
by Panos Merkouris
Treaty Interpretation and its Rules:

Of Motion through Time, ‘Time-Will’ and ‘Time-Bubbles’

by Panos Merkouris

forthcoming in:

P Merkouris & M Fitzmaurice, Treaties in Motion: The Evolution of Treaties from Formation to Termination (CUP 2020) Chapter 4

The TRICI-Law project has received funding from the European Research Council (ERC) under the European Union’s Horizon 2020 Research and Innovation Programme (Grant Agreement No. 759728).
Chapter 4

Treaty Interpretation and its Rules:

Of Motion through Time, ‘Time-Will’ and ‘Time-Bubbles’

1 Introduction

‘[i]t’s time that rules, time is our gambling partner on the other side of the table and it holds all the cards of the deck in its hand’
José Saramago, Blindness

In the previous Chapters, the concept of ‘motion’ of treaties and of treaty law was discussed mainly within the frame of reference of changes to the ‘object-state’ of the rules under examination. However, motion is to be understood not only through space but also through time. Nowhere is this more evident in the law of treaties than in treaty interpretation, and it is exactly this motion through spacetime that will be the focus of this Chapter. What will be analysed is the manner in which time, and temporal considerations affect the substance of treaty rights and obligations, and which rules (if any) govern this particular motion of treaties. Furthermore, since motion as demonstrated by Einstein is dependent on the observer’s particular frame of reference, so in the present Chapter the analysis will move between the two critical frames of references: i) that of the treaty being interpreted, ie whether from a substantive and interpretative point of view it remains at a state of stasis (contemporaneous interpretation) or whether it changes/evolves through time (evolutive interpretation) and ii) that of the rules of interpretation, ie whether these interpretative rules are constants, immutable and perennial ones, in the system of the law of treaties or are as any other rule potentially subject to motion and change through the temporal dimension.

As is evident from these preliminary thoughts, in this Chapter the concepts of time and motion through time, inter alia in the form of content (non-)change, are critical in our analysis. The study of time and the changes effectuated by and through the passage of time have always been

1 J Saramago, Blindness (Harvest Books 1999) 318.
2 See Ch 1 of the present book.
central to logic, philosophy, mathematics and physics. Zeno’s arrow paradox,³ Heraclitus’ river paradox,⁴ and Theseus’ ship paradox,⁵ are but a few examples from Antiquity that demonstrate not only the fascination of ancient philosophers with the notion of time and change, but also how tangled and multi-dimensional even the simplest thought experiments could become when tackled from the angle of time and change.

Legal science and, for our purposes, international law is no stranger to the complexities and the problems that the passage of time can produce. The principle of tempus regit actum, the principle of contemporaneity and inter-temporal law are but a few manifestations of the approaches that have emerged through practice in order to respond to the inherent difficulties of deciding in the present on matters of the near or far removed past. Several seminal academic works have been devoted to tackling the concept of time in international law from a variety of angles.⁶

The purpose of this Chapter is neither to address the notion of ‘time’ in its totality, nor all the temporal aspects that come in one way or another within the process of interpretation. What will be demonstrated is firstly that in legal interpretation there are well-established rules that govern the motion of treaties through time, and to present the key features of these rules.⁷ Secondly, and perhaps more interestingly, what will be shown is also a form of ‘double-think’ that seems to be pervasive when we switch our frame of reference to the VCLT rules themselves.⁸ Whereas when dealing with treaty rules judges and academics are familiar and often pay lip service to the fact that the law to be applied is the law contemporaneous to the relevant juridical fact, nonetheless in the case of interpretation and in particular the rules that govern interpretation, the notion of ‘time’ becomes rather ‘relative’. What we mean by this is that even when interpreting treaties concluded before 1980,⁹ in some cases even treaties of the

---

⁵ Plutarch, Theseus Ch 23.1 (available at the Perseus Digital Library as above). An interesting variation on the theme is offered by Hobbes, Elements of Philosophy Ch XI, Sect 7.
⁷ Sect 2 of this Chapter (excluding Sect 2.2.2) is an updated version of the ideas that appear in Ch 2 of Merkouris, Article 31(3)(c) VCLT.
⁸ With a particular emphasis to the ICJ.
⁹ Year of entry into force of the VCLT.
19th century, most have no hesitation to refer to the VCLT rules on interpretation. However, that would be methodologically appropriate, only if one of the following two propositions were valid; either the rules on interpretation are ubiquitous and immutable, or they are capable of moving backwards through time, ie of ‘time-travelling’. As will be shown in Section 3 of the Chapter, neither of the aforementioned propositions holds up to scrutiny.

2 Contemporaneous Interpretation v Evolutive Interpretation: Content Stasis v Content Motion

2.1 Interpretative Motion through Time: Intertemporality and its Connection to Interpretation

Intertemporal law is a concept central to the *kata chronon metavole* of treaties. Despite this its exact content is somewhat elusive. Judge Huber’s *dictum* in the *Island of Palmas case* is the passage most often cited in connection to intertemporality

> a juridical fact must be appreciated in the light of the law contemporary with it … The same principle which subjects the act creative of a right to the law in force at the time the right arises, demands that the *existence of the right, in other words its continued manifestation, shall follow the conditions required by the evolution of law.*

However, as Higgins rightly points out this quote has been read ‘in the most remarkably extensive fashion, as providing obligatory rules in circumstances that it never addressed, with consequences that it never intended’.[11] This fluidity in the content and substance of intertemporality is also reflected in the multitudinous terms associated with it. Indicatively, ‘international intertemporal law’, [12] ‘doctrine of intertemporal law’, [13] ‘rule of intertemporal

---

[10] *The Island of Palmas case (or Miangas) (Netherlands v USA) (1928) 2 UNR/AA 829, 845 (emphasis added).*


Both legs of Huber’s dictum concern the determination of the existence or non-existence of rights, not the determination of its content, so one could wonder if there is a connection with interpretation. 19 However, as Fitzmaurice observed the principle of contemporaneity can be understood as a ‘particular application of the doctrine of inter-temporal law [within treaty interpretation]’, 20 a view that seems to be shared by judges and academics alike. 21

The link between intertemporality and the process of interpretation was not for the first time observed by Judge Huber. Both Vattel and Grotius had included in their writings an analysis of the effect of time on treaties, and, in fact, came down on the side of the principle of contemporaneity arguing that ‘[l]anguages vary incessantly and the significanation and force of words change with time. When an ancient act is to be interpreted, we should then know the common use of the terms at the time when it was written’. 22

Despite this, and perhaps surprisingly, the connection between the interpretative process and intertemporality would again be seriously discussed in the international arena by the ILC.

---

14 Land and Maritime Boundary between Cameroon and Nigeria, Separate Opinion of Judge Al-Khasawneh [12]; Jan de Nul NV and Dredging International NV v Egypt (Award of 24 October 2008) ICSID Case No ARB/04/13 [132].
15 Anglia Auto Accessories Limited v Czech Republic (Final Award of 10 March 2017) SCC Case No V 2014/181 [146].
16 Spence International Investments LLC and Others v Costa Rica (Interim Award of 30 May 2017) ICSID Case No UNCT/13/2 [222] and Duke Energy International Peru Investments No 1, Ltd v Peru (Decision of the Ad hoc Committee of 1 March 2011) ICSID Case No ARB/03/28 [175] citing Mondev International Ltd v USA [70]; Pac Rim Cayman LLC v El Salvador (Decision on the Respondent’s Jurisdictional Objections of 1 June 2012) ICSID Case No ARB/09/12 [2.79]; ATA Construction, Industrial and Trading Company v Jordan (Award of 12 May 2010) ICSID Case No ARB/08/2 [109];
17 Société Générale v Dominic Republic (Award on Preliminary Objections to Jurisdiction of 19 September 2008) LCIA Case No UN 7927 [78]; Case of the Serrano Cruz Sisters v El Salvador (Merits, Reparations and Costs) IAC/HR Series C No 120 (1 March 2005), Dissenting Opinion of Judge AA Cançado Trindade [69]
18 MCI Power Group LC and New Turbine Incorporated v Ecuador (Award of 26 July 2007) ICSID Case No ARB/03/6 [89].
Although the *Institut de droit international*, had delved in several of its sessions in the 50s on the law of treaties and particularly treaty interpretation, only Lauterpacht seems to have raised the issue and then again only in passim.\(^{23}\) The ILC discussions on intertemporality were the completely opposite to the lackluster interest that the *Institut* had shown to the topic. Attempts to introduce explicit references to intertemporality happened along two main tracks. Firstly, an article devoted specifically to intertemporality was proposed. Waldock in his ‘Third Report’ included a draft article entitled ‘Inter-temporal Law’, which followed closely Huber’s *dictum* in *Island of Palmas*.\(^{24}\) Draft Article 56(1) enshrined the principle of contemporaneity, which in Waldock’s view was already customary law.\(^{25}\) In his view the reason for the principle being supported by international jurisprudence was that it closest reflected the *will of the parties*.\(^{26}\) Draft Article 56 was at the epicenter of a fiery debate, regarding the limits between interpretation and application,\(^{27}\) the autonomy of the Article with respect to the other articles on the law of treaties,\(^{28}\) and the hierarchy between the sub-paragraphs of Draft Article 56. With respect to the latter three were the main approaches: i) the principle of contemporaneity was the

---

\(^{23}\) *Institut de Droit International*, ‘De l’ interprétation des traités’ (1952) 44 AIDI 359, 405 (Lauterpacht). Two decades later the *Institut* would return again to the issue of intertemporality (not onyl from an interpretative perspective) and adopt a Resolution, that is almost a *verbatim* reproduction of Huber’s *dictum*; *Institut de Droit International*, ‘Resolution of 11 August 1975: The Intertemporal Problem in Public International Law’ (1975) 56 AIDI 536 [1], [3], [4].

\(^{24}\) ‘Article 56 – Inter-temporal law: 1. A Treaty is to be interpreted in the light of law in force at the time when the treaty was drawn up, [but] 2. Subject to paragraph 1, the *application* of a treaty shall be governed by the rules of international law in force at the time when the treaty is applied.’ (emphasis added); Waldock, ‘Third Report’ 8-9.

\(^{25}\) As shown by the following cases to which he referred: *Grishbådarna Case (Norway v Sweden)* (1909) 11 UNRIAA 147, 159-60; *North Atlantic Coast Fisheries Case (Great Britain v USA)* (1910) 11 UNRIAA 167, 196; *Case Concerning Rights of Nationals of the United States of America in Morocco, (France v USA)* (Judgment) [1952] ICJ Rep 176, 189 (hereinafter *US Nationals in Morocco*).


rule and evolutive interpretation the exception;\textsuperscript{29} ii) evolutive interpretation was the rule and the principle of contemporaneity was the exception;\textsuperscript{30} and iii) that the two paragraphs of Draft Article 56 were neither in conflict nor in a hierarchical relationship, but should be applied in a complementary fashion.\textsuperscript{31}

In all of these debates, however, what everybody agreed on was that the will of the parties was the decisive criterion for determining the rules that applied to a treaty \textit{medio tempore},\textsuperscript{32} an approach that found the States in agreement as well.\textsuperscript{33} This was, however, not enough to secure enough momentum for Draft Article 56 to be included in the adopted Articles. Nonetheless, during the Vienna Conferences on the Law of Treaties, Waldock reiterated the importance of intertemporal law for the law of treaties, but acknowledged that the omission of an article devoted to intertemporal law was the tactically and politically correct choice to avoid the discussions being prolonged and weighed down by never-ending discussions on the relationship between customary law and treaty law.\textsuperscript{34}

However, the rejected Draft Article 56 was not the only attempt to introduce a point of entry of intertemporal considerations in the VCLT. The second manner, in which the doctrine almost found its way in the text of the VCLT was through the articles on treaty interpretation and more specifically Article 31(3)(c) VCLT. Article 31(3)(c) provides that account shall be taken of ‘any relevant rules of international law applicable in the relations between the parties’. The question that the members of the ILC debated was which rules, from a temporal perspective, fell under this provision. Should a treaty be interpreted in the light of the rules \textit{in force at the time of the conclusion of the treaty} or \textit{in force at the time of the interpretation of a treaty}? Both approaches had their supporters.\textsuperscript{35} In order to resolve the impasse Waldock proposed the following text: ‘in

\textsuperscript{29} ILC, ‘Summary Record of the 728th Meeting’ [12-3] (Paredes); ILC, Summary Record of the 729th Meeting’ [31-7] (de Luna); Sixth Committee, ‘20th Session, Summary Record of the 843rd Meeting’ (7 October 1965) UN Doc A/C.6/20/SR.843 [25] (UK).

\textsuperscript{30} ILC, Summary Record of the 729th Meeting’ [3] (Castrén); Sixth Committee, ‘20th Session, Summary Record of the 845th Meeting’ (11 October 1965) UN Doc A/C.6/SR.845 [41-2] (Greece).

\textsuperscript{31} ILC, Summary Record of the 729th Meeting’ [14-5] (Rosenne), [38-40] (Briggs) and [54] (Lachs).

\textsuperscript{32} ILC, Summary Record of the 729th Meeting’ [30] (de Luna); similarly ibid [24-6] (Tsuruoka); ILC, Summary Record of the 728th Meeting’ [10-1] (de Aréchaga), [12-4] (Paredes).

\textsuperscript{33} Sixth Committee, ‘20th Session, Summary Record of the 850th Meeting’ (13 October 1965) UN Doc A/C.6/SR.850 [40] (Kenya); Sixth Committee, ‘Summary Record of the 845th Meeting’ [9] (Syria).

\textsuperscript{34} United Nations Conference on the Law of Treaties, ‘1st Session – 33rd Meeting of the Committee of the Whole (COW)’ (22 April 1968) UN Doc A/CONF.39/C.1/SR.33 177 [74].

\textsuperscript{35} In favour of the more static view, ie rules in force at the time of the conclusion of the treaty, see ILC, ‘Summary Record of the 765th Meeting’ (14 July 1964) UN Doc A/CN.4/SR.765 [56-9] (Yasseen), [75-6] (Pal), [80] (Chairman). In favour of the more evolutive approach, ie rules in force at the time of the interpretation of the treaty, see ibid [48-9] (Tunkin), [62] (Verdross), [63-6] (Bartoš).
the light of the rules of international law [in force at the time of its conclusion]' \textsuperscript{36} However, this did not have the compromissory effect that Waldock hoped for.\textsuperscript{37} For this reason, Waldock in his ‘Sixth Report’ removed the bracketed part of the sentence.\textsuperscript{38} In this way, the provision would be vague enough to ensure maximum flexibility,\textsuperscript{39} while at the same time making it more easy to achieve as much close as to a consensus possible among the ILC members.\textsuperscript{40} This flexible approach was the one tabled for the Vienna Conference on the Law of Treaties and found most States in absolute agreement. As the Netherlands had acutely observed even before the Vienna Conference, the application of the principle of good faith was the key to resolving the complex relationship between interpretation and intertemporality. Consequently, it was best ‘to leave unanswered the question whether any term should be interpreted in any specific case according to the law in force at the time or to that in force now. It would seem more correct and quite enough in itself to allow oneself to be guided solely by good faith when answering the question’.\textsuperscript{41}

\subsection*{2.2 Principle of Contemporaneity and Evolutive Interpretation: Stasis or Kinesis?}

\subsubsection*{2.2.1 Contemporaneous v Evolutive Interpretation}

Although intertemporal considerations were not explicitly reflected in the text of the VCLT, that is not to say that they were still not part of the interpretative exercise as delineated by Articles 31-3 VCLT. Fitzmaurice in his seminal series of articles in the \textit{British Yearbook of International Law} had attempted to streamline the interpretative process by identifying key principles. One of these was the \textit{principle of contemporaneity}.$^\text{42}$ According to this principle,
‘[t]he terms of a treaty must be interpreted according to the meaning which they possessed, or which would have been attributed to them, and in the light of current linguistic usage, at the time when the treaty was originally concluded’. 43 Taking the torch over this series, Thirlway built on and improved on Fitzmaurice’s legacy, by adding that this principle was not an irrefutable presumption in favour of historical interpretation, but when it could ‘be established that it was the intention of the parties that the meaning or scope of a term or expression used in the treaty should follow the development of the law, the treaty must be interpreted so as to give effect to that intention’. 44

International courts and tribunals have for decades now applied both the principle of contemporaneity, 45 and ‘evolutive/dynamic’ interpretation 46,47 depending on the facts of the case. Although evolutive interpretation is usually connected to human rights treaties, 48 49 almost

---


44 Thirlway, ‘The Law and Procedure of the ICJ: Supplement 2006: Part Three’ 57 (emphasis added). In this context, Thirlway in his earlier writings used the term ‘intertemporal renvoi’ to describe situations in which the intention of the parties is deemed to have been ‘to subject the legal relations created to such law as might from time to time thereafter become effective’; H Thirlway, ‘The Law and Procedure of the International Court of Justice 1960 – 1989: Part One’ (1989) 60 BYBIL 1, 135.

45 Minquiéres and Ecrehos (France v UK) (Judgment) [1953] ICJ Rep 47, 56; US Nationals in Morocco 189; Aegean Sea Continental Shelf; Dissenting Opinion of Judge de Castro 63 [4]; Case Concerning Right of Passage over Indian Territory (Portugal v India) (Merits) [1960] ICJ Rep 6, 37; Case Concerning a Boundary Dispute between Argentina and Chile Concerning the Frontier Line between Boundary Post 62 and Mount Fitzroy (Argentina v Chile) (1994) 22 UNRIAA 3 [130] (hereinafter Laguna del Desierto); Kasikili/Sedudu Island [25]; Grisbádarna Case 159; North Atlantic Coast Fisheries 196; Western Sahara (Advisory Opinion) [1975] ICJ Rep 12 [126]; Case Concerning the Temple of Preah Vihear (Cambodia v Thailand) (Merits) [1962] ICJ Rep 6, Dissenting Opinion of Judge Spender 128; Dispute Regarding Navigational and Related Rights (Costa Rica v Nicaragua) (Judgment) [2009] ICJ Rep 213, Separate Opinion of Judge Skotnikov [5].


49 Indicatively: Christine Goodwin v UK [GC] ECHR, App No 28957/95 (11 July 2002) [74-5]; Schalk and Kopf v Austria, ECHR, App No 30141/04 (24 June 2010) [93-4], [105-6]; Vo v France [82]; Tyrer v UK [31]; Loizidou v Turkey (Preliminary Objections) [71].
all courts and tribunals have at one point resorted to this kind of interpretation, or at least have had the option to do so.\(^{50,51}\)

Their practice is so wide and diverse, that even the name given to describe this process is equally wide and diverse: ‘evolutionary interpretation’\(^ {52}\), ‘evolutive interpretation’\(^ {53}\) or ‘dynamic interpretation’\(^ {54}\) have all been used either alone or in any and all imaginable combinations: ‘dynamic or evolutive’;\(^ {55}\) ‘evolutive and dynamic’;\(^ {56}\) or both these options in different parts of the judgment.\(^ {57}\) This would seem to indicate that there is no measurable qualitative difference amongst these terms. They are merely different adjectives used to describe essentially the same

50 Indicatively: Merrill & Ring Forestry LP v Canada (Award of 31 March 2010) ICSID Case No UNCT/07/1 [190]; Mondev International Ltd v USA [116-25]; ADF Inc v USA [181-4], [190]; Waste Management Inc v Mexico (Award of 30 April 2004) ICSID Case No ARB(AF)/00/3 [93]; GAMI Investment, Inc v Mexico (Award of 15 November 2004) UNCITRAL <https://www.itralaw.com/sites/default/files/case-documents/ita0353_0.pdf> [95]; Namibia Advisory Opinion [53]; Aegean Sea Continental Shelf [77]; Gabčíkovo-Nagymaros Project [112]; Iron Rhine Arbitration [79-81]; Dispute Regarding Navigational and Related Rights, Declaration of Guillaume [9-16]; WTO, USA – Import Prohibition of Certain Shrimp and Shrimp Products – Report of the Appellate Body (6 November 1998) WT/DS58/AB/R [130] and fns 110-13 (hereinafter US-Shrimp (AB)).


53 Jadhav Case (India v Pakistan) (Provisional Measures) [2017] ICI Rep 231, Separate Opinion of Judge Cançado Trindade [27]; Daimler Financial Services AG v Argentina (Award of 22 August 2012) ISICD Case No ARB/05/1 [267]; Mondev International Ltd v USA [123]; Bámara Velásquez v Guatemala (Merits) IACtHR Series C No 70 (25 November 2000) Separate Opinion of Judge Cançado Trindade [37].


55 Caesar v Trinidad and Tobago, Separate Opinion of Judge Cançado Trindade [10]; The Right to Information on Consular Assistance, Concurring Opinion of Judge Cançado Trindade [3].

56 Şahin and Şahin v Turkey [GC] ECtHR, App No 13279/05 (20 October 2011) [58]; Bayatyan v Armenia [GC] ECtHR, App No 23459/03 (7 July 2011) [98]; YY v Turkey, ECtHR, App No 14793/08 (10 March 2015) [103]; Meftah and others v France [GC] ECtHR, App No 32911/96 (26 July 2002) Concurring Opinion of Judge Lorenzen joined by Hedigan.

process. Helgesen, however, offers a different approach. According to him, ‘evolutive’ covers situations where the court or tribunal gives answers to a new issue that has not been brought before the court ever before. ‘Dynamic’, on the other hand, describes a situation where the court gives ‘new answers to old facts’.  

Such considerations aside, from the above it is evident that evolutive interpretation\(^{59}\) is inextricably linked to both temporal motion and ‘motion’ as change. It is no coincidence that it has been characterised as the ‘intertemporal dimension’\(^ {60}\) and the ‘temporal issue’\(^ {61}\) in treaty interpretation.

This ‘motion’ is also evident in the manner in which evolutive interpretation can occur. Two are the main track along which evolutive interpretation can happen: evolution of fact (\textit{ouverture du texte}), and evolution of law (\textit{renvoi mobile}).\(^ {62}\) In ‘evolution of fact’, the rule being interpreted takes into account how the all kinds of changes that have occurred in the societal context, in which the rule produces its effects. Medical and scientific advancements, societal and cultural changes, moral developments,\(^ {65}\) and the socio-economic situation of a State (including current living conditions),\(^ {66}\) have all been considered as ‘evolution of fact’. In ‘evolution of law’, on the other hand, the content of the rule being interpreted changes on the basis of the current status of the surrounding legal framework, eg if any new rules have emerged that could potentially affect the scope of its content. Customary international law,\(^ {67}\)

---

\(^{58}\) JE Helgesen, ‘What are the Limits to the Evolutive Interpretation of the European Convention on Human Rights?’ (2011) 31 HRLJ 275, 276.

\(^{59}\) From his point onward, we will be using the term ‘evolutive’ interpretation, for reasons of consistency, but also because this term is closer to the concept of ‘motion’ as change, which is the central theme of our book.

\(^{60}\) \textit{Caesar v Trinidad and Tobago}, Separate Opinion of Judge Cançado Trindade [10].

\(^{61}\) Higgins, \textit{Problems and Process} 797.


\(^{63}\) \textit{Gabčíkovo-Nagymaros Project} [104] and [107]; \textit{Vo v France}, Dissenting Opinion of Judge Ress [5]; \textit{Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC)}, Separate Opinion of Judge Lucky [9-10]; \textit{Puttaswamy and Khanna v Union of India and Others} [151].

\(^{64}\) \textit{The Right to Information on Consular Assistance}, Concurring Opinion of Judge Cançado Trindade [4]; \textit{Öztürk v Germany}, Dissenting Opinion of Judge Bernhardt.

\(^{65}\) \textit{Cossey v UK}, Joint Dissenting Opinion of Judge Palm, Foighel and Pekkanen [5].

\(^{66}\) \textit{India – Certain Measures Relating to Solar Cells and Solar Modules} [7.231-7.232]; WTO, \textit{Argentina — Measures Relating to Trade in Goods and Services} (30 September 2015) WT/DS453/R [7.873-7.875]; \textit{Yakye Axa Indigenous Community v Paraguay} [125]; \textit{Gómez Paquiayauri and others v Peru} [165]; ibid, Partly Concurring and Partly Dissenting Opinion of Judge Fogel [33]; \textit{Mayagna (Sumo) Awas Tingni Community v Nicaragua} [146]; \textit{Case of the 'Street Children' v Guatemala} [193]; \textit{The Right to Information on Consular Assistance} [114]; \textit{Tyrer v UK} [31].

\(^{67}\) \textit{Merrill & Ring Forestry LP v Canada} [190]; \textit{Mondev International Ltd v USA} [116-25]; \textit{ADF Inc v USA} [181-4], [190]; \textit{Waste Management Inc v Mexico} [93]; \textit{GAMI Investment, Inc v Mexico} [95].
international treaties, and even domestic law all fall within the scope of ‘evolution of law’ and have, on occasion, been resorted to by courts and tribunals to breathe renewed life in treaty provisions.

2.2.2 Evolutive Interpretation and Subsequent Agreements and Practice

Recently, the ILC in its work on ‘Subsequent Agreements and Subsequent Practice in the Interpretation of Treaties’ and the ICJ in the Whaling in the Antarctic had to deal with the concept of intertemporalitry within the process of interpretation, ie ‘whether a treaty should be interpreted in the light of the circumstances and the law at the time of its conclusion (‘contemporaneous’ or ‘static’ interpretation), or in the light of the circumstances and the law at the time of its application (‘evolutive’, ‘evolutionary’, or ‘dynamic’ interpretation)’ and in particular as to what it concerned subsequent agreement and practice, both under Article 31 and 32 VCLT.

With respect to subsequent practice and agreements, Nolte has cautioned that ‘the possibility of influencing the fate of a treaty through the practice of its application should not, however, be overestimated’. In his view, and in conformity with the holistic nature of the interpretative

---

68 Whaling in the Antarctic [38] and ibid, Dissenting Opinion of Judge Yusuf [26]; Jadhav Case (Provisional Measures) Separate Opinion of Judge Cançado Trindade [27]; Application of the International Convention on the Elimination of All Forms of Racial Discrimination, Dissenting Opinion of Judge Cançado Trindade [172]; Sawhoyamaxa Indigenous Community v Paraguay [117]; Yaye Axa Indigenous Community v Paraguay [124-31]; Mayagna (Sumo) Awas Tingni Community v Nicaragua 148-9; Gómez Paquiyauri and others v Peru [165-6]; The Right to Information on Consular Assistance [114]; Case of the ‘Street Children’ v Guatemala [193-4]; Juridical Status and Human Rights of the Child [24].

69 Öcalan v Turkey [162-4]; The Right to Information on Consular Assistance, Concurring Opinion of Judge Cançado Trindade [7]; Mareks v Belgium [41]; Dudgeon v UK [60].

70 ILC, ‘Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties, with Commentaries’ (30 April–1 June and 2 July–10 August 2018) UN Doc A/73/10, reproduced in [2018/II – Part Two] YBILC 11, Commentary to Draft Conclusion 8, 64 [2].

71 The ICJ in Whaling in the Antarctic made some really interesting observations as to the role of subsequent agreements and practice in the interpretative process, its connection and position with respect to other elements of Art 31 VCLT (in particular its relationship with and effect on ‘object and purpose’) and its relation to and influence on evolutive interpretation. For a detailed analysis of this case see M Fitzmaurice, ‘The Whaling Convention and Thorny Issues of Interpretation’ in M Fitzmaurice and D Tamada (eds), Whaling in the Antarctic: Significance and Implications of the ICJ Judgment (Brill/Martinus Nijhoff 2016) 55–138; M Fitzmaurice, ‘The Practical Working of the Law of Treaties’ in MD Evans ed), International Law (5th edn, CUP 2019) 138, 155-8;

process, reference to subsequent agreements and practice is but one of the elements in the process of progressive encirclement that is interpretation.\textsuperscript{73}

As far as evolutive interpretation is concerned, and despite some sweeping claims to the contrary, such as the one made by the arbitral tribunal in the \textit{Iron Rhine Arbitration} that ‘note[d] a general support among the leading writers today for evolutive interpretation of treaties’,\textsuperscript{74} most authors take the view that while subsequent practice and evolutionary interpretation are similar in objectives, in the sense that they allow for the development of treaties over time,\textsuperscript{75} this is not to say that evolutive interpretation is the default setting when we are dealing with subsequent agreements and practice. As shown in the analysis in Sections 2.1 and 2.2.1,\textsuperscript{76} it is the intention of the parties, which is the answer to the question. This intention is the ‘cornerstone of evolutionary interpretation, ie obligations can evolve only if the parties intended that a particular term, or the treaty as a whole, have an evolutionary character’.\textsuperscript{77} Similarly, Nolte, while referring to the \textit{Dispute Regarding Navigational and Related Rights}, was of the view that this case was ‘illustrative of the question of the relationship between the roles of practice in the narrow and in the broad sense for the interpretation of treaties [but it did] not point to a general approach, or to a theory.’\textsuperscript{78}

In the end, the ILC adopted Draft Conclusion 8 ‘Interpretation of treaty terms as capable of evolving over time: Subsequent agreements and subsequent practice under articles 31 and 32 may assist in determining whether or not the presumed intention of the parties upon the conclusion of the treaty was to give a term used a meaning which is capable of evolving over time’.\textsuperscript{79}


\textsuperscript{74} \textit{Iron Rhine Arbitration} [81].

\textsuperscript{75} I Buga, ‘Subsequent Practice and Treaty Modification’ in Bowman and Kritsiotis (eds), \textit{Conceptual and Contextual Perspectives} 363, 370.

\textsuperscript{76} And further strengthened below in Sect 2.2.3.

\textsuperscript{77} J Arato, ‘Subsequent Practice and Evolutive Interpretation’ (2010) 9/3 Law and Practice of International Courts and Tribunals 443, 466; see also Merkouris, \textit{Article 31(3)(c) VCLT}, Ch 2, and cases and authors cited therein. How one goes about establishing this intention is, of course, an even more complex question.

\textsuperscript{78} Nolte, ‘Treaties and Their Practice’ 359.

\textsuperscript{79} Ibid, Draft Conclusion 8.
In the view of the authors, this Draft Conclusion highlights the correct approach to deciding between static and evolutive interpretation. Instead of adopting any legal and mental shortcuts, it correctly determines that any solution to that question, will have to be decided on the basis of the facts of each case, and always by referring to the intention of the parties. According to the Commentary,

[d]raft conclusion 8 does not take a position regarding the question of the appropriateness of a more contemporaneous or a more evolutive approach to treaty interpretation in general … The conclusion should, however, be understood as indicating the need for some caution with regard to arriving at a conclusion in a specific case whether to adopt an evolutive approach. For this purpose, draft conclusion 8 points to subsequent agreements and subsequent practice as means of interpretation that may provide useful indications to the interpreter for assessing, as part of the ordinary process of treaty interpretation, whether the meaning of a term is capable of evolving over time.81

2.2.3 Choosing Between Static (Contemporaneous) and Evolutive Interpretation

As shown in Section 2.1, the VCLT drafters were well aware of the way that intertemporal considerations could encroach upon the interpretative process. Instead of offering explicit and deatiled solutions, which could in the long run have led to issues of rigidity and stasis, they decided to exercise caution by opting for a ‘flexible approach’, in which the interpreter would sometimes ‘draw upon the language and rules that were in existence when the interpreted treaty was concluded, and sometimes upon the language and rules existing at the time of interpretation’.82 What is unclear, however, is on what basis would the interpreter know, which of these two solutions was the appropriate one for the text s/he would be interpreting. Various methods have been proposed, but all can be categorised into three main groups that, unsurprisingly, are also reflective of the three mains schools of interpretation: i) intention of the parties; ii) text, and in particular the so-called ‘generic terms’ and iii) the object and purpose of

80 On a deconstruction of these, see below Sect 2.2.3.
81 ILC, ‘Draft Conclusions on Subsequent Agreements and Subsequent Practice, with Commentaries’, Commentary to Draft Conclusion 8, 67 [10].
82 Linderfalk, ‘Doing the Right Thing for the Right Reason’ 113; Linderfalk, identifies three approaches to addressing intertemporal issues: i) the categorically static approach ii) the categorically dynamic approach and iii) the flexible approach (ibid).
the treaty. All of these have been, on occasion, relied on by courts and tribunals to offer guidance as to whether the interpreted provision has experienced a *kata chronon metavole* that has led to its *auxesis/meiosis*, or whether its content has remained frozen in time, in a state of *stasis*.

### 2.2.3.1 Intention of the Parties

This approach is generally uncontested. If the intention of the parties can be revealed to have shown a preference of a particular approach to the interpretation of the treaty to which they are parties, then as a logical corollary of the consent-based nature of international law this should be the determinative factor.\(^{83}\) This is also evidenced by Fitzmaurice and Thirlway’s definition of the principle of contemporaneity, which is built around the intention of the parties. Consequently, it is the will of the parties that provides the answer when deciding between a contemporaneous or evolutive interpretation, ie how change in time, law and fact affects the interpretation of a legal rule. Bearing in mind the main philosophical approaches to time, change and identity, ie endurantism, perdurantism and exdurantism,\(^{84}\) where the existence of an object is described in terms as such as ‘time-slices’, and ‘space-time worms’, it is only appropriate to refer to this intention of the parties that determines the temporal destiny of a particular term as the ‘time-will’ of the parties.

### 2.2.3.2 ‘Generic Terms’

The text itself and, in particular, the linguistic characteristics of the terms being interpreted may also affect the intertemporal dimension in the interpretation of treaties. It has been argued that evolutive interpretation is linguistic in nature, that it is ‘based on the linguistic usage of the term at the time of interpretation’.\(^{85}\) The key concept in this school of thought is that of a term being ‘generic’. If a term is of a ‘generic’ nature this may tip the scales in favour of a contemporaneous

---


\(^{84}\) See Ch 1, Sect 5.

\(^{85}\) G Ress, ‘The Interpretation of the Charter’ in Br Simma (ed), *The Charter of the United Nations: a Commentary* (2nd edn, OUP 2002) 13, 23. However, as Helmersen rightly points out this is only fitting for terms that actually have the capacity to evolve linguistically, not for the rest; ST Helmersen, ‘Evolutive Treaty Interpretation: Legality, Semantics and Distinctions’ (2013) 6 EurJLegStud 127, 129; see also in more detail below, in this Sect, where Hemersen’s theory is analysed in more detail.
(static) or evolutive interpretation. Courts and tribunals, while characterizing a term as ‘generic’ when interpreting it, have on some occasions attempted to offer some glimpse of what makes a particular term, a ‘generic’ one. The ICJ has opined that such terms a content, which ‘the parties expected would change through time’, and that its ‘meaning was intended to follow the evolution of the law’. Along similar lines, the Arbitral Tribunal in Mondev simply stated that such terms have an ‘evolutionary potential’. Unsurprisingly, all of these are not truly definitions but rather, at best, broad descriptions of certain qualities that a generic term will have, and which most likely be evident after the fact.

Addressing head on this issue, Linderalk and Helmersen have attempted, using linguistics as their base, to provide some guidance as to how such a determination could potentially be accomplished ex ante. Linderfalk, identifies three groups of ‘referring expressions’: i) ‘definite referring expressions’, which refer to one or more specific phenomena ii) ‘indefinite referring expressions’, which refer to one or more non-specific phenomena and iii) ‘generic referring expressions’, which refer to one or more phenomena as they change in time. Out of these three the ‘generic referring expressions’ are the prime candidates for qualifying as ‘generic terms’ that can be open to evolutive interpretation that takes into account not only the evolution of law, but also the evolution of fact. The reason is that these ‘generic referring expressions’ are not time-bound since ‘no relationship is established between the time of the utterance and the time when the referent was assumed to exist’. Helgersen, on his part, using two axes, that of values and that of evolution, identifies four different groups of ‘generic terms’: i) ‘value-driven non-evolving’, ii) ‘value driven evolving’, iii) ‘non-value driven non-evolving’ and iv) ‘non-value driven evolving’. If a term on the axis of evolution is non-evolving, ie groups (i) and (iii), then evolutive interpretation is possible within the context of the term being given a special meaning under Article 31(4) VCLT. ‘Value driven evolving’ are the ones with the highest ‘evolutionary potential’, whereas for ‘non-value driven evolving’ terms there is no presumption, and their evolutive potential would have to be decided always on an ad hoc basis.

86 Iron Rhine Arbitration [79-80]; Nationality Decrees Issued in Tunis and Morocco (Advisory Opinion) PCIJ Rep Series B No 4, 24; Aegean Sea Continental Shelf [74-7]; Gabčíkovo-Nagymaros Project [112]; US-Shrimp (AB) [130]; Dispute Regarding Navigational and Related Rights [65-7].
87 Kasikili/Sedudu Island, Declaration of Judge Higgins [2].
88 Aegean Sea Continental Shelf [77].
89 Mondev International Ltd v USA [119].
90 ‘referring expression’ is an expression used by an ‘utterer’ for the purpose of ‘reference’. In turn ‘reference’ refers to the relationship between an expression and what the expression stands for in the world at the time that it is uttered; Linderfalk, ‘Doing the Right Thing for the Right Reason’ 129.
91 Ibid 130-1.
92 Ibid 132.
and by reference to the actual ‘time-will’ of the parties.\textsuperscript{93} When applying this tool to the jurisprudence of the ICJ, Helgersen came to the conclusion that the Court is more likely to adopt an evolutive interpretation, when the term is ‘generic’ and the treaty is of unlimited duration.\textsuperscript{94}

Despite the undeniable theoretical value of Linderfalk and Helgersen’s approach, one major issue in is that courts and tribunals very rarely elaborate on why a particular term is characterised as ‘generic’ or not.\textsuperscript{95} In most cases they will assert it and so far, to the knowledge of the authors, no court has undertaken explicitly a linguistic exercise such as the ones described above. Furthermore, as both Linderfalk and Helgersen concede, in several cases the evolutive or not potential of a term will rest on identifying the will of the parties, and even in the cases where there is a presumption in favour of evolutive interpretation, that would always be rebuttable and exists in the first place by virtue of the fact that the parties intentionally selected that type of term as it served their intention. They chose a ‘generic term’ to be included in the text of a treaty, because its ability to evolve through time reflected their intention/will, or more appropriately their ‘time-will’.\textsuperscript{96}

In the \textit{Namibia Advisory Opinion}, which is sometimes used as one example where the Court resorted to evolutive interpretation based on the ‘generic’ nature of the terms,\textsuperscript{97} the text of the Opinion itself gives an indication that is is the ‘time-will’ of the parties that is the critical factor. The Parties to the Covenant [by selecting these generic terms] \textit{must consequently be deemed to have accepted them as such} [ie non-static and evolutive].\textsuperscript{98} It is noteworthy that both Fitzmaurice in his Dissenting Opinion\textsuperscript{99} and Thirlway in his writings\textsuperscript{100} criticised the Court because they could find no evidence of this evolutive ‘time-will’ of the parties and the Court had failed to provide any evidence of such intent.

Judge Higgins, in \textit{Kasikili/Sedudu Island} drives this point home

\textsuperscript{93} Ibid 139.
\textsuperscript{94} Ibid 135-8 using these cases as reinforcing his argument: \textit{Dispute Regarding Navigational and Related Rights} [65-7]; \textit{Aegean Sea Continental Shelf} [77].
\textsuperscript{95} \textit{Ambiente Ufficio Spa} and others v Argentina (Decision of 8 February 2013) ICSID Case No ARB/08/9 [492]; \textit{Siemens AG} v Argentina (Decision of 3 August 2014) ICSID Case No ARB/02/8 [114] (Respondent’s claim).
\textsuperscript{96} \textit{Namibia Advisory Opinion} [53]; \textit{Aegean Sea Continental Shelf} [77]; \textit{Dispute Regarding Navigational and Related Rights} [66] and Separate Opinion of Judge Skotnikov [6]; \textit{Siemens AG} v Argentina [114] (Respondent’s claim). In all of these cases, the relevant judicial body although making use of ‘generic terms’, always comes back to the fact that the selection of such terms, reflects the intention of the parties to allow these terms to evolve (ie is a reflection of the ‘time-will of the parties’).
\textsuperscript{97} The exact wording of the ICJ was ‘… by definition evolutionary’; \textit{Namibia Advisory Opinion} [53]
\textsuperscript{98} \textit{Namibia Advisory Opinion} [53] (emphasis added).
\textsuperscript{99} Ibid, Dissenting Opinion of Judge Fitzmaurice [85].
\textsuperscript{100} Thirlway, ‘The Law and Procedure of the ICJ: Part One’ 137; Fitzmaurice, ‘The Tale of Two Judges’ 125-70.
...[The aim] is not to discover a mythical ‘ordinary meaning’ ... we must never lose sight of the fact that we are seeking to give flesh to the intention of the parties, expressed in generalised terms in 1890. We must trace a thread back to this point of departure. We should not, as the Court appears at times to be doing, decide what in abstracto the term ‘the main channel’ might today mean, by a mechanistic appreciation of relevant indicia. Rather, our task is to decide what general idea the parties had in mind, and then make reality of that general idea through the use of contemporary knowledge. 101

Consequently, the text is not and cannot be the sole basis for evolutive interpretation. It is merely a reflection of the true basis, ie the intention of the parties, and specifically, their ‘time-will’).

2.2.3.3 Object and Purpose of the Treaty

There is a growing trend in international jurisprudence to justify recourse to evolutive interpretation based on the nature of the text being interpreted, ie its object and purpose. This trend is most pronounced with respect to human rights treaties, environmental treaties (to a lesser degree of intensity than human rights treaties) and constituent instruments of international organisations. The underlying hypothesis is that human rights treaties because of their particular character and of the nature of the rights they enshrine, their content must be bolstered and continuously be updated in order to remain relevant in the face of challenges posed by a constantly changing legal and societal environment. 102 Despite the existence of an extensive jurisprudence on the matter, 103 however, that is not to say that human rights treaties are an automatic exception to the principle of contemporaneity. Similarly, to what we saw in evolutive interpretation based on the ‘generic’ nature of a term, so is this approach actually also based on the ‘time-will’ of the parties. Higgins, once again, draws the blinds on any misconception as to the object and purpose being an automatic exception. ‘“[G]eneric clauses” and human rights

101 Kasikili/Sedudu Island, Declaration of Judge Higgins [3-4].
102 Caesar v Trinidad and Tobago, Separate Opinion of Judge Cançado Trindade [11], citing Loizidou v Turkey (Preliminary Objections) [75]; ‘Other Treaties’ Subject to the Advisory Jurisdiction of the Court (Art 64 American Convention on Human Rights) (Advisory Opinion) IACtHR Series A No 1 (24 September 1982); The Effect of Reservations on the Entry Into Force of the American Convention on Human Rights (Arts 74 and 75) (Advisory Opinion) IACtHR Series A No 2 (24 September 1982); Restrictions to the Death Penalty (Arts 4(2) and 4(4) American Convention on Human Rights) (Advisory Opinion) IACtHR Series No 3 (8 September 1983).
103 Generally, see Bjorge, The Evolutionary Interpretation of Treaties; Letsas, A Theory of Interpretation of the ECHR.
provisions are not really random exceptions to a general rule … [but] an application of a wider principle – intention of the parties, reflected by reference to the object and purpose – that guides the law of treaties’. 104 Similarly the Tribunal in RosInvest v Russia draws attention to the fact that intention is always the underlying principle. ‘[Since human rights treaties] represent the very archetype of treaty instruments in which the Contracting Parties must have intended that the principles and concepts which they employed should be understood and applied in the light of developing social attitudes’. 105 Consequently, the object and purpose argument in favour of evolutive interpretation is simply a variation to the overall theme of the ‘time-will’ of the parties.

The same is applicable to the argument that ‘a treaty of constitutional character should be subject to different rules of interpretation to allow for the “intrinsically evolutionary nature of a constitution”’. 106 However, similarly as with human rights treaties, sooner or later it always comes back to the acknowledgement that for the purposes of evolutive interpretation the nature of the treaty is a reflection of the intention of the parties. 107 Of note is Brölmann’s excellent analysis on the topic, who draws attention to the fact that teleological interpretation and evolutive interpretation should not be conflated with one another, and that it is actually teleological rather than evolutive interpretation that features more prominently in the interpretation of these treaties. 108 Consequently, object and purpose as well is not a completely independent basis for establishing an evolutive interpretation, but rather a manifestation of expressed or presumed intention of the parties. No automatic exception to the principle of contemporaneity can be deduced from international jurisprudence, and any exception will, once again, be determined on an ad hoc basis, on the facts of the case and, most importantly, on the intention of the parties.

105 RosInvest v Russia [39] (emphasis added).
The above analysis coupled with an examination of the *travaux préparatoires* of Article 31 VCLT in the previous Sections, has demonstrated that irrespective of which school of interpretation one takes as a starting point, and irrespective of which presumptions may apply, in all situations the deciding factor either directly or indirectly was and still is the ‘time-will’ of the parties. This ‘time-will’ may be identified by reference to the text of the treaty, the drafting history, the object and purpose of the treaty, State practice, as well as other relevant treaties,\(^\text{109}\)\(^\text{110}\) but it is that ‘time-will’ and nothing else that each time determines the balance between the principle of contemporaneity and evolutive interpretation are premised on the intention of the parties, their ‘time-will’.

2.2.4 Limits of Evolutive Interpretation

Evolutive interpretation is an extremely useful tool that allows a treaty, while moving along the axis of the fourth (temporal) dimension (*kata chronon metavole*) to also move within the meaning of two more of Aristotle’s types of ‘motion’, ie increase (*auxesis*) and diminution (*meiosis*). A common characterization of a treaty connected to the process of evolutive interpretation, is that of a treaty being a ‘living tree’. Similarly, thus, to a ‘living tree’ a treaty also expands and grows (or in some rare cases may also whittle away) in order to adapt to situations and problems that the original drafters may not have envisaged at all.

However, this need to adapt should not give us the false impression that this ‘motion’ is an unlimited one. On the contrary, not only are there limits (or precautions),\(^\text{111}\) but these limits can be grouped into two main categories.

The first group of limits/precautions is the *internal* ones. These limits refer to the treaty itself, and are connected to its building blocks, most of which are also evident in the interpretative process as enshrined in Articles 31-33 VCLT. As early as 1929, Lord Sankey, in *Edwards v Attorney-General for Canada* expressed this, while harking back to the simile of treaties as ‘living instruments’. He opined that although certain legal documents were ‘living tree[s]

---

109 These could be either ‘relevant rules’ under Article 31(3)(c), or in pari materiae treaties; *Daimler Financial Services AG v Argentina* [220 ff].


111 This is a term used by Judge Bedjaoui in: *Gabčíkovo-Nagymaros Project*, Separate Opinion of Judge Bedjaoui [5].
capable of growth and expansion’, this growth should always be ‘within [the instrument’s / “living tree’s”] natural limits’. But what exactly are these ‘natural limits’?

The ‘umbrella’ limit of this first category is the one that states that evolutive interpretation should always observe the general interpretative rule laid down in Article 31 VCLT. This has been further elaborated by a number of international courts and tribunals to refer, among others, to the text of the provision under interpretation, its context, and, of course, the intention of the parties. Especially, with respect to this last one, although evolutive interpretation may be used to address modern challenges and, thus, better serve the object and purpose of a treaty, this at no point should lead to fictional considerations of object and purpose leading to a substitution of the actual intention of the parties. As Fitzmaurice, acting as an ECtHR judge, pointed out ‘[t]he objects and purposes of a treaty are not something that exist in abstracto: they follow from and are closely bound up with the intentions of the parties, as expressed in the text of the treaty, or as properly to be inferred from it, these intentions being the sole sources of those objects and purposes . . . a fortiori [these intentions] may certainly not be subsequently imported under the guise of objects and purposes not thought of at the time’.

Another limit, within the first group of ‘internal’ ones, and which is the underlying common denominator of all the limits of that group, is that evolutive interpretation should never amount to a de facto revision of a treaty. Any such outcome would be tantamount to the judges exercising a pouvoir de légiférer, which has been consistently held to fly in the face of the judicial function and the notion of the separation of powers.

113 Gabčíkovo-Nagymaros Project, Separate Opinion of Judge Bedjaoui [5].
115 Soering v UK, ECtHR, App No 14038/88 (7 July 1989) [103].
116 Gabčíkovo-Nagymaros Project, Separate Opinion of Judge Bedjaoui [7].
The ILC also raised this issue in ‘Subsequent Agreement and Subsequent Practice in Relation
to the Interpretation of Treaties’. Draft Conclusion 7(3) states that:

It is presumed that the parties to a treaty, by an agreement or a practice in the application
of the treaty, intend to interpret the treaty, not to amend or to modify it. The possibility
of amending or modifying a treaty by subsequent practice of the parties has not been
generally recognised. The present draft conclusion is without prejudice to the rules on
the amendment or modification of treaties under the Vienna Convention on the Law of
Treaties and under customary international law.\(^{120}\)

In this Draft Conclusion, the ILC recognises revision of a treaty as a limit to the interpretative
process, and that when States aim to amend or modify the treaty they should do so either by
following the treaty specific rules on amendment, modification or the VCLT residual ones, or
customary international law, whichever set of rules is applicable to the treaty and the parties in
question. However, even the ILC was aware of the fact, that although the differentiation of
subsequent agreements and practice relevant for interpretative purposes under Article 31(3)(a)
and (b) and subsequent agreements and practice leading to modification, is a theoretically sound
proposal, in practice the differentiation between the two groups may not always be so
straightforward. According to the ILC ‘[i]t may sometimes be difficult to draw a distinction
between agreements of the parties under a specific treaty provision that attributes binding force
to subsequent agreements, simple subsequent agreements under article 31, paragraph 3 (a),
which are not binding as such, and, finally, agreements on the amendment or modification of a
treaty under articles 39 to 41.\(^{121}\)

With the exception of the formal criteria set forth in Article 39 VCLT, and any other criteria
that may have been included by the parties themselves in the treaty being interpreted, the ILC
concluded that

[t]here do not seem to be any [other] formal criteria. It is clear, however, that States and
international courts are generally prepared to accord parties a rather wide scope for the
interpretation of a treaty by way of a subsequent agreement. This scope may even go
beyond the ordinary meaning of the terms of the treaty. The recognition of this scope
for the interpretation of a treaty goes hand in hand with the reluctance by States and

\(^{120}\) ILC, ‘Draft Conclusions on Subsequent Agreements and Subsequent Practice, with Commentaries’ Draft
Conclusion 7(3) (emphasis added).

\(^{121}\) Ibid 58-9, Commentary to Draft Conclusion 7(3) [24].
courts to recognize that an agreement relating to the application of a treaty actually has the effect of amending or modifying the treaty. An agreement to modify a treaty is thus not excluded, but also not to be presumed.\textsuperscript{122}

The difficulty of distinguishing between interpretation and modification by recourse to subsequent agreement and practice is further complicated by the fact that sometimes courts and tribunals simply avoid taking a position on the matter. In \textit{Territorial Dispute (Libya/Chad)}, for instance, ‘in the view of the Court, for the purposes of the present Judgment, there is no reason to categorize it either as confirmation or as a modification of the Declaration’.\textsuperscript{123} In other cases, it is also unclear whether the judgment of the court was based on use of subsequent practice as an interpretative element or as a basis of treaty modification.\textsuperscript{124} Another complicating factor is that a subsequent agreement under Article 31(3)(a) can also have the effect of modifying a treaty,\textsuperscript{125} although the ILC was, eventually, of the view that ‘while there exists some support in international case law that, absent indications in the treaty to the contrary, the agreed subsequent practice of the parties theoretically may lead to modifications of a treaty, the actual occurrence of that effect is not to be presumed, and the possibility of amending or modifying a treaty by subsequent practice has not been generally recognised’.\textsuperscript{126}

Irrespective of the difficulties surrounding distinguishing interpretation and revision/modification of a treaty, it is without question that the latter is a limit that interpretation should never cross. The interpretative process and the amendment/modification procedures abide and are governed by different sets of rules. One should not be conflated with another. If an alteration (\textit{alloiosis}) is to transpire for a treaty, that should be the outcome of the clear intention of the parties to the treaty, and not the interpretative outcome of the legal reasoning

\textsuperscript{122} Ibid 59, Commentary to Draft Conclusion 7(3) [24].
\textsuperscript{123} \textit{Territorial Dispute (Libyan Arab Jamahiriya/Chad)} (Judgment) [1994] ICJ Rep 6 [60] (emphasis added).
\textsuperscript{124} In \textit{Dispute Regarding Navigational and Related Rights}, for instance, the Court seems to indicate that subsequent practice of parties may lead to ‘a departure from the original intent on the basis of a tacit agreement’, but it is unclear whether it means that in the sense of modification, or whether in the sense of departing from the original understanding of the terms by the drafters, which would fall under evolutive interpretation. The matter is further complicated, since the Court goes on to base its entire judgement on evolutive interpretation; \textit{Dispute Regarding Navigational and Related Rights} [ 64]; see also \textit{Temple of Preah Vihear} (Merits) 34 and criticism by R Moloo, ‘When Actions Speak Louder than Words: The Relevance of Subsequent Party Conduct to Treaty Interpretation’ (2013) 31/1 BerkJ IntlL 39, 78.
\textsuperscript{125} Aust, Modern Treaty Law and Practice 212-4 and cases cited therein.
\textsuperscript{126} ILC, ‘Draft Conclusions on Subsequent Agreements and Subsequent Practice, with Commentaries’ 63 [38].
of a judge. Or as Dupuy forcefully summarised the whole debate ‘[m]emory must remain loyal and not serve to rewrite history; a treaty belongs to its authors and not to the judge’.127

The aforementioned limit, ie that evolutive interpretation should never lead to a revision of a treaty, is not only the connecting tissue between all the ‘internal’ limits but its proximity to concepts such as ‘separation of powers’ links it also to second group of limits, which are the systemic ones. These limits refer to the entire system of international law, and consists of limits that emerge as a result of ensuring logical and normative consistency throughout the entire system of international law. Two are the main limits that belong in this category:128 non-retroactivity and jus cogens norms.

As shown in the previous Sections, the principle of non-retroactivity does not eo ipso conflict with intertemporal law. However, courts and tribunals have found it pertinent to underline that an evolutive interpretation should always be carried out in such a manner so as not to perfidiously lead to a violation of the principle of non-retroactivity.129 Even more straightforward is the systemic limit relating to jus cogens norms.130 Since jus cogens norms are norms from which no derogation is possible,131 an interpretation that would end up with a result that would be in clear contradistinction to such a norm would be impermissible.132 The Institut de droit international considered this so fundamental to the interpretative process that it explicitly referred to it in its ‘Resolution on Intertemporal Law’: ‘States and other subjects of international law shall, however, have the power to determine by common consent the temporal

127 P-M Dupuy, ‘Evolutionary Interpretation of Treaties: Between Memory and Prophecy’ in Cannizzaro (ed), The Law of Treaties Beyond the Vienna Convention 123, 129; although, citing Chief Justice Holmes, he acknowledges that when international judges seek the presumed intention of the parties ‘evolutionary interpretation is not simply an exercise of memory; it tends towards prophecy’. In such a scenario, drawing the exact line where a judge crosses from the permitted boundaries of evolutive interpretation into the impermissible realm of exercising a pouvoir de légiférer would be a challenging task; ibid 126-7, citing OW Holmes ‘The Path of the Law’ 10 HLR 457, 458.
128 Or three if one decides to categorise non-revision as a systemic limit as well.
129 ATA Construction, Industrial and Trading Company v Jordan [109]; Mondev International Ltd v USA [70].
131 Art 53 VCLT; see also all four of Tladi’s reports on jus cogens.
sphere of application of norms, . . . subject to any imperative norm of international law which might restrict that power'.

All the aforementioned limits are universal, ie apply to evolutive interpretation of any type of treaty by any international agent. Of course, this does not preclude that additional limits may emerge in the future or that an individual treaty may be subject to additional limits. For instance, the ECtHR has introduced some limits, which are, however, specific only to the sphere of the interpretation and application of the ECHR. Regime-specific limits aside, all the aforementioned internal and systemic limits demonstrate that evolutive interpretation is not a carte blanche for judges to exercise a pouvoir de légiférer but rather an important tool in their interpretative toolkit, which must, however, be used within certain boundaries, no matter how wide, and always with deference to the intention of the parties.

3 Motion through Time of the Rules on Interpretation

In the previous Sections we examined, when dealing with the motion of treaties through the spacetime of the international legal system, what the rules are that govern the determination of the choice between a contemporaneous (static) and an evolutive interpretation. The conclusion was that despite the variety of approaches and solutions adopted by academics and judicial bodies the underlying constant was the intention of the parties.

However, our frame of reference for these Sections were the treaties being interpreted. In order to present a ‘holistic’ picture of motion in the interpretative process we need to switch our frame of reference to the VCLT itself, and specifically Articles 31-33 VCLT. What will be shown is that the manner in which rules of interpretation are being applied in the temporal dimension is

134 See below Sect 3, on the fallacy of the immutability of the rules of interpretation.
135 Such as the ‘margin of appreciation’, ‘the common European standard’ or ‘European consensus’ and to a lesser degree its established jurisprudence departure from which is justified only for good reason. For ‘margin of appreciation’ see eg Vo v France [82]; Rasmussen v Denmark, ECtHR, App No 8777/79 (28 November 1984) [40]; Sheffield and Horsham v UK [GC] ECtHR, App Nos 22885/93, 23390/94 (30 July 1998) [1–4]; for ‘the common European standard’ or ‘European consensus’ see eg Vo v France [82] and Separate Opinion of Judge Costa, Joined by Judge Traja; Scoppola v Italy (No 2) [GC] ECtHR, App No 10249/03 (17 September 2009) [104]; for established jurisprudence as a relative limit see eg Chapman v UK [GC] ECtHR, App No 27238/95 (18 January 2001) [70]; Stafford v UK [GC] ECtHR, App No 46295/99 (28 May 2002) [68]; Inze v Austria, ECtHR, App No 8695/79 (28 October 1987) [41]; Vilho Eskelinen and others v Finland [GC] ECtHR, App No 63235/00 (19 April 2007) [56]; Micallef v Malta [GC] ECtHR, App No 17056/06 (15 October 2009) [81]; Airey v Ireland [GC] ECtHR, App No 6289/73 (9 October 1979) [24]; Goodwin v UK [GC] ECtHR, App No 17488/90 (27 March 1996) [74].
fraught with logical, methodological and normative inconsistencies as well as with contradictory assertions that are detrimental to the rule of law of the international legal system. Often when courts are required to interpret a treaty concluded several decades before the VCLT, they automatically presuppose that the customary rules of interpretation were and have remained the same throughout the ages. It is this practice, of going back in the past to interpret a treaty, but in doing so ‘looking back’ to the future rules of interpretation for guidance, that this Section aims to deconstruct.

Looking at the jurisprudence of the ICJ alone, this practice is alarmingly widespread. In no less than 29 cases, the Court has found it useful to refer to the VCLT for purposes of interpretation, even though the VCLT was not applicable either because one or both of the parties were not parties to the VCLT, or became parties to the VCLT after the date on which the treaty under interpretation was concluded, or the treaty was concluded before 27 January 1980 (date of entry into force of the VCLT). The relevant cases, along with relevant ratification and treaty information are reproduced in the table below:

---

136 8 of these, are the *Legality of Use of Force* cases.
137 In an additional one the VCLT was referred to only by one of the parties to the dispute but not the Court itself; *Elettronica Sicula SpA (ELSI) (USA v Italy)* (Judgment) [1989] ICJ Rep 15 [118]. The USA was not a party to the VCLT, and both the treaties being interpreted had been concluded before 1980; Treaty of Friendship, Commerce and Navigation (Italy – USA) (adopted 2 February 1948, entered into force 26 July 1949) 79 UNTS 171; Agreement supplementing the Treaty of Friendship, Commerce and Navigation of 2 February 1948 (Italy – USA) (adopted 26 September 1951, entered into force 2 March 1961) 404 UNTS 326.
<table>
<thead>
<tr>
<th>No.</th>
<th>Case</th>
<th>VCLT EIF for Parties</th>
<th>Judgment Date</th>
<th>Relevant paras</th>
<th>Treaty being Interpreted</th>
</tr>
</thead>
<tbody>
<tr>
<td>4</td>
<td>Maritime Delimitation between Qatar and Bahrain (Qatar v Bahrain) (Jurisdiction and Admissibility) [1995] ICJ Rep 6</td>
<td>Qatar (n/a) Bahrain (n/a)</td>
<td>15/2/1995</td>
<td>[33]</td>
<td>Doha Minutes (Qatar – Bahrain) (adopted 25 December 1990)</td>
</tr>
<tr>
<td>5</td>
<td>Oil Platforms (Iran v USA) (Preliminary Objections) [1996] ICJ Rep 803</td>
<td>Iran (n/a) USA (n/a)</td>
<td>12/12/1996</td>
<td>[23]</td>
<td>Treaty of Amity, Economic Relations and Consular Rights (USA – Iran) (adopted 15 August 1955, entered into force 16 June 1957) 284 UNTS 93</td>
</tr>
<tr>
<td>6</td>
<td>Oil Platforms (Iran v USA) (Counter-Claims) [2003] ICJ Rep 16</td>
<td>Iran (n/a) USA (n/a)</td>
<td>6/11/2003</td>
<td>[41]</td>
<td>Treaty of Amity, Economic Relations and Consular Rights (USA – Iran) (adopted 15 August 1955, entered into force 16 June 1957) 284 UNTS 93</td>
</tr>
<tr>
<td>No.</td>
<td>Case Title</td>
<td>Parties</td>
<td>Date</td>
<td>Reference</td>
<td>Judgment</td>
</tr>
<tr>
<td>-----</td>
<td>---------------------------------------------------------------------------</td>
<td>----------------------------------------------</td>
<td>------------</td>
<td>--------------------------------------------------------------------------</td>
<td>--------------------------------------------------------------------------</td>
</tr>
<tr>
<td>8</td>
<td>Kasikili/Sedudu Island (Botswana/Namibia) (Judgment) [1999] ICJ Rep 1045</td>
<td>Botswana (n/a) Namibia (n/a)</td>
<td>13/12/1999</td>
<td>[18], [20], [25], [48], [52], [55], [63], [73], [75], [78-9]</td>
<td>Anglo-German Treaty [Heligoland – Zanzibar Treaty] (adopted 1 July 1890) 51 Das Staatsarchiv, Sammlung der offiziellen Aktenstücke zur Geschichte der Gegenwart [German State Archive, Collection of Official Documents Relating to Contemporary History] 151</td>
</tr>
<tr>
<td>9</td>
<td>Sovereignty Over Pulau Litigan and Pulau Sipadan (Indonesia/Malaysia) (Judgment) [2002] ICJ Rep 625</td>
<td>Indonesia (n/a) Malaysia (EIF 1994)</td>
<td>17/12/2002</td>
<td>[37-8], [44], [48], [59-61]</td>
<td>Convention Between Great Britain and the Netherlands Defining Boundaries in Borneo (adopted 20 June 1891) 83 BFSP 42</td>
</tr>
<tr>
<td>10</td>
<td>LaGrand (Germany v USA) (Merits) [2001] ICJ Rep 466</td>
<td>Germany (EIF 1987) USA (n/a)</td>
<td>27/06/2001</td>
<td>[99-109]</td>
<td>Statute of the International Court of Justice (adopted on 26 June 1945, entered into force 24 October 1945) 1 UNTS 993</td>
</tr>
<tr>
<td>13</td>
<td><strong>Legality of Use of Force (Serbia and Montenegro v France)</strong> (Preliminary Objections) [2004] ICJ Rep 575</td>
<td>Serbia and Montenegro (EIF 2001/2006; [Yugoslavia EIF 1980]) France (n/a)</td>
<td>15/12/2004</td>
<td>[99]</td>
<td>Statute of the International Court of Justice (adopted on 26 June 1945, entered into force 24 October 1945) 1 UNTS 993</td>
</tr>
<tr>
<td>15</td>
<td><strong>Legality of Use of Force (Serbia and Montenegro v Italy)</strong> (Preliminary Objections) [2004] ICJ Rep 865</td>
<td>Serbia and Montenegro (EIF 2001/2006; [Yugoslavia EIF 1980]) Italy (EIF 1980)</td>
<td>15/12/2004</td>
<td>[99]</td>
<td>Statute of the International Court of Justice (adopted on 26 June 1945, entered into force 24 October 1945) 1 UNTS 993</td>
</tr>
<tr>
<td></td>
<td>Case Description</td>
<td>Parties</td>
<td>Date</td>
<td>Reference</td>
<td></td>
</tr>
<tr>
<td>---</td>
<td>----------------------------------------------------------------------------------</td>
<td>---------------------------------------------------</td>
<td>----------</td>
<td>-----------------------------------------------------------------------------------------------</td>
<td></td>
</tr>
<tr>
<td>Case Title</td>
<td>Year</td>
<td>Country 1</td>
<td>Country 2</td>
<td>Decision Date</td>
<td>Notes</td>
</tr>
<tr>
<td>---------------------------------------------------------------------------</td>
<td>------</td>
<td>-----------------------------</td>
<td>-------------------------</td>
<td>---------------</td>
<td>-------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>Maritime Delimitation in the Indian Ocean (Somalia v Kenya) (Preliminary Objections)</td>
<td>2017</td>
<td>Somalia (n/a)</td>
<td>Kenya (n/a)</td>
<td>2/2/2017</td>
<td>Memorandum of Understanding between the Government of the Republic of Kenya and the Transitional Federal Government of the Somali Republic to Grant to Each Other No-Objection in Respect of Submissions on the Outer Limits of the Continental Shelf beyond 200 Nautical Miles to the Commission on the Limits of the Continental Shelf (adopted and entered into force 7 April 2009) 70 Law of the Sea Bulletin 52</td>
</tr>
<tr>
<td>Jadhav Case (India v Pakistan) (Merits)</td>
<td>2019</td>
<td>India (n/a)</td>
<td>Pakistan (n/a)</td>
<td>17/7/2019</td>
<td>Vienna Convention on Consular Relations (adopted on 24 April 1963, entered into force 19 March 1967) 596 UNTS 261</td>
</tr>
</tbody>
</table>
Of note is that out of these 29 cases, in 19 the Court does not merely pay lip-service to the fact that the customary rules on interpretation are enshrined in the VCLT, and use the classical VCLT terms such as ‘object and purpose’, but actually actively refers to the text of the VCLT for interpretative purposes. In an additional two, (Maritime Delimitation in the Black Sea, and Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea) the Court goes a step further, where it does not even refer to the fact that they have to apply CIL, and simply goes directly to the VCLT.

Bearing the above in mind, what will be demonstrated is that one solution to the problem of using modern rules of interpretation when interpreting earlier treaties would be to argue that these rules are immutable, or at least that they have not changed in the last few centuries. However, that is not the case. Not only the very existence of rules of interpretation was hotly debated until recently, but even their content both in academic writings and international judicial practice has been and continues to be in a continuous state of flux. Apart from this empirical evidence, even logically such a claim would be systemically incoherent with the structure of the international legal system.

Having thus proven that the rules of interpretation are open to change, what will be examined is whether the use of future rules for past treaties conflicts with any existing rules or principles of international law. If not, then it would simply be in the discretion of each judge to do as they pleased. What will be shown is that there are principles in play, which set certain limits to what rules the judges can apply. This Chapter will then conclude, based on the previous analysis, as to what are the scenarios where our ‘time-travelling’ rules of interpretation are allowed to traverse the arrow of time in the opposite direction and provide a set of guidelines as to what is the logically and normatively coherent manner in interpreting pre-VCLT treaties.

3.1 The Claim that Rules of Interpretation Despite the Passage of Time are Immutable

3.1.1 The Very Existence of Rules of Interpretation

The claim that rules of interpretation enshrined in the VCLT are either immutable or have, at least, not undergone any significant changes throughout the centuries is one that deserves our attention. If that is the case, then the ICJ and any interpreter for that matter by considering the VCLT rules would be in principle applying the rules at the time of the conclusion of a treaty, since their content has not changed at all. However, upon closer scrutiny this does not seem to hold any water. Firstly, even the very existence of rules of interpretation was a topic that was
highly debated decades before the International Law Commission (ILC) started discussing the draft articles on the law of treaties. Taylor, for instance, was of the opinion that ‘it seems to be universally admitted that it is next to impossible “to prescribe any system of rules of interpretation for cases of ambiguity in written language that will really avail to guide the mind in the decision of doubt”’.¹³⁸ Yü, on the other hand, starting from the excessive multiplicity of alleged canons of construction or maxims of interpretation was led to the conclusion that the abundance of such rules detracted from any meaningfulness that they may have since ‘a mere application of one, or a shrewd combination of two, of them may yield almost whatever conclusion the interpreter desires’.¹³⁹ He acknowledged that one ‘rule’ on interpretation existed and that was the discovery of the intention of the parties. In his view, the challenge [that the people that support the existence of a set of rules of interpretation face] … is this: Can scientific results be obtained through sheer flights of imagination? That the collection of rules sponsored by some publicists are inefficacious in interpreting treaties between nations may be seen from the very fact that interpretation is eminently a practical science, and as such it has to consider extrinsic evidence and circumstances peculiar to each individual case. Moreover, the fundamental difficulty in prescribing a system of rules also lies in the imperfect nature of human language itself, through which no one can define or direct any intellectual process with perfection. How then is it to be expected that any artificial rules which are generally to govern the operations of human relationship can be of scientific value? It would appear, therefore, as futile to attempt to frame positive and fixed rules of construction as to endeavor in the same manner to set forth the mode by which judges should draw conclusions from various species of evidence.¹⁴¹

Similar views regarding the impossibility and/or undesirability of a strict set of rules on interpretation were expressed by Westlake,¹⁴² Hyde,¹⁴³ Lawrence,¹⁴⁴ Fenwick,¹⁴⁵ Hershey.¹⁴⁶

---

¹³⁸ H Taylor, A Treatise on Public International Law (Callaghan 1901) 394.
¹³⁹ T-Ch Yü, The Interpretation of Treaties (Sn 1927) 72. For example, in the van Bokkelen case the tribunal provided an extensive list of alleged ‘rules’ of interpretation; Charles van Bokkelen case (USA v Haiti) (1888) 2 Moore International Arbitrations 1807, 1848 ff.
¹⁴⁰ Understood in an abstract manner and not as a legal rule per se.
¹⁴¹ Yü, The Interpretation of Treaties 28.
¹⁴² ‘[The rules on interpretation laid down by publicists] are not likely to be of much practical use’; J Westlake, International Law (2nd edn, Sn 1910) 293.
¹⁴³ Hyde was of the view that the objective of interpretation was to discover the intention of the parties, and that this effort should not be hampered by any preconceived rules, principles or assumptions; CC Hyde, ‘Concerning the Interpretation of Treaties’ (1909) 3 AJIL 46, 47.
¹⁴⁴ ‘[A] vast amount of misplaced energy has been expended [on trying to devise a set of rules of interpretation]’, although he later on concedes to textual (ordinary and special meaning) and contextual interpretation; TJ Lawrence, Principles of International Law (7th edn, MacMillan 1923) 302.
¹⁴⁵ Rules of interpretation only have an ‘inchoate legal value’; CG Fenwick, International Law (The American Law Book Co 1924) 331.
¹⁴⁶ Although Hershey puts down nine rules on interpretation in his writings he makes it crystal clear that these rules have found general acceptance but should not be considered as forming ‘part of International Law proper’; AS Hershey, The Essentials of International Public Law and Organization (rev edn, MacMillan 1927) 445.
Oppenheim\textsuperscript{147} and Brierly.\textsuperscript{148} Even in the Commentary of the Harvard Convention on the Law of Treaties, the drafters acknowledged this problem only to state that the rules on interpretation which were laid out in Article 19 were not iron-clad rules but rather ‘guides to direct the interpreter’.\textsuperscript{149}

One could brush aside most of these views by simply stating that they were a thing of the past, as they were all expressed prior to 1930, at a time where the rules of interpretation may still have been considered still in formation. On that argument, however, two critical remarks need to be raised as an objection. First of all, that would have an underlying assumption that if a treaty from or before that period was to be interpreted then it would be dubious whether any international court or tribunal could refer to the modern rules of interpretation. But this is exactly what several courts and tribunals have been doing, by interpreting pre-VCLT treaties by reference to the customary content of the rules of interpretation as enshrined in the VCLT. Secondly, this uncertainty continued well on into the 50 and 60s\textsuperscript{150} and was reflected in the discussions of the Institut de droit international, and during the ILC meetings on the law of treaties.

As to what the Institut de droit international is concerned, members expressed similar doubts as to the existence of technical rules on interpretation.\textsuperscript{151} In the end, however, the Institut

\textsuperscript{147} ‘[N]either customary nor conventional rules of International Law exist concerning the interpretation of treaties’; L Oppenheim, International Law – Vol 1: Peace (4\textsuperscript{th} edn, Longmans 1928) 759.

\textsuperscript{148} Brierly was of the view that there ‘are no technical rules in international law for the interpretation of treaties; its objective can only be to give effect to the intention of the parties as fully and fairly as possible’; JL Brierly, The Law of Nations: An Introduction to the International Law of Peace (Clarendon Press 1928) 168.

\textsuperscript{149} It is worth reproducing the relevant part in full: ‘It seems evident that the prescription in advance of hard and fast rules of interpretation - even though, as in the case of those proposed by Ehrlich, they amount only to rebuttable presumptions - contains an element of danger which is to be avoided…If it be kept always in mind that the so-called rules of interpretation have no extraordinary sanctity or universality of application, and that in all probability they developed as neat ex post facto descriptions or justifications of decisions arrived at by mental processes more complicated than the mere mechanical application of rules to a text, they may serve some purpose as aids to interpretation. Where a rule is of such a nature as to suggest a line of investigation for discovering the general purpose of the parties, or where a consideration of all pertinent circumstances in a particular case results in a decision easily explained by a well-known maxim, there is probably no harm in relying on it. It is always to be recalled, however, that the process of interpretation of treaties is, of necessity, one which is not to be confined within narrow limits by iron-clad rules; that all “rules”, including those laid down in this article, are but guides to direct the interpreter toward a decision which conforms, not to preconceived standards, but to the circumstances peculiar to the particular case before him’ (emphasis added); JW Garner (Reporter), ‘Codification of International Law: Part III – Law of Treaties – Draft Convention on the Law of Treaties’ (1935) 29 AJIL Supp 657, 946-7 (hereinafter Harvard Draft Convention).

\textsuperscript{150} See for instance McNair, who wrote that he was ‘amongst those who are sceptical as to the value of those so-called rules and are sympathetic to the process of their gradual devaluation, of which indications exist. The many maxims and phrases which have crystallised out and abound in the textbooks and elsewhere are mere prima facie guides to the intention of the parties in a particular case’; McNair, The Law of Treaties 366.

\textsuperscript{151} Institut de Droit International, ‘De l’interprétation des traités’(1950) 43/1 AIDI 336 ff.
adopted, during the Grenada Session in 1956, a resolution on interpretation of treaties.\(^{152}\) Despite this, the situation in the ILC was not radically different. Waldock, for instance, in his ‘Third Report on the Law of Treaties’ starts his commentary on the articles relating to interpretation of treaties by acknowledging that ‘even the existence of rules of international law governing the interpretation of treaties are questions which are not free from controversy’.\(^{153}\) Apart from the Rapporteur, other members also expressed qualms as to the existence of rules of interpretation. For instance, Briggs was of the view that ‘[t]he canons of interpretation were not always rules of international law but, as Judge de Visscher had said, they were working hypotheses’.\(^{154}\) Ruda also felt that ‘at the present stage of development of international law, there did not as yet exist for States any obligatory rules on the subject of interpretation’.\(^{155}\) According to him if there were any rules that would simply be the Vattelian axiom in claris non fit interpretatio. he stressed that he was referring to rules binding upon States. At least, if any rules existed, they were subject to considerable doubt, except for the rule in claris non fit interpretatio, which had been first formulated by Vattel and which meant that there could be no question of interpretation where the sense was clear and there was nothing to interpret.

Both USA and Ghana also had their doubts, with the former when asked for comments on the draft articles suggesting that it might be better to draft the relevant articles as guidelines rather than as rules,\(^{156}\) whereas the latter during the 1968 Vienna Conference on the Law of Treaties raised similar objection as to the nature of the proposed ‘rules’.\(^{157}\)

As is manifestly evident from the material presented above, the existence of binding rules of interpretation was questioned even right up to the adoption of VCLT. Even today, there are authors who still object to the existence of binding rules of interpretation.\(^{158}\) So to argue that for every treaty ever signed and ratified there were customary rules of interpretation which

\(^{152}\) Institut de Droit International, ‘De l’interprétation des traités’(1956) 46 AIDI 359.
\(^{154}\) ILC, ‘Summary Record of the 765th Meeting’ [9].
\(^{155}\) Ibid [33] and similar comments in ibid [16] (de Luna).
\(^{156}\) Waldock, ‘Sixth Report’ 93.
\(^{157}\) The objection was raised by Ghana; United Nations Conference on the Law of Treaties, ‘1st Session – 31st Meeting of the Committee of the Whole (COW)’ (19 April 1968) UN Doc A/CONF.39/C.1/SR.31 164 [68].
applied is to say the least a very generalised and superficial description of an extremely complex
topic.\(^{159}\)

3.1.2 Various Forms

But let us leave aside the highly debatable proposition that customary ‘rules’ of interpretation
existed since the inception of the international legal system. Even if one concedes the fact that
customary rules (or more likely principles of interpretation) existed at the dawn of interpretation
of international treaties, that still does not solve the problem of using the VCLT rules as a
reflection of customary international law. There is still an insurmountable hurdle that needs to
be overcome; the problem of the content of those customary rules/principles, at various points
in history. As the argument goes at least according to the practice of the ICJ, these customary
rules have not been the subject of radical change. But is this really the case? In the previous
Section, some of the authors who doubted the existence of rules of interpretation also made
some educated guesses as to possible useful ones, as have done several other authors.\(^{160}\) These
are too numerous and diverse to enumerate here. However and in order to demonstrate that this
diversity is a common and repeating theme, in this Section the focus will be on the various
Codes and Treaties that included rules of interpretation. What will be shown is that each of
these documents not only proposed different rules from one another, but also and most

---

\(^{159}\) The author wishes to clarify at this point, that in his view, both after and prior to the VCLT there are and were
customary rules on interpretation, although their content has changed and/or been clarified through time. Prior to
the VCLT and the further back we go in time, these rules become less customary and more principles stemming
from domestic legal systems and/or ‘constructive rules’, in the Anzilottian sense, ie rules that must by necessity
exist otherwise the judges would be unable to execute properly their function (consider the logical absurdity of a
case, where a judge did not have any rules of interpretation to fall back on); as one author has characterised them,
these ‘constructive rules’ are essentially ‘not the rules of the game but the necessary premises for the game to be
played’; J Crivellaro, ‘How did Anzilotti’s Jurisprudential Conception Influence the Jurisprudence of the
‘constructive rules’ see D Anzilotti, *Cours de Droit International, Tome I* (Strey 1929) 68 ff; G Gaja, ‘Positivism
and Dualism in Dionisio Anzilotti’ (1992) 3 EJIL 123, 128 ff.

\(^{160}\) See for instance Fitzmaurice, who identified six principles of interpretation on the basis of the jurisprudence of the
ICJ: i) principle of actuality (or textuality); ii) principle of the natural and ordinary meaning; iii) principle of
integration. Subject to those principles were: iv) principle of effectiveness (*ut res magis valeat quam pereat*) v)
principle of subsequent practice vi) principle of contemporaneity; G Fitzmaurice, ‘The Law and Procedure of the
International Court of Justice, 1951–4: Treaty Interpretation’ 211-2; for presentations of the various principles of
interpretation used in both international and domestic jurisprudence see: CC Hyde, ‘Interpretation of Treaties by
the Permanent Court of International Justice’ (1930) 24 AJIL 1; WE Beckett, ‘Decisions of the Permanent Court
of International Justice on Points of Law and Procedure of General Application’ (1930) 11 BYIL 1; WE Beckett,
‘Les questions d’intérêt général au point de vue juridique dans la jurisprudence de la Cour permanente de justice
internationale’ (1932) 39 RdC 135, 261 ff; WE Beckett, ‘Les questions d’intérêt général au point de vue juridique
dans la jurisprudence de la Cour permanente de justice international (juillet 1932 – juillet 1934)’ (1934) 50 RdC
JB Moore, *A Digest of International Law* (Government Printing Office 1906) 249 ff; AD McNair, ‘L’ application
et l’ interprétation des traités d’ après la jurisprudence britannique’ (1933) 43 RdC 247.
importantly different from the VCLT rules. In the following analysis various rules proposed have been distilled to their essence and described in a manner similar to the wording used by the VCLT in order for the differences to become more apparent.

In the first attempts towards codification of the international law of treaties, rules of interpretation are conspicuous by their absence. Neither in the Havana Convention on Treaties, nor in David Dudley Field’s or Bluntschli’s Draft Code or the 1927 Draft of the International Commission of American Jurists do we find any rules of interpretation included. In Fiore’s Draft Code, however, an extensive list of rules referring to interpretation can be seen. First of all, Fiore adheres to the *in claris non fit interpretatio* maxim. According to him, when interpretation is necessary it can have one of two forms, either grammatical or logical. The former may be used to determine the meaning of vague expressions, whereas the latter is aimed at ‘fix[ing] precisely the concept and extent of the reciprocal obligations assumed by the […] parties’. He then provides an extensive list of ‘rules’ that fall under each of these categories of interpretation. Grammatical interpretation, on the one hand, includes the following rules:

- *in claris non fit interpretatio*;
- ordinary meaning;
- contextual interpretation;
- technical ordinary meaning supersedes everyday ordinary meaning;
- in case of conflict between the ordinary meaning of a term and its meaning as clearly determined by the intention of the parties, it is the latter that shall prevail;
- in case of terms with different meanings in different languages the dominant meaning is that of the State which undertakes the relevant obligation;

---

166 Ibid [798].
• interpretation by reference to prior and/or subsequent agreements, practice and other relevant rules.\textsuperscript{167}

Logical interpretation, on the other hand, consists of the following rules:

• the intention of the parties is the dominant criterion (\textit{semper autem in fide quid senseris, non quid dixeris cogitandum});\textsuperscript{168}
• \textit{contra proferentem};
• \textit{in dubio mitius};
• \textit{ut res magis valeat quam pereat};
• interpretation by reference to other ‘relevant rules’;
• contextual interpretation;
• \textit{travaux préparatoires} cannot be used to deviate from the meaning of the text.\textsuperscript{169}

In addition to the above, Fiore also offers some rules regarding resort to broad or restrictive interpretation. According to him, in principle when the text is clear a broad interpretation or an interpretation by analogy should be avoided.\textsuperscript{170} If, however, the text is ambiguous this can be resolved through in \textit{pari materia} interpretation.\textsuperscript{171} Finally, provisions creating obligations or restricting rights should be interpreted restrictively.\textsuperscript{172}

Unlike Fiore’s Draft Code, a Resolution on interpretation of treaties adopted by the Seventh International Conference of American States clearly demonstrated that the participating States were of the view that interpretation was governed not by ‘rules’ but by ‘principles’.\textsuperscript{173} In fact Article 1 of the Resolution states that ‘the rules governing the interpretation of domestic law are applicable to the interpretation of international conventions’. Other interesting morsels taken from that Resolution are that:

\textsuperscript{167} Ibid [799-806].
\textsuperscript{168} Ibid [807]. The Latin phrase is a quote from Cicero’s \textit{De Officiis} and can be translated as: ‘but in a promise, what you mean, not what you say, is always to be taken into account’; Marcus Tullius Cicero, \textit{De Officiis} 1.40 (Latin text and translation available at the Perseus Digital Library, as above).
\textsuperscript{169} Fiore’s Draft Code [807-14].
\textsuperscript{170} Ibid [815-6].
\textsuperscript{171} Ibid [816]; this interpretation is very similar to Art 31(3)(c) VCLT.
\textsuperscript{172} Ibid [817].
• the intention of the parties\textsuperscript{174} shall be sought in the preamble and the preparatory work;
• that the treaty must be interpreted in good faith;
• according to the ordinary meaning of its terms (or special meaning when that can be demonstrated);
• in context;
• by reference to subsequent agreements and practice;
• and in conformity with established rules of international law but only when the intention of the parties cannot be established clearly;\textsuperscript{175}\textsuperscript{176}
• notably, restrictive or expansive interpretation may be resorted to only when the ordinary methods of interpretation have failed;
• \textit{in dubio mitius} is to be resorted to when the issue is about an obligation of a State;\textsuperscript{177}
and finally
• if there is an issue of interpretation arising from the existence of equally authentic texts then the intention of the parties will be the deciding factor. If that cannot be established then the restrictive interpretation will be the solution to be given.\textsuperscript{178}

The commentary to the Harvard Convention, although explaining that the relevant Article 19 should be seen as including guidelines rather than strict rules, included the following: the object and purpose of the treaty; preparatory work; circumstances of conclusion; subsequent practice and agreements; the conditions prevailing at the time interpretation is being made. But all of these are subservient to the general purpose of the treaty. Also in case of multiple authentic texts the interpretation that best serves the object and purpose of the treaty will be opted for.\textsuperscript{179}

Finally, \textit{the Institut de Droit International} in its 1956 Resolution on ‘Interpretation of Treaties’ provided two articles that included various ‘principles’ from which the various courts and tribunals could draw inspiration. The first article includes references to interpretation based on good faith, the text, the ordinary meaning of the words (unless a special meaning was intended by the parties) in their context and in the light of principles of international law. In a supplementary and discretionary fashion, according to Article 2, recourse could also be had to

\textsuperscript{174} Referred to as ‘will or purpose of the parties’.
\textsuperscript{175} A faint echo of Art 31(3)(c) VCLT.
\textsuperscript{176} Conference of American States Resolution, Arts 3-8.
\textsuperscript{177} Ibid Art 10.
\textsuperscript{178} Ibid Arts 9 and 11.
\textsuperscript{179} Harvard Draft Convention, Art 19.
other means, which include the recourse to preparatory work, subsequent practice and the purposes of the treaty.\textsuperscript{180} Leaving aside the various ILC drafts on the articles on interpretation, which vary significantly from one another,\textsuperscript{182} and focusing on the preceding attempts to codify the rules of interpretation, one thing becomes eminently clear. Although there are some similarities with Articles 31-33 VCLT, they are a far cry from being identical. Granted, there is reference to text, ordinary meaning, special meaning, good faith, and subsequent practice,\textsuperscript{183} but the differences are much more pronounced. For instance, in some Codes\textsuperscript{184} there is reference to restrictive and expansive interpretations, which are activated when the main methods of interpretation have failed. Fiore’s Draft Code starts with a reaffirmation of the \textit{in claris non fit interpretation} maxim, which, however, was rejected in the Vienna Conference on the Law of Treaties as being an ‘obscurantist tautology’.\textsuperscript{185}

Furthermore, the proposed rules in all the Codes are peppered with references to other principles and maxims, which were not included explicitly in the VCLT, such as the \textit{in dubio mititus} and \textit{contra proferentem} maxims. Interestingly, Fiore’s Draft Code and the Conference of American States Resolution place intention at the apex of the interpretative process and any other rule ends up yielding to it in case of conflict, an approach that was not necessarily reflected in the text of the VCLT, where textual interpretation was given not substantive but at least a temporal prominence. This deviation from the text of the VCLT is also reflected in the solutions in case of conflict between multiple authentic texts. Here we are presented with an embarrassment of solutions. Fiore’s Draft Code gives precedence to the language of the State that undertakes the obligation; the Conference of American States Resolution opts for intention as the deciding factor and if that fails for a restrictive interpretation; only the Harvard Draft Convention goes for a version of the VCLT approach by opting for object and purpose as the means of resolving the ambiguity. A last example that can be offered is that in the Resolution of the \textit{Institut de droit international}.

\begin{itemize}
\item \textsuperscript{180} Note the use of plural. For an extensive analysis of the inconsistencies, variations in the use and evolution of the terms ‘object and purpose’ see I Buffard and K Zemanek, ‘The “Object and Purpose” of a Treaty: An Enigma?’ (1998) 3/1 ARIEL 311; and for a recent foray into the purpose of ‘object and purpose’ see D Kritsiotis, ‘The Object and Purpose of a Treaty’s Object and Purpose’ in Bowman and Kritsiotis (eds), \textit{Conceptual and Contextual Perspectives} 237-302.
\item \textsuperscript{182} See the various ILC reports in YBILC between the years 1963 and 1966.
\item \textsuperscript{183} Although not in all of the attempts at codification. For instance, in the Harvard Draft Convention there is no explicit reference to ordinary meaning.
\item \textsuperscript{184} In Fiore’s Draft Code and the Conference of American States Resolution.
\item \textsuperscript{185} United Nations Conference on the Law of Treaties, ‘1st Session – 31st Meeting COW’ [38].
\end{itemize}
international not only preparatory work, but also subsequent practice, and even the object and purpose of the treaty are categorised as supplementary means of interpretation, whose employment is entirely dependent on the discretion of the interpreter. The list of comparisons could continue to some length, but the above should suffice to prove the point that before the ILC any attempts towards codification of the rules of interpretation of treaties were widely different from one another not only with respect to the actual rules codified, but also their interplay and hierarchy. This, once again demonstrates what a significant change in the interpretative process the VCLT was, where choices were made after long debates that were radically different from choices in earlier Codes. Consequently, on this front as well the claim that the rules of interpretation have not undergone any significant changes fails.

3.1.3 Interpretation of Rules of Interpretation

Having established that not only the nature of the ‘rules’ of interpretation (as being either rule, principles, canons or maxims) was debated, but even their content was in a constant state of flux at least until the adoption of the VCLT, one more thing remains to be proven; that the rules of interpretation are themselves also amenable to interpretation and change. If this can be demonstrated, then another critical blow will have been struck against the claim of immutability of the rules of interpretation in the pre-VCLT era, but this will also prove the possibility of change of the existing rules in the future.

Examining the interpretation of the rules of interpretation might sound somewhat self-referential and a recipe for legal and logical paradoxes, however, the importance of this exercise cannot be overstated. Even the ILA Study Group on the Content and Evolution of the Rules of Interpretation in its ‘Preliminary Report’ of 2016, considered this topic one of fundamental importance and will be devoting its resources on establishing the process by which this interpretation has and continues to happen, as well as identifying divergent practices in interpretation depending on the tribunal in question.186

An exhaustive enumeration of the instances where such an interpretation has occurred falls outside the scope of this Chapter. However, some examples that could be mentioned in order to prove the interpretability of the rules of interpretation are the clarificatory or divergent

solutions that various courts and tribunals have given, when faced with questions relating to the exact scope of a rule of interpretation. Most notable amongst these are:

- International courts and tribunals often refer to a wide gamut of maxims such as *effet utile*,\(^{187}\) *in dubio mitius*,\(^{188}\) *expression unius est exclusion alterius*,\(^{189}\) *ex abundante cautela*,\(^{190}\) *ejusdem generis*,\(^{191}\) *contra proferentem*,\(^{192}\) *exception est strictissimae applicationis*,\(^{193}\) *lex posterior* and *lex specialis*,\(^{194}\) or apply comparative reasoning,\(^{195}\) and logical tools (such as the rule of necessary implication\(^{196}\) or *per argumentum a fortiori*),\(^{197}\) in order to reach an interpretative conclusion.

However, this use raises a slew of questions, which have been answered differently depending on the tribunals or author and particular time period. Are these maxims and approaches to be considered as customary international law? If so are they customary law on interpretation *praeter* VCLT, or do they fall under the Articles 31(3)(c) or 32 VCLT (*intra legem*)?\(^{198}\) If not when they are used by courts and tribunals, is this interpretation under Article 32 or *contra legem*? Any answer to these questions is by nature an interpretation of the VCLT rules on interpretation and one that crystallises, and in some cases, evolves the content of those rules\(^{199}\)

- The nature, form and content of subsequent agreements/practice for the purpose of interpretation, is also another area where jurisprudential interpretation of the rules of

---

187 Also known as *ut res magis valeat quam pereat*; C Braumann and A Reinisch, ‘*Effet Utile*’ 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) 47-72.
188 P Merkouris, ‘*In Dubio Mitius*’ in ibid 259-306.
189 J Klingler, ‘*Expressio Unius Est Exclusio Alterius*’ in ibid 73-114.
190 A Macdonald, ‘*Ex Abundante Cautela*’ in ibid 115-32.
191 Fr Baetens, ‘*Ejusdem Generis and Noscitur a Sociis*’ in ibid 133-60.
192 P d’Argent, ‘*Contra Proferentem*’ in ibid 241-58.
193 A Solomou, ‘Exceptions to a Rule Must Be Narrowly Construed’ in ibid 359-86.
194 D Pulkowski, ‘*Lex Specialis Derogat Legi Generali/Generalia Specialibus Non Derogant*’ in ibid 161-96.
197 A Minon, ‘*Per Argumentum a Fortiori*’ in ibid 197-210.
198 Even for widely used ones such as effective interpretation and evolutive interpretation, there has been debate as to whether they are *intra legem* or *prater legem*; for effective interpretation see Braumann and Reinisch, ‘*Effet Utile*’ 47-72; for evolutive interpretation see analysis in Ch 4 of the present book, Sect 2.2; see also P Tzeng, ‘The Principles of Contemporaneous and Evolutionary Interpretation’ in Klingler, Parkhomenko and Salonidis, *Between the Lines of the Vienna Convention?* 387-422; Moeckli and White, ‘Treaties as “Living Instruments”’ 136-70; Chr Djeffal, *Static and Evolutive Treaty Interpretation: A Functional Reconstruction* (CUP 2016); Bjorge, *The Evolutionary Interpretation of Treaties*.
199 In more detail see entire Volume by Klingler, Parkhomenko and Salonidis (eds), *Between the Lines of the Vienna Convention?*. 

41
interpretation has occurred. Nolte’s reports on this topic provide an extensive presentation of the relevant international jurisprudence revealing the multitude of complexities connected to identifying a particular act as ‘subsequent agreement/practice’ and the conflicting or gradually more refined approaches in international jurisprudence on the matter.200

- Connected to this is also the debate on where the exact line between interpretation and modification should be drawn, an issue that was acknowledged by the ILC and Nolte in the discussions on subsequent agreements and practice and will be addressed in more detail in Chapter 5.

- The exact meaning of the term ‘rules’ (does it apply also to treaties that have been signed but not ratified), ‘parties’ (‘parties to the treaty’ or ‘parties to the dispute’) and ‘relevant’ (how is relevance determined) of Article 31(3)(c), as well as the connection of that provision with in pari materia interpretation has given rise to heated debates and extensive case-law aiming to interpret the scope of this provision.201

- Whether a hierarchy exists between the various schools of interpretation, or between Article 31 and 32 VCLT, or even between the rules of interpretation enshrined in the VCLT and other extraneous rules/maxis of interpretation.202

- The conditions under which subsequent agreements and practice can be considered as supplementary means under Article 32 VCLT. Draft Conclusion 5(4) has included subsequent practice as supplementary means of interpretation.203 According to the ILC Commentary the ‘subsequent practice’ of Draft Conclusion 3 that does not meet the

---

200 See Nolte’s five Reports on Subsequent Agreements and Subsequent Practice.

201 Merkouris, Article 31(3)(c) VCLT, Chs 1 and 2, and the case-law analysed therein; see also PF Henin, ‘In Pari Materia Interpretation in Treaty Law’ in J Klingler, Y Parkhomenko and C Salonidis (eds), Between the Lines of the Vienna Convention? 211-40.

202 See various codification attempts analysed in Sect 3.1.2; Klingler, Parkhomenko and Salonidis (eds), Between the Lines of the Vienna Convention?; Polish Postal Service in Danzig (Advisory Opinion) PCIJ Rep Series B No 11, 39; River Oder 26.

203 ‘Conclusion 2 General rule and means of treaty interpretation
1. Articles 31 and 32 of the Vienna Convention on the Law of Treaties set forth, respectively, the general rule of interpretation and the recourse to supplementary means of interpretation. These rules also apply as customary international law.2. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose, as provided in article 31, paragraph 1.3. Article 31, paragraph 3, provides, inter alia, that there shall be taken into account, together with the context, (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; and (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.4. Recourse may be had to other subsequent practice in the application of the treaty as a supplementary means of interpretation under article 32.
5. The interpretation of a treaty consists of a single combined operation, which places appropriate emphasis on the various means of interpretation indicated, respectively, in articles 31 and 32’; ILC, ‘Draft Conclusions on Subsequent Agreements and Subsequent Practice, with Commentaries’ Conclusion 2.
criteria set out for subsequent practice Article 31 (b), nonetheless may fall under the scope of Article 32, which includes a non-exhaustive list of supplementary means of interpretation. The language used in Draft Conclusion 3, ie ‘recourse may be had’, mirrors that of Article 32 VCLT. The inclusion of subsequent practice in Article 32, has resulted in many comments from scholars who had queried certain aspects of such an approach, for instance the consequence that the distinction between ‘agreed subsequent practice ‘and subsequent practice in broad sense’ would have in relation to the practice of international organisations. For instance, although, the prevailing view is that such practice would presumably fall under Article 32, authors have questioned whether this is entirely correct, as there may be doubts if such a practice is representative of intention of States at the time of the conclusion of a treaty. The approach to subsequent practice as a supplementary means on interpretation, although treated with a certain degree of trepidation by publicists, has been in fact acknowledged by international courts and tribunals.

- Article 32 VCLT allows for recourse to preparatory work only for purposes of confirmation or to determine the meaning in case of ambiguity or if the result of interpretation under Article 31 VCLT is manifestly absurd. This raises then the interesting question of whether preparatory work could also have a corrective function, ie correct the ordinary meaning of the text, a topic that surprisingly has been examined in multiple cases, both before the ICJ and other arbitral tribunals.

- Are the ILC discussions preparatory work or merely other supplementary means? In the ILC this point was raised, with members expressing diverging views as to whether they were ‘other supplementary means’ or travaux préparatoires of a ‘second order’.

---

204 ILC, ‘Draft Conclusions on Subsequent Agreements and Subsequent Practice, with Commentaries’ 20 [8], Commentary to Conclusion 2(4).
205 Ibid
209 In the end they were considered as preparatory work; ILC, ‘Summary Record of the 872nd Meeting’ [35]; ILC, ‘Summary Record of the 873rd Meeting’ [25-8], [34]; see also Merkouris, Article 31(3)(c) VCLT 11.
• Can preparatory work be used against third States?\(^{210}\) The jurisprudence of the ICJ has evolved on this matter. Whereas originally, unless a party had not participated in the negotiations the preparatory work could not be used against it on the basis of the *res inter alios acta* and *pacta tertiis nec nocent nec prosunt* principles, this has changed in more recent cases, with knowledge or presumption of knowledge of the relevant documents being a sufficient ground for resorting to them.\(^{211}\)

The above examples illustrate that even the VCLT rules of interpretation are also open to interpretation in order to determine their content. There is already extensive jurisprudence on the matter which continues to grow. Even more so the interpretations given have either been consistently held, reverse in *toto* or partly modified and/or refined. The aim here is not to give a definitive answer to all the questions that were identified above, but rather to realise that the interpretability of the VCLT rules on interpretation shatters any illusion that the rules of interpretation have not undergone any changes both pre-VCLT and post-VCLT.

### 3.1.4 Logical Fallacies of the Immutability of Rules of Interpretation

Based on the analysis of the previous Sections, it is evident that there is empirical evidence disproving any claim surrounding the immutability of the VCLT and customary rules on interpretation. In order to buttress further this conclusion let us also examine the logical fallacies of accepting such a proposition.

It is generally accepted that the VCLT rules of international law reflect contemporary customary international law. However, customary international law emerges through State practice and *opinio juris*. What is there to prohibit States introducing and applying new rules of interpretation? This would in combination with an *opinio juris* lead to a modification of customary international law (or emergence of a new customary rule) which would deviate from that of the VCLT. This possibility of States agreeing to opt out of the VCLT rules of interpretation was explicitly recognised by ILC members.\(^{212}\) This leads to one of the following scenarios. Either the VCLT and customary rules of interpretation would end up having a different content, or the VCLT would automatically adapt, by applying the customary law version of Article 31(3)(c)\(^{213}\) and their respective contents would remain the same. However,

\(^{210}\) Merkouris, “‘Third Party’ Considerations and ‘Corrective Interpretation’”.

\(^{211}\) Ibid.

\(^{212}\) ILC, ‘Summary Record of the 765th Meeting’ [61] (Verdross), [78] (Ago).

\(^{213}\) Since the customary rules on interpretation would be considered as ‘relevant rules’ for the interpretation of the VCLT rules on interpretation.
in both scenarios change has occurred, and thus immutability despite the passage of time has been disproved.

Furthermore, by applying the *a majore ad minus* logical tool, since the possibility of emergence of future *jus cogens* norms and the modification of existing ones is generally accepted\(^\text{214}\) then clearly the same should apply for the possibility of emerging customary rules on interpretation.

Let us now argue *a contrario*. If the customary rules on interpretation cannot and have not changed and they have the same content as the VCLT rules, then this would mean that the VCLT rules are also immune to time and change. But as has been shown in the previous Section, this is clearly not the case, as international courts and tribunals have gradually developed the content of these rules, not to mention that this approach also fails to offer a systemically coherent explanation of the possibility of opting out of the rules of interpretation.

The inescapable conclusion of accepting the immutability of the rules on interpretation would be that they are something entirely different of any kind of rules that we are accustomed to. If they are not affected by the passage of time, and if they cannot change then they clearly are not conventional rules, or customary rules, or principles. They would have to be a unique set of rules unique falling outside the classical sources with which we are familiar. However, neither States, nor the ILC nor international courts and tribunals have adopted this kind of approach. An additional problem that this kind of logic may create, especially with respect to the ICJ, would be one of applicable law. According to Article 36 of the ICJ Statute, the Court can apply treaties, customary law or general principles. But if rules of interpretation are something different, then the Court would not even be able to apply them!

The above thoughts demonstrate the paradoxes and internal inconsistencies that the acceptance of the immutability of the rules of interpretation leads to. To say that the rules of interpretation have not changed, significantly or not, throughout the centuries may be a practically alluring solution, as it ties all loose ends with a nice bow, however as has been shown above it is not supported by practice, nor the history of the rules of interpretation of international law and to make matters even worse is logically, normatively and methodologically simply incorrect.

3.2 The Mutability of Rules of Interpretation Leads to Inter-temporal Concerns

3.2.1 The Effect of Time on Rules of Interpretation

Having established that the rules of interpretation can be and are affected by the passage of time, then the follow-up question that needs to be addressed is what the effects of the passage of time in the application of legal norms are. In international law, as in any legal system, the need for stability presupposes that most rules are created with a view to apply for extended periods of time, but that also they are allowed to change. This, on the one hand, may ensure a modicum of stability but, on the other hand, can also give rise to a whole gamut of complex issues regarding the appropriate rules to be applied at a specific situation and at a particular juncture in time. In the previous Sections we examined how the principle of contemporaneity and evolutive interpretation offer the tools to achieve this feat of balance. According to the former, a treaty and its terms are to be understood as they stood at the time of the conclusion of the treaty. However, if the parties so intended, the treaty can evolve and its terms can be understood in the light of modern-day conditions. That is the basic tenant of evolutive interpretation.

In the case at hand, what is of interest for our analysis is whether the rules of interpretation, which as was shown in the previous Sections can, have and will continue to change and be refined through time, can be considered for the purpose of evolutive interpretation. Essentially, the question boils down to what elements can be taken into account in the process of evolutive interpretation. Do legal rules fall into the set of elements to be considered under evolutive interpretation or is that set restricted only to elements which qualify as facts?

As shown in Section 2.2.1 evolutive interpretation can refer to evolution of fact and/or evolution of law. Examples of what international courts and tribunals have considered as evolution of fact are medical and scientific advancements, societal and cultural changes, the socio-economic situation of a State and changes in morals. On the other hand, evolution of law has been recognised as including customary international law, international treaties, and even domestic law. Having this in mind, it is evident then that the rules of interpretation can also form part of the process of evolutive interpretation.

---

216 See Sect 2.2.1 of this Chapter and cases cited therein.
217 Ibid.
3.2.2 Scenarios (Dis)Allowing ‘Time-travelling’ Rules of Interpretation

This analysis leads us inexorably to the necessity of examining the approach by international courts and tribunals in using the VCLT rules on interpretation to interpret pre-VCLT treaties.

International courts and tribunals have shown a tendency when interpreting treaties concluded several decades before the entry into force of the VCLT,\(^ {218}\) to simply pay lip service to the fact that the VCLT rules reflect customary international law\(^ {219}\) and in some cases even indicate that there have been no significant changes to the content of those rules under customary international law.\(^ {220}\) This practice has not gone unnoticed amongst academics,\(^ {221}\) although there is a begrudging admittance that any other solution ‘would complicate matters considerably’.\(^ {222}\) However, that is immaterial as to what is the proper application of the law.

The question we are faced with then is what possible options are there with respect to this issue, and whether by process of elimination one can arrive at a solution. As mentioned above, the principle of contemporaneity provides that a treaty is to be understood as it stood at the time of its conclusion unless the parties intended for it to follow the evolution of fact and/or law.\(^ {223}\) A treaty, therefore, can be interpreted either statically (contemporaneously) or evolutively. Similarly, the rules of interpretation applicable to that treaty can be either those of the time of the conclusion of the treaty or those at the time of its interpretation. This then provides us with all the possible variations, and these are expressed below in Table 1:

---


\(^ {219}\) Kasikili/Sedudu Island [8]; Case Concerning Oil Platforms (Iran v USA) (Merits) [2003] ICJ Rep 161 [23].

\(^ {220}\) Kasikili/Sedudu Island, Separate Opinion of Judge Oda [4].


\(^ {222}\) Shaw ‘Case Concerning Kasikili/Sedudu Island’ 968.

\(^ {223}\) Elsewhere I have opted the term ‘time-will’ to express this intention of the parties that determines whether a treaty is to be understood as frozen in time or as a living instrument. For reasons of simplicity I will be using that term from this point onwards to describe that form of intention; Merkouris, ‘(Inter)temporal Considerations’.
Consequently, there are four possible variations:

i) The treaty is to be interpreted statically and the rules of interpretation are those that existed at the time of the treaty’s conclusion.

ii) The treaty is to be interpreted statically but the rules of interpretation are those that exist at the time of the treaty’s interpretation.

iii) The treaty is to be interpreted evolutively and the rules of interpretation are those that exist at the time of the treaty’s interpretation.

iv) The treaty is to be interpreted evolutively but the rules of interpretation are those that existed at the time of the treaty’s conclusion.

Let us take a closer look at these four possibilities. The first and the third should in actually be considered one and the same. The reason is that the underlying premise is for both of them that the rules of interpretation follow the intention of the parties as to the treaty as whole. If the treaty is meant to be interpreted contemporaneously, so should be (ie contemporaneous to the time of conclusion of the treaty) the rules of interpretation. The same is true when the parties opt for evolutive interpretation. That same intention demands that the rules of interpretation are the ones applicable at the time of interpretation. Even if there is no explicit expression that the parties wish for those particular rules to apply, following the overall intention/ ‘time-will’ of the parties seems a reasonable choice. A separation of treaty and the rules that interpret it seems too artificial without the parties having clearly indicated their preference for such a two-level approach. Such an approach would also avoid the burdening of the courts with the obligation to identify the content of the rules of interpretation in long by-gone eras. However, this would happen only when the treaty was to be interpreted evolutively. For those where the parties
wanted the principle of contemporaneity to apply the aforementioned task would become a necessity.

But let us examine the other two options to see if any of them can be rejected. The second option would bring about a situation where whereas the treaty remained in its own ‘time-bubble’ the rules of interpretation would be the modern ones. Indeed, this would be the preferred option by international courts and tribunals as this would mean that they could rely on the VCLT rules as a reflection of present-day customary international law. However, this would seem to conflict with the principle of non-retroactivity, a well-recognised principle in international law, and the principle of contemporaneity as analysed above. Both these principles can be circumvented only when there is an express intention of the parties to that effect. In the present case, and unless such an express stipulation by the parties exists, the only intention that is apparent is either one that has opted for a static interpretation of the treaty, or no apparent intention either way, whereby the principle of contemporaneity kicks in. Consequently, this option conflicts with the basic tenets of the principles of non-retroactivity and contemporaneity and does not withstand scrutiny. The decisive criterion is the ‘time-will’ of the parties.

A possible way out of this conclusion, would be to argue that even if one were to apply the contemporary of that time rules of interpretation, this would include the customary version of Article 31(3)(c). Consequently, the modern rules of interpretation could be taken into account as ‘relevant rules’ in order to determine the content of the earlier rules of interpretation. That way, although the court applies the earlier rules, it still ends up using their modern version. Apart from the evident ouroboric nature of this argument, it is entirely based on an assumption that is not supported either by doctrine or jurisprudence. Firstly, whether in earlier eras Article 31(3)(c) existed as such in customary international law is a topic equally open to debate as the ones we examined in the previous Sections. Second, Article 31(3)(c) is silent on the fact on what is the temporal stamp of the ‘relevant rules’, ie relevant rules applicable at the time of the conclusion of the treaty, or at the time of the interpretation of the treaty. Unsurprisingly we also end up returning to our starting point. This issue was extensively debated in the ILC and eventually any such reference was omitted from the final text. However, it seems that even in this case the solution will be determined by the ‘time-will’ of the parties; and once again we

---

224 The Chamizal case (Mexico v USA) (1911) 11 RIAA 309, 343; Clipperton Island Arbitration (Mexico v France) (1931) 2 RIAA 1105, 1105-11; Ambatielos case (Greece v UK) (Preliminary Objections) [1952] ICJ Rep 28, 40.
225 Although earlier drafts, possibly influence by the ideas behind the principle of contemporaneity leaned in favour of at the time of the conclusion of the treaty”; see Merkouris, Article 31(3)(c) VCLT, Ch 2.
also return to our original conclusion that the ‘time-will’ is the decisive criterion in each scenario, that offers solutions not only with respect to the treaty as such, but also to the peripheral rules that may be used in order to ensure its application and interpretation.

The final option of using old rules of interpretation to interpret a treaty that is considered a ‘living instrument’ is perhaps the easiest to discard. Not only all the previous considerations regarding the single solution to the treaty and its rules of interpretation, and the ‘time-will as the decisive criterion’ apply here as well, but it is not supported by any case-law whatsoever. This is not surprising. Consider as we mentioned before that a ‘living instrument’ will be interpreted on the basis not only of evolution of fact but also of law. Consequently, using earlier rules of interpretation would rather be a (d)evolution of law in clear contradiction to one of the two main venues through which evolutive interpretation is accomplished.

Based on the above, the only logical solution is that there is a presumption of a single solution. The ‘time-will’ choices that the parties make with respect to the treaty equally apply to the rules of interpretation. Of course, this should be considered a rebuttable presumption. Bearing in mind that parties can anytime they please opt out even from the existing rules of interpretation and agree amongst themselves to apply other ones of their own choosing the presumption can be reversed. But in order for this to happen the parties must explicitly demonstrate their intention for opting for one of the aforementioned discarded options or for an entirely different set of rules of interpretation.

Updating Table 1 to reflect the above analysis we arrive at the solution to our problem which is represented in Table 2.

---

226 See fn 205 in the present Chapter.
Diagram 2: What Rules of Interpretation Should Apply

4 Forward and Backward Motion through Time: Rules of Interpretation as ‘Time-Travellers’

In this Chapter we examined the *auxesis* and *meiosis* that can happen to treaty provisions as a result of their *kata chronon metavole* and in the context of the process of interpretation. In Section 2 we focused on the two opposite spectra of motion, ie *stasis* and *kinesis* as exemplified through contemporaneous and evolutive interpretation, respectively. Going through the preparatory work of the VCLT and case-law across different courts and tribunals we identified that the intention of the parties is the driving force, which informs each and every time the choice between static and evolutive interpretation. Such a choice, however, is not without its limits, most notable amongst these being that evolutive interpretation should never reach the point where it modifies/amends the treaty text and the corresponding obligation. This would lead to an *alloiosis* of the obligation, a type of motion that goes beyond the scope of interpretation, and is more characteristic of amendment as will be shown in Chapter 5.

In Section 3 of the Chapter, we started from an observed tendency amongst international courts and tribunals to apply the VCLT rules, and the modern understanding thereof, to pre-VCLT treaties. This practice has been rationalised on the basis of the claim that the rules of interpretation have not changed significantly in the last few centuries.
In order to put to the test this claim the following were examined: i) whether pre-VCLT there was general agreement even as to the existence of rules of interpretation; ii) whether pre-VCLT the content of those rules was fixed and enjoyed general approval; iii) whether the rules of interpretation were also open to interpretation; and iv) the logical and methodological fallacies of refusing the mutability of rules of interpretation through time. From that analysis, what emerged was that rules of interpretation not only can change, but they have and continue to do so.

This then led then to the question, when and under what conditions modern rules of interpretation can be applied to earlier treaties. This question opened the door to examining issues connected to intertemporal and the tug-of-war between the principle of contemporaneity and evolutive interpretation. By examining all the possible solutions and the logical and normative consistency with the existing international legal system it was concluded that the ‘time-will’ of the parties to the earlier treaty will be determinative of whether the rules of interpretation of that time or of today should be applied. The only exception was when the parties explicitly made a determination on the specific set of rules of interpretation to be applied. In that case, the explicit expression of the intention of the parties, supersedes any presumption on the basis of the ‘time-will’ relating to the treaty as a whole. This solution, of course means that courts and tribunals may have to start examining properly what the exact content of the rules of interpretation at a particular era were, when they interpret a pre-VCLT treaty. But the difficulty of the situation does not bear upon the systemic coherence of our conclusions.

Returning, thus, to the concept of motion through time and the ability of the rules of interpretation to ‘time-travel’ rules of interpretation, the answer should be this. As in physics, any notion of ‘time-travel’ is connected and restricted by the speed of light, which is the cornerstone of the physical laws of our Universe, so any ‘time-travel’ in international law is dependent on the cornerstone of this system, ie the intention of the parties.

This intention provides all the answers to our questions. When a treaty is to be interpreted statically, then the rules of interpretation at the time of the conclusion of the treaty are to be applied. The treaty and its interpretative rules travel forward in time in a kind of ‘time-bubble’ to be adjudicated and applied today. When a treaty is to be interpreted evolutively, then the rules of interpretation to be applied are those as they have emerged through the passage of time. The only way to break up this connection between the treaty and its rules of interpretation is,
once again, through that fundamental concept of international, the intention of the parties. In theory, and if the parties so will it, then modern rules of interpretation can go against the arrow of time and apply to a treaty that exists in its own ‘time-bubble’. But this has to be expressly agreed on by the parties. In conclusion, rules of interpretation can indeed be ‘time-travelers’ but only if the parties so will it.