THE RULES OF INTERPRETATION OF CUSTOMARY INTERNATIONAL LAW

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Interim Report of the ILA Study Group on the Content and Evolution of the Rules of Interpretation

by Photini Pazartzis, Geir Ulfstein, Panos Merkouris & Daniel Peat

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ILA STUDY GROUP ON
THE CONTENT AND EVOLUTION OF THE RULES OF INTERPRETATION

INTERIM REPORT – 19-24 AUGUST 2018, SYDNEY**

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* This Interim Report was prepared by the Chairs (Pazartzis and Ulfstein) and the Rapporteurs (Peat and Merkouris) on the basis of the Preliminary Reports on specific (quasi-) judicial bodies prepared by the members of the Study Group. The Chairs and Rapporteurs would like to thank all the members for their tireless work, invaluable contributions and comments to earlier drafts of this report.

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Introduction

The ILA Study Group on Content and Evolution of the Rules of Interpretation was established in May 2015, upon approval by the Executive Council of the ILA. The Study Group has held annual meetings since its formation, in Athens (13-14 May 2016), The Hague (21-22 April 2017), and Oslo (14-15 May 2018). These meetings have been made possible by the generous support of the Athens Public International Law Center (AthensPIL) and PluriCourts - Centre for the Study of the Legitimate Roles of the Judiciary in the Global Order.

During the Study Group’s inaugural meeting in 2016, the ILA Study Group Road Map was presented and discussed. The members present showed particular interest in certain topics, but it was decided that finalisation of the work agenda of the Study Group should occur after the input of all members of the Study Group and other ILA members at Johannesburg, at which the Group presented its preliminary report. It was decided that the work of the Study Group would be divided according to issue areas, with a view to cover the most important courts, tribunals and treaty bodies (ICs) and members being invited to draft a report on the approach to interpretation adopted by the IC in relation to which they had particular expertise. At the second meeting of the Study Group, held in The Hague in 2017, members presented draft reports on the interpretative practice of various ICs, which were structured around the questionnaire that is annexed to this Report. Two members (d’Aspremont & Gardiner) also presented an introductory paper on the nature of interpretation, which is discussed below. The third meeting of the Study Group, which was held in Oslo in 2018, allowed the members of the Group to elaborate their draft reports with a view to submitting interim reports in light of the ILA Biennial Meeting in Sydney. The Study Group aims to finalise its work by the expiration of its mandate in 2020.

The present Report, which was drafted before the Study Group met in May 2018, will outline the main features of the reports on the interpretative approaches of ICs submitted by members. The divergences in the interpretative practice across specialist areas can be looked at from a great variety of perspectives.¹ Due to space constraints, this Report necessarily summarises members’ reports in a very selective manner. Readers that are interested in consulting the individual reports in more depth are directed towards the page of

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¹ See Report submitted by Gardiner and d’Aspremont.
the Study Group on the ILA website, where full versions of the reports will be uploaded. The Rapporteurs have decided to focus on several key issues in this Report: namely, the court or tribunal’s recognition (or otherwise) of Articles 31 to 33 of the Vienna Convention on the Law of Treaties (VCLT) as applicable; the application of any maxims or canons of interpretation outside the framework of the VCLT; and any factors that influence or may explain the interpretative approach of the particular court or tribunal.

The term ‘interpretation’ is often used to denote processes that have different objects and are governed by different rules.2 ‘What is interpreted in international legal practice and discourses mainly include the legal pedigree of rules (law-ascertainment formalism), the content of rules (content-determination interpretation),3 and facts (facts-determination or evidentiary interpretation).4 For the purposes of this Report, and unless otherwise explicitly indicated, what is examined is ‘content-determination interpretation’.

i. PCIJ/ICJ5

The jurisprudence of the International Court of Justice (ICJ) at first sight epitomizes the orthodox approach to treaty interpretation, manifesting, in the words of one author, “une symbiose parfaite”6 with the rules of interpretation that are codified in the Vienna Convention on the Law of Treaties (VCLT).

The link between the practice of the World Court and the development of the rules of interpretation is clear in the work of the International Law Commission, which almost exclusively relied on the jurisprudence of the nascent ICJ and its predecessor, the Permanent

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4 Facts can also the object of several types of interpretive processes. In that sense, establishing facts can also be understood as an interpretive process (See e.g. J d’Aspremont and MM Mbengue, ‘Strategies of Engagement with Scientific Fact-finding in International Adjudication’, (2014) 5/2 Journal of International Dispute Settlement 240–72. Yet, it remains that the two main facets of interpretation pertains to the determination of the content of rules and the ascertainment of these rules as legal rules)
5 Based on a report submitted by Panos Merkouris and Daniel Peat.
Court of International Justice (PCIJ), as the basis upon which to elaborate the rules that later became Articles 31-33 of the VCLT.\footnote{See for example, Yearbook of the ILC 1966, vol II, 217-26.}

Yet, despite this close link between the World Court and the rules of the VCLT, understanding the interpretative practice of the Court is not as straightforward as it seems. The Court adopts a pragmatic approach to interpretation, which rejects a mechanistic approach to the rules of interpretation and admits the existence of interpretative principles that are not codified in the VCLT, albeit usually in a supplementary fashion. This approach has provided the Court with a great degree of latitude, both in terms of the materials that it takes into account in the interpretative process and the weight that it gives to different elements of interpretation.

The Court attributes great weight to the text and its ‘ordinary meaning’, and although it recognizes it as a starting point, it does not consider it hierarchically superior to other approaches. ‘The rule of interpretation according to the natural and ordinary meaning of the words employed “is not an absolute one. Where such a method of interpretation results in a meaning incompatible with the spirit, purpose and context of the clause or instrument in which the words are contained, no reliance can be validly placed on it.” (South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962, p. 336)’.\footnote{Arbitral Award of 31 July 1989 (Guinea-Bissau v Senegal) (Judgment) [1991] ICJ Rep 53, [48].}

The Court’s preference towards a ‘holistic approach’ to interpretation aside, it has generally been reticent to explicitly define particular concepts in the general rule of interpretation and the supplementary means of interpretation available under Articles 31 and 32 of the Vienna Convention. Nevertheless, some judgments provide an insight into the Court’s conception of these elements.\footnote{In more detail, and analysis of relevant case-law see Report submitted by Merkouris and Peat.}

Although the Court post-VCLT has eventually settled to a tendency of referring to the VCLT rules, even if simply to assert that they codify customary international law, on occasion it has referred to maxims/canons of interpretation not explicitly mentioned in the VCLT. These
include *in dubio mitius*,\(^{10}\) *effet utile* (ut res magis valeat quam pereat),\(^ {11}\) *contra proferentem*,\(^ {12}\) *expressio unius est exclusio alterius/ a contrario*,\(^ {13}\) *ejusdem generis*,\(^ {14}\) *per analogiam*,\(^ {15}\) and *a minore ad majus*.\(^ {16}\) This practice was for obvious reasons more prevalent during the pre-VCLT era,\(^ {17}\) and nowadays when referred to the Court tends to stress their supplementary nature, or their subsumption by the VCLT rules.\(^ {18}\)

Although the use of publications to assist in the interpretative process was and remains a common practice in the Separate and Dissenting Opinions of Judges of the PCIJ and ICJ in order to bolster their findings, the Court (and the PCIJ) tend to be much more cautious. However, there have been cases where both the PCIJ and the ICJ have found recourse to material, such as dictionaries\(^ {19}\) and ILC Draft Codes and Articles.\(^ {20}\)

Finally, the Courts when required have also dabbled in interpretation of non-treaty instruments, such as optional clause declarations and Security Council resolutions. Although the interpretation of these instruments bears striking similarities with that of treaties, the


\(^{12}\) *Case concerning the Payment in Gold of Brazilian Federal Loans Contracted in France* (France v Brazil), *PCIJ Series A*, No 21; *Fisheries Jurisdiction Case* (Spain v Canada), [1998] *ICJ Rep* 432, [51].


\(^{14}\) *Northern Cameroons (Cameroon v United Kingdom)* (Preliminary Objections), [1963] *ICJ Rep* 15, Separate Opinion of Judge Sir Percy Spender, 91.


\(^{16}\) *Corfu Channel (United Kingdom v Albania)* (Merits), [1949] *ICJ Rep* 4, Dissenting Opinion by Judge Azevedo, [22].

\(^{17}\) See, for instance, *Dispute Regarding Navigational and Related Rights* (Costa Rica v Nicaragua), [2009] *ICJ Rep* 213, [48], where the ICJ refused to apply the *in dubio mitius* principle.

\(^{18}\) With the *effet utile* being perhaps a notable exception.

\(^{19}\) *Competence of the International Labour Organization in regard to International Regulation of the Conditions of Labour of Persons Employed in Agriculture* (Advisory Opinion), *PCIJ Series B*, No 2, [41-5]; *Oil Platforms* (Iran v United States of America) (Preliminary Objections), [1996] *ICJ Rep* 803, [45].

Court and academics have cautioned that ‘the provisions of [the VCLT] may only apply analogously to the extent compatible with the sui generis character of [these instruments]’.

ii. Ad hoc arbitrations

The nature of ad hoc tribunals means that awards are less likely to exhibit trends in interpretation that might be evident in the jurisprudence of a permanent court or tribunal. Indeed, the practice is too variegated to draw one predominant approach. Whilst the awards manifest an eclectic approach to interpretation, some offer more thorough accounts of interpretation or specific indications of how relevant principles of interpretation are to be applied, especially the Rhine Chlorides and Iron Rhine awards.

In the early period (i.e. pre-VCLT) certain tribunals adopted a Vattelian approach according to which it is not allowable to interpret what has no need of interpretation. Thus the Tribunal in John Hois, held that: ‘[i]t is not permissible for the Commissioner to speculate with respect to what the treaty makers might or could have provided when their language is clear’.

Historically, the case law of ad hoc arbitral tribunals seems to show that tribunals referred frequently to a subjective intention in the context of bilateral treaties. For example, the Tribunal in the Island of East Timor case stated that the interpretation of treaties ought ‘to be made in conformity with the real mutual intentions of the parties, and also in conformity with what can be presumed between parties acting loyally and with reason, not that which has been promised by one to the other according to the meaning of the words used’. This search for the intention of the Parties has even extended to interpretation of treaties contra legem.

In the post-VCLT period, however, there appeared to be, eventually, a shift in the interpretative approaches of tribunals. Although acknowledging that the purpose of


22 Based on a report submitted by Richard Gardiner and Eirik Bjorge.


24 Louis John Hois (United States) v Austria and Wiener Bank-Verein (1928) 6 RIAA 265.

25 See for example Island of East Timor case (1914) 11 RIAA 497 and Ambatielos (1956) 12 RIAA 107.

26 Island of East Timor, 497.

interpretation is to search for the intentions of the parties, tribunals recognised that this was to be done through the means of interpretation set out in the Vienna Rules.\textsuperscript{28}

Few post-VCLT \textit{ad hoc} tribunals have placed reliance on maxims of interpretation that are not explicitly enshrined in the VCLT. Certain instances nevertheless bear mention. The principle of effectiveness was invoked by the tribunals in \textit{Rhine Chlorides} and \textit{Iron Rhine};\textsuperscript{29} the maxim \textit{expressio unius est exclusio alterius} was referred to by the Tribunal in the \textit{Air Services Agreement of 27 March 1946 (United States v France)} arbitration;\textsuperscript{30} and the maxim \textit{generalia specialibus non derogant} was considered by the tribunal to be available and of potential use in the \textit{Beagle Channel} arbitration.\textsuperscript{31}

\textbf{iii. ITLOS\textsuperscript{32}}

In the jurisprudence of ITLOS, express reference to the rules enshrined in Articles 31 and 32 of the VCLT is rare. The Tribunal has mentioned those provisions in only two cases,\textsuperscript{33} and in only one instance in its full composition.\textsuperscript{34} Nevertheless, the Tribunal has implicitly referred to and regularly borrowed the terminology and methodology enshrined within Articles 31 to 33 VCLT, even if not citing those articles explicitly.\textsuperscript{35}


\textsuperscript{29} \textit{Rhine Chlorides}, [92]; \textit{Iron Rhine}, [49].

\textsuperscript{30} \textit{Air Services Agreement of 27 March 1946 (United States v France)}, (1978) 54 \textit{ILR} 303, 316.

\textsuperscript{31} \textit{Argentina/Chile (Beagle Channel)} 21 \textit{RIAA} 53, [39].

\textsuperscript{32} Based on a report submitted by Valerie Boré Eveno.

\textsuperscript{33} \textit{Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)}, ITLOS Case No 16 (Judgment, 14 March 2012); \textit{Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area}, ITLOS Case No 17 (Advisory Opinion, 1 February 2011).

\textsuperscript{34} \textit{Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)}, ITLOS Case No 16 (Judgment, 14 March 2012).

\textsuperscript{35} See e.g. \textit{The 'Volga' Case (Russian Federation v Australia)}, ITLOS Case No 11 (Judgment, 23 December 2002), [77]; \textit{The MOX Plant Case (Ireland v United Kingdom)}, ITLOS Case No 10 (Order, 3 December 2001), [51].
The Tribunal has adopted a flexible, pragmatic approach to interpretation, without necessarily following a strict sequence of interpretative techniques.\textsuperscript{36} Despite this flexibility, the general approach of the Tribunal has been to read the provision being interpreted in light of other provisions of the Convention that concern the same subject or using the same terminology, or even in a broader context in light of the object and purpose of these provisions or the Convention. This conforms to the general approach of the rule of interpretation enshrined in Article 31 (1) VCLT. On the other hand, there are few references to the \textit{travaux préparatoires} in the jurisprudence of the Tribunal.

Rarely has the Tribunal drawn expressly on maxims or canons of interpretation that lie outside the scope of the VCLT, with the exception of reference to prior jurisprudence (if, indeed, one considers that to be a “canon” of interpretation). On occasion, however, the Tribunal seems to have implicitly relied on other maxims of interpretation, such as \textit{effet utile},\textsuperscript{37} restrictive or expansive interpretation,\textsuperscript{38} \textit{in dubio mitius},\textsuperscript{39} and \textit{expressio unius est exclusion alterius}.\textsuperscript{40}

With the exception of its own jurisprudence and that of the ICJ or arbitral tribunals, the Tribunal rarely explicates the materials upon which it draws in order to make an interpretation.\textsuperscript{41} It has occasionally relied on certain materials that fit within the rubric of Articles 31 and 32 of the Vienna Convention, such as other international agreements,\textsuperscript{42} the work of the International Law Commission (particularly in relation to State responsibility), and the preparatory work of the UNCLOS (i.e. the records of the Third Conference on the Law of the Sea and work of the ILC).

\textsuperscript{36} See \textit{The M/V ‘Virginia G’ Case (Panama/Guinea-Bissau)}, ITLOS Case No 19 (Judgment, 14 April 2014) [98]; \textit{The M/V ‘Louisa’ Case (Saint Vincent and the Grenadines v Kingdom of Spain)}, ITLOS Case No 18 (Judgment, 28 May 2013), [137]; \textit{Dispute Concerning Delimitation of the Maritime Boundary between Ghana and Côte d’Ivoire in the Atlantic Ocean (Ghana/Côte d’Ivoire)}, ITLOS Case No 23 (Judgment, 23 September 2017), [624 et seq].

\textsuperscript{37} \textit{Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)}, ITLOS Case No 16 (Judgment, 14 March 2012), [391].

\textsuperscript{38} \textit{Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission (SRFC)}, ITLOS Case No 21 (Advisory Opinion, 2 April 2015), [68].

\textsuperscript{39} \textit{Dispute Concerning Delimitation of the Maritime Boundary between Ghana and Côte d’Ivoire in the Atlantic Ocean (Ghana/Côte d’Ivoire)}, ITLOS Case No 23 (Judgment, 23 September 2017), [545 et seq].

\textsuperscript{40} Ibid, [549-50].

\textsuperscript{41} See \textit{Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission (SRFC)}, ITLOS Case No 21 (Advisory Opinion, 2 April 2015), Separate Opinion of Judge Cot, [32].

\textsuperscript{42} \textit{The M/V ‘Virginia G’ Case (Panama/Guinea-Bissau)}, ITLOS Case No 19 (Judgment, 14 April 2014) [216].
One might surmise that certain factors have led to the Tribunal’s particular approach to interpretation. The first element is that the majority of cases with which the Tribunal was seised (15 out of 25) related to emergency procedures, such as prompt release of ships or provisional measures, which explains the relatively summary nature of decisions issued by ITLOS. Second, UNCLOS does not refer to any applicable rule of interpretation, which, in combination with vague provisions in the Convention, leaves a significant discretion to the Tribunal and could explain its pragmatist and constructive approach to interpretation. Third, one might think that the customary origins of certain rules incorporated into UNCLOS lead to a certain reticence on the part of the Tribunal to apply rules of treaty interpretation to those provisions. This impression is supported by the fact that the two times in which the Tribunal has referred to the articles of the VCLT, the provisions at issue did not have customary origins. Fourth, from a systemic point of view, the interpretative approach of ITLOS might be dictated by the desire to assert itself as a specialized court, different from other courts and tribunals that are competent to hear cases related to the law of the sea, such as the ICJ. Fifth, the composition of the 21-member bench, and – in particular – the previous experience that those judges, as well as judges ad hoc, bring to the bench may form the approach adopted by the Tribunal. Finally, the fact that international organisations, and even private persons (in relation to activities carried out in the Zone), may appear before the Tribunal is without doubt a factor favouring the teleo-systemic and constructive interpretation adopted by the Tribunal.

iv. WTO

The interpretative approach of the panels and Appellate Body (AB) of the WTO has been guided by Article 3.2 of the Dispute Settlement Understanding (DSU), which provides that the purpose of the dispute settlement system is ‘to clarify the existing provisions [of the covered agreements] in accordance with customary rules of interpretation of public international law.’ The AB referred to the VCLT rules of interpretation in its first decision (U.S.—Gasoline 1996), and has affirmed that Articles 31, 32, and 33 of the VCLT reflect the customary rules of interpretation of public international law, and thus are applicable by

43 Based on a report submitted by Hélène Ruiz Fabri & Joel Trachtman.
virtue of Article 3.2 DSU. It has, however, frequently applied other rules or principles of interpretation.

At the time that the WTO was formed, the member states determined to modify the interpretative style followed previously in GATT dispute settlement. The GATT period was characterized by frequent and early resort to travaux préparatoires. Article 3.2 of the WTO Dispute Settlement Understanding was formulated to refer explicitly to the rules of interpretation of customary international law, and implicitly to the VCLT, which was thought to prioritize text and context over travaux préparatoires. The case law of the AB is equivocal about the relationship between Articles 31 and 32 VCLT, emphasizing in some cases a sequential relationship between the two provisions, whilst also recognizing in other cases that ‘[t]he principles of interpretation that are set out in Articles 31 and 32 are to be followed in a holistic fashion.’

The AB has adopted certain canons of interpretation that lay outside the framework of Articles 31 and 32 of the VCLT, in particular effet utile, which has been influential in countless cases. Another interpretative principle used is that of cumulative application, whereby each restrictive provision generally applies, regardless of whether another provision applies, and regardless of whether another provision seems to permit the relevant conduct. Other canons of interpretation that lay outside the VCLT have also been applied by the AB, including ejusdem generis, a contrario interpretation, and in dubio mitius.

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Whilst, in early WTO jurisprudence, the AB emphasized dictionary definitions as indicative of ordinary meaning, the AB has criticized the extent to which panels rely on dictionary definitions: ‘to the extent that the Panel’s reasoning simply equates the ‘ordinary meaning’ with the meaning of words as defined in dictionaries, this is, in our view, too mechanical an approach.’\textsuperscript{52} In EC—\textit{Chicken Classification}, the AB clarified its approach to ‘ordinary meaning.’ First, dictionaries are a useful starting point, but ‘must be seen in the light of the intention of the parties “as expressed in the words used by them against the light of surrounding circumstances”.’\textsuperscript{53} Second, ‘interpretation pursuant to the customary rules codified in Article 31 of the \textit{Vienna Convention} is ultimately a holistic exercise that should not be mechanically subdivided into rigid components.’\textsuperscript{54} The Appellate Body has cautioned against equating ‘ordinary meaning’ with dictionary definition.\textsuperscript{55}

In relation to context, the AB has often interpreted specific provisions of WTO law by reference to other provisions of WTO law, utilizing the other provisions as context, and seeking to provide an integrated and coherent approach to the overall treaty.\textsuperscript{56} The AB has also adopted a broader conception of context in certain cases. In its \textit{Computers} decision, for example, the AB found that the Harmonized System and its Explanatory Notes, including decisions by the Harmonized System Committee of the World Customs Organization, were part of the context required to be considered.\textsuperscript{57}

\textsuperscript{52} \textit{United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services}, WT/DS285/AB/R (Appellate Body Report, adopted 20 April 2005), [166 and 175-6]. ‘We do not accept, as the Panel appears to have done, that, simply by requesting the preparation and circulation of these documents and using them in preparing their offers, the parties in the negotiations have accepted them as agreements or instruments related to the treaty. Indeed, there are indications to the contrary’ [176]. For a history and analysis of the Appellate Body’s use of dictionaries, see I Van Damme, \textit{Treaty Interpretation by the WTO Appellate Body} (Oxford 2009), 221-35.


\textsuperscript{54} \textit{European Communities – Customs Classification of Frozen Boneless Chicken Cuts}, WT/DS269/AB/R, WT/DS286/AB/R (Appellate Body Report, adopted 27 September 2005), [176].


In relation to object and purpose, the AB has stated that the object and purpose to be referenced is that of the treaty as a whole, rather than that of a specific provision, although it is also possible to take into account the object and purpose of specific treaty terms or specific agreements. Thus, ‘to the extent that we can speak of the “object and purpose of a treaty provision”, it will be informed by, and will be in consonance with, the object and purpose of the entire treaty of which it is but a component.’

The AB has been forthcoming in explicating the stages in its interpretative reasoning, most clearly when operating under the VCLT. According to some views, sticking to a rather dominantly textualist approach was a way for the Appellate Body to be rid of the teleological approach (‘embedded liberalism’) in force during the GATT.

v. The UN Human Rights Committee, other UN Human Rights Treaty Bodies and Treaty Interpretation

The Human Rights Committee (HRCttee) and the other UN Human Rights Treaty Bodies (hereinafter collectively referred to as UN-HRTBs) are treaty-monitoring bodies, which perform three main functions: i) they conduct periodic state reporting procedures; ii) they develop/adopt General Comments and iii) they hear ‘communications’, i.e. complaints by individuals under the human rights treaties. It is this multifariousness of the roles that the UN-HRTBs are called to play, the synthesis of the various Committees, the ‘pragmatic’ structure of the Views, and their ‘audience’ that are some of the factors that influence the interpretative approaches and solutions adopted by the UN-HRTBs.

The UN-HRTBs jurisprudence (views) contain only sporadic and limited explicit references to the VCLT rules. Such references were encountered more often in the early stages of

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61 Based on a report submitted by Photini Pazartzis and Panos Merkouris.
62 SWM Brocks v The Netherlands, Communication No 172/1984 (Views adopted on 9 April 1987), [12.2-3]; LG Danning v The Netherlands, Communication No 180/1984 and FH Zwaan-de Vries v The Netherlands, Communication No 182/1984 (Views adopted on 9 April 1987), [12.2-3]; Errol Johnson v Jamaica, Communication No 588/1994 (Views adopted on 22 March 1996), [8.2]; Robinson LaVende v Trinidad and
evolution of the UN-HRTBs’ body of work, but gradually have been making increasingly rarer appearances, \(^{63}\) possibly in an attempt to make the views more accessible and palatable to a wider audience. Nonetheless, that is not to say that the UN-HRTBs do not adhere to the VCLT rules, far from it. Despite the fact that the UN-HRTBs often announce the interpretative result without much in the direction of an exegesis, there are frequent references to the wording and denominations of interpretative norms and methods as stipulated under the VCLT, \(^{64}\) and the structure of Arts. 31-33 VCLT is often used as inspiration.\(^{65}\)

The UN-HRTBs, of course, seek the ‘ordinary meaning’ of the terms to be interpreted\(^{66}\) in ‘good faith’, \(^{67}\) and refer to ‘context’ ‘subsequent practice’ and other ‘relevant rules’, \(^{68}\) as well as ‘other supplementary means’.\(^{69}\) However, consistent with their special roles as bodies supervising the application of international human rights treaties, the UN-HRTBs (and particularly the HRCttee) have progressively favored a broader and more liberal interpretation of the Covenant’s provisions, \(^{70}\) although it is difficult to ‘identify a consistent

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\(^{63}\) Appearing mostly either in individual opinions of members or more likely in the arguments of the parties; TM v Sweden, Communication No 228/2003 (Views adopted on 18 November 2003), CAT/C/31/D/228/2003, Individual opinion by Committee member, Mr Fernando Mariño Menéndez.

\(^{64}\) E.g references to ‘object and purpose’, ‘travaux préparatoires’ etc. See inter alia: Robinson LaVende v Trinidad and Tobago, Communication No 554/1993 (Views adopted on 29 October 1997), [5.3-4]; Lauri Peltonen v Finland, Communication No 492/1992 (Views adopted on 21 July 1994), [8.3]; Hugo van Alphen v The Netherlands, Communication No 305/1988 (Views adopted on 23 July 1990), [5.8].


\(^{66}\) Charles Stewart v Canada, Communication No 538/1993 (Views adopted on 1 November 1996), [12.4]; Darmon Sultanova v Uzbekistan, Communication No 915/2000 (Views adopted on 30 March 2006), [7.3]. Sometimes the ‘ordinary meaning’ is determined by reference to other international instruments, although this blurs somewhat the lines between Art. 31(1) and 31(3)(c) of the VCLT; Grieu v Algeria, Communication No 1327/2004 (Views adopted on 10 July 2007), [7.2].

\(^{67}\) Glen Ashby v Trinidad and Tobago, Communication No 580/1994 (Views adopted on 21 March 2002) [10.8-9].


\(^{69}\) SWM Brocks v The Netherlands, Communication No 172/1984 (Views adopted on 9 April 1987), [12.2].

\(^{70}\) Using teleological interpretation, either be referring simply to the ‘object and purpose’ of the treaty, or by referring to the nature of the treaty as a ‘living instrument’.
trend of liberalism or conservatism, and this has been attributed mainly to the changes in composition of the HRC over time’.  

They have done so mainly by referring to the ‘living instrument’ doctrine and holding that ‘the rights protected under [the core UN human rights treaties] should be applied in context and in the light of present–day conditions’. Other interpretative principles, maxims or techniques, not explicitly mentioned in the VCLT, that have been used by the UN-HRTBs include the *ut res magis valeat quam pereat* principle, and *a contrario* interpretation and ‘margin of appreciation’ although this last one is rather better characterized as ‘application’ than ‘interpretation’.

The UN-HRTBs have also predominantly favored a self-referential approach of invoking their own Concluding Observations, General Comments and jurisprudence. On occasion, they have even referred to General Comments of other human rights treaties. Despite the importance of General Comments in their jurisprudence, the Views of the UN-HRTBs do not shed any substantial light as to where exactly in the Article 31-32 VCLT framework they consider such reference to fall. The most that has been said has been that such Comments/Recommendations are ‘an authoritative interpretation tool’.

71 Report submitted by Fay Pazartis and Panso Merkouris, 7.
74 *Charles Stewart v Canada*, Communication No 538/1993 (Views adopted on 1 November 1996), [12.7].
Finally, on occasion, the HRCttee has also followed a more subjective line of interpretation motivated by its concern to convey the ‘proper’ message to States parties,\textsuperscript{79} although this has also been criticized as being extremely subjective and tantamount to hypothetical reasoning.\textsuperscript{80}

vi. Inter-American Commission/Court of Human Rights\textsuperscript{81}

Generally, the IACtHR refers, in passing, to the VCLT asserting that such question must be analyzed in conformity with the customary rules of interpretation enshrined in the VCLT. This mention appears in a very formal way, as a sort of necessary and obliged international classical mantra. When a very specific rule of the VCLT is cited, it is only to point it out within the framework of its general demonstration. It has to be pointed out that an ‘explicit mention to the way of interpreting (a kind of pedagogical development addressed in a special section or paragraph … is quite common trend in the advisory function of the IACtHR, although not in the contentious cases, unless the Court is dealing with a ‘hard case’.\textsuperscript{82}

However, the IACtHR does not make any \textit{substantial considerations} about interpretation in general and about VCLT’s rules of interpretation in particular.\textsuperscript{83} Even where Advisory opinions are concerned, where in some instances a “discussion” of the VCLT rules was required, this did not trigger a real reflection on its “interpretation rules”.\textsuperscript{84} Because of this, it is quite challenging to find a clear shift in the apprehension of the content of a rule of interpretation, since the Court does not clearly detail the meaning of VCLT rules, nor does it explain any shifts in its approach to them.

During the first years of its functioning, the IACtHR used to point out quite regularly the rules of the VCLT. After a while, during A. Cançado Trindade tenure, Article 29(b) of the ACHR was its main focal point, and in fact the Court has interpreted its own standard of

\textsuperscript{79} \textit{Errol Johnson v Jamaica}, Communication No 588/1994 (Views adopted on 22 March 1996), [8.4].
\textsuperscript{80} \textit{Errol Johnson v Jamaica}, Communication No 588/1994 (Views adopted on 22 March 1996), Individual Opinions of Christine Chanet and Francisco José Aguilar Urbina.
\textsuperscript{81} Based on a report submitted by Laurence Burgorgue-Larsen.
\textsuperscript{82} See Report submitted by Laurence Burgorgue-Larsen, 22-5.
\textsuperscript{83} Viviana Gallardo and al, IACtHR (Order of the President of the Court, 15 July 1981), Series A, No 101, OC-21/14.
\textsuperscript{84} \textit{The Effect of Reservations on the Entry into Force of the American Convention on Human Rights (Arts 74 and 75)}, IACtHR (24 September 1982), OC-2/82; \textit{Restrictions to the Death Penalty (Arts. 4§2 and 4§4) American Convention on Human Rights)}, IACtHR (8 September 1983), OC-3/83, [45].
interpretation enshrined in that article. Nowadays, we could affirm that both “rules” (VCLT rules and American convention rules of interpretation) are used, mixed with all the other kinds of “techniques of interpretation”.

Needless to say that such preference and prevalence of interpretation developed by the IACtHR is a clearly teleological one. This approach has been pointed out since the very beginning of its activity, and holds strong until today. Textual, contextual, intention of the parties, and historical interpretation have also been resorted to, with different weight being given to them, yet the teleological remains the dominant one. Revealing is the latest advisory opinion where the Court asserted that the textual approach and good faith could not be “a rule in itself”. For the Court, “the interpretation exercise must integrate the context, and more especially, the object and purpose”.

What are called other “maxims/canons” of interpretation cannot be said to have been clearly used by Inter-American bodies. However, other “interpretation techniques”, such as the pro homine (or pro persona) principle, the international corpus juris, effet utile, the ‘integration technique’ and the ‘combinaison normative’ technique, are strongly employed in Inter-American case-law.

The interpretative approach does not change when unilateral acts of States or of international organizations are concerned, e.g. waivers, reservations, or declarations. As the IACtHR

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85 Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts 13 and 29) (requested by Costa Rica), IACtHR (13 November 1985), OC-5/85, [44]; see also Report submitted by Laurence Burgorgue-Larsen, 32-4 on “the conventionality control”.

86 Viviana Gallardo and al, IACtHR (Order of the President of the Court, 15 July 1981), Series A, No 101, [15-6]; Other Treaties Subjected to the Consultative Jurisdiction of the Court (Art 64 American Convention on Human Rights), IACtHR (24 September 1982), OC-1/82.

87 Mapiripán Massacre v Colombia, IACtHR (Judgment, 15 November 2005), Series C No134, [104]; Baena Ricardo v Peru, IACtHR (Judgment, 28 November 2003), Series C No 104, [96].

88 In more detail see Report submitted by Burgorgue-Larsen, 9-11. Of note is the original dismissal by the Court of the ‘subjective criteria’ (e.g. the intention of the parties) in Restrictions to the Death Penalty (Arts. 4§2 and 4§4 American Convention on Human Rights), IACtHR (8 September 1983), OC-3/82, [50], which was a few years later tempered by the search for the ‘intention of all the American States’.

89 Entitlement of Legal Entities to Hold Rights under the Inter-American Human Rights System, IACtHR (26 February 2016), OC-22/16, [39] (this is the Report author’s translation). The original text goes “una regla por si misma ... el ejercicio de interpretación debe involucrar el contexto y, en especial, dentro de su objeto y fin”.

90 For an analysis of the relevant case-law, see Report submitted by Burgorgue-Larsen, 13-9. The last two methods lead to such an enlargement of the scope of certain rights that they could be qualified as ‘creating’ new rights.

91 Viviana Gallardo case.

92 Other Treaties Subjected to the Consultative Jurisdiction of the Court (Art 64 American Convention on Human Rights), IACtHR (24 September 1982), OC-1/82; The Effect of Reservations on the Entry into Force of
has pointed out, a textual interpretation mixed with the teleological one ensures that the realm of the discretionary power of the States is diminished.94

Finally, a wide array of factors, both internal and external have and continue to shape the Court’s bold approach to interpretation. These include: i) legal internal factors (the features of the American Declaration and Convention; the *ratione materiae* jurisdiction of the IACtHR; the Court’s Statute); ii) sociological internal factors (e.g. the composition of the Court – background and profile of the legal staff); iii) external factors (e.g. the political context during the first steps of the Inter-American Human Rights System).95

vii. European Court of Human Rights96

The interpretation of the European Court of Human Rights (ECHR) raises certain questions that are specific to that regime: for example, whether human rights conventions should be interpreted in a special way; the extent to which judgments of the European Court of Human Rights (ECHR) incur on the sovereignty of the contracting parties; and the relationship between interpretation and deference.

At the outset, it should be noted that the Court has addressed the VCLT’s application to ECHR in several cases. In the *Demir and Baykara* (2008), the Court stated that it is ‘guided mainly by the rules of interpretation provided for in articles 31 to 33 of the Vienna Convention on the Law of Treaties’. The Court has in its subsequent practice constantly confirmed the relevance of the Vienna Convention for the interpretation of the ECHR. But, as in the *Demir and Baykara*, the significance of the VCLT has been subject to qualifications. For example, in *Rantsev* (2010) the Court stated that the ECHR must be interpreted in the light of the VCLT.97 Similarly, in *Cyprus v. Turkey* (2014), the Court said that ‘[d]espite its specific character as a human rights instrument, the Convention is an international treaty to

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93 *Interpretation of the American Declaration of the Rights and Duties*, IACtHR (14 July 1989), OC-10/89, [42].
95 For a detailed analysis, see Report submitted by Burgorgue-Larsen, 25-32.
96 Based on a report submitted by Geir Ulfstein.
97 *Rantsev v Cyprus and Russia* (2010), Application No 25965/04, [273].
be interpreted in accordance with the relevant norms and principles of public international law, and, in particular, in the light of the Vienna Convention on the Law of Treaties’.98

Three interpretative approaches of the Court are particularly noteworthy: effective interpretation, evolutive interpretation, and systemic interpretation. In relation to effective interpretation, an early example is the Golder [Plenary] case (1975) where the Court without explicit basis in ECHR article 6 on fair trial read in a right of access to a court. Similarly, in the Soering case [Plenary] (1989) the Court noted that ECHR article 5 (1) (f) allowed detention with a view to extradition. It held, however, that in interpreting article 3 on the prohibition on torture and degrading and inhuman treatment or punishment the Court had to interpret the ECHR ‘so as to make its safeguards practical end effective’ and that the interpretation is ‘consistent with the general spirit of the Convention, an instrument designed to maintain and promote the ideals and values of a democratic society’.99 Extradition to US death row was therefore prohibited. This was cited with support in the Mamatkulov and Askarov (2005) where the Court, without explicit basis in the ECHR, held that its interim measures were binding on the states parties.

The jurisprudence of the Court also manifests a tendency to interpret the Convention in an evolutive manner. The Tyrer case (1978) introduced the doctrine of the European Convention as a ‘living instrument’,100 which has been followed in subsequent cases. The Court has based its evolutive interpretation on what it deems a European consensus in domestic law among member states as well as practice in the form of international instruments.101 As stated in the Demir and Baykara: ‘The consensus emerging from specialized international instruments and from the practice of Contracting States may constitute a relevant consideration for the Court when it interprets the provisions of the Convention in specific cases’.102 In this respect, it can be concluded that subsequent state practice plays a far more extensive role than what is envisaged in article 31 (3) (b) in the Court’s evolutive interpretation. But the Court does not make it clear whether the requirements set out in article 31 (3) (b) are fulfilled – or whether

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98 Cyprus v Turkey [GC] (2014), Application No 25781/94, [23] (emphasis added)
100 Tyrer v the United Kingdom (1978), Application No 5856/72, [31].
102 Demir and Baykara v Turkey [GC] (2008), Application No 34503/97, [85] (emphasis added).
subsequent state practice is used in the Court’s evolutive interpretation, beyond article 31 (3) (b), based on the original evolutive intention of the parties according to article 31 (1).103

The ECtHR has generally expressed its commitment to interpreting the ECHR consistent with other rules of international law, in accordance with Article 31(3)(c) of the VCLT. In Demir and Baykara (2008) the Court devoted a full section to ‘[t]he practice of interpreting Convention provisions in the light of other international texts and instruments’.104 The relationship between the ECHR and other rules of international law may concern general international law or its relationship to other treaties. For example, the Behrami and Saramati (2007) case is based on the general rules on attribution of responsibility between the United Nations and member states contributing with military forces.105 In a similar vein, the Stichting Mothers of Srebrenica and others case (2013) concerned the immunity of the United Nations – which partly is based on general international law and partly on treaty.106

In addition to the abovementioned approaches, the Court has adopted certain interpretative practices that are deferential to Member States. First, the margin of appreciation, as part of the principle of subsidiarity, has been developed by the Court since the classic Handyside case in 1976.107 It is now reflected in the Brighton Declaration (2012) as well as in the new Protocol 15 to the ECHR. Subsidiarity aims at the protection of national freedom by leaving decision-making to states, unless it is more effectively or efficiently performed at the international level.108

In a similar, but slightly different vein, the Bosphorus standard has been applied by the Court since 2005 regarding national implementation of EU law.109 This standard means that the ECtHR will not review states’ implementation of EU law since the EU is considered to protect human rights ‘in manner which can be considered at least equivalent to that for which

104 Demir and Baykara v Turkey [GC] (2008), Application No 34503/97, [65-86].
105 Behrami and Behrami v France and Saramati v France, Germany and Norway [GC] (2007), Application Nos 71412/01 and 78166/01.
106 Stichting Mothers of Srebrenica and others v the Netherlands (2013), Application No 65542/12.
107 Handyside v United Kingdom, Application No 5493/72 (1976), [48].
the Convention provides’. Therefore, the Court applies a presumption that a member state respects the Convention obligations when it ‘does no more than implement legal obligations flowing from its membership of the organisation’. However, this presumption ‘can be rebutted if, in the circumstances of a particular case, it is considered that the protection of Convention rights was manifestly deficient. In such cases, the interest of international cooperation would be outweighed by the Convention’s role as a “constitutional instrument of European public order” in the field of human rights’.110 This standard has been followed in subsequent case law, including the Michaud case (2012)111 and the recent Avotinš case (2016).112

viii. European Charter of Fundamental Rights113

Interpretation of the EuFRCH (in force since 1/12/2007) follows the general “rules of interpretation” of human rights treaties insofar as the Charter does not provide special references or methods to be respected.

The systematic-contextual interpretation finds its counterpart in the principle of ‘unity of Community law’, i.e. the synoptical evaluation of all parts of primary law of the EU including the protocols and the EuCHFR with its Protocol No. 30 concerning the application of the Charter for Poland and UK. The ECJ underlined in its first sentences this overall contextual approach: In Chatzi114 the Court refers to its constant case law where a norm has to be interpreted not only according to its wording but in the context and the aims pursued by the norm.115 Similarly, in Donagh v. Ryan Ltd116 the Court interpreted Arts. 16, 17 EuCHRF and the principle of proportionality in accordance with the entire primary law of the Union.

A special case of contextual interpretation is illustrated by Protocol No. 30 for Poland and the UK. The preliminary ruling by the Irish High Court in N.S./Secretary of State for the Home Department concerned the potential opting out of the UK117 from the EuCHFR. The Court

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111 Michaud v France (2012), Application No 12323/11.
112 Avotinš v Latvia [GC] (2016), Application No 17502/07.
113 Based on a report submitted by Albrecht Weber.
114 C-149/10 – Chatzi, CJEU (Judgment, 16 September 2010).
115 In this case the principle of equal treatment was relevant for parental leave; ibid, [43].
116 C-12/11 – Denise McDonagh v Ryanair Ltd, CJEU (Judgment, 31 January 2013), [44].
117 C-411/10 – NS and others, CJEU (Judgment [GC], 21 December 2011).
confirmed that Art. 1 par. 1 Protocol No. 30 did not intend to exempt the UK nor Poland from the obligations of the Charter nor from providing to observe the obligations committed therewith.

The special relevance of the explanations of the Presidency of the Convent however play an additional role in the process of interpretation and reflect the relevance of the historical-genetic concretization. As these are not directly binding upon the parties they may play an auxiliary part in the process of interpretation. The ECJ in its cases Akerberg Fransson and DEB referred to the explanations as additional source of interpretation and thus strengthens its argumentative basis already gained by teleological interpretation.118

ix. International Criminal Law Tribunals119

International criminal tribunals, share a unique property, which to some degree affects their interpretative approach. Whereas for other courts and tribunals, a clear line can theoretically be drawn between the applicable law on the one hand, and the law regulating matters of the administration of justice on the other, ‘[b]y contrast, in international criminal law, the applicable law is, by default, derived from the tribunals’ constituent instruments’.120 Furthermore, ‘the statutes of international criminal tribunals will generally prevail over other sources of law, ‘[t]hus, [i]t follows that the bulk of interpretation relates to the tribunals’ statutes and that there is, comparatively speaking, less (extraneous) treaty interpretation than in other fields of international law.121

Generally, the tribunals have held that the interpretative rules enshrined in the VCLT apply to their respective statutes (irrespective of whether they are a treaty or other instrument – in the latter case, of course, we are talking about a mutatis mutandis application).122

118 C-617/10 – Åklagaren v Hans Åkerberg Fransson, CJEU (Judgment [GC], 26 February 2013); C-279/09 – DEB, CJEU (Judgment, 22 December 2010), [32].
119 Based on a report submitted by Olufemi Elias and Anneliese Quast-Mertsch.
120 Report submitted by Olufemi Elias and Anneliese Quast-Mertsch, 1; see also D Akande, ‘Sources of International Criminal Law’, in A Cassese (ed), The Oxford Companion to International Criminal Justice (OUP 2009), 44.
121 Report submitted by Olufemi Elias and Anneliese Quast-Mertsch, 1.
122 Prosecutor v Tadić, ICTY, Case No IT-94-1-T, Decision on the Prosecutor’s Motion Requesting Protective Measures for Victims and Witnesses (10 August 1995), [18]; Prosecutor v Kanyabashi, ICTR, Case No ICTR-96-15-A, Joint Separate and Concurred Opinion of Judges Wang and Nieto-Navia (3 June 1999), [10]; Ayyash et al, STL, Case No STL-11-01 (16 February 2011), [26]. For a contrary view, that holds that the VCLT is and should not be applicable, or at least not unless in a modified manner see: D Jacobs, ‘Why the Vienna
Arts. 31-32 of the VCLT are frequently quoted by international criminal tribunals either as such, or by reference to their constitutive elements, and applied in a holistic manner, albeit not all elements being given equal weight. ‘Ordinary meaning’, ‘object and purpose’, ‘subsequent practice’, and ‘supplementary means’ have all featured prominently in the jurisprudence of international criminal tribunals. That is not to say that the usual debates regarding, for instance the multiplicity of objects and purposes or the supplementary or not nature of Article 32, do not plague these courts as well. Art. 33 also poses issues, as in the majority of instances the tribunals’ reasoning is based on concepts foreign to the procedure envisaged by that article, for instance the adoption of the interpretation that is more ‘favourable to the accused’.

In this context, of particular note, is the widely diverging approaches of international criminal tribunals on the question of whether a teleological interpretation may be used to override the wording of the text, considering also that a positive response to the above question may imply a direct conflict with the principle of legality, exemplified by, among other, the nullum crimen nulla poena sine lege scripta principle. In a string of ICTY cases, where this issue...
arose only in one was the text preferred. In all others, a teleological interpretation, both in
text.\textsuperscript{133}
While some academics have suggested that the VCLT rules could/should be modified to
accommodate criminal law principles, this does not seem to be reflected, yet, in practice.
‘Thus far, it would appear that an all-or-nothing approach is chosen, where the result is based
exclusively on either the VCLT rules or criminal law principles, at the exclusion of the other.
In some instances, this may be a deliberate choice aimed at achieving a desired interpretative
result; in others, it may be that the combined application of the VCLT rules and criminal law
principles may still be novel’.\textsuperscript{134}
\x. Regional Courts in Africa\textsuperscript{135}
Due to the special nature of certain operative African courts, the observations to follow are
based on the jurisprudence of five (quasi)-judicial bodies: the Court of Justice of the East
African Community (EACJ), the Tribunal of the Southern African Development Corporation
(SADC-T), the Court of Justice of the Economic Community of West African States (CCJ),
the African Court on Human and People’s Rights (ACtHR), and the African Commission on
Human and People’s Rights (ACmHR).
‘Regional African courts are well aware of the political sensitivity of some African states
which appear as respondents before the courts; all institutions have had to decide on
politically sensitive issues. Famously, the SADC tribunal with its controversial Campbell
judgment against Zimbabwe walked right into repressive measures. It cannot be said though
that the tribunal’s fate had an impact on the interpretive work of other African courts.’\textsuperscript{136}
\begin{flushleft}
\textsuperscript{132} Prosecuter v Tadić, ICTY, Case No IT-94-1-T, Opinion and Judgment (7 May 1997), [587-607].
\textsuperscript{133} Prosecuter v Mucić et al, ICTY, Case No IT-96-21-T, Judgment (16 November 1998), [263]; Prosecuter v Tadić, ICTY, Case No IT-94-1-A, Judgment (15 July 1999), [163-9]; Prosecuter v Blaškić, ICTY, Case No IT-95-14-T, Judgment (3 March 2000), [125-7]; Prosecuter v Aleksovski, ICTY, Case No IT-95-14/1-A, Judgment (24 March 2000), [152]; Prosecuter v Mucić et al, ICTY, Case No IT-96-21-A, Judgment (20 February 2001), [73].
\textsuperscript{134} Report submitted by Olufemi Elias and Anneliese Quast-Mertsch, 8.
\textsuperscript{135} Based on a report submitted by Kirsten Schmalenbach.
\textsuperscript{136} Report submitted by Kirsten Schmalenbach, 5.
\end{flushleft}
Most of these courts do not refer explicitly to the VCLT, and are apodictic and concise with respect to their interpretative exercise. The EACJ is a notable exception on both counts. The ECOWAS CCJ is also unique in the sense that it applies rules of statutory interpretation, that it calls ‘general principles of the construction of documents’. Although textual interpretation features prominently in the jurisprudence of these bodies (especially in the case of the CCJ, where the court has refused, more than once, to use any other interpretative method if the ordinary meaning is clear), it is tempered by references to ‘good faith’, ‘effet utile’, and the corpus jurisprudentiae of human rights. On occasion, these courts have shown extreme diligence in defining key concepts of the interpretative process, such as ‘ordinary meaning’, ‘good faith’, and ‘subsequent practice’.

Although well-known extra-VCLT maxims of interpretation (such as *expression unius est exclusion alterius*, *exception est strictissimae applicationis*, *in dubio mitius* etc.) have not been used by the courts themselves, they are resorted to in the pleadings of the Applicants and the Defendants, drawing inspiration from their common law background.

Some other interesting examples, of various (alleged) interpretative techniques, include: i) ECOWAS CCJ’s reliance on a common law interpretation maxim (the “Mischief Rule”),

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138 Akpo v G77 South South Health Care Delivery Programme, ECOWAS CCJ, ECW/CCJ/RUL/04/08 (Ruling, 16 October 2008), [83].
139 Olajide Afolabi v Nigeria, ECOWAS CCI, ECW/CCJ/APP/01/03 (Judgment, 27 April 2004), [53]; Akpo v G77 South South Health Care Delivery Programme, ECOWAS CCI, ECW/CCJ/RUL/04/08 (Ruling, 16 October 2008), [42]; Folami v Community Parliament (ECOWAS), ECOWAS CCI, ECW/CCJ/JUD/10/08 (Judgment, 28 November 2008), [57].
140 Which the EACJ called the ‘golden rule of treaty interpretation’; Henry Kyarimpa v The Attorney General of Uganda – Appeal No 6 of 2014, EACJ (Judgment, 19 February 2016), 44 et seq, [91].
141 Campbell v Zimbabwe, SADC-T, Case No 02/2007 (Judgment, 28 November 2008), 25 et seq; Akpo v G77 South South Health Care Delivery Programme, ECOWAS CCJ, ECW/CCJ/RUL/04/08 (Ruling, 16 October 2008), [84, 87]; Legal Resources Foundations v Zambia, ACmHR, Communication No 211/98 (Decision, 7 May 2001), [70]; Social and Economic Rights Action Centre et al v Nigeria, ACmHR, Communication No 155/96 (Decision, 27 October 2001), [68].
142 Scanlen and Holderness v Zimbabwe, ACmHR, Communication No 297/2005 (Decision, 3 April 2009), [93-7].
143 Akpo v G77 South South Health Care Delivery Programme, ECOWAS CCJ, ECW/CCJ/RUL/04/08 (Ruling, 16 October 2008), [83], citing R Cross, *Statutory Interpretation* (3rd edn, OUP 1995).
144 Timothy Alvin Kahoho v The Secretary General Of The East African Community –Appeal No 2 of 2013, EACJ (Judgment, 28 November 2014), 29 et seq.
145 Request for an Advisory Opinion No 1 of 2015, EACJ (Advisory Opinion, 19 November 2015), 31 et seq.
146 See e.g the invocation of *ejusdem generis* in ECOWAS CCJ in a staff dispute; Folami v Community Parliament (ECOWAS), ECOWAS CCI, ECW/CCJ/JUD/10/08 (Judgment, 28 November 2008), [19, 30, 32].
which allows a departure from the literal rule, also called “the Golden Rule”);\textsuperscript{147} ii) ACmHR’s demand that the African Charter should be interpreted in ‘a culturally sensitive way’, taking into full account the different legal traditions of Africa’s diversity;\textsuperscript{148} iii) ACmHR’s acceptance that the principle of subsidiarity shapes the African Charter like all other human rights treaties, but refusal to accept a restrictive effect of the doctrine on the Commission’s work.\textsuperscript{149} the principle of subsidiarity. In Prince v South Africa, that the African Charter should be interpreted by applying the method of subsidiarity.

xi. Iran-US Claims Tribunal\textsuperscript{150}

The Iran-U.S. Claims Tribunal (IUSCT) is in a unique position insofar as the negotiation of the agreements took place solely through an intermediary, the Government of Algeria. This means that the proposals, counter-proposals and comments that led to the final Declarations were sent between the three parties in writing, and are thus well-documented. As a result, the Tribunal has readily referred to the travaux préparatoires, as well as occasionally giving weight to affidavits from negotiators related to the meaning of a particular provision.

With the exception of the first decision it issued,\textsuperscript{151} the IUSCT has consistently referred to the provisions of the VCLT when interpreting the agreements.\textsuperscript{152} The Tribunal generally follows the ‘orthodox’ application of the VCLT provisions, considering that the intention of the Parties as embodied in the text of the Declarations is the starting point for interpretation, then moving to the context, object and purpose of the agreements, subsequent practice, and the preparatory work/circumstances of conclusion of the agreements, if necessary.\textsuperscript{153} Although it generally follows this progression through the elements of Articles 31 and 32, it does not necessarily refer to each and every element.

\textsuperscript{147} Olajide Afolabi v Nigeria, ECOWAS CCJ, ECW/CCJ/APP/01/03 (Judgment, 27 April 2004), [37].
\textsuperscript{148} Constitutional Rights Project et al v Nigeria, ACmHR, Communication Nos 143/95 and 150/96 (Decision, 15 November 1999), [26].
\textsuperscript{149} Garreth Anver Prince v South Africa, ACmHR, Communication No 255/2002 (Decision, 7 December 2004), [37, 50, 53]. Interesting is also the fact that the Respondent had argued that the margin of appreciation was a method of interpretation.
\textsuperscript{150} Based on a report submitted by Malgosia Fitzmaurice and Daniel Peat.
\textsuperscript{151} Decision No DEC 1–A2–FT, Iran-USCT (26 January 1982), 4, reprinted in 1 Iran-USCTR 104.
\textsuperscript{152} The first decision in which it did so was Decision No DEC 12-A1-FT, Iran-USCT (3 August 1982), 3-5, reprinted in 1 Iran-USCTR 189, 190-2.
\textsuperscript{153} See Case ITIL 83-B1-FT, Iran-USCT (9 September 2004), [106-33].
The structure of the Tribunal’s analysis in Award No. 597 provides an illustrative example.154 The Tribunal first looked to the ordinary meaning of the text, referring approvingly to the jurisprudence of the International Court of Justice, according to which ‘interpretation must be based above all upon the text of the treaty.’155 After finding that the text of the relevant provision was ‘clear’,156 it nevertheless moved to examine the context of the provision, which it defined as ‘primarily the text of the treaty itself – in other words, the remaining provisions of the same treaty.’157 Having found that the ordinary meaning in its context was clear, the Tribunal moved to find confirmation for this view in the negotiating history of the Algiers Declarations.158

The Tribunal has occasionally referred to canons of interpretation outside the VCLT, such as effet utile,159 expressio unius est exclusio alterius,160 ejusdem generis,161 and, in four early awards, restrictive interpretation.162

Unlike certain other tribunals, the IUSCT has rarely defined the key concepts in the interpretative process. In Award A11, it defined context as ‘primarily the text of the treaty itself – in other words, the remaining provisions of the same treaty.’163 The Tribunal identified the object and purpose of the Algiers Declarations as being to ‘to resolve a crisis in relations between Iran and the United States, not to extend diplomatic protection in a normal sense,’164 and has stressed that the object and purpose ‘do not form any independent basis for interpretation, but rather are factors to be taken into account’ in determining the meaning of the terms of the treaty’.165 The Tribunal seems to take a relatively strict approach to subsequent practice, stating that it ‘may be relevant in shedding light on the original

154 See also Award No 590-A15(IV)/24-FT, Iran-USCT (28 December 1998), [91-103].
155 Award No 597-A11-FT, Iran-USCT (7 April 2000), [4].
156 Ibid, [192].
157 Ibid, [195].
158 Ibid, [200-4].
159 Award No ITL 63–A15(I:G)–FT, Iran-USCT (20 August 1986), [17], reprinted in 12 Iran-USCTR 40,46–7.
160 Case ITL 83-B1–FT, Iran-USCT (9 September 2004),[80-7].
161 Award No 25–71–1, Iran-USCT (22 February 1983), reprinted in 2 Iran-USCTR 78-9.
163 Award No 597-A11-FT, Iran-USCT (7 April 2000), [195].
164 Decision No DEC 32-A18–FT, Iran-USCT (6 April 1984), 9.
165 The United States of America v The Islamic Republic of Iran, Decision No DEC 37–A17–FT, Iran-USCT (18 June 1985), [9], reprinted in 8 Iran-USCTR 189, 200–1.
intentions of the Parties and is compelling evidence of the parties’ understanding as to the meaning of the treaty’s provisions’, which is demonstrated by ‘a concordant, common and consistent practice’.  

The Tribunal’s approach to materials admissible in the interpretative process is notable. Whilst referring most commonly to the preparatory work of the Algiers Declaration, the Tribunal seems in principle to accept that affidavits by negotiators could be instructive in shedding light on the intended meaning of a particular term. However, it seems in practice to rarely have given affidavits weight. More broadly, the Tribunal has drawn on the jurisprudence of the ICJ in order to inform its interpretative approach.

xii. International Investment Tribunals

The interpretative approach of international investment tribunals is shaped by three groups of considerations. First, the procedural-institutional setting of tribunals, which permit individuals or corporate entities to make claims against States, rely on domestic courts for enforcement, and are constituted on an ad hoc basis, provides a notably different backdrop to the interpretative practice of investment tribunals than permanent courts or tribunals. Second, from a substantive point of view, the vast majority of international investment agreements are bilateral, relatively short, and contain vague and broadly worded provisions. Finally, issues of policy and legitimacy have featured more prominently in investment arbitration over the years, including issues related to environment, health, and financial crises. Other issues, such as controversy over the size of awards issued and the composition of arbitral tribunals also constitute the backdrop against which the interpretative approach of investment tribunals should be viewed.

The overwhelming majority of investment tribunals make reference to, and accept, the VCLT rules in relation to interpretation, including frequent acknowledgement of the customary nature of those rules. Many tribunals have explicitly recognized Article 31 as a ‘single’.

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166 Case ITL 83-B1-FT, Iran-USCT (9 September 2004), [116].
167 Award No ITL 11-39-2, Iran-USCT (30 December 1982), 4-5; Award No ITL 2–51–FT, Iran-USCT (5 November 1982), 5–6.
168 Award No 597-A11-FT, Iran-USCT (7 April 2000), [4]; Decision No DEC 1-A2-FT (26 January 1982), 4.
169 Based on a report submitted by Julian Arato and Andreas Kulick.
170 Pošštová banka, as and Iströkapital SE v Hellenic Republic, ICSID Case No ARB/13/8 (Award, 9 April 2015) [282-3].
In relation to ordinary meaning, many tribunals have closely adhered to the ‘objective’ approach enshrined in the VCLT. For example, the Tribunal in Methanex v. U.S. considered that ordinary meaning was not coextensive with literal meaning, and that such interpretation could not ‘be decided on a purely semantic basis’. In relation to context, however, tribunals have not adhered as closely to the approach of the Vienna Convention. In particular, certain tribunals have analysed the investment treaty practice of one or both parties to a case with third States for the purpose of interpretation. In ADC v. Hungary, for example, the Tribunal looked into other treaties that Hungary had concluded with third States in order to determine which entities qualified as an ‘investor’ under the relevant treaty. It is not clear whether tribunals considered this reasoning to be relevant context under Article 31(2) of the VCLT, or an additional means of determining the ordinary meaning of the treaty. In relation to the object and purpose of a treaty, and in contrast to some earlier arbitral decisions, tribunals have recently emphasized that the preamble of a treaty may be used to discern the object and purpose of that treaty, but that it cannot in and of itself ‘add substantive requirements to the provisions of the Treaty’.

Given the fragmented nature of the regime, one cannot speak of a consistent approach to treaty interpretation over time. Nevertheless, certain commonalities may be discerned. First, when addressing the issue whether an underlying treaty is capable of evolving over time, tribunals have regularly based their reasoning on Articles 31(3)(a), (b), or (c) of the VCLT. Only in a handful of instances have tribunals considered evolutive interpretation as a separate doctrine dissociated from the Vienna Convention. Second, whilst some tribunals have adopted a more expansive understanding of these rules, overall the picture is one of restraint.

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172 HICEE BV v The Slovak Republic (Partial Award, 23 May 2011) [135].
173 Daimler Financial Services AG v Argentine Republic, ICSID Case No ARB/05/1 (Award, 22 August 2012) [254].
174 Methanex Corporation v United States of America (Partial Award, 7 August 2002) [136]. See also Wintershall Aktiengesellschaft v Argentine Republic, ICSID Case No ARB/04/14 (Award, 8 December 2008) [88].
175 DC Affiliate Limited and ADC & ADMC Management Limited v The Republic of Hungary, ICSID Case No. ARB/03/16 (Award, 2 October 2006) [359].
176 Société Générale In respect of DR Energy Holdings Limited and Empresa Distribuidora de Electricidad del Este, SA v The Dominican Republic, LCIA Case No UN 7927 (Award on Preliminary Objections to Jurisdiction, 19 September 2008) [31-2].
Despite the *ad hoc* nature by which tribunals are constituted, many tribunals have been careful to support their interpretative approach by reference to the Vienna Convention rules and/or by recourse to the practice of the ICJ. Divergence from the Vienna rules in the practice of tribunals can be explained by, on the one hand, the vagueness of the provisions of many international investment agreements, and, on the other, concerns regarding the legitimacy of tribunals. In relation to the former, the elements of Article 31(1) VCLT are of little help in substantiating broad treaty standards; as such, tribunals have moved to search for more concrete guidance from, for example, case law. In relation to the latter, tribunals have frequently drawn on the jurisprudence of the ICJ in order to ground their reasoning in the jurisprudence of a reputed court.
Annex: Questionnaire sent to Members

I. Content-related Issues/Questions
1. Do the courts and tribunals refer to the VCLT rules of interpretation? Do they discuss the content of these rules?
2. Preference/Prevalence of a particular approach to interpretation over others (textual, contextual, teleological, intentions of the parties, historical). Has the approach changed over time?
3. When has the case-law of an international court and tribunal indicated a clear shift in the content of a rule of interpretation? How was this established?
4. When, how and what maxims/canons of interpretation (not explicitly referred to in the VCLT) have been used in international case-law? What is their status?
5. How do courts and tribunals define key concepts in the interpretative process (e.g. ordinary meaning, context, object and purpose [multiplicity, selection between a variety of objects and purposes]), supplementary means etc.?
6. Is there a difference between the interpretative approach to treaties and that to unilateral acts of States and/or acts of international organizations?
7. How do courts and tribunals respond to multiple authentic and conflicting texts of a treaty (or any other instrument)? How has Art. 33 VCLT been employed in practice? Does the procedure followed by courts and tribunals differ from that of Art. 33 VCLT?

II. Process-related Issues/Questions
1. The variety of materials used during the interpretative process and their probative value (e.g. dictionaries, commentaries, books, statements etc.)
2. Do international courts and tribunals have a tendency to explain the process and stages of their interpretative reasoning? If yes, what is the form that this usually takes?
3. What internal or external factors (e.g. contract incompleteness, statute of the court, the background of judges, the subject area, political constellations or situations, concerns about the court’s legitimacy, or about implementation of the judgment) affect the interpretative choices of international courts and tribunals, or changes in such choices, and in what manner?

III. Systemic Issues/Questions
1. What are the defining characteristics that differentiate interpretation from gap-filling and normative conflict? How do courts and tribunals address these processes?
2. When have international courts and tribunals interpreted (not identified) the rules of interpretation? How do they distinguish between interpretation and identification?