminal Proceedings* (*Preliminary Objections*), at para. 92; *Maritime Dispute* (*Peru v Chile*) (*Judgment*) [2014] ICJ Rep 3 ('*Peru v Chile*'), at paras 58–60.

question to determine the ordinary meaning of a term, but this is clearly the exception rather than the rule.

In this respect, the Court has relied occasionally on dictionary definitions with variable degrees of confidence. For instance, in *Oil Platforms*, the Court resorted to the *Oxford English Dictionary*, *Black's Law Dictionary*, and the *Dictionnaire de la terminologie du droit international* in order to demonstrate that the meaning of the word 'commerce' extended to transactions beyond purchase and sale.[39] In *Aegean Sea Continental Shelf,* the Court referred to a dictionary – the *Robert's Dictionnaire* – to support its conclusion that the ordinary meaning of the term '*notamment*' was not the narrow understanding of the term proposed by Greece.[40] The Court has generally shown reticence to rely on dictionary definitions, recognizing that they often provide multiple meanings of a word that are context-dependent. This is stated particularly clearly in *Avena*, in which the Court stated that '[t]he Court observes that dictionary definitions, in the various languages of the Vienna Convention, offer diverse meanings of the term "without delay" (and also of "immediately"). It is therefore necessary to look elsewhere for an understanding of this term'.[41]

The Court has exercised a comparable degree of caution even when the term in question relates to a specialized or scientific subject matter. For instance, in *Kasikili/Sedudu Island*, the Court stated that it would 'seek to determine the meaning of the words "main channel" by reference to the most commonly used criteria in international law and practice, to which the Parties have referred'.[42] The Court cited various scientific dictionaries' definitions of the 'main channel', as well as the approach of an arbitral tribunal to an analogous interpretative issue, to demonstrate that various criteria had been used to determine the 'main channel' of a river.[43] Yet, it did not follow one of these definitions, but instead purported to take into account all of the criteria that the Parties suggested in determining the 'main channel'.[44] In the *Whaling* case, the Court followed a similar approach regarding the value of scientific definitions in the determination of 'ordinary meaning'. In that case, the parties disagreed about the meaning of the term 'scientific research' in the International

39 *Oil Platforms* (*Preliminary Objections*), at para. 45; for an early example see, e.g., *Competence of the International Labour Organization in regard to International Regulation of the Conditions of Labour of Persons Employed in Agriculture* (*Advisory Opinion*), at 32–35.

40 *Aegean Sea Continental Shelf* (*Judgment*) (*Dissenting Opinion of Judge de Castro*), at 54.

41 *Avena and Other Mexican Nationals* (*Mexico v United States of America*) (*Judgment*) [2004] ICJ Rep 12 ('*Avena*'), at para. 48.

42 *Kasikili/Sedudu Island* (*Botswana/Namibia*) (*Judgment*) [1999] ICJ Rep 1045, at para. 27.

43 Ibid., at para. 30.

44 Ibid.

Whaling Convention and adduced conflicting expert testimony on the issue.[45] In the end, the Court accorded little weight to the definitions produced by the experts and found that '[t]heir conclusions as scientists […] must be distinguished from the interpretation of the Convention, which is the task of this Court'.[46]

Temporality is another important consideration in the determination of the ordinary meaning of a term. In *US Nationals in Morocco*, the Court found that, in construing the provisions of the treaties in question, it was necessary to take into account the meaning of the relevant words at the time when the treaties were concluded.[47] In the *Namibia Advisory Opinion*, whilst acknowledging the 'primary necessity' of this approach, the Court considered itself bound to take into account the fact that the concepts encompassed in the treaty in question 'were not static, but by definition evolutionary' and that the parties 'accepted them as such'.[48] More recent judgments of the Court seem to focus on what it has labelled as the 'generic' nature of a term. The concept of a 'generic term' first appeared in the *Aegean Sea Continental Shelf* case, in which the interpretation of a Greek reservation to the 1928 General Act for Pacific Settlement of International Disputes was at issue. The Court considered that

> the nature of the word 'status' itself indicates, it was a generic term […] Once it is established that the expression 'the territorial status of Greece' was used in Greece's instrument of accession as a generic term […] 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.[49]

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

45 *Whaling in the Antarctic* (*Australia v Japan; New Zealand intervening*) (*Judgment*) [2014] ICJ Rep 226 ('*Whaling in the Antarctic*'), at paras 74–75.

46 Ibid., at para. 82.

47 *Rights of Nationals of the United States of America in Morocco* (*France v United States of America*) (*Judgment*) [1952] ICJ Rep 176, at 189.

48 *Legal Consequences for States of the Continued Presence of South Africa in Namibia* (*South West Africa*) *notwithstanding Security Council Resolution 276* (*1970*) (*Advisory Opinion*) [1971] ICJ Rep 16 ('*Namibia Advisory Opinion*'), at para. 53.

49 *Aegean Sea Continental Shelf* (*Judgment*) (*Dissenting Opinion of Judge de Castro*), at paras 75, 77.

been, to give the terms used – or some of them – a meaning or content capable of evolving, not one fixed once and for all, so as to make allowance for, among other things, developments in international law'.[50] Indeed, it is notable that the Court based its reasoning on the 'generic character' of the term, rather than finding such confirmation in the manifest intentions of the Parties.[51]

It is clear that the Court considers ordinary meaning to be an indispensable element of its interpretative process. Indeed, the Court has enunciated on various occasions that 'interpretation must be based *above all* upon the text of the treaty'.[52] This means that 'a first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty, is to endeavour to give effect to them in their natural and ordinary meaning in the context in which they occur'.[53] Yet, at the same time, ordinary meaning is only the starting point of this process. As the Court has emphasized since early on in its jurisprudence:

> The rule of interpretation according to the natural and ordinary meaning of the words employed is not an absolute one. Where such a method of interpretation results in a meaning incompatible with the spirit, purpose and context of the clause or instrument in which the words are contained, no reliance can be validly placed on it.[54]

In other words, the ordinary meaning of the terms of the treaty is determinative only if it is confirmed by the other elements of interpretation reflected in Article 31(1) VCLT.[55]

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50 *Dispute regarding Navigational and Related Rights* (*Costa Rica v Nicaragua*) (*Judgment*) [2009] ICJ Rep 213 ('*Navigational and Related Rights*'), at para. 64.

51 Ibid., at para. 66. In this respect, see also UN ILC, 'Draft Conclusions on Subsequent Agreement and Subsequent Practice in Relation to the Interpretation of Treaties, with Commentaries', at 65, para. 6.

52 See, e.g., *Application of the Convention on the Elimination of All Forms of Racial Discrimination* (*Qatar v United Arab Emirates*) (*Preliminary Objections*) [2021] ICJ Rep 71 ('*Qatar v UAE*'), at para. 81 (emphasis added); *Territorial Dispute* (*Libya/Chad*) (*Judgment*), at para. 41.

53 See, e.g., *Competence of the General Assembly for the Admission of a State to the United Nations* (*Advisory Opinion*) [1950] ICJ Rep 8.

54 *Arbitral Award of 31 July 1989* (*Dissenting Opinion of Judge Weeramantry*), at para. 48 citing *South West Africa* (*Liberia v South Africa*) (*Preliminary Objections*) [1962] ICJ Rep 319, at 336.

55 Gardiner, *Treaty Interpretation*, at 185.

4.2 *Context*

Another element which has played a crucial role in the Court's interpretative reasoning–and that of its predecessor institution, the PCIJ – is context. In fact, the Court's approach with respect to context has inspired and, after its adoption, consolidated the process envisaged in the VCLT rules. Mirroring this process, context operates in the interpretative reasoning of the Court as an 'immediate qualifier of the ordinary meaning of terms used in a treaty and [...] a modifier to any over-literal approach to interpretation'.[56] As such, it constitutes an inextricable part of its interpretative practice.

Indeed, the Court's recent judgment on preliminary objections in *Somalia v Kenya* is notable for the clarity with which it sets out the Court's understanding of the interaction between the elements of the general rule of interpretation, as well as its conception of context. In that judgment, the Court stated that the three elements of the general rule 'are to be considered as a whole',[57] reflecting the ILC's 'crucible' approach to interpretation.[58] However, perhaps more interestingly, it continued to state that it could not determine the meaning of the provision at issue without first analysing its context and the object and purpose of the Memorandum of Understanding (MOU).[59] In this context, it stated that the 'text of the MOU as a whole [...] provides the context in which any particular paragraph should be interpreted and gives insight into the object and purpose' of the treaty.[60]

At its core, the element of context includes the immediate surroundings of a term within a provision. One illustrative example is the *IMCO Advisory Opinion*, in which the Court gave weight to the context in which a particular word was used within the provision itself. In that case, the Court was called upon to interpret a provision which provided that 'the Maritime Safety Committee shall consist of fourteen members elected by the Assembly from the Members [...] of which not less than eight shall be the largest ship-owning nations'. Some States contended that the word 'elected' implied free-choice amongst any member States. The Court disagreed, stating that '[t]he word obtains its meaning from the context in which it is used'.[61] The Court thus concluded that

56 Ibid., at 197.
57 *Somalia v Kenya* (*Preliminary Objections*), at para. 64; also *Arbitral Award of 3 October 1899*, at para. 71; *Qatar v UAE* (*Preliminary Objections*), at para. 78.
58 UN ILC, 'Draft Articles on the Law of Treaties with Commentaries', at 220, para. 8.
59 *Somalia v Kenya* (*Preliminary Objections*), at 65.
60 Ibid.
61 *Constitution of the Maritime Safety Committee*, at 158.

'elected' was to be understood as qualified by reference to the phrase 'largest ship-owning nations'.

According to the Court's conception, the element of context also envisages the overall structure and configuration of the text of the treaty where circumstances might call for synthesis or contrast between treaty provisions. For instance, in the *Bosnian Genocide* case, the issue arose whether the Genocide Convention prohibited States from engaging in acts constituting genocide and ancillary acts of genocide as described in Article III of the Convention. The Court noted that 'such an obligation is not expressly imposed by the actual terms of the Convention'.[62] However, it did establish that such an obligation arose by necessary implication from Article I of the Convention.[63] The Court corroborated this finding by reference to the compromissory clause of the Convention which granted jurisdiction to the Court, *inter alia*, for 'those [disputes] relating to the responsibility of a State for genocide or any of the other acts enumerated in Article III'.[64]

Besides, according to the general rule of interpretation reflected in Article 31 VCLT, the concept of context is not limited to the text of the treaty and the interrelation of its terms and provisions. As a technical term of the law of treaties, 'context' also includes certain interpretative material besides the text of the treaty that form an integral part of the interpretative process. Specifically, Article 31(2) VCLT clarifies that the context of a treaty comprises also agreements and instruments made in connection with the conclusion of the treaty. This is also a key element of the Court's interpretative reasoning when applicable, admittedly infrequently, to the circumstances of the case.

Overall, the Court has taken a liberal approach as to the form of the materials that could potentially qualify as context. Apart from treaties,[65] the Court has been receptive to the argument that maps or even minutes of discussions between the parties could potentially be taken into account under the general rule of interpretation as context.[66] Similarly, the Court has not made any specific pronouncement as to the connection needed between the agreement or instrument and the conclusion of the treaty. For instance, in *Libya v Chad*,

62 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia and Herzegovina v Serbia and Montenegro*) (*Merits*) [2007] ICJ Rep 43 ('*Bosnian Genocide*'), at para 166.

63 Ibid.

64 Ibid., at para. 169.

65 *Territorial Dispute* (*Libya/Chad*) (*Judgment*), at para. 53.

66 *Sovereignty over Pulau Ligitan and Pulau Sipadan* (*Merits*), at para. 48; *Peru v Chile* (*Judgment*), at para. 65.

the Court was satisfied that an agreement concluded 'at the same time' as the treaty in question could be taken into account as context of that treaty.[67] Rather, faithful to the approach of the VCLT, the Court has required that the relevant material evidences the agreement of the parties.[68] Similarly, in case of instruments originating from some of the parties, the Court needs to establish the acceptance or at least acquiescence of the other parties.[69] It should be noted, however, that in *Oil Platforms,* the Court used as context its previous interpretation of a treaty term in the Nicaragua–US Treaty of Friendship, Commerce, and Navigation ('FCN Treaty'), which was identical to the clause at issue in the Iran-US FCN Treaty.[70] Otherwise, such materials can only be taken into account as *travaux préparatoires* or circumstances of the conclusion of the treaty and hence as supplementary means of interpretation.[71]

4.3 *Object and Purpose*

Another inextricable component of the Court's interpretative reasoning, in line with the general rule of interpretation, is the object and purpose of the treaty. As to the methodology for its determination, the Court has stated on many occasions that the object and purpose of a treaty may be discerned from the surrounding text of the agreement,[72] including, but not limited to, the title of the treaty and the preamble.[73] This approach reflects the Court's reasoning in its prior judgments. The *Oil Platforms* case provides an illustrative example. In that case, the Court determined that the object and purpose of the 1955 Treaty of Amity, Economic Relations and Consular Relations between the US and Iran was 'not to regulate peaceful and friendly relations between the two States in a general sense [as Iran contended]' but rather by providing specific obligations for the effective implementation of such relations.[74] This object and purpose were induced from both the Preamble and the substantive articles of the Treaty.[75]

67 *Territorial Dispute* (*Libya/Chad*) (*Judgment*), at para. 53.
68 *Peru v Chile* (*Judgment*), at para. 65.
69 *Sovereignty over Pulau Ligitan and Pulau Sipadan* (*Merits*), at para. 48.
70 *Oil Platforms* (*Preliminary Objections*), at para. 20.
71 *Peru v Chile* (*Judgment*), at para. 65.
72 *Somalia v Kenya* (*Preliminary Objections*), at para. 65.
73 Ibid., at para. 70. See also *Certain Iranian Assets* (*Iran v USA*) (*Preliminary Objections*) [2019] ICJ Rep 7 ('*Certain Iranian Assets*'), at para. 57; *Jadhav* (*Judgment*), at para. 74.
74 *Oil Platforms* (*Preliminary Objections*), at para. 27.
75 See also *Sovereignty over Pulau Ligitan and Pulau Sipadan* (*Merits*), at para. 51 (stating that the object and purpose can be determined by reference to the preamble and the 'very structure' of the treaty).

That said, the concept of object and purpose in the Court's interpretative practice is not necessarily limited to the recitation of specific parts of the treaty in question. On the one hand, the determination of the object and purpose of the treaty might lead the Court to materials beyond the text of the treaty. For instance, in *Qatar v UAE*, the Court referred to UNGA Resolution 1514(XV) in examining the object and purpose of the International Convention on the Elimination of Racial Discrimination ('ICERD').[76] Arguably, the preambular reference in ICERD to this Resolution was also relevant to the Court's reasoning.[77] On the other hand, the Court occasionally refers to the object and purpose of a specific provision of a treaty rather than the treaty at large.[78] Thus, for instance, in *LaGrand*, the Court induced from the terms of Article 41 of its Statute that 'the power [to indicate provisional measures] is based on the necessity, when the circumstances call for it, to safeguard, and to avoid prejudice to, the rights of the parties as determined by the final judgment of the Court'.[79] On this basis, it concluded that '[t]he contention that provisional measures indicated under Article 41 might not be binding *would be contrary to the object and purpose of that Article*'.[80]

4.4 *Subsequent Agreement and Practice Relating to the Interpretation of the Treaty*

The interpretative materials laid down in the general rule of interpretation are not limited to the treaty or those connected with its conclusion, but can also be external to the treaty. In the first place, an interpreter is bound to take into account also any subsequent agreements of the parties regarding its interpretation and any subsequent practice in its application establishing the agreement of the parties regarding its interpretation. The Court has frequently had recourse to the subsequent agreement and subsequent practice of the Parties under Article 31(3)(a) and (b) of the Vienna Convention, although it has not explicitly defined those terms.[81]

Overall, the Court has not taken a formulaic approach as to what constitutes subsequent agreement or practice under Article 31(3)(a) and (b) VCLT.

76 *Qatar v UAE* (*Preliminary Objections*), at para. 86; for a similar approach see, e.g., *Reservations to Convention on Genocide* (*Advisory Opinion*) [1951] ICJ Rep 15, at 23.

77 *Qatar v UAE* (*Preliminary Objections*), at para. 85.

78 On this point see, e.g., *Arbitral Award of 31 July 1989* (*Dissenting Opinion of Judge Weeramantry*), at para. 48; *Legality of Use of Force* (*Serbia and Montenegro v Belgium*) (*Preliminary Objections*) [2004] ICJ Rep 279, at para. 102.

79 *LaGrand* (*Judgment*), at para. 102.

80 Ibid. (emphasis added).

81 See further *Kasikili/Sedudu Island* (*Judgment*), at para. 50, and the cases cited therein.

In *Kasikili/Sedudu Island,* the Court seemed to adhere to the definitions of subsequent agreement and practice outlined by the ILC in its commentary on the draft Convention on the Law of Treaties, which are also somewhat open-ended as to the issue of form.[82] So, for instance, in *Whaling*, the Court could not preclude in principle that resolutions adopted within an international organization–in the event, the International Whaling Commission ('IWC') – could be regarded as 'subsequent agreements' for the purposes of interpretation.[83] Similarly, in *Interim Accord*, the Court accepted that lack of protest could be considered 'subsequent practice' for that purpose.[84]

According to the Court, an instrument or a course of conduct qualifies as subsequent agreement or practice for the purposes of Article 31(3)(a) and (b) VCLT only insofar as it manifests an agreement on the part of the Parties regarding the interpretation of the treaty.[85] To illustrate this point, in *Whaling*, the IWC resolutions in question could not be considered under the general rules of interpretation, because they were adopted without the support of all State Parties to the treaty in question and, in particular, without the concurrence of Japan which was the respondent in the case.[86] Similarly, in *Equatorial Guinea v France*, the Court could not accept that evidence adduced by France as to the practice of 14 States in the implementation of the Vienna Convention on Diplomatic Relations ('VCDR') would necessarily establish the agreement of the parties within the meaning of Article 31(3)(b) VCLT.[87]

In principle, the Court is bound to take into account the relevant material or conduct to the extent that this material or conduct establishes an agreement or practice under Article 31(3)(a) and (b) of the Vienna Convention. However, materials that fall short of a subsequent agreement or practice under the VCLT are not necessarily excluded from the interpretative reasoning of

82 Ibid., at para. 49.

83 *Whaling in the Antarctic*, at para. 83.

84 *Application of the Interim Accord of 13 September 1995* (*The Former Yugoslav Republic of Macedonia v Greece*) (*Judgment*) [2011] ICJ Rep 644 ('*Application of the Interim Accord of 13 September 1995*'), at para. 99; similarly *Arbitral Award of 3 October 1899*, at para. 99.

85 See, in particular, *Kasikili/Sedudu Island* (*Judgment*), at para. 63 ('Those events cannot therefore constitute "subsequent practice in the application of the treaty [of 1890] which establishes the agreement of the parties regarding its interpretation" (1969 Vienna Convention on the Law of Treaties, Art. 31, para. 3 (b)). A fortiori, they cannot have given rise to an "agreement between the parties regarding the interpretation of the treaty or the application of its provisions" (Ibid., Art. 31, para. 3 (a))').

86 *Whaling in the Antarctic*, at para. 83.

87 *Immunities and Criminal Proceedings* (*Merits*) [2020] ICJ Rep 300, at para. 69.

the Court.[88] Rather, the relative value of such materials for the interpretation of a treaty varies depending on the circumstances of the case. For instance, a slightly different use of subsequent practice arose in *Somalia v Kenya,* where the Court held that Kenya's own conduct of engaging in negotiations prior to the issuance of recommendations by the Commission on the Limits of the Continental Shelf demonstrated that 'Kenya did not consider itself bound to wait for those recommendations before engaging in negotiations on maritime delimitation', as Kenya had argued it was obliged to do under the terms of the MOU.[89] The Court neither cited Article 31(3)(b) of the VCLT, nor did it enquire whether an agreement of the Parties underpinned this subsequent practice. Rather, Kenya's actions were used to estop it from advancing a particular claim. Similarly, in *Equatorial Guinea v France*, even though the Court did not accept that evidence as the practice of 14 States sufficed for the purposes of Article 31(3)(b) VCLT, it nonetheless found that these acts constituted 'factors which weigh' into the interpretation of VCDR.[90]

4.5 *Relevant Rules of International Law*

Possibly the broadest category of interpretative materials encompassed in the general rule of interpretation is 'relevant rules of international law applicable in the relations between the parties' under Article 31(3)(c) VCLT. Although in international jurisprudence, there has been a 'flowering of case-law'[91] surrounding the invocation and application of Article 31(3)(c) VCLT, the ICJ has had somewhat of a limited engagement with what is known as the 'principle of systemic integration'.[92] That is not to say, of course, that there has been none but it is one that is gradually becoming more pronounced.

88 UN ILC, 'Draft Conclusions on Subsequent Agreement and Subsequent Practice in Relation to the Interpretation of Treaties, with Commentaries', at 31, para. 16.

89 *Somalia v Kenya* (*Preliminary Objections*), at para. 92.

90 *Immunities and Criminal Proceedings* (*Merits*), para. 69; along similar lines, but without any reference to the VCLT, see *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v United States of America*) (*Jurisdiction and Admissibility*) [1984] ICJ Rep 392, at paras 39–42 ('*Nicaragua*').

91 Gardiner, *Treaty Interpretation*, at 290.

92 A term popularized by C. McLachlan, 'The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention' (2005) 54(2) International and Comperative Law Quaterly 279. Various courts and tribunals have, on occasion, used other terms to describe the interpretative method enshrined in Article 31(3)(c), such as 'systemic interpretation', 'systemic harmonisation', 'systematic interpretation', 'principle of systematic integration', 'principle of integration' and 'harmonious interpretation'. In detail see P. Merkouris, 'Principle of Systemic Integration' (last updated August 2020) in H. Ruiz Fabri (ed.), *Max Planck Encyclopedia of International Procedural Law* (Oxford University Press 2019-) <https://opil.ouplaw.com/home/mpil>.

The ICJ has recognized Article 31(3)(c) VCLT as being a codification of customary international law.[93] Despite this, there are a number of elements of this provision that both during the ILC meetings when preparing the draft Convention on the Law of Treaties and later in various international courts and tribunals were a subject of debate and were either gradually clarified or are still in the process of concretization. These elements are: i) what is a 'rule'; ii) what is an 'applicable rule', iii) which are the 'parties' in the relations of which the rules need to be applicable and iv) how is 'relevance' determined.[94] In addition to these, an element not explicitly mentioned in the text of Article 31(3)(c) is the issue of intertemporality within the principle of systemic integration, i.e. whether the rules to be taken into account are the rules that were in force 'at the time of the conclusion of the treaty' or the rules that were in force 'at the time of the interpretation of the treaty'. The Court has not explicitly defined all the key elements found in this provision, but its decisions have elucidated certain ambiguities including as to the issue of relevance. What is more, the Court's practice with respect to this element of interpretation has revealed a latent tension between the interpretation of a treaty in line with relevant rules of international law and the application of relevant rules of international law in lieu of the treaty. In the following paragraphs, we will examine whether and in what manner the ICJ has addressed these issues in determining the content and applicability of Article 31(3)(c) VCLT, both as a treaty rule and as a rule of customary international law.

The Court has on multiple occasions affirmed that 'rules' include treaties and rules of customary international law.[95] Although the ICJ has not had occasion to consider 'general principles' under Article 31(3)(c) it seems highly unlikely that it would decline to do so. This is supported by international

93 *Certain Questions of Mutual Assistance in Criminal Matters* (*Djibouti v France*) (*Judgment*) [2008] ICJ Rep 177 ('*Mutual Assistance in Criminal Matters*'), at para. 112.

94 On a discussion of these elements see McLachlan, 'The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention'; B. Simma and T. Kill, 'Harmonizing Investment Protection and International Human Rights: First Steps Toward a Methodology' in C. Binder et al. (eds), *International Investment Law for the 21st Century: Essays in Honor of Christoph Schreuer* (Oxford University Press 2009) 680, at 698–702; P. Merkouris, *Article 31(3)(c) VCLT and the Principle of Systemic Integration: Normative Shadows in Plato's Cave* (Brill 2015); Merkouris, 'Principle of Systemic Integration'.

95 *Oil Platforms* (*Merits*) [2003] ICJ Rep 161, at 41; *Mutual Assistance in Criminal Matters* (*Judgment*), at paras 112–113; *Pulp Mills on the River Uruguay* (*Argentina v Uruguay*) (*Judgment*) [2010] ICJ Rep 14 ('*Pulp Mills*'), at para. 66; *Somalia v Kenya* (*Preliminary Objections*), at paras 89–91; *Certain Iranian Assets* (*Preliminary Objections*), at paras 67–70.

jurisprudence on the matter,[96] as well as the fact that both in the discussions within the ILC and the *Institut de droit international* general principles were actually the starting point of the debate on systemic integration, which then expanded to include custom and then treaties.[97] Consequently, as far as 'rules' is concerned, this concept would include all binding rules stemming from the three formal sources of international law.

On the other hand, the Court has not had occasion to address what an 'applicable' rule is. This may be due to the fact, as Villiger points out, that the term 'applicable' refers to the bindingness or not of the 'rule',[98] and thus it tends to be subsumed in the judicial reasoning of the latter.[99] Although the ICJ has not pronounced explicitly on this matter, this approach seems to be supported by other tribunals such as that of the *OSPAR Arbitration*, where the tribunal refused to consider a principle invoked by the parties as it was still in *statu nascendi*.[100] One of the few tribunals that have had something to say on the matter was the *RosInvest* tribunal which opined that:

> *Applicable* in the relations between the parties' must be taken as a reference to rules of international law that condition the performance of the specific rights and obligations stipulated in the treaty – or else it would amount to a general license to override the treaty terms that would be quite incompatible with the general spirit of the Vienna Convention as a whole.[101]

However, even in this case, the tribunal's ensuing analysis seemed to conflate 'applicable' with 'relevant', which reinforces the argument that the discussion of 'applicability' is not explicitly addressed in judicial pronouncements as it tends to be subsumed in the consideration of one of the other elements of Article 31(3)(c) VCLT.

96 *Golder v United Kingdom* [1975] ECtHR App No. 4451/70, at para. 35; *Georges Pinson* (*France*) *v Mexico* (*Decision No. 1*) [1928] 5 UNRIAA 327, at para. 50(4); *Renco v Peru* (*Partial Award on Jurisdiction*) [2016] UNCT/13/1, at para. 144; *Eiser v Spain* (*Decision on Respondent Application for Annulment*) [2020] ICSID Case No. ARB/13/36, at para. 177.

97 Merkouris, *Article 31(3)(c) VCLT and the Principle of Systemic Integration*, 25–37.

98 Consequently, excluding non-binding rules.

99 M. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Nijhoff 2009), at 433.

100 *Dispute Concerning Access to Information under Article 9 of the OSPAR Convention* (*Ireland v UK*) (*Final Award*) [2003] 23 UNRIAA 59, at paras 99–105.

101 *RosInvest v Russia* (*Award on Jurisdiction*) [2007] SCC Case No. V079/2005 ('*RosInvest v Russia*'), at para. 39.

The next element of the principle of systemic integration, which the Court has only partially touched upon is that of 'parties'. One of the original major controversies surrounding this term, brought to the limelight by the *EC-Biotech* case,[102] was whether it should be understood as referring to 'parties to the treaty' or '[any one of the] parties to the dispute' or anywhere in the spectrum. International courts and tribunals have taken a wide range of approaches, while sometimes the number of common parties factors in as an element of 'relevance'.[103] The ICJ has not as of the moment of the writing of this contribution taken a firm position on this debate. The reason is quite simple. In the cases where Article 31(3)(c) VCLT was invoked, the Court i) either referred to customary international law, which due to its general bindingness would satisfy all readings of Article 31(3)(c), ranging from the strictest to the most liberal and/or ii) was interpreting a bilateral treaty in which case, even when referring to other treaties, both readings of 'parties', i.e. as 'parties to the [bilateral] treaty' or 'parties to the dispute', have the exact same content.[104] Due to this, the Court had no reason to make a foray into the theoretical dispute on the content of 'parties' as this would have no effect on its judgment.

A final point that needs to be mentioned in this context is the recent *Qatar v UAE* case. There the disputing parties invoked a number of regional human rights treaties and the jurisprudence of their respective (quasi-) judicial bodies to argue regarding the interpretation of the term 'national origin' in Article 1(1) ICERD and whether it encompassed current nationality. Although the Court acknowledged that such jurisprudence could be relevant for the purposes of interpretation,[105] it later on concluded that despite the proximity in language, those human rights instruments had a different purpose than ICERD and therefore both they and their bodies' jurisprudence was not relevant for the interpretation of Article 1(1) ICERD.[106] What is interesting is to inquire into what the basis was for the invocation of these instruments for the purpose of interpreting Article 1(1) ICERD. Was this a claim based on these instruments assisting in finding the 'ordinary meaning', a very liberal reading of Article 31(3)(c) verging on *in pari materia* interpretation since none of the disputing parties

102 *European Communities – Measures Affecting the Approval and Marketing of Biotech Products* (*United States of America v European Communites*) [2006] WT/DS291R, WT/DS292R and WT/DS293R, at paras. 7.70–7.71.

103 For a detailed analysis, Merkouris, 'Principle of Systemic Integration' and Merkouris, *Article 31(3)(c) VCLT and the Principle of Systemic Integration*.

104 *Pulp Mills* (*Judgment*), at para. 66.

105 *Qatar v UAE* (*Preliminary Objections*), at para. 77.

106 Ibid., at para. 104.

was party to the human rights treaties in question, an *in pari materia* interpretation under the rubric of 'supplementary means' of Article 32 VCLT, or an *in pari materia* interpretation in and of its own right as a *praeter*-VCLT rule of interpretation? The Court remained mercurial, and the arguments raised by the disputing parties are of no real assistance either, regarding the correct characterization. Judge Iwasawa, although disagreeing with the Court and being of the view that the human rights treaties were relevant for the purposes of interpretation, also did not offer any insight as to the proper characterization of such recourse to such material under the VCLT interpretative framework.[107]

As noted above, the discussion on 'rules', 'applicable' and 'relevant' oftentimes overlaps. In international case law, although there is little dedicated analysis devoted to 'relevant', some patterns do present themselves in a rather consistent fashion. These patterns revolve around how proximate the two rules are. Such manifestations of proximity[108] that are relied on to establish relevance are: linguistic similitude or proximity;[109] temporal proximity[110] subject-matter proximity[111] and actor proximity.[112] The ICJ has also on occasion made remarks and choices that are pertinent with respect to relevance. *Somalia v Kenya* provides an interesting case study.[113] The Court had to interpret a particular paragraph from an MOU between Somalia and Kenya, that the Court earlier had found to be a treaty. The relevant paragraph was virtually identical to Article 83 UNCLOS. The Court reasoned that: 'both Somalia and Kenya are parties to UNCLOS, which is expressly mentioned in the MOU. UNCLOS therefore contains [...] relevant rules [within the meaning of Article 31(3)(c) VCLT]'.[114] This passage suggests that other rules of international law might be particularly relevant if express reference is made to them in the treaty being interpreted. Furthermore, the Court continued: 'In line with Article 31, paragraph 3 (c), of the Vienna Convention, *and particularly given the similarity in*

107 *Qatar v UAE* (*Preliminary Objections*) (*Separate Opinion of Judge Iwasawa*), at para. 36.

108 For a detailed analysis of the proximity criterion as utilised to determine relevance under Art. 31(3)(c) see Merkouris, 'Principle of Systemic Integration'.

109 *Warsaw Electricity Company* (*France v Poland*) [1929] 3 UNRIAA 1669, at 1675; *Somalia v Kenya* (*Preliminary Objections*), at para. 91.

110 *Warsaw Electricity Company*, at 1675; *Affaire des boutres de Mascate* (*France v UK*) (*Award*) [1905] 11 UNRIAA 83, at 83 et seq.

111 *Oil Platforms* (*Merits*) (*Separate Opinion of Judge Higgins*), at para. 46; *European Communities and Certain Member States – Civil Aircraft* (*United States of America v European Communities et al.*) [2011] WT/DS316/AB/R, at para. 846; *RosInvest v Russia* (*Award on Jurisdiction*), at para. 39; Gardiner, *Treaty Interpretation*, at 299.

112 The latter is connected to the discussion of the term 'parties'.

113 See also *Oil Platforms* (*Merits*), at para. 41.

114 *Somalia v Kenya* (*Preliminary Objections*), at para. 89.

wording between the sixth paragraph of the MOU and Article 83, paragraph 1, of UNCLOS, the Court considers that it is reasonable to read the former in light of the latter'.[115] This sentence suggests that a similarity (linguistic proximity) in wording might also constitute a reason why the Court may consider another rule relevant for the purposes of Article 31(3)(c) and look to it when interpreting a particular provision of a different treaty. Of note is as well that this phrasing of the ICJ echoes that of the arbitral tribunal in the *Warsaw Electricity Company* case where the arbiter noted that 'one is stunned by the near identity between the main and relevant texts and provisions'.[116]

That said, the Court's approach as to relevance seems less exacting and formalistic than one might think. Indeed, as the Court found in *Certain Iranian Assets*, the mere fact that a provision does not contain a *renvoi* to certain rules of international law does not suffice to exclude these rules from the material scope of the provision at issue.[117] In that case, the issue was whether the rules of general international law on immunity could be considered relevant for the interpretation of the provision of a bilateral treaty at issue on the obligation to afford access to justice for the nationals of State Parties. For this purpose, the Court required that the breach of immunity 'would have to be capable of having some impact on compliance' with the provision in question, which it found not to be the case.[118] This implies that the concept of relevance also involves practical considerations of subject-matter proximity.[119]

An upshot of Article 31(3)(c) VCLT is that it invites an interpreter to define the limits of the interpretative process, and in our case to draw a line between using relevant rules of international law for interpretation and applying these rules to the facts.[120] The general rule of interpretation only encompasses the former operation. This aspect of Article 31(3)(c) VCLT has proven particularly contentious, because frequently the Court's jurisdictional scope is limited to a

115 Ibid., at para. 91.

116 (Author's translation); the original text goes as follows: '*on est frappé par la presque identité entre les textes des dispositions principales y relatives*', see *Warsaw Electricity Company*, at 1675.

117 *Certain Iranian Assets* (*Preliminary Objections*), at para. 70.

118 Ibid.

119 In the aforementioned *Qatar v UAE* case, if it involves an Art. 31(3)(c) consideration, then it would seem that the rejection of the other human rights instruments was based on the ground that despite the linguistic proximity, the lack of subject-matter/teleological proximity rendered them 'not relevant'; *Qatar v UAE* (*Preliminary Objections*), at para. 104; *contra Qatar v UAE* (*Preliminary Objections*) (*Separate Opinion of Judge Iwasawa*), at para. 36. For the various aspects of relevance see, e.g., Merkouris, *Article 31(3)(c) VCLT and the Principle of Systemic Integration*, at 95–101.

120 Gardiner, *Treaty Interpretation*, at 320.

specific treaty containing a compromissory clause. The judgment on the merits of *Oil Platforms* best illustrates this point. In that case, the Parties disagreed about the relationship between self-defence and Article XX(1)(d) of the Treaty of Amity of 1955, which provided that the Treaty did not 'preclude the application of measures [...] necessary to fulfil the obligations of a High Contracting Party for the maintenance or restoration of international peace and security, or necessary to protect its essential security interests'. The question before the Court was whether this provision included measures that involved the use of force, and, if so, whether there was an implicit limitation that those measures should comply with general international law.[121] The Court stated that it was obliged to take account of any relevant rules of international law under Article 31(3)(c) VCLT and thus that it could not accept

> that Article XX, paragraph 1(d), of the 1955 Treaty was intended to operate wholly independently of the relevant rules of international law on the use of force, so as to be capable of being successfully invoked, even in the limited context of a claim for breach of the Treaty, in relation to an unlawful use of force. The application of the relevant rules of international law relating to this question thus forms an integral part of the task of interpretation entrusted to the Court by Article XXI, paragraph 2, of the 1955 Treaty [...] The Court is therefore satisfied that its jurisdiction under Article XXI, paragraph 2, of the 1955 Treaty [...] extends, where appropriate, to the determination whether action alleged to be justified under that paragraph was or was not an unlawful use of force, by reference to international law applicable to this question, that is to say, the provisions of the Charter of the United Nations and customary international law.[122]

This approach was criticized by Judge Higgins, who was of the view that '[t]he Court has [...] not interpreted Article XX, paragraph 1 (d) by reference to the rules on treaty interpretation. It has rather invoked the concept of treaty interpretation to displace the applicable law'.[123]

The Court's approach in *Oil Platforms* seems to have been moderated in subsequent judgments. In *Certain Iranian* Assets, for instance, comparable issues arising from the same treaty were dealt with without reliance on the rules of general international law external to the treaty. Another case which raised similar issues, but led to entirely different analyses and conclusions,

121 *Oil Platforms* (*Merits*), at para. 40.
122 Ibid., at para. 41.
123 *Oil Platforms* (*Merits*) (*Separate Opinion of Judge Higgins*), at para. 49.

was the *Immunities and Criminal Proceedings* case. In this latter case, the Court was faced with the interpretation of Article 4(1) of the UN Convention against Transnational Organized Crime (Palermo Convention) pursuant to which 'States Parties shall carry out their obligations under this Convention in a manner consistent with the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of other States'. Equatorial Guinea argued that this provision implied an obligation of States parties to respect immunities of State officials in carrying out their obligations under the Convention. In this way, Equatorial Guinea sought to bring within the Court's jurisdiction under the compromissory clause of the Palermo Convention the issue of its Vice-President's immunities in criminal proceedings initiated by French authorities for corruption.

The Court held that the provision in question was not merely hortatory, but it established a binding obligation which was dependent upon the other provisions of the Convention.[124] It also conceded that rules of customary international law on State immunity derived from the principle of sovereign equality, but stressed that the terms of the provision referred only to the latter principle.[125] Immunities were not mentioned in the rest of the Convention nor were they relevant to the stated object and purpose of the Convention to promote co-operation in the prevention and suppression of organized crime.[126] After corroborating this conclusion by reference to the *travaux préparatoires* and to similar provisions of other treaties, it concluded that the rules on State immunity were not incorporated into Article 4(1) of the Palermo Convention.[127] Several dissenting judges noted that there was an inconsistency between the Court's affirmation of Article 4(1) as a legal obligation incumbent on State Parties and its reliance on the rest of the Convention to substantiate that provision.[128] According to these judges, the Court should have referred to general international law, as opposed to other provisions of the Palermo Convention, for the determination of the content of the relevant principles, as these principles stemmed from customary international law.[129] Moreover, the dissenting Judges remarked that the connection between sovereign equality and

124 Ibid.

125 *Immunities and Criminal Proceedings* (*Preliminary Objections*), at para. 93.

126 Ibid., at paras 94–95.

127 Ibid., at paras 99–102.

128 *Immunities and Criminal Proceedings* (*Preliminary Objections*) (*Joint Dissenting Opinion of Vice-President Xue, Judges Sebutinde and Robinson and Judge ad hoc Kateka*), at para. 27.

129 Ibid.

immunity entailed that a violation of State immunity is also at the same time a violation of sovereign equality.[130]

A parallel reading of the Court's judgment in *Immunities and Criminal Proceedings* and in *Oil Platforms* reveals that the Court is still in the process of drawing a line between the interpretation of a treaty in light of relevant external rules and the application of such rules in a case.[131] To an external observer, it may be difficult to understand how the rules of State immunity were irrelevant for the interpretation of an explicit *renvoi* to the principle of sovereign equality when the prohibition of the use of force had been read into a reference of an exception clause to 'essential security interests'.[132] It seems likely that the Court sought to prevent the invocation of Article 31(3)(c) VCLT as a way to circumvent jurisdictional limitations arising from specific instruments. Yet, the exact contours of the distinction remain to be clarified further by the Court.

The lines to be drawn between the interpretation and application of a rule are not the only limit that the Court has addressed in connection with the role of Article 31(3)(c) VCLT in the interpretative process. The ICJ has, on occasion, reaffirmed a standard limit that is applicable to the interpretative process as a whole, and thus also applicable in the context of the principle of systemic integration.[133] In *Certain Questions of Mutual Assistance in Criminal Matters* the Court very explicitly noted that taking into account any 'relevant rules of international law' could not amount to what essentially would be a revision of the treaty being interpreted.[134]

Having dealt with all the elements mentioned in the text of Article 31(3)(c) VCLT, what remains to be seen is whether the ICJ has pronounced on the intertemporality issue of that provision. This was a highly contentious issue in the ILC and during the Vienna Conference on the Law of Treaties. The topic was so complex that it was felt the best course of action was inaction, and to avoid making any explicit choices on intertemporality on which were the 'relevant rules'.[135] The ICJ has also not had the opportunity to pronounce on this, both given the circumstances and relevant rules invoked, and also because none of

130 Ibid., at para. 28.

131 Cf. *Oil Platforms* (*Merits*), at 41.

132 Ibid.

133 On limits to interpretation see Merkouris, 'Principle of Systemic Integration'.

134 *Mutual Assistance in Criminal Matters* (*Judgment*), at para. 114.

135 E.g., UN ILC, 'Summary Record of the 872nd Meeting' (17 June 1966) UN Doc. A/CN.4/SR.872, at para. 9; United Nations Conference on the Law of the Treaties, '33rd Meeting of the Committee of the Whole' (22 April 1968) UN Doc. A/CONF.39/C.1/SR.33, at 177, paras 53–54, 74.

the parties to the dispute have raised this point. In fact, the only notable exception in international jurisprudence on the matter is *Armas v Venezuela*, where the tribunal came to the conclusion that the intertemporality of Art. 31(3)(c) would be dependent on whether the relevant provision should be interpreted by applying the principle of contemporaneity or whether an evolutive interpretation was called for.[136]

4.6 *Supplementary Means of Interpretation*

Another important feature of the VCLT rules is the compartmentalization of the interpretative process into the necessary components of the interpretative reasoning under the general rule of interpretation and the supplementary means of interpretation under Article 32 VCLT, recourse to which is in principle optional. The Court has affirmed on many occasions that it does not need to have recourse to supplementary means of interpretation, once it has reached a conclusion by applying the elements of the general rule of interpretation.[137] The Court has also developed an extensive and variable practice as to the interpretative material that may be used as supplementary means of interpretation.

Indeed, the Court has taken a relatively flexible approach in relation to the supplementary means of interpretation that are permissible under Article 32 of the VCLT. On many occasions, the Court has referred to the *travaux préparatoires* of a treaty and the circumstances of its conclusion.[138] However, the practice of the Court affirms that supplementary means of interpretation are not only the ones explicitly mentioned in Article 32 of the Vienna Convention. For instance, in *Somalia v Kenya*, the MOU in that case was drafted by Ambassador Longva of Norway in the context of assistance provided by Norway to a number of African coastal States related to their submissions to the Commission on the Limits of the Continental Shelf before the deadline established by States Parties to UNCLOS. The Court placed importance on the fact that neither Ambassador Longva (in a presentation given at the Pan African Conference on Maritime Boundary Delimitation and the Continental Shelf) nor Norway

136 *Armas v Venezuela* (*Award on Jurisdiction*) [2019] PCA Case No. 2016-08, at paras 654, 650–658. For an earlier detailed analysis of this issue, see Merkouris, *Article 31(3)(c) VCLT and the Principle of Systemic Integration*.

137 E.g., *Jadhav* (*Judgment*), at para. 76; *Sovereignty over Pulau Ligitan and Pulau Sipadan* (*Merits*), at para. 53.

138 For recent examples of recourse to the *travaux préparatoires* by the Court, see *Immunities and Criminal Proceedings* (*Preliminary Objections*), at paras 96–98; *Jadhav* (*Judgment*), at paras 76–86.

(in a Note Verbale to the Secretariat of the UN) noted that the MOU specified a particular method of settlement for the Parties' maritime dispute (as Kenya had contended).[139] Two elements of this reasoning are notable. First, the Court relied on the *absence* of support for Kenya's argument in the *travaux* to confirm its interpretation.[140] In this context, the Court stated that 'were [the sixth] paragraph [of the MOU] to have the potentially far-reaching consequences asserted by Kenya, it would in all likelihood have been the subject of some discussion'.[141] This demonstrates that the purpose for which the *travaux* are used – and the elements of the *travaux* on which the Court places importance – depend on the particular circumstances of the case at hand. Second, the supplementary means of interpretation drawn on by the Court did not emanate from one of the Parties to the MOU. Instead, the Court reasoned that as Norway had drafted the MOU, it was Norway's understanding of the MOU more broadly that was relevant. This was particularly important given the absence of any *travaux* from the adoption of the MOU by the Parties.

In this latter respect, another set of documents that features in the interpretative process of the Court is documents drafted by the International Law Commission that later formed the basis for binding treaties. The ILC itself, in a somewhat 'meta' fashion, had addressed this question during the discussions surrounding what would become Article 32 VCLT. After some debate on the issue, the members of the ILC seemed to lean towards considering the ILC discussions and commentaries as preparatory work of a second order.[142] The *Jadhav* case seems to confirm this, as the Court examined the discussions within the ILC on the topic 'consular intercourse and immunities' under the rubric of *travaux préparatoires* of Article 36 of the Vienna Convention on Consular Relations.[143] Citing explicitly Article 32 VCLT, the Court referred to the ILC discussions only to confirm the interpretation reached through the means of Article 31 VCLT.[144] That said, the evidentiary value to be accorded to ILC documents *qua travaux préparatoires* can lie anywhere on the spectrum between absolute adherence and total rejection, and will largely depend on the circumstances of each case. For instance, in the *Jurisdictional Immunities* case,

139 *Somalia v Kenya* (*Preliminary Objections*), at paras 103–104.

140 See also *Oil Platforms* (*Preliminary Objections*), at paras 28–29; *Qatar v Bahrain* (*Jurisdiction and Admissibility*), at para. 41.

141 *Somalia v Kenya* (*Preliminary Objections*), at para. 103.

142 UN ILC, 'Summary Record of the 872nd Meeting' (17 June 1966) UN Doc A/CN.4/SR.872, at para. 35; UN ILC, 'Summary Record of the 873rd Meeting' (20 June 1966) UN Doc A/CN.4/SR.873, at paras 25, 27–28, 34.

143 *Jadhav* (*Judgment*), at paras 77–83.

144 Ibid., at para. 76.

the ICJ relied on the ILC's commentary to its Draft Articles on Jurisdictional Immunities of States and their Property according to which the provision at issue did not apply to 'situations of armed conflict'.[145] The Court read this caveat into the UN Convention Jurisdictional Immunities of States and their Property, notwithstanding the fact that the text of the Convention did not provide for such a qualification *expressis verbis*.[146]

Depending on the nature of the case, documents from other international organs may also be relied on by the Court. Indicatively, in the *Wall Advisory Opinion*, the Court referred to documents originating from the ICRC to support its interpretation of the provisions of the Fourth Geneva Convention.[147] In *Diallo*, the Court referred to the jurisprudence of the Human Rights Committee and its General Comments, as well as the African Commission on Human and Peoples' Rights, and the European Court of Human Rights. It explained this in the following way:

> Although the Court is in no way obliged, in the exercise of its judicial functions, to model its own interpretation of the Covenant on that of the Committee, it believes that it should ascribe great weight to the interpretation adopted by this independent body that was established specifically to supervise the application of that treaty. The point here is to achieve the necessary clarity and the essential consistency of international law, as well as legal security, to which both the individuals with guaranteed rights and the States obliged to comply with treaty obligations are entitled.
>
> Likewise, when the Court is called upon, as in these proceedings, to apply a regional instrument for the protection of human rights, it must take due account of the interpretation of that instrument adopted by the independent bodies which have been specifically created, if such has been the case, to monitor the sound application of the treaty in question.[148]

145 *Jurisdictional Immunities of the State* (*Germany v Italy: Greece intervening*) (*Judgment*) [2012] ICJ Rep 99, at para. 69.

146 Cf., critically, *Jurisdictional Immunities of the State* (*Germany v Italy: Greece intervening*) (*Judgment*) (*Dissenting Opinion of Judge ad hoc Gaja*), at para. 5.

147 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (*Advisory Opinion*) [2007] ICJ Rep 136 ('*Wall Advisory Opinion*'), at para. 97.

148 *Ahmadou Sadio Diallo* (*Republic of Guinea v Democratic Republic of Congo*) (*Judgment*) [2010] ICJ Rep 639, at paras 66–67.

The Court's approach was later clarified in *Qatar v UAE*. In that case, the issue at hand was whether the term 'national origin' in Article (1)(1) ICERD covered differentiations based on nationality as alleged by Qatar. The Court applied, first, the elements of the general rule of interpretation and then turned to the *travaux préparatoires* of the Convention to confirm its interpretation. Whilst it took note of the views of the ICERD Committee, the Court came to the opposite conclusion 'by applying, as it is required to do, the customary rules of treaty interpretation'.[149] In so doing, the Court implied that the relative value of such materials depends on the circumstances of the case and the faithful application of rules of treaty interpretation by the bodies of origin.

The Court has not indicated any limit as to the material which may be taken into account as supplementary means of interpretation. For example, in the recent *Equatorial Guinea v France* judgment on preliminary objections, the Court consulted the commentary to the 1988 Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, from which the relevant provision of the 2000 Convention against Transnational Organized Crime (the 'Palermo Convention') at issue in the case at hand was transposed, in order to confirm its interpretation under Article 31 of the VCLT.[150] Although the Court did not frame its reasoning in these terms, this would appear to be an example of recourse to the circumstances of conclusion of a treaty as a supplementary means of interpretation under Article 32 VCLT.

4.7 *Multiple Authentic and Conflicting Texts of a Treaty*

The leading judgment on the application of Article 33 is the judgment of the Court in the merits phase of the *LaGrand* case. In that case, the Court had issued provisional measures, ordering the United States of America to stay the execution of a German national pending the outcome of the final decision on the merits. This national was executed prior to the merits phase of the case in contravention of the Court's Order of provisional measures. Germany claimed that such an order created international legal obligations for the United States of America and as such a breach of the provisional measures entailed the latter's responsibility. The question therefore before the Court was whether provisional measures created binding obligations, a question that in its view 'essentially concern[ed] the interpretation of Article 41' of the Court's Statute.[151] The Court analysed the English and French versions of the Court's

149 *Qatar v UAE* (*Preliminary Objections*), at para. 101.

150 *Immunities and Criminal Proceedings* (*Preliminary Objections*), at paras 99–101.

151 *LaGrand* (*Judgment*), at para. 99.

Statute,[152] finding that the two versions differed in relation to the imperative character of provisional measures. As a result of this divergence, it invoked Article 33(4) VCLT, according to which 'when a comparison of the authentic texts discloses a difference of meaning which the application of Articles 31 and 32 does not remove the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted'. The Court reasoned that the object and purpose of the Statute was to enable the Court to fulfil 'the basic function of judicial settlement of international disputes' and that the 'object and purpose' of Article 41 was 'to safeguard, and to avoid prejudice to, the rights of the parties as determined by the final judgment of the Court'.[153]

5 The International Court of Justice and Maxims or Canons of Interpretation not Explicitly Mentioned in the VCLT

As shown above, the dominant tendency in the jurisprudence of the ICJ is to refer back to the VCLT rules. Despite this, on occasion, it has also referred to maxims/canons of interpretation not explicitly mentioned in the VCLT.[154] For obvious reasons this tendency was more prevalent during the pre-VCLT era. Nowadays, with some notable exceptions as will be discussed below, such reference is either prompted by the arguments of the parties or as reinforcing the interpretative outcome already arrived at through an application of the elements and the process enshrined in Articles 31–33 VCLT.

An exhaustive presentation of all these maxims is beyond the scope of this article. Below what will be addressed are some of the most notable instances of invocations of such maxims/canons and the lessons to be taken away from these with respect to the interpretative practice of the ICJ.

5.1 *In Dubio Mitius*

The *in dubio mitius* principle, sometimes erroneously referred to as the principle of restrictive interpretation, requires that 'if the wording of a treaty

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

153 *LaGrand* (*Judgment*), at para. 102.

154 For a detailed exploration of some of these maxims across different courts and tribunals see: J Klingler, Y. Parkhomenko and C. Salonidis (eds), *Between the Lines of the Vienna Convention? Canons and Other Principles of Interpretation in Public International Law* (Wolters Kluwer 2018).

provision is not clear, in choosing between several admissible interpretations, the one which involves the minimum of obligations for the Parties should be adopted'.[155] Although the PCIJ noted the principle in the *Interpretation of Article 3, Paragraph 2, of the Treaty of Lausanne* Advisory Opinion, it was of the view that it was not necessary to apply it as the wording of Article 3 was clear.[156]

As is the case with most of these maxims/canons, even if they are considered to be binding principles of interpretation, their role is a supplementary one. They are to be applied only if the application of Articles 31–33 does not lead to a definitive interpretative outcome. As stated in *Polish Postal Service in Danzig*, *in dubio mitius* should be applied 'only in cases where ordinary methods of interpretation have failed'.[157] Similarly, in *Territorial Jurisdiction of the International Commission of the River Oder*, the PCIJ held that *in dubio mitius*

> must be employed only with the greatest caution. To rely upon it is not sufficient that the purely grammatical analysis of a text should not lead to definitive results; there are many other methods of interpretation, in particular reference is properly had to the principles underlying the matters to which the text refers; it will be only when, in spite of all pertinent considerations, the intention of the Parties still remains doubtful, that that interpretation should be adopted which is most favourable to the freedom of States.[158]

Of note is also the fact that *in dubio mitius* also has as a limit that it should not lead to a rewriting or revision of the treaty being interpreted, as stated in *S.S. 'Wimbledon'*.[159]

The ICJ has been even more reserved in the application of *in dubio mitius.* In most instances, the principle is invoked by one of the parties, but the Court either disregards it, focusing on a standard application of Articles 31–33 VCLT (or their customary counterparts), connects it with the intention of the parties

155 *Interpretation of Article 3, Paragraph 2, of the Treaty of Lausanne*, at 25.

156 Ibid.

157 *Polish Postal Service in Danzig* (*Advisory Opinion*) [1925] PCIJ Series B No. 11, at 39.

158 *Case relating to the Territorial Jurisdiction of the International Commission of the River Oder* (*United Kingdom v Poland*) [1928] PCIJ Series A No. 23, at 26. Similarly, *Case of the Free Zones of Upper Savoy and the District of Gex* (*Second Phase*) (*France v Switzerland*) [1928] PCIJ Series A No. 24, at 12; *Case of the Free Zones of Upper Savoy and the District of Gex* (*France v Switzerland*) [1932] PCIJ Series A/B No. 46, at 167; *Phosphates in Morocco* (*Italy v France*) [1938] PCIJ Series A/B No. 74, at 23–24.

159 *The SS 'Wimbledon'* [1923] PCIJ Series A No. 1, at 24–25.

rather than as a self-standing principle of interpretation, and/or underlines its supplementary role.[160] In sum, the *in dubio mitius* principle seems to be used in the jurisprudence of the ICJ only sparingly, in a supplementary fashion and even then there is a strong tendency to connect it with both the text and the intention of the parties. All in all the use of *in dubio mitius* seems to be more descriptive of the interpretative outcome rather than a self-standing principle.

5.2 *Contra Proferentem*

The *contra proferentem* rule requires that when a text is ambiguous it must be construed against the party who drafted it. As is the case with the previously mentioned canons/maxims, the tendency is to highlight the supplementary fashion of this maxim, and to note that Articles 31–33 suffice without the need to resort to such maxims.[161]

In *Fisheries Jurisdiction* (*Spain v Canada*), the ICJ noted, without however going into more detail, that 'the *contra proferentem* rule may have a role to play in the interpretation of contractual provisions'. It went on though to clarify that with respect to the interpretation of unilateral declarations under Article 36 ICJ Statute, seemingly making a distinction as to the utility of the rule depending on the source of the obligation (treaty or optional clause declaration).[162] Most recently, in *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* Judge Shahabuddeen reiterated the supplementary nature of *contra proferentem,* noted the need for its application with circumspection,[163] but was of the view that 'a certain irreducible logic in its substance is not altogether banished'.[164]

5.3 *Expressio Unius est Exclusion Alterius/per Argumentum a Contrario*

This approach to interpretation has been described by the ICJ as 'the fact that a provision expressly provides for one category of situations is said to justify the

160 *Nuclear Tests* (*New Zealand v France*) (*Judgment*) [1974] ICJ Rep 253, at para. 47; *Frontier Dispute* (*Burkina Faso/Republic of Mali*) (*Judgment*) [1986] ICJ Rep 554 ('*Frontier Dispute* (*Burkina Faso/Mali*)'), at para. 39; *Navigational and Related Rights* (*Judgment*), at para. 48.

161 *Brazilian Loans* [1929] PCIJ Series A No. 21.

162 *Fisheries Jurisdiction* (*Spain v Canada*) (*Jurisdiction*) [1998] ICJ Rep 432, at para. 51.

163 Referring to C. de Visscher, *Problèmes d'interprétation judiciaire en droit international public* (Pedone 1963), at 110–112.

164 *Qatar v Bahrain* (*Jurisdiction and Admissibility*) (*Dissenting Opinion of Judge Shahabuddeen*), referring back to *Polish Agrarian Reform and German Minority* (*Order of 29 July 1933*) (*Dissenting Opinion of Judge Anzilotti*) [1933] PCIJ Series A/B No. 58, at 182, final paragraph.

inference that other comparable categories are excluded'.[165] Recently, however, in *Certain Iranian Assets*, Judge Robinson expressed the view that *a contrario* interpretation has a much wider scope. In his view, '[a]n *a contrario* interpretation does not always lead to an inference that other comparable categories are excluded. This means of interpretation can, as in this case, lead to an inference that a comparable category is included'.[166]

The Court and the Judges have on occasion examined the principle of *expressio unius est exclusion alterius* and *a contrario* constructions,[167] however always in a supplementary fashion, i.e. when recourse to elements of Article 31 VCLT does not lead to a definite answer,[168] and always in a manner that does not allow for an *a contrario* construction to prevail when it is not supported (or even goes against) the standard elements of treaty interpretation provided in Articles 31–32 VCLT.[169] In fact, on two occasions the Court has pre-emptively excluded any possible *a contrario* construction of its own judgment.[170]

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165 *Sovereign Rights and Maritime Spaces in the Caribbean Sea* (*Preliminary Objections*), at para. 37. For more detail on the Court's use of this maxim, see A.A. Yusuf and D. Peat, '*A Contrario* Interpretation in the Jurisprudence of the International Court of Justice' (2017) 3(1) Canadian Journal of Comparative and Contemporary Law 1.

166 *Certain Iranian Assets* (*Preliminary Objections*) (*Separate Opinion of Judge Robinson*), at para. 9. This would amount to an inversion of the maxim *expressio unius est exclusio alterius*.

167 *Corfu Channel* (*United Kingdom v Albania*) (*Merits*) (*Dissenting Opinion by Judge Azevedo*) [1949] ICJ Rep 4 ('*Corfu Channel*'), at para. 30; *United States Diplomatic and Consular Staff in Tehran* (*United States of America v Iran*) (*Judgment*) [1980] ICJ Rep 3, at para. 40; *Application for Review of Judgment No. 273 of the United Nations Administrative Tribunal* (*Advisory Opinion*) (*Dissenting Opinion of Judge Schwebel*) [1982] ICJ Rep 325, at 488; *Frontier Dispute* (*Burkina Faso/Mali*) (*Judgment*), at para. 88.

168 *Asylum Case* (*Colombia v Peru*) (*Judgment*) (*Dissenting Opinion of Judge Badawi Pasha*) [1950] ICJ Rep 266.

169 *Fisheries Jurisdiction* (*Germany v Iceland*) (*Merits*) (*Joint Separate Opinion by Judges Forster, Bengzon, Jiménez de Aréchaga, Nagendra Singh and Ruda*), at para. 4; *Western Sahara* (*Advisory Opinion*) (*Separate Opinion of Judge de Castro*) [1975] ICJ Rep 12, at 137; *Certain Expenses of the United Nations* (*Article 17, Paragraph 2, of the Charter*) (*Advisory Opinion*) (*Dissenting Opinion of Judge Moreno Quintana*) [1962] ICJ Rep 151, at 248, 252; *Continental Shelf* (*Libyan Arab Jamahiriya/Malta*) (*Judgment*) (*Separate Opinion of Judge Jimenez de Arechaga*) [1984] ICJ Rep 3, at 10; *Land, Island and Maritime Frontier Dispute* (*Application to Intervene*) (*Dissenting Opinion of Judge Shahabuddeeen*) [1990] ICJ Rep 3, at 34; *Arrest Warrant of 11 April 2001* (*Democratic Republic of Congo v Belgium*) (*Judgment*) (*Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal*) [2002] ICJ Rep 3 ('*Arrest Warrant of 11 April 2001*'), at para. 38; *Sovereignty over Pulau Ligitan and Pulau Sipadan* (*Merits*) (*Dissenting Opinion of Judge Franck*), at para. 33.

170 *Avena* (*Judgment*), at para. 151 ('there can bc no question of making an *a contrario* argument in respect of any of the Court's findings in the present Judgment. In other words, the fact that in this case the Court's ruling has concerned only Mexican nationals cannot be

The Court has best summarized the above jurisprudence in *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea*, where it held that recourse to an *a contrario* interpretation

> is only warranted [...] when it is appropriate in light of the text of all the provisions concerned, their context and the object and purpose of the treaty. Moreover, even where an *a contrario* interpretation is justified, it is important to determine precisely what inference its application requires in any given case.[171]

The Court remained steadfast in its approach to *a contrario* interpretations in *Certain Iranian Assets*.[172]

5.4 *Ejusdem Generis*

According to the *ejusdem generis* canon of construction 'where general words follow an enumeration of persons or things, by words of a particular and specific meaning, such general words are not to be construed in their widest extent, but are to be held as applying only to persons or things of the same general kind or class as those specifically mentioned'.[173] Although *ejusdem generis* has on occasion been relied on by Judges, and mentioned *in passim* by the Court,[174] in the context in which it appears seems to be rather as a confirmation of an interpretation arrived at through an ordinary application of Articles 31–32 VCLT, rather than a self-standing interpretative rule.

5.5 *Per Analogiam & a Minore ad Majus/a Majore ad Minus*

Per analogiam constructions have been brought before the Court on numerous instances.[175] The Court has refrained from taking a position on the place of

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taken to imply, that the conclusions reached by it in the present Judgment do not apply to other foreign nationals finding themselves in similar situations in the United States'); *LaGrand* (*Judgment*) (*Declaration of President Guillaume*).

171 *Sovereign Rights and Maritime Spaces in the Caribbean Sea* (*Preliminary Objections*), at para. 37.

172 *Certain Iranian Assets* (*Preliminary Objections*), at para. 63.

173 'Ejusdem Generis' in *Black's Law Dictionary*, Free Online Dictionary 2nd edn, available at < https://thelawdictionary.org/>.

174 *Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal* (*Advisory Opinion*) [1973] ICJ Rep 166, at paras 50–51; *Northern Cameroons* (*Cameroon v UK*) (*Judgment*) (*Separate Opinion of Judge Sir Percy Spender*) [1963] ICJ Rep 15, at 91.

175 Analogy with rules on diplomatic protection in *Reparation for Injuries Suffered in the Service of the United Nations* (*Advisory Opinion*) [1949] ICJ Rep 174 ('*Reparation for Injuries Suffered in the Service of the United Nations*'), at 182; analogy with previous case-law in

such constructions in the VCLT-provided interpretative framework, with their acceptance or rejection being asserted or emerging as an outcome of the normal application of Articles 31–32 VCLT.

A minore ad majus/a majore ad minus interpretations can be seen as a subset of *per analogiam* interpretations. Only Judge Azevedo has referred to it explicitly in *Corfu Channel*,[176] although implicitly it may have come somewhat into play in *Bosnian Genocide* as well.[177] Although the Court referred to a number of *intra*-and *praeter*-VCLT interpretative elements, principles or maxims, such as for instance, object and purpose, logic and necessary implication this seems to be a case where the maxim *a minore ad majous* and *a majore ad minus* (depending on one's analytical frame of reference) may have come into play in a supplementary fashion.

5.6 *Effet Utile/Effective Interpretation/Ut Res Magis Valeat Quam Pereat*

The principle of effectiveness is understood thus:

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

Barcelona Traction, at para. 70 and *Wall Advisory Opinion* (*Separate Opinion of Judge Higgins*), at paras 4–5; analogous application of the 'reasonable time' requirement for withdrawal or termination of treaties to optional clause declarations in *Nicaragua* (*Jurisdiction and Admissibility*), at para. 63; analogous application of VCLT rules to optional clause declarations in *Fisheries Jurisdiction* (*Germany v Iceland*) (*Merits*), at para. 46; analogy with immunities for diplomatic agents and Heads of State in *Arrest Warrant of 11 April 2001* (*Dissenting Opinion of Judge ad hoc van den Wyngaert*), at para. 14. See also: *Namibia Advisory Opinion* (*Separate Opinion of Judge de Castro*), at para. 3; *Continental Shelf* (*Tunisia/Libya*) (*Separate Opinion of Judge Jiménez de Aréchaga*) [1982] ICJ Rep 18, at para. 115. More recently also in *Certain Iranian Assets* (*Preliminary Objections*), at para. 46.

176 The relevant passage goes as follows: 'It is of small importance that this is a case of a quasi-delict; for the argument *majus ad minus* would fully justify a conclusion (quite in conformity with the *litis contestatio*, or rather special agreement) in which the purpose of the claim is compensation; this becomes even clearer when we compare it with the counterclaim', see *Corfu Channel* (*Merits*) (*Dissenting Opinion by Judge Azevedo*), at para. 22.

177 *Bosnian Genocide* (*Merits*), at para. 166.

> be inconsistent with the intention of the parties. This principle is stated in the rule *ut res magis valeat quam pereat.*[178]

The principle of effectiveness by the Court's own admission plays an important law in the interpretation of treaties and in its own jurisprudence.[179] Before the adoption of the VCLT, Sir Gerald Fitzmaurice, in his seminal series of articles in the *British Yearbook of International Law*,[180] qualified it as one of the main principles of interpretation. He also cautioned though against the fact that it 'is all too frequently misunderstood as denoting that agreements should always be given their maximum *possible* effect, whereas its *real object is merely* [...] *to prevent them failing altogether*'.[181] The ICJ earlier had also had to deal with such claims.

> *It may be urged that the Court is entitled to engage in a process of 'filling in the gaps', in the application of a teleological principle of interpretation, according to which instruments must be given their maximum effect in order to ensure the achievement of their underlying purposes.* The Court need not here enquire into the scope of *a principle the exact bearing of*

178 *South West Africa* (*Dissenting Opinion of Judge van Wyk*), at 583.

179 *Lighthouses Case between France and Greece* (*France v Greece*) [1934] PCIJ Series A/B No. 62, at 27; *Factory at Chorzów* (*Indemnity*) (*Jurisdiction*), at 24; *Corfu Channel* (*Merits*), at 24; *Reparation for Injuries Suffered in the Service of the United Nations*, at paras 179, 183; *Namibia Advisory Opinion*, at para. 66; *Aegean Sea Continental Shelf* (*Judgment*) (*Dissenting Opinion of Judge de Castro*), at para. 52; *Territorial Dispute* (*Libya/Chad*) (*Judgment*), at paras 50–51; *Qatar v Bahrain* (*Jurisdiction and Admissibility*), at para. 35; *Fisheries Jurisdiction* (*Germany v Iceland*) (*Merits*), at para. 52; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (*Georgia v Russia*) (*Preliminary Objections*) [2011] ICJ Rep 70 ('*Application of the ICERD*'), at paras 133–134; *Application of the Interim Accord of 13 September 1995*, at para. 92; *Sovereign Rights and Maritime Spaces in the Caribbean Sea* (*Preliminary Objections*), at paras 43–44; as to the scope of the principle Judge Cançado Trindade has expressed the view that it 'applies not only in relation to substantive norms of human rights treaties (that is, those which provide for the protected rights), but also in relation to procedural norms', see *Application of the ICERD* (*Preliminary Objections*) (*Dissenting Opinion of Judge Cançado Trindade*), at para. 79 (emphasis added).

180 Fitzmaurice, 'The Law and Procedure of the International Court of Justice'; see also H. Thirlway, 'The Law and Procedure of the International Court of Justice 1960–1989: Supplement 2006, Part Three' (2006) 77 British Yearbook of International Law 1, at 52–55.

181 G.G. Fitzmaurice, '*Vae victis* or Woe to the Negotiators: Your Treaty or our "Interpretation" of it?' (1971) 65 American Journal of International Law 373; similarly *Whaling in the Antarctic* (*Judgment*) (*Separate Opinion of Judge Cançado Trindade*), at para. 54.

> *which is highly controversial*, for it is clear that it can have no application in circumstances in which the Court would have to go beyond what can reasonably be regarded as being a process of interpretation, and *would have to engage in a process of rectification or revision. Rights cannot be presumed to exist merely because it might seem desirable that they should*.[182]

This demonstrates the ICJ's well-founded sensitivity in setting out the limits of the principle of effectiveness. The application of the principle cannot lead to an interpretation that would be 'contrary to [the] letter and spirit' of the treaty being interpreted,[183] and not go against the intention of the parties,[184] which follows the reasoning of the PCIJ in *Free Zones of Upper Savoy*, that had noted in a similar vein that an *effet utile* interpretation should 'not involve doing violence to [the] terms [of the treaty]'.[185] In other cases, the ICJ has focused less on the limits of the principle of effectiveness and rather underscored more its connection with other elements explicitly mentioned in Articles 31–33 VCLT, such as context, intention, object and purpose, circumstances surrounding the conclusion of a treaty and other authentic versions of the text.[186]

This inexorably leads us to the question of where precisely the principle of effectiveness lies in relation to Articles 31–33 VCLT. Judge Torres Bernardez in *Land, Island and Maritime Frontier Dispute* opined that the principle of effectiveness 'in so far as it reflects a true general rule of interpretation, is embodied, as explained by the International Law Commission, in Article 31, paragraph 1, of the Vienna Convention'.[187] Judge Cançado Trindade has also

182 *South West Africa* (*Second Phase*) (*Liberia v South Africa*) (*Judgment*) [1966] ICJ Rep 6, at para. 91 (emphasis added).

183 *Interpretation of Peace Treaties* (*Second Phase*) (*Advisory Opinion*) [1950] ICJ Rep 221, at 229.

184 *Land, Island and Maritime Frontier Dispute* (*Judgment*), at para. 376.

185 *Free Zones of Upper Savoy and the District of Gex* (*France v Switzerland*) (*Order of 19 August 1929*) [1929] PCIJ Series A No. 22, at 13. In other cases relating to interpretation of optional clause declarations the ICJ has also expressed the view that in the interpretations of these instruments the principle of effectiveness should not lead to a revision of the text, and disregarding the intention of the parties and what they aimed to achieve; *Fisheries Jurisdiction* (*Germany v Iceland*) (*Merits*), at paras 52, 66; *Certain Norwegian Loans* (*France v Norway*) (*Judgment*) [1957] ICJ Rep 9, at 27.

186 *Oil Platforms* (*Preliminary Objections*), at para. 24; *Fisheries Jurisdiction* (*Germany v Iceland*) (*Merits*), at paras 52, 66; *Application of the ICERD* (*Preliminary Objections*), at paras 133–135.

187 *Land, Island and Maritime Frontier Dispute* (*Judgment*) (*Separate Opinion of Judge Torres Bernardez*), at para. 205.

and more recently expressed the view that the principle underlies the general rule of Article 31 VCLT.[188]

In *Georgia v Russia*, the Court applied the principle under the heading of the 'ordinary meaning' of the provision in question,[189] but without further elaborating on its connection with the VCLT. This finding of the Court was censured by several Judges in a joint dissenting opinion. However, the dissenting Judges as well, did not take a clear position on where the principle of effectiveness fits within the VCLT rules.[190] They criticized the fact that 'the "general rule of interpretation", i.e., "the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose", is applied in the Judgment in a way that amounts to nothing more than applying the principle of "effectiveness"'.[191] As they noted 'this technique of interpretation is never as all-determinative as the Court would appear to treat it in the present case; it does not suffice by itself'.[192] Nonetheless, they did not 'deny the relevance, or underestimate the importance, of the principle that the interpreter of a treaty must normally seek to give its terms a meaning which leads them to have practical effect, instead of one which deprives them of any effect (the "principle of effectiveness")'.[193]

A final issue to be mentioned is the state of tension that exists between the principle of effectiveness and the *ex abundante cautela* maxim, which – in exceptional circumstances – may permit treating certain words or phrases of a treaty as somewhat redundant,[194] and existing solely out of an 'abundance of caution', and for the 'avoidance of doubt', as was mentioned in *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea*.[195] This maxim has rarely been considered by the ICJ, although in *Anglo-Iranian Oil Co.*, the Court alluded that it may have some relevance for the interpretation

188 *Whaling in the Antarctic* (*Judgment*) (*Separate Opinion of Judge Cançado Trindade*), at para. 54.

189 Cf. *Application of the ICERD* (*Preliminary Objections*), at paras 123–141.

190 *Application of the ICERD* (*Preliminary Objections*) (*Joint Dissenting Opinion of President Owada, Judges Simma, Abraham, Donoghue, and Judge ad hoc Gaja*), at paras 20–22.

191 Ibid., at para. 21.

192 Ibid., at para. 22.

193 Ibid.

194 See A. MacDonald, '*Ex abundante cautela*' in J Klingler, Y. Parkhomenko and C. Salonidis (eds), *Between the Lines of the Vienna Convention? Canons and Other Principles of Interpretation in Public International Law* (Wolters Kluwer 2018) 115, at 121 et seq.

195 *Sovereign Rights and Maritime Spaces in the Caribbean Sea* (*Preliminary Objections*), at para. 43.

of optional clause declarations.[196] Nonetheless even in the few cases where it has been mentioned, this may be explained as the outcome of consideration of other more well-established elements of the interpretative process, such as context, circumstances surrounding the conclusion of the treaty/instrument and preparatory to name a few.[197]

6 Conclusion

The jurisprudence of the International Court of Justice at first sight epitomizes the orthodox approach to treaty interpretation, manifesting, in the words of one author, 'une symbiose parfaite'[198] with the rules of interpretation that are codified in the VCLT. Not only was the interpretative practice of the ICJ and its predecessor the PCIJ an inspiration for what would become Articles 31–33 VCLT, but those two were and remain entangled in a tango-esque dance, with no clear leader in this dance partnership.

The VCLT rules on interpretation have gradually and increasingly made their *gravitas* felt. As Waibel notes the

> VCLT's interpretive framework responds to the need for harmonized interpretive principles, even if at a high level of generality. It provides a common language for treaty interpreters to think conceptually about interpretive questions. It equips international lawyers with a 'rudimentary legal grammar' that unites them, even if they disagree in particular cases how these principles should be applied. This grammar is part of the glue that keeps international law together.[199]

However, this should not lead to the erroneous assumption that the interpretative process has reached its own *telos*. The VCLT rules on interpretation and the corresponding practice by international courts and tribunals and other 'users' of international law have led to the emergence of a common vocabulary that

196 *Anglo-Iranian Oil Co.* (*United Kingdom v Iran*) (*Jurisdiction*) [1952] ICJ Rep 93 ('*Anglo-Iranian Oil Co*'.), at 105.

197 *Sovereign Rights and Maritime Spaces in the Caribbean Sea* (*Preliminary Objections*), at para. 43; *Anglo-Iranian Oil Co.* (*Jurisdiction*), at 105.

198 M. Forteau, '*Les techniques interprétatives de la Cour internationale de Justice*' (2011) 115(2) *Revue Generale de Droit International Public* 399.

199 M. Waibel, 'Uniformity versus Specialisation (2): A Uniform Regime of Treaty Interpretation?' in C.J. Tams, A. Tzanakopoulos and A. Zimmermann (eds), *Research Handbook on the Law of Treaties* (Edgar Elgar 2014) 375, at 381.

has somewhat streamlined, although far from perfected, the interpretative process.

To revert to the issues that we identified in the introduction to this article, the jurisprudence demonstrates that despite the close link between the ICJ and the rules of the VCLT, or perhaps more accurately precisely because of it, the Court adopts a pragmatic approach to interpretation, which rejects a mechanistic approach to the rules of interpretation. This has provided the Court with a great degree of latitude, both in terms of the materials that it takes into account in the interpretative process and the weight that it gives to different elements of interpretation. The Court has, to a certain degree, admitted the existence of interpretative principles that are not explicitly codified in the VCLT, but these generally operate as subsidiary principles of interpretation that reinforce conclusions already reached through Articles 31–33 VCLT.

The judgments and advisory opinions of the Court provide useful examples of the various elements of which the interpretative process consists and, more importantly, how they interact, complement and/or conflict with one another. Examining the Court's jurisprudence demonstrates the iterative and context-specific nature of interpretation, in which the importance of interpretative elements and choice of materials changes from case to case. But this does not detract from the importance of the ICJ's interpretative practice. Far from it. In fact, it is precisely this that gives it value.