



TRICI-Law
RESEARCH PAPER SERIES

THE RULES OF INTERPRETATION OF
CUSTOMARY INTERNATIONAL LAW

Paper No. 009/2020

Final 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*



university of
 groningen

faculty of law

This 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).



European Research Council
Established by the European Commission



TRICI-Law

Final 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

published in:

F Pazartzis, G Ulfstein, P Merkouris & D Peat, ‘Final Report of the ILA Study Group on the Content and Evolution of the Rules of Interpretation’ (2020) (available [here](#) & with Annexes [here](#))

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).

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

FINAL REPORT

29 NOVEMBER – 13 DECEMBER 2020, KYOTO***

Study Group Members:

Chairs

Professor Photini Pazartzis (Hellenic)
Professor Geir Ulfstein (Norwegian)

Rapporteurs

Professor Panos Merkouris (Hellenic)
Dr. Daniel Peat (British)

Members (in alphabetical order)

Professor Julian Arato (American)	Professor Richard K. Gardiner (British)
Professor Eirik Bjorge (Norwegian)	Dr. Andreas Kulick (German)
Dr. Valerie Boré Eveno (French)	Professor Joost Pauwelyn (Belgian)
Dr. Catherine Brölmann (Dutch)	Dr. Anneliese Quast-Mertsch (German)
Professor Laurence Burgogues-Larsen (French)	Professor H��l��ne Ruiz Fabri (French)
Professor Jean d'Aspremont (Belgian)	Professor Kirsten Schmalenbach (Austrian)
Dr. Olufemi Elias (HQ)	Professor Akiho Shibata (Japan)
Professor Malgosia Fitzmaurice (British)	Professor Joel Trachtman (American)
Professor Andreas F��llesdal (Norwegian)	Professor Albrecht Weber (German)

* This Final Report was prepared by the Chairs (Pazartzis and Ulfstein) and the Rapporteurs (Peat and Merkouris) on the basis of the 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.

** Photini Pazartzis is Professor at the University of Athens, Director of the *Athens Public International Law Centre* and Member of the Human Rights Committee. Geir Ulfstein is Professor at the University of Oslo and Deputy Director of the *PluriCourts Centre for the Study of the Legitimate Roles of the Judiciary in the Global Order*. His contribution to this report was supported by the Research Council of Norway through its Centres of Excellence Funding Scheme, project number 223274 PluriCourts – The Legitimacy of the International Judiciary. Daniel Peat is Assistant Professor in Public International Law, Grotius Centre for International Legal Studies, Leiden University. Panos Merkouris is Professor at the University of Groningen, and holds a Chair on Interpretation and Dispute Settlement in International Law. His contribution to this report is conducted in the context of the project ‘The Rules of Interpretation of Customary International Law’ (‘TRICI-Law’). This 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).

Table of Contents

Introduction.....	3
i. PCIJ/ICJ	5
ii. ITLOS	8
iii. WTO.....	10
iv. The UN Human Rights Committee and other UN Human Rights Treaty Bodies	13
v. Inter-American Commission/Court of Human Rights	16
vi. European Court of Human Rights	18
vii. International Criminal Law Tribunals	22
viii. Regional Courts in Africa	24
ix. Iran-US Claims Tribunal.....	27
x. International Investment Tribunals	29
xi. Aarhus Convention Compliance Committee	31
Concluding Remarks	33

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 regular 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 covering 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 available on the ILA website of the Study Group.¹ 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 for the ILA Biennial Meeting in Sydney. At the ILA Biennial Meeting in Sydney, which was chaired by Professor Andrea K. Bjorklund, the interim report was introduced and discussed at its open session.²

In 2019, the Study Group did not hold a physical meeting, but members were given the opportunity to revise their interim reports in light of recent case law. The Study Group also

¹ Under the tab 'Documents' (<https://www.ila-hq.org/index.php/study-groups?study-groupsID=75>). Whilst an interim report on the practice of *ad hoc* arbitration tribunals was submitted by members, on further reflection, the Study Group decided that did not form a sufficiently coherent body of jurisprudence to be the subject of a final report.

² ILA, *Report of the Seventy-Eighth Conference held in Sydney, 19-24 August 2018*, (ILA 2019) 1150-8.

welcomed a new member in 2019, Dr. Catherine Brölmann, who contributed a paper on the practice of the Aarhus Convention Compliance Committee.

This Final Report, which was drafted on the basis of the members' revised reports, outlines the main features of the reports on the interpretative approaches of ICs. The divergences in the interpretative practice across specialist areas can be looked at from a great variety of perspectives.³ Due to space constraints, this Report necessarily summarises members' reports in a very selective manner. The individual reports have covered a significantly wider array of topics, in much greater detail and uncovered a wide and diverse landscape of issues and points deserving further research. Readers that are interested in consulting the individual reports in more depth are directed towards the relevant individual Final Reports available on the ILA website of the Study Group (under the tab 'Documents'), where they will find full versions of the members' reports.

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.⁴ '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*),⁵ and facts (*facts-determination* or *evidentiary interpretation*).⁶ For the purposes of this Report, and unless otherwise explicitly indicated, what is examined is 'content-determination interpretation'.

³ See the report submitted by Richard Gardiner and Jean d'Aspremont (a).

⁴ A Marmor, 'Textualism in Context', *USC Gould School of Law Legal Studies Research Paper Series* No 12-13 - July 18, 2012.

⁵ GJ Postema, *Legal Philosophy in the Twentieth Century: The Common Law World* (Springer 2001), 390-3; R Dworkin, *Law's Empire* (Harvard University Press 1986); J d'Aspremont, 'The Multidimensional Process of Interpretation: Content-Determination and Law-Ascertainment Distinguished', in A Bianchi, D Peat and M Windsor (eds), *Interpretation in International Law* (OUP 2015).

⁶ Facts can also be 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 pertain to the determination of the content of rules and the ascertainment of these rules as legal rules)

i. PCIJ/ICJ⁷

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’⁸ 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 Court of International Justice (PCIJ), as the basis upon which to elaborate the rules that later became Articles 31-33 of the VCLT.⁹ The Court, in turn, has referred to the VCLT rules of interpretation expressly in its judgments since its judgment in *Arbitral Award of 31 July 1989*,¹⁰ and has stated consistently that those provisions reflect rules of customary international law.¹¹ However, references to the VCLT provisions on interpretation can be found even before the VCLT’s entry into force in 1980 in individual opinions of members of the Court.¹²

The various relevant pronouncements of the ICJ reveal that that entrenchment of the VCLT rules on interpretation in the jurisprudence of ICJ was neither automatic nor spontaneous. Rather, it came about through an incremental process of carefully formulated *dicta* over a long period of time.¹³

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

⁷ Based on a report submitted by Panos Merkouris and Daniel Peat (see relevant Final Report available on the ILA website of the Study Group).

⁸ M Forteau, ‘Les techniques interpretatives de la Cour internationale de justice’, (2011) 115/2 *RGDIP* 399; H Thirlway, *The Law and Procedure of the International Court of Justice: Fifty Years of Jurisprudence* (OUP 2013) 269.

⁹ See for example, *Yearbook of the ILC 1966*, vol II, 217-26.

¹⁰ *Arbitral Award of 31 July 1989 (Guinea-Bissau v Senegal)* (Judgment) [1991] *ICJ Rep* 53 [48]; see also *Maritime Delimitation in the Indian Ocean (Somalia v Kenya)* (Preliminary Objections) [2017] *ICJ Rep* 3 [63] and judgments referred to therein.

¹¹ See for example, *Jadhav (India v Pakistan)* (Judgment) [2019] *ICJ Rep* 418 [71].

¹² *Barcelona Traction, Light and Power Company Limited (New Application, 1962) (Belgium v Spain) (Second Phase)* (Preliminary Objections) [1970] *ICJ Rep* 3, Separate Opinion of Judge Ammoun [11]; *Appeal Relating to the Jurisdiction of the ICAO Council (India v Pakistan)* (Judgment) [1972] *ICJ Rep* 46, Separate Opinion of Judge Dillard [90]. In total, citations of the provisions of the VCLT on interpretation – ie Arts 31-33 VCLT – appear in more than 30 decisions and advisory opinions of the Court and more than 65 individual opinions.

¹³ In detail see report submitted by Panos Merkouris and Daniel Peat, 2-7 (see (see relevant Final Report available on the ILA website of the Study Group).

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's endorsement of VCLT rules on interpretation as expressions of customary international law was certainly a turning point, at least for the ways in which the Court justified its interpretative practices. That said, much like that process, the elaboration of the VCLT rules of interpretation by the Court was also a gradual process occasionally meandering between different strands of interpretation. Hugh Thirlway observed in 2013 that the interpretative practice of the ICJ since 1991 has swung back again 'towards a more textual approach'.¹⁴ In *Gulf of Fonseca*, however, Judge Torres Bernárdez, advocated fervently against any kind of predisposition towards one or the other school of interpretation, but rather that the 'interpretative principles and elements form "an integrated whole", including the "ordinary meaning" element'.¹⁵ Ever since *Gulf of Fonseca*, the Court has avoided references to its own pre-1991 findings or any fragmentary quotation of the VCLT when stating the basic rule of interpretation, but rather reproduces faithfully the formulation of the VCLT.¹⁶ Arguably, this subtle change aimed to dispel any impression of hierarchy between the elements of the basic rule of interpretation as reflected in Article 31(1) VCLT.

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).¹⁷

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

¹⁴ Thirlway (n 8) 1234.

¹⁵ *Land, Island and Maritime Frontier Dispute (El Salvador v Honduras; Nicaragua intervening)* (Judgment) [1992] ICJ Rep 351, Separate Opinion of Judge Torres Bernárdez [190-1].

¹⁶ eg *Territorial Dispute (Libya/Chad)* (Judgment) [1994] ICJ Rep 6 [41]; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v Bahrain)*, (Jurisdiction and Admissibility) [1995] ICJ Rep 6 [33]; *Oil Platforms (Iran v United States)* (Preliminary Objections) [1996] ICJ Rep 803 [23].

¹⁷ *Arbitral Award of 31 July 1989* [48].

Convention. Nevertheless, some judgments provide an insight into the Court's conception of these elements.¹⁸

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*,¹⁹ *effet utile (ut res magis valeat quam pereat)*,²⁰ *contra proferentem*,²¹ *expressio unius est exclusio alterius/a contrario*,²² *eiusdem generis*,²³ *per analogiam*,²⁴ and *a minore ad majus*.²⁵ This practice was for obvious reasons more prevalent during the pre-VCLT era,²⁶ and nowadays when referred to the Court tends to stress their supplementary nature, or their subsumption by the VCLT rules.²⁷

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

¹⁸ In more detail, and analysis of relevant case-law see report submitted by Panos Merkouris and Daniel Peat 15 *et seq* (see relevant Final Report available on the ILA website of the Study Group).

¹⁹ *Interpretation of Article 3, Paragraph 2, of the Treaty of Lausanne* (Advisory Opinion) PCIJ Series B, No 12, 25; *Case relating to the Territorial Jurisdiction of the International Commission of the River Oder (United Kingdom, Czechoslovakia, Denmark, France, Germany, Sweden v Poland)* PCIJ Series A, No 23, 26.

²⁰ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation)* (Preliminary Objections) [2011] ICJ Rep 70 [123-41] and Joint Dissenting Opinion of President Owada, Judges Simma, Abraham, Donoghue, and (then) Judge *ad hoc* Gaja [20-2]. See also case-law mentioned in G Fitzmaurice, 'The Law and Procedure of the International Court of Justice: Treaty Interpretation and Other Points', (1957) 33 BYIL 203; H Thirlway, 'The Law and Procedure of the International Court of Justice 1960-1989: Supplement 2006, Part Three', (2006) 77 BYIL 1, 52-5.

²¹ *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].

²² *The SS "Wimbledon"* (United Kingdom, France, Italy and Japan v Germany) PCIJ Series A, No 1, 24; *Railway Traffic between Lithuania and Poland* (Advisory Opinion) PCIJ Series A/B, No 42, 121; *Corfu Channel (United Kingdom v Albania)* [1949] ICJ Rep 15, Dissenting Opinion by Judge Azevedo [30]; *United States Diplomatic and Consular Staff in Tebran (United States of America v Iran)* [1980] ICJ Rep 3 [40]; *Application for Review of Judgment No 273 of the United Nations Administrative Tribunal* (Advisory Opinion), [1982] ICJ Rep 325, Dissenting Opinion of Judge Schwebel 488; *Frontier Dispute (Burkina Faso/Republic of Mali)* [1986] ICJ Rep 554 [88]; *Certain Iranian Assets (Iran v United States of America)* (Preliminary Objections) [2019] IJC Rep 7 [63-5] and Separate Opinion of Judge Robinson [9].

²³ *Northern Cameroons (Cameroon v United Kingdom)* (Preliminary Objections) [1963] ICJ Rep 15, Separate Opinion of Judge Sir Percy Spender 91.

²⁴ *Reparation for Injuries Suffered in the Service of the United Nations* (Advisory Opinion) [1949] ICJ Rep 174, 182; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Jurisdiction and Admissibility) [1984] ICJ Rep 392 [63]; *Fisheries Jurisdiction Case* [46]; *Certain Iranian Assets* [46]. The Court has occasionally used a methodology that bears some resemblance to *per analogiam* interpretation to interpret declarations made under Article 36(2) of its Statute; see D Peat, *Comparative Reasoning in International Courts and Tribunals* (CUP 2019) Ch 3.

²⁵ *Corfu Channel (United Kingdom v Albania)* (Merits) [1949] ICJ Rep 4, Dissenting Opinion by Judge Azevedo [22]; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Merits) [2007] IJC Rep 43 [166].

²⁶ 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.

²⁷ With the *effet utile* being perhaps a notable exception.

cases where both the PCIJ and the ICJ have found recourse to material, such as dictionaries²⁸ and ILC Draft Codes and Articles.²⁹

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 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]’.³⁰

ii. ITLOS³¹

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 three cases,³² and in only two instances in its full composition,³³ the other concerning a request for Advisory Opinion submitted to the Seabed Disputes Chamber.³⁴ Nevertheless, the Tribunal has implicitly referred to and regularly borrowed the terminology, methodology, and concepts enshrined within Articles 31 to 33 VCLT, even if not citing those articles explicitly.³⁵

The Tribunal has adopted a flexible, pragmatic approach to interpretation, without necessarily following a strict sequence of interpretative techniques.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,

²⁸ *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* (Preliminary Objections) [1996] ICJ Rep 803 [45].

²⁹ *Jurisdictional Immunities of the State (Germany v Italy)* [2012] ICJ Rep 99 [64]; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* [186].

³⁰ *Fisheries Jurisdiction Case* [46] (emphasis added); in more detail see report submitted by Panos Merkouris and Daniel Peat, 26 *et seq* (see relevant Final Report available on the ILA website of the Study Group).

³¹ Based on a report submitted by Valérie Boré Eveno (see relevant Final Report available on the ILA website of the Study Group).

³² *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) [372]; *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) [57-63]; *The M/V “Norstar” Case (Panama v Italy)*, ITLOS Case No 25 (Judgment, 10 April 2019) [244].

³³ *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal*, and *The M/V “Norstar” Case (Panama v Italy)*, ITLOS Case No 25 (Judgment, 10 April 2019).

³⁴ *Responsibilities and Obligations of States Sponsoring Persons and Entities with respect to Activities in the Area*.

³⁵ See eg *The ‘Volga’ Case (Russian Federation v Australia)*, ITLOS Case No 11 (Judgment, 23 December 2002) [77]; *The MOX Plant Case (Ireland v United Kingdom)*, ITLOS Case No 10 (Order, 3 December 2001) [51].

³⁶ See *The M/V ‘Virginia G’ Case (Panama/Guinea-Bissau)*, ITLOS Case No 19 (Judgment, 14 April 2014) [98]; *The M/V ‘Louisa’ Case (Saint Vincent and the Grenadines v Kingdom of Spain)*, ITLOS Case No 18 (Judgment, 28 May 2013) [137]; *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*].

more broadly, in light of the object and purpose of those provisions or the Convention. This conforms to the general approach of the rule of interpretation enshrined in Article 31 (1) VCLT. It is notable that there are few references to the *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 *effet utile*,³⁷ restrictive or expansive interpretation,³⁸ *in dubio mitius*,³⁹ and *expressio unius est exclusio alterius*.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.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,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).

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 has been seized (17 out of 29) 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 of the three occasions on which the Tribunal has referred to the articles of the VCLT, the provisions at issue did not have customary origins. Fourth, from a

³⁷ *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal* [391].

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

³⁹ *Dispute Concerning Delimitation of the Maritime Boundary between Ghana and Côte d’Ivoire in the Atlantic Ocean* [545 *et seq.*].

⁴⁰ *Ibid* [549-50].

⁴¹ See *Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission*, Separate Opinion of Judge Cot [32].

⁴² *The M/V ‘Virginia G’ Case* [216].

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 equally competent to hear cases related to the interpretation or application of UNCLOS, 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. Sixth, 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. Finally, the fact that political, economic and environmental concerns have evolved profoundly since the conclusion of UNCLOS has required the Tribunal to take this into account as a factor when interpreting the Convention, even though that practice surpasses the limits of Article 31(3)(b) of the Vienna Convention.

iii. WTO⁴³

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 (*US—Gasoline* 1996), and has affirmed that Articles 31, 32, and 33 of the VCLT reflect the customary rules of interpretation of public international law,⁴⁴ and thus are applicable by 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

⁴³ Based on a report submitted by Hélène Ruiz Fabri and Joel Trachtman (see relevant Final Report available on the ILA website of the Study Group).

⁴⁴ *United States - Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R (Appellate Body Report, adopted 20 May 1996) 16-7; *Japan - Taxes on Alcoholic Beverages*, WT/DS8/ AB/R, WT/DS10/AB/R, WT/DS11/AB/R (Appellate Body Report, adopted 1 November 1996) 104, note 17; *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, WT/DS257/AB/R (Appellate Body Report, adopted 17 February 2004) [59].

Articles 31 and 32 VCLT, emphasizing in some cases a sequential relationship between the two provisions,⁴⁵ 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’.⁴⁶

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.⁴⁷ 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.⁴⁸ Other canons of interpretation that lay outside the VCLT have also been applied by the AB, including *ejusdem generis*,⁴⁹ *a contrario* interpretation,⁵⁰ and *in dubio mitius*.⁵¹

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’.⁵² In *EC—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”’.⁵³ Second, ‘interpretation pursuant to the customary rules codified in Article 31 of the *Vienna Convention* is ultimately a holistic

⁴⁵ *European Communities – Customs Classification of Certain Computer Equipment*, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R (Appellate Body Report, adopted 22 June 1998) [85].

⁴⁶ *United States – Continued Existence and Application of Zeroing Methodology*, WT/DS350/AB/R (Appellate Body Report, adopted 19 February 2009) [268].

⁴⁷ *United States – Standards for Reformulated and Conventional Gasoline* 23.

⁴⁸ *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R (Appellate Body Report, adopted 12 January 2000) [81].

⁴⁹ *United States – Certain Country of Origin Labelling (COOL) Requirements*, WT/DS384/AB/R / WT/DS386/AB/R (Appellate Body Report, adopted 23 July 2012) [444].

⁵⁰ *Japan – Taxes on Alcoholic Beverages* 18. Although cf *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R (Appellate Body Report, adopted 25 March 2011) [567]. See also [581].

⁵¹ *EC Measures Concerning Meat and Meat Products*, WT/DS26/AB/R, WT/DS48/AB/R (Appellate Body Report, adopted 13 February 1998) note 154. Although cf *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/AB/R (Appellate Body Report, adopted 19 January 2010) [411].

⁵² *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, *Treaty Interpretation by the WTO Appellate Body* (Oxford 2009) 221-35.

⁵³ *European Communities – Customs Classification of Frozen Boneless Chicken Cuts*, WT/DS269/AB/R, WT/DS286/AB/R (Appellate Body Report, adopted 27 September 2005) [175], citing Lord McNair, *The Law of Treaties* (Clarendon Press 1961) 365.

exercise that should not be mechanically subdivided into rigid components'.⁵⁴ The Appellate Body has cautioned against equating 'ordinary meaning' with dictionary definition.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.⁵⁶ The AB has also adopted a broader conception of context in certain cases. In its *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.⁵⁷

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'.⁵⁸

The AB has been forthcoming in explicating the stages in its interpretative reasoning, most clearly when operating under the VCLT. According to some views,⁵⁹ sticking to a rather dominantly textualist approach⁶⁰ was a way for the Appellate Body to be rid of the teleological approach ('embedded liberalism') in force during the GATT.

⁵⁴ *European Communities – Customs Classification of Frozen Boneless Chicken Cuts* [176].

⁵⁵ *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products* [348].

⁵⁶ *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R (Appellate Body Report, adopted 12 January 2000) [81] (citations omitted).

⁵⁷ *European Communities – Customs Classification of Certain Computer Equipment* [92]. See also *European Communities – Customs Classification of Frozen Boneless Chicken Cuts* [199].

⁵⁸ *European Communities – Customs Classification of Frozen Boneless Chicken Cuts* [238] (citation omitted).

⁵⁹ R Howse, 'The World Trade Organization 20 Years On: Global Governance by Judiciary' (2016) 27/1 *EJIL* 9-77.

⁶⁰ G Distefano and P Mavroidis, 'L'interprétation systémique : le liant de l'ordre international' in O Guillod and Ch Müller (eds), *Pour un droit équitable, engagé et chaleureux, Mélanges en l'honneur de Pierre Wessner* (Helbing Lichtenhahn 2011) 743-59.

iv. The UN Human Rights Committee and other UN Human Rights Treaty Bodies⁶¹

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 and word-limit of the Views, and the ‘authors’ of the submission of the Communications or their ‘audience’ that are some of the factors that influence the interpretative approaches and solutions adopted by the UN-HRTBs. Indicative of the fine balance required of the UN-HRTBs with respect to the ‘authors/audience’ influence is the following quote from the 2019 *SC and GP v Italy*: ‘6.15 The Committee understands that communications *may be filed by authors who are not in all cases represented by lawyers or jurists trained in international human rights law. Therefore, the admissibility requirements have to be interpreted in a flexible manner, without resulting in the imposition of unnecessary technical requirements, to avoid creating obstacles to the presenting of communications to the Committee*’.⁶²

The UN-HRTBs jurisprudence (views) contain only sporadic and limited *explicit* references to the VCLT rules.⁶³ Such references were encountered more often in the early stages of evolution of the UN-HRTBs’ body of work, but gradually have been making increasingly rarer appearances, appearing mostly either in individual opinions of members or more likely in the arguments of the parties,⁶⁴ 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

⁶¹ Based on a report submitted by Photini Pazartzis and Panos Merkouris (see relevant Final Report available on the ILA website of the Study Group).

⁶² *SC and GP v Italy*, Communication No 22/2017 (Views adopted on 7 March 2019) E/C.12/65/D/22/2017 [6.15] (emphasis added). For an in-depth analysis of the system of individual communications in the system of the UN-HRTBs, see T Stavrinaki, *Le régime des procédures de communications individuelles dans le système des traités des Nations Unies relatifs aux droits de l’homme* (Pedone 2016).

⁶³ *SWM Brocks v the Netherlands* (Views adopted on 9 April 1987) CCPR/C/29/D/172/1984 [12.2-3]; *LG Danning v the Netherlands* (Views adopted on 9 April 1987) CCPR/C/29/D/180/1984 and *FH Zwaan-de Vries v the Netherlands* (Views adopted on 9 April 1987) CCPR/C/29/D/182/1984 [12.2-3]; *Errol Johnson v Jamaica* (Views adopted on 22 March 1996) CCPR/C/56/D/588/1994 [8.2]; *Robinson LaVende v Trinidad and Tobago* (Views adopted on 29 October 1997) CCPR/C/61/D/554/1993 [5.3]; *Ramcharan Bickaroo v Trinidad and Tobago* (Views adopted on 29 October 1997) CCPR/C/55/D/555/1993 [5.3]. For explicit references to Article 33 VCLT see: *Yelítze Lisbeth Moreno de Castillo v Venezuela* (Views adopted on 10 November 2017) CCPR/C/121/D/2610/2015 [8.3]; *Rafael Rodríguez Castañeda v Mexico* (Views adopted on 18 July 2013) CCPR/C/108/D/2202/2012 [6.3]; *Adam Harun v Switzerland* (Views adopted on 6 December 2018) CAT/C/65/D/758/2016, Individual dissenting opinion of Abdelwahab Hani [5].

⁶⁴ *TM v Sweden* (Views adopted on 18 November 2003) CAT/C/31/D/228/2003, Individual opinion by Committee member Mr Fernando Mariño Menéndez; *Gemma Beasley v Australia* (Views adopted on 1 April 2016) CRPD/C/15/D/11/2013 [5.7].

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,⁶⁵ and the structure of Articles 31-33 VCLT is often used as inspiration.⁶⁶ The UN-HRTBs follow this approach not only with respect to the interpretation of their respective treaties but also of the reservations to them, where an implicit *mutatis mutandis* application of the VCLT rules seems to be the guiding principle.⁶⁷

The UN-HRTBs, of course, seek the ‘ordinary meaning’ of the terms to be interpreted⁶⁸ in ‘good faith’,⁶⁹ and refer to ‘context’ ‘subsequent practice’ and other ‘relevant rules’,⁷⁰ as well as ‘other supplementary means’.⁷¹ 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,⁷² although it is difficult to ‘identify a *consistent* trend of liberalism or conservatism, and this has been attributed mainly to the changes in composition of the HRCttee over time’.⁷³

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’.⁷⁴ Other interpretative principles, maxims or techniques, not

⁶⁵ Eg references to ‘object and purpose’, ‘travaux préparatoires’ etc. See *inter alia*: *Robinson LaVende v Trinidad and Tobago* [5.3-4]; *Lauri Peltonen v Finland* (Views adopted on 21 July 1994) CCPR/C/51/D/492/1992 [8.3]; *Hugo van Alphen v the Netherlands* (Views adopted on 23 July 1990) CCPR/C/39/D/305/1988 [5.8].

⁶⁶ *Antti Vuolanne v Finland* (Views adopted on 7 April 1989) CCPR/C/35/D/265/1987 [9.3]; *Roger Judge v Canada* (Views adopted on 5 August 2002) CCPR/C/78/D/829/1998 [10.4-5].

⁶⁷ *Franz Wallmann et al v Austria* (Views adopted on 29 April 2004) CCPR/C/80/D/1002/2001 [8.3]; *Duilio Fanali v Italy* (Views adopted on 31 March 1983), CCPR/C/18/D/75/1980 [7.1].

⁶⁸ *Charles Stewart v Canada* (Views adopted on 1 November 1996) CCPR/C/58/D/538/1993 [12.4]; *Darmon Sultanova v Uzbekistan* (Views adopted on 30 March 2006) CCPR/C/86/D/915/2000 [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; *Grioua v Algeria* (Views adopted on 10 July 2007) CCPR/C/90/D/1327/2004 [7.2].

⁶⁹ *Glen Ashby v Trinidad and Tobago* (Views adopted on 21 March 2002) CCPR/C/74/D/580/1994 [10.8-9].

⁷⁰ *Keith Cox v Canada* (Views adopted on 31 October 1994) CCPR/C/52/D/539/1993 [16.2]; *Marie-Hélène Gillot et al v France* (Views adopted on 15 July 2002) CCPR/C/75/D/932/2000 [13.4]; *DR v Australia* (Opinion adopted on 14 August 2009) CERD/C/75/D/42/2008 [6.3]; *Yeo-Bum Yoon and Myung-Jin Choi v Republic of Korea* (Views adopted on 23 January 2007) CCPR/C/88/D/1321-1322/2004 [8-9]; *S Jegatheeswara Sarma v Sri Lanka* (Views adopted on 16 July 2003) CCPR/C/78/D/950/2000 [9.2-3]; *Franz Wallmann et al v Austria* [8.4]; *Klaus Dieter Baumgarten v Germany* (Views adopted on 31 July 2003) CCPR/C/78/D/960/2000 [9.4].

⁷¹ *SWM Brocks v the Netherlands* [12.2].

⁷² Using teleological interpretation, either by referring simply to the ‘object and purpose’ of the treaty, or by referring to the nature of the treaty as a ‘living instrument’.

⁷³ See report submitted by Fay Pazartis and Panos Merkouris, 8 (see relevant Final Report available on the ILA website of the Study Group).

⁷⁴ *Roger Judge v Canada* [10.3-7]; *Joseph Kindler v Canada* (Views adopted on 30 July 1993) CCPR/C/48/D/470/1991 [14.2].

For the other Committees see: *Stephen Hagan v Australia* (Opinion adopted on 20 March 2003) CERD/C/62/D/26/2002 [7.3]; *Elizabeth de Blok et al v the Netherlands* (Views adopted on 17 February 2014) CEDAW/C/57/D/36/2012 [5.5].

explicitly mentioned in the VCLT, that have been used by the UN-HRTBs include the *ut res magis valeat quam pereat* principle,⁷⁵ *a contrario* interpretation,⁷⁶ and ‘margin of appreciation’⁷⁷ although this last one is rather better characterized as ‘application’ than ‘interpretation’.

A *pro homine* approach to interpretation, along the lines of the Inter-American Court of Human Rights,⁷⁸ has also been advocated for in individual opinions.⁷⁹ Although the exact place of this principle within the VCLT interpretative scheme is not explicitly stated, it is indicated that it is strongly connected both to evolutive interpretation by taking into account the ‘developments in the system of human rights protection’ and to the ‘better fulfilment of the object and purpose of the Covenant’.⁸⁰

The UN-HRTBs have also predominantly favored a self-referential approach of invoking their own Concluding Observations, General Comments and jurisprudence.⁸¹ On occasion, they have even referred to General Comments of *other* human rights treaties,⁸² and even to preparatory work of other instruments and to non-binding instruments.⁸³

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

⁷⁵ *Kennedy v Trinidad and Tobago* (Views adopted 2 November 1999) CCPR/C/74/D/845/1998 [6.6-7]; *Oleg Grishkuntsov v Belarus* (Views adopted on 1 April 2015) CCPR/C/113/D/2013/2010 [6.4-5]; *Peter Chiiko Bwalya v Zambia* (Views adopted on 14 July 1993) CCPR/C/48/D/314/1988 [6.4]; *The Jewish Community of Oslo et al v Norway* (Opinion adopted on 15 August 2005) CERD/C/67/D/30/2003 [7.4]; *RS et al v Switzerland* (Views adopted on 21 November 2014) CAT/C/53/D/482/2011 [7].

⁷⁶ *Charles Stewart v Canada* [12.7].

⁷⁷ *Ilmari Lämsmäen et al v Finland* (Views adopted on 26 October 1994) CCPR/C/52/D/511/1992 [9.4]; *Leo R Hertzberg et al v Finland* (Views adopted on 2 April 1982) CCPR/C/15/D/61/1979 [10.3].

⁷⁸ For an analysis of the *pro homine* principle in the Inter-American system see report submitted by Laurence Burgorgue-Larsen (see relevant Final Report available on the ILA website of the Study Group).

⁷⁹ *Ebenezer Derek Mbongo Akwanga v Cameroon* (Views adopted on 22 March 2011) CCPR/C/101/D/1813/2008, Individual opinion of Committee member Mr Fabián Omar Salvioli [10]; *El Abani (El Ouerfeli) v Libya* (Views adopted on 26 July 2010) CCPR/C/99/D/1640/2007, Individual opinion of Committee member Mr Fabián Omar Salvioli [10].

⁸⁰ *Ibid.*

⁸¹ *TPF v Peru* (Views adopted on 17 October 2011) CEDAW/C/50/D/22/2009 [8.11]; *DR v Australia* (Opinion adopted on 14 August 2009) CERD/C/75/D/42/2008 [6.4]; *Sabli v Algeria* (Views adopted on 3 June 2011) CAT/C/46/D/341/2008 [9.9]; *Abramova v Belarus* (Views adopted on 25 July 2011) CEDAW/C/49/D/23/2009 [7.3].

⁸² *Abramova v Belarus* [7.6]; *Muñoz-Vargas y Sainz de Vicuña v Spain* (Decision adopted on 9 August 2007), CEDAW/C/39/D/7/2005, Individual opinion by Committee member Mary Shanthi Dairiam (dissenting) [13.9].

⁸³ *Nura Hamulić and Halima Hodžić v Bosnia and Herzegovina* (Views adopted on 30 March 2015) CCPR/C/113/D/2022/2011, Separate opinion of Committee members Olivier de Frouville, Mauro Politi, Victor Manuel Rodríguez-Rescia and Fabián Omar Salvioli (partly dissenting) [3], where reference is made not only to the *travaux préparatoires* of the ICCPR but also of the UNHCR *travaux*, as well as to a number of other non-binding documents.

Comments/Recommendations are ‘*an authoritative interpretation tool*,⁸⁴ or in a similar vein that they are an ‘*authoritative interpretation of the Covenant*’.⁸⁵

The UN-HRTBs have also referred on occasion to the jurisprudence of other courts and tribunals, most notably the Inter-American Court of Human Rights, the European Court of Human Rights and the International Court of Justice. Although as already noted there is preference for reasons of consistency and promotion of their role to refer to their own jurisprudence. Former HRCttee member, de Frouville, in his opinions has suggested that the HRCttee, as a matter of ‘*jurisdictional policy ... should be mindful of ensuring consistency between its interpretations and those of other courts, including regional courts*’.⁸⁶

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,⁸⁷ although this has also been criticized as being extremely subjective and tantamount to hypothetical reasoning.⁸⁸

v. Inter-American Commission/Court of Human Rights⁸⁹

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’.⁹⁰ However, the IACtHR does not make any *substantial considerations* about interpretation in general and about VCLT’s rules of interpretation in

⁸⁴ *TPF v Peru* [8.11] (emphasis added).

⁸⁵ *López Albán et al v Spain* (Views adopted on 11 October 2019) E/C.12/66/D/37/2018 [6.2]; *SSR v Spain* (Views adopted on 11 October 2019) E/C.12/66/D/51/2018 [6.2].

⁸⁶ *Seyma Türkan v Turkey* (Views adopted on 17 July 2018) CCPR/C/123/D/2274/2013, Individual opinion (concurring) of Olivier de Frouville [11] (emphasis added); see also *Gabriel Osío Zamora v Venezuela* (Views adopted on 7 November 2017), CCPR/C/121/D/2203/2012, Individual opinion of Olivier de Frouville (partially dissenting) [9-10].

⁸⁷ *Errol Johnson v Jamaica* [8.4].

⁸⁸ *Errol Johnson v Jamaica* Individual opinions of Christine Chanet and Francisco José Aguilar Urbina.

⁸⁹ Based on a report submitted by Laurence Burgorgue-Larsen (see relevant Final Report available on the ILA website of the Study Group).

⁹⁰ See report submitted by Laurence Burgorgue-Larsen, 22-5 (see relevant Final Report available on the ILA website of the Study Group).

particular.⁹¹ 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’.⁹² 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 VLCT 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’s tenure, Article 29(b) of the ACHR was its main focal point, and in fact the Court has interpreted its own standard of interpretation enshrined in that article.⁹³ 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, 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,⁹⁴ and holds strong until today.⁹⁵ Textual, contextual, intention of the parties, and historical interpretation have also been resorted to, with different weight being given to them,⁹⁶ 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’.⁹⁷

⁹¹ *Viviana Gallardo and al*, IACtHR (Order of the President of the Court, 15 July 1981) Series A, No 101, OC-21/14.

⁹² *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; *Restrictions to the Death Penalty (Arts 4§2 and 4§4) American Convention on Human Rights*, IACtHR (8 September 1983), OC-3/83 [45].

⁹³ *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’ (see relevant Final Report available on the ILA website of the Study Group).

⁹⁴ *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.

⁹⁵ *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].

⁹⁶ In more detail see report submitted by Burgorgue-Larsen, 9-11 (see relevant Final Report available on the ILA website of the Study Group). 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’.

⁹⁷ *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 sí misma ... el ejercicio de interpretación debe involucrar el contexto y, en especial, dentro de su objeto y fin*”.

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,⁹⁸ 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,⁹⁹ reservations,¹⁰⁰ or declarations.¹⁰¹ As the IACtHR has pointed out, a textual interpretation mixed with the teleological one ensures that the realm of the discretionary power of the States is diminished.¹⁰²

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).¹⁰³

vi. European Court of Human Rights¹⁰⁴

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 (ECtHR) incur on the sovereignty of the contracting parties; and the relationship between interpretation and deference.

⁹⁸ For an analysis of the relevant case-law, see Report submitted by Burgorgue-Larsen, 13-9 (see relevant Final Report available on the ILA website of the Study Group). The last two methods lead to such an enlargement of the scope of certain rights that they could be qualified as ‘creating’ new rights.

⁹⁹ *Viviana Gallardo* case.

¹⁰⁰ ‘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 the American Convention on Human Rights (Arts 74 and 75)*, IACtHR (24 September 1982) OC-2/82; *Restrictions to the Death Penalty (Arts 4§2 and 4§4) American Convention on Human Rights*, IACtHR (8 September 1983) OC-3/83.

¹⁰¹ *Interpretation of the American Declaration of the Rights and Duties*, IACtHR (14 July 1989), OC-10/89 [42].

¹⁰² *Restrictions to the Death Penalty (Arts 4§2 and 4§4) American Convention on Human Rights*, IACtHR (8 September 1983) OC-3/83.

¹⁰³ For a detailed analysis, see report submitted by Burgorgue-Larsen, 25-32 (see relevant Final Report available on the ILA website of the Study Group).

¹⁰⁴ Based on a report submitted by Geir Ulfstein (see relevant Final Report available on the ILA website of the Study Group).

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*, 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', reiterating a stance that it took in the early case of *Golder*.¹⁰⁵ The Court has in its subsequent practice constantly confirmed the relevance of the Vienna Convention for the interpretation of the ECHR. However, in *Rantsev*, the Court stated that the ECHR must be interpreted *in the light of* the VCLT.¹⁰⁶ Any apparent contradiction between the rules incorporated in the VCLT and the interpretation of the ECHR was laid to rest, however, in *Cyprus v. Turkey*, in which the Court said that '[d]espite its specific character as a human rights instrument, the Convention is an international treaty to 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'.¹⁰⁷ This has been subsequently re-affirmed by the Court on several occasions.¹⁰⁸

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 in which the Court, without an explicit basis in article 6 ECHR on fair trial, read in a right of access to a court. Similarly, in the *Soering* case [Plenary] 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'.¹⁰⁹ Extradition to US death row was therefore prohibited. This was cited with support in the *Mamatkulov and Askarov* where the Court, again 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 introduced the doctrine of the European Convention as a 'living

¹⁰⁵ For a recent exposition of its interpretative approach, see *Magyar Helsinki Bizottság v Hungary* [GC] (2016), Application No 18030/11 [118-25].

¹⁰⁶ *Rantsev v Cyprus and Russia* (2010), Application No 25965/04 [273].

¹⁰⁷ *Cyprus v Turkey* [GC] (2014), Application No 25781/94 [23] (emphasis added)

¹⁰⁸ *Al-Dulimi and Montana Management Inc v Switzerland* [GC] (2016), Application No 5809/08 [80] and *Nait-Liman v Switzerland* [GC] (2018), Application No 51357/07 [174] and *ND and NT v Spain* [GC] (2017), Applications Nos 8675/15 and 8697/15 [172].

¹⁰⁹ *Soering v the United Kingdom* [Plenary] (1989), Application No 14038/88 [87].

instrument’,¹¹⁰ 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.¹¹¹ 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’.¹¹² 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 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).¹¹³ It should also be noted that the Court has not been consistent in its recent case law with respect to the required consensus in domestic law.¹¹⁴

The ECtHR has generally expressed its commitment to interpreting the ECHR in consistency with other rules of international law, in accordance with Article 31(3)(c) of the VCLT. In *Demir and Baykara* the Court devoted a full section to ‘[t]he practice of interpreting Convention provisions in the light of other international texts and instruments’.¹¹⁵ 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 *Bebrami and Saramati* case is based on the general rules on attribution of responsibility between the United Nations and member states contributing with military forces.¹¹⁶ In a similar vein, the *Stichting Mothers of Srebrenica and others* case concerned the immunity of the United Nations, which is partly based on general international law and partly on treaty law.¹¹⁷

In addition to the abovementioned approaches, the Court has adopted certain interpretative practices that are deferential to Member States. The margin of appreciation, as part of the principle of subsidiarity, has been developed by the Court since the classic *Handyside* case in 1976.¹¹⁸ It is

¹¹⁰ *Tyrer v the United Kingdom* (1978), Application No 5856/72 [31].

¹¹¹ K Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights* (CUP 2015) 45-9.

¹¹² *Demir and Baykara v Turkey* [GC] (2008), Application No 34503/97 [85] (emphasis added).

¹¹³ See also WA Schabas, *The European Convention on Human Rights: A Commentary* (OUP 2015) 37.

¹¹⁴ Compare *Magyar Helsinki Bizottság v Hungary* [GC] (2016), Application No 18030/1 [138] (emphasis added) with *ibid* [139], and *Nait-Liman v Switzerland* [GC] (2018), Application No 51357/07 [175] (emphasis added).

¹¹⁵ *Demir and Baykara v Turkey* [GC] (2008), Application No 34503/97 [65-86].

¹¹⁶ *Bebrami and Bebrami v France* and *Saramati v France, Germany and Norway* [GC] (2007), Application Nos 71412/01 and 78166/01.

¹¹⁷ *Stichting Mothers of Srebrenica and others v the Netherlands* (2013), Application No 65542/12.

¹¹⁸ *Handyside v United Kingdom* (1976), Application No 5493/72 [48].

reflected in the Brighton Declaration (2012), the Brussels Declaration (2015), and the Copenhagen Declaration (2018), 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.¹¹⁹

In a similar, but slightly different vein, the *Bosphorus* standard has been applied by the Court since 2005 regarding national implementation of EU law.¹²⁰ 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 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'.¹²¹ This standard has been followed in subsequent case law, including the *Michaud* case¹²² and the recent *Avotiņš* case.¹²³

In terms of factors that influence the Court's interpretative approach, there has been discussion regarding the extent to which the Court has shown increasing restraint in interpretation as a result of the recent criticism levelled at its judgments.¹²⁴ Although these authors do not argue that the Court has explicitly withdrawn from previous principles of interpretation, they do suggest that it may have become more restrictive in its application of the principle of effectiveness/evolutive interpretation, and more restrictive in what it perceives as a 'European consensus'.

¹¹⁹ See A Føllesdal, 'Survey Article: Subsidiarity' (1998) 6/2 *The Journal of Political Philosophy* 190-218; PG Carozza, 'Subsidiarity as a Structural Principle of International Human Rights Law' (2003) 97/1 *American Journal of International Law* 38-79; M Kumm, 'The Legitimacy of International Law: A Constitutionalist Framework of Analysis' (2004) 15/5 *European Journal of International Law* 907, 920-4; I Feichtner, 'Subsidiarity', in *Max Planck Encyclopedia of Public International Law* (2009); A Føllesdal, 'The Principle of Subsidiarity as a Constitutional Principle in International Law' (2013) 2/1 *Global Constitutionalism* 37-62.

¹²⁰ *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v Ireland* [GC] (2005), Application No 45036/98.

¹²¹ *Ibid* [155-6] (emphasis added).

¹²² *Michaud v France* (2012), Application No 12323/11.

¹²³ *Avotiņš v Latvia* [GC] (2016), Application No 17502/07.

¹²⁴ MR Madsen, 'Rebalancing European Human Rights: Has the Brighton Declaration Engendered a New Deal on Human Rights in Europe?' (2018) 9 *Journal of International Dispute Settlement* 199-222, 220; 13; LR Helfer and E Voeten 'Walking Back Human Rights in Europe?' (*SSRN*, 23 June 2020) *iCourts Working Paper Series, No 196* (forthcoming in *European Journal of International Law*) 38, available online at: <https://ssrn.com/abstract=3633877> or <http://dx.doi.org/10.2139/ssrn.3633877> (last accessed on 20 September 2020).

vii. International Criminal Law Tribunals¹²⁵

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'.¹²⁶ Furthermore, 'the statutes of international criminal tribunals will generally prevail over other sources of law, '[thus, 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.'¹²⁷

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).¹²⁸

Articles 31-32 of the VCLT are frequently quoted by international criminal tribunals either as such,¹²⁹ or by reference to their constitutive elements,¹³⁰ and applied in a holistic manner,¹³¹ albeit

¹²⁵ Based on a report submitted by Olufemi Elias and Anneliese Quast-Mertsch (see relevant Final Report available on the ILA website of the Study Group).

¹²⁶ Report submitted by Olufemi Elias and Anneliese Quast-Mertsch, 1 (see relevant Final Report available on the ILA website of the Study Group); see also D Akande, 'Sources of International Criminal Law' in A Cassese (ed), *The Oxford Companion to International Criminal Justice* (OUP 2009) 44.

¹²⁷ Report submitted by Olufemi Elias and Anneliese Quast-Mertsch, 1 (see relevant Final Report available on the ILA website of the Study Group).

¹²⁸ *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 Concurring 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 Convention Should Not Be Applied to the ICC Rome Statute' (*Spreading the Jam*, 2013) <https://dovjacobs.com/2013/08/24/why-the-vienna-convention-should-not-be-applied-to-the-icc-rome-statute-a-plea-for-respecting-the-principle-of-legality/> (last accessed on 20 September 2020); D Akande, 'Sources of International Criminal Law', in A Cassese (ed), *The Oxford Companion to International Criminal Justice* (OUP 2009) 48.

¹²⁹ WA Schabas, *The UN International Criminal Tribunals* (CUP 2006) 80.

¹³⁰ *Ibid* 80; *Prosecutor v Tadić*, ICTY, Case No IT-94-1-AR72, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction (2 October 1995) [71-93].

¹³¹ *Prosecutor v Germain Katanga*, ICC, Case No ICC-01/04-01/07, Jugement rendu en application de l'article 74 du Statut (7 March 2014) [45]; *Prosecutor v Kordić & Čerkez*, ICTY, Case No IT-95-14/2-A, Judgment (17 February 2004) [59, 62].

not all elements being given equal weight. ‘Ordinary meaning’,¹³² ‘object and purpose’, ‘subsequent practice’,¹³³ and ‘supplementary means’¹³⁴ 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 purposes¹³⁵ or the supplementary or not nature of Article 32,¹³⁶ do not plague these courts as well. Article 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’.¹³⁷

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.¹³⁸ In all others, a teleological interpretation, both in its static and dynamic/evolutive manifestation was resorted to override the meaning of the text.¹³⁹

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

¹³² *Prosecutor v Mucić et al*, ICTY, Case No IT-96-21-T, Judgment (16 November 1998) [506-10]; *Prosecutor v Sikirica et al*, ICTY, Case No IT-95-8-T, Judgment on Defence Motions to Acquit (3 September 2001) [60]; *Prosecutor v Jelisić*, Case No IT-95-10-T, Judgment (14 December 1999) [71, 82].

¹³³ See cases mentioned in G Nolte (ed), *Treaties and Subsequent Practice* (OUP 2013) 230.

¹³⁴ *Prosecutor v Krstić*, ICTY, Case No IT-98-33-T, Judgment (2 August 2001) [584]; *Prosecutor v Stakić*, ICTY, Case No IT-97-24-T, Judgment (31 July 2003) [517-9]; *Prosecutor v Mucić et al*, ICTY, Case No IT-96-21-T, Judgment (16 November 1998), [391-2].

¹³⁵ *Situation in the Democratic Republic of the Congo*, ICC, ICC-01/04-168, Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal (13 July 2006) [33]; *Prosecutor v Blagojević & Jokić*, ICTY, Case No IT-02-60-A, Judgment (09 May 2007) [281].

¹³⁶ *Prosecutor v Krstić*, ICTY, Case No IT-98-33-T, Judgment (2 August 2001) [584]; *Prosecutor v Stakić*, ICTY, Case No IT-97-24-T, Judgment (31 July 2003) [517-9]; *Prosecutor v Mucić et al*, ICTY, Case No IT-96-21-T, Judgment (16 November 1998) [391-2].

¹³⁷ *Prosecutor v Akayesu*, ICTR, Case No ICTR-96-4-A, Judgment (1 June 2001) [501]; *Prosecutor v Bagilishema*, ICTR, Case No ICTR-95-1A, Judgment (07 June 2001) [57]; *Prosecutor v Musema*, ICTR, Case No ICTR-96-13, Judgment (27 January 2000) [155]; *Prosecutor v Rutaganda*, ICTR, Case No ICTR-96-3, Judgment (6 December 1999) [50]; *Prosecutor v Kayishema & Ruzindana*, ICTR, Case No ICTR 95-1-T, Judgment (21 May 1999) [139].

¹³⁸ *Prosecutor v Tadić*, ICTY, Case No IT-94-1-T, Opinion and Judgment (7 May 1997) [587-607].

¹³⁹ *Prosecutor v Mucić et al*, ICTY, Case No IT-96-21-T, Judgment (16 November 1998) [263]; *Prosecutor v Tadić*, ICTY, Case No IT-94-1-A, Judgment (15 July 1999) [163-9]; *Prosecutor v Blaškić*, ICTY, Case No IT-95-14-T, Judgment (3 March 2000) [125-7]; *Prosecutor v Aleksovski*, ICTY, Case No IT-95-14/1-A, Judgment (24 March 2000) [152]; *Prosecutor v Mucić et al*, ICTY, Case No IT-96-21-A, Judgment (20 February 2001) [73].

others, it may be that the combined application of the VCLT rules and criminal law principles may still be novel'.¹⁴⁰

viii. Regional Courts in Africa¹⁴¹

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'.¹⁴²

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,¹⁴³ although the density of referring to the VCLT has been gradually declining since 2016. The ACtHR has also referred explicitly to the VCLT, although not going into a detailed analysis.¹⁴⁴ 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'.¹⁴⁵ These principles have led to an ECOWAS CCJ jurisprudence that is heavily reliant on textual interpretation. It sometimes goes as far as refusing to use any interpretative method if the ordinary meaning is deemed as clear: 'Strictly speaking,

¹⁴⁰ Report submitted by Olufemi Elias and Anneliese Quast-Mertsch, 8 (see relevant Final Report available on the ILA website of the Study Group).

¹⁴¹ Based on a report submitted by Kirsten Schmalenbach (see relevant Final Report available on the ILA website of the Study Group).

¹⁴² Report submitted by Kirsten Schmalenbach, 5 (see relevant Final Report available on the ILA website of the Study Group).

¹⁴³ *Attorney General of the Republic of Uganda v Tom Kyaburwenda – Case Stated No 1 of 2014*, EACJ (Preliminary Ruling, 31 July 2015) 12; *Njong'o v Kenya Attorney General – Reference No 1 of 2006*, EACJ (Decision, 30 March 2007) 26; *Steve Deniss v Burundi Attorney General et al – Reference No 3 of 2015* (Decision, 31 March 2017) [84]; *East African Law Society and Others v Attorney General of the Republic of Kenya and Others – Reference No 3 of 2007* (Judgment, 1 September 2008) 19 *et seq.*

¹⁴⁴ *Request No 001/2013 for Advisory Opinion by the Socio-Economic Rights and Accountability Project (SERAP)*, ACtHR (Advisory Opinion, 26 May 2017) [55] note 16.

¹⁴⁵ *Akpo v G77 South Health Care Delivery Programme*, ECOWAS CCJ, ECW/CCJ/RUL/04/08 (Ruling, 16 October 2008) [83].

when the meaning of the Treaty is clear, it is applied not interpreted. Interpretation is a secondary process which only comes into play when it is impossible to make sense of the plain terms of the Treaty, or when they are susceptible to different meanings'.¹⁴⁶

An interesting deviation from this practice can be found in *Akpo v G77 South Health Care Delivery Programme*. There although ECOWAS CCJ had as a starting point a predominantly textual interpretation, this was then coloured by a selection of an interpretative method that in the Court's view would best serve justice. This led the Court to opt for a purposive method of interpretation as the 'one that will do justice to the instant case' and although deviating from the text would remain 'as near as possible to what the parties indicated'.¹⁴⁷

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),¹⁴⁸ it is tempered by references to 'good faith',¹⁴⁹ 'effet utile',¹⁵⁰ 'purposive approach'¹⁵¹ and the *corpus jurisprudentiae* of human rights.¹⁵² On occasion, these courts have shown extreme diligence in defining key concepts of the interpretative process, such as 'ordinary meaning',¹⁵³ 'good faith',¹⁵⁴ and 'subsequent practice'.¹⁵⁵

¹⁴⁶ *Olajide Afolabi v Nigeria*, ECOWAS CCJ, ECW/CCJ/APP/01/03 (Judgment, 27 April 2004) [53]; *Akpo v G77 South Health Care Delivery Programme*, ECOWAS CCJ, ECW/CCJ/RUL/04/08 (Ruling, 16 October 2008) [42]; *Folami v Community Parliament (ECOWAS)*, ECOWAS CCJ, ECW/CCJ/JUD/10/08 (Judgment, 28 November 2008) [57].

¹⁴⁷ *Ibid* [82, 84].

¹⁴⁸ *Olajide Afolabi v Nigeria*, ECOWAS CCJ, ECW/CCJ/APP/01/03 (Judgment, 27 April 2004) [53]; *Akpo v G77 South Health Care Delivery Programme*, ECOWAS CCJ, ECW/CCJ/RUL/04/08 (Ruling, 16 October 2008) [42]; *Folami v Community Parliament (ECOWAS)*, ECOWAS CCJ, ECW/CCJ/JUD/10/08 (Judgment, 28 November 2008) [57].

¹⁴⁹ 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].

¹⁵⁰ *Campbell v Zimbabwe*, SADC-T, Case No 02/2007 (Judgment, 28 November 2008) 25 *et seq.*; *Akpo v G77 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].

¹⁵¹ *Request No 002/2013 for Advisory Opinion by African Committee of Experts on the Rights and Welfare of the Child*, ACtHR (Advisory Opinion, 5 December 2014) [98]. The Court, however, made it clear that the purposive approach cannot override the clear and unambiguous intention of the legislature, which can be discerned from the plain and ordinary meaning of the text.

¹⁵² *Scanlen and Holderness v Zimbabwe*, ACmHR, Communication No 297/2005 (Decision, 3 April 2009) [93-7].

¹⁵³ *Akpo v G77 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); *Nyong'o v Kenya Attorney General – Reference No 1 of 2006*, EACJ (Decision, 30 March 2007) 31 where the ECJ extensively cited G Schwarzenberger, *International Law and Order* (Stevens & Sons 1971) and held that: '[the] absence of any definition of the words of the treaty does not provide grounds to contend that the parties to the Treaty attached no meaning to them. The phenomenon of double or even multiple meanings of words is a common occurrence but does not prevent the court from giving an interpretation to a word or phrase in the context it is used';

¹⁵⁴ *Timothy Alvin Kabobo v The Secretary General Of The East African Community – Appeal No 2 of 2013*, EACJ (Judgment, 28 November 2014) 29 *et seq.*

¹⁵⁵ *Request for an Advisory Opinion No 1 of 2015*, EACJ (Advisory Opinion, 19 November 2015) 31 *et seq.*

Although well-known extra-VCLT maxims of interpretation (such as *expressio unius est exclusio alterius*, *exceptio 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.¹⁵⁶

Some other interesting examples, of various (alleged) interpretative techniques, include: i) ECOWAS CCJ's reliance on a common law interpretation maxim (the '*Mischief Rule*', which allows a departure from the literal rule, also called 'the Golden Rule');¹⁵⁷ 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;¹⁵⁸ 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.¹⁵⁹

All courts make or have made use of a variety of materials, ranging from commentaries on interpretation, in particular, General Comments by the UN Human Rights Committee and CESCR, as well as textbooks, ILC documents and UN resolutions. Dictionaries, such as *Wikipedia*, *Black's Law Dictionary*, *Words and Phrases Legally Defined*, *Britannica Online*, *Merriam Webster Dictionary*, are extensively consulted in order to identify the ordinary meaning of terms (especially by the EACJ).¹⁶⁰

Self-reference and reference to international (ICJ, WTO, ECJ, ECtHR, UN-HRTBs) and domestic case-law is not uncommon.¹⁶¹ Both the ACtHR and ACmHR heavily rely on self-determined guidelines, which usually focus on one particular issue (e.g. combating sexual violence). This practice is remarkable as it often unburdens both organs from engaging in a case-by-case textual and teleological interpretation of the treaty text.¹⁶² These bodies also take other international

¹⁵⁶ See e.g. the invocation of *eiusdem generis* in ECOWAS CCJ in a staff dispute; *Folami v Community Parliament (ECOWAS)*, ECOWAS CCJ, ECW/CCJ/JUD/10/08 (Judgment, 28 November 2008) [19, 30, 32].

¹⁵⁷ *Olajide Afolabi v Nigeria*, ECOWAS CCJ, ECW/CCJ/APP/01/03 (Judgment, 27 April 2004) [37].

¹⁵⁸ *Constitutional Rights Project et al v Nigeria*, ACmHR, Communication Nos 143/95 and 150/96 (Decision, 15 November 1999) [26].

¹⁵⁹ *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.

¹⁶⁰ *Application No 1 of 2008 for an Advisory Opinion by the Council of Ministers of the East African Community*, EACJ (Advisory Opinion, 24 April 2009) 28, 36, 40.

¹⁶¹ In more detail, see report submitted by Kirsten Schmalenbach, 7 (see relevant Final Report available on the ILA website of the Study Group).

¹⁶² See e.g. *Patrick Okiring and Agupio v Uganda*, ACmHR, Communication No 339/2007 (Decision, August 2017) [104 *et seq.*]; *Thomas Kwoyelo v Uganda*, ACmHR, Communication No 431/12 (Decision, April 2018) [202, 244, 261]; *Application No 003/2015 – Kennedy Owino Onyachi and Others v Tanzania*, ACtHR, (Judgment, 28 September 2017) [131]; *Application No 016/2016 – Diocles William v Tanzania*, ACtHR (Judgment of 21 September 2018) [62].

human right instruments into consideration, in particular, the ICCPR, the UNDHR (despite it not being a binding instrument) and the ECHR (despite the fact that none of the African States are parties to it). This is not so surprising as Articles 60 and 61 of the African Charter on Human and Peoples' Rights explicitly requires the Commission to draw inspiration from these sources and the relevant jurisprudence.¹⁶³ As Schmalenbach notes, all of these human rights instruments seem to be treated as *pari materia*,¹⁶⁴ especially by the ECOWAS' CCJ, which explicitly refers to them this way.¹⁶⁵

ix. Iran-US Claims Tribunal¹⁶⁶

The Iran-US 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,¹⁶⁷ the IUSCT has consistently referred to the provisions of the VCLT when interpreting the agreements, even though neither the U.S. nor Iran are party to the Vienna Convention.¹⁶⁸ Insofar as the Tribunal has invoked the rules of the VCLT, therefore, this is because they were considered to reflect rules of customary international law.

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.¹⁶⁹ It should be noted, however, that the Tribunal has explicitly acknowledged that the various

¹⁶³ *Open Society Justice Initiative v Cameroon*, ACmHR, Communication No 290/04 (Decision, February 2019) [138 *et seq* and 165].

¹⁶⁴ In more detail, see report submitted by Kirsten Schmalenbach, 7-8 (see relevant Final Report available on the ILA website of the Study Group).

¹⁶⁵ *Gabriel Inyang v Nigeria*, ECOWAS CCJ, Suit No ECW/CCJ/APP/03/18 (Judgment, 29 June 2018) 14.

¹⁶⁶ Based on a report submitted by Malgosia Fitzmaurice and Daniel Peat (see relevant Final Report available on the ILA website of the Study Group).

¹⁶⁷ *Decision No DEC 1-A2-FT*, Iran-USCT (26 January 1982) 4, reprinted in 1 *Iran-USCTR* 104.

¹⁶⁸ 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.

¹⁶⁹ See *Case ITL 83-B1-FT*, Iran-USCT (9 September 2004) [106-33].

elements of Article 31 are not hierarchical, thus endorsing the ‘crucible’ approach to interpretation described by the International Law Commission. Although the Tribunal generally progress through the elements of Articles 31 and 32 in order, it does not necessarily refer to each and every element.

The structure of the Tribunal’s analysis in Award No. 597 of Case A11 provides an illustrative example.¹⁷⁰ 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’.¹⁷¹ After finding that the text of the relevant provision was ‘clear’,¹⁷² 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’.¹⁷³ 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.¹⁷⁴

The Tribunal has occasionally referred to canons of interpretation outside the VCLT, such as *effet utile*,¹⁷⁵ *expressio unius est exclusio alterius*,¹⁷⁶ *ejusdem generis*,¹⁷⁷ and, in four early awards, restrictive interpretation.¹⁷⁸

Unlike certain other tribunals, the IUSCT has rarely defined the key concepts in the interpretative process. In Award No 597 of Case A11, it defined context as ‘primarily the text of the treaty itself – in other words, the remaining provisions of the same treaty’.¹⁷⁹ 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’,¹⁸⁰ and has stressed that the object and purpose ‘do not form any independent basis for interpretation, but rather are

¹⁷⁰ See also *Award No 590-A15(IV)/24-FT*, Iran-USCT (28 December 1998) [91-103]. This approach was confirmed in the recent *Award No 604-A15(II:A)/A26 (IV)/B43-FT*, Iran-USCT (10 March 2020) [103].

¹⁷¹ *Award No 597-A11-FT*, Iran-USCT (7 April 2000) [4].

¹⁷² *Ibid* [192].

¹⁷³ *Ibid* [195].

¹⁷⁴ *Ibid* [200-4].

¹⁷⁵ *Award No IIL 63-A15(I:G)-FT*, Iran-USCT (20 August 1986) [17], reprinted in 12 *Iran-USCTR* 40, 46-7.

¹⁷⁶ *Case IIL 83-B1-FT*, Iran-USCT (9 September 2004) [80-7].

¹⁷⁷ *Award No 25-71-1*, Iran-USCT (22 February 1983) reprinted in 2 *Iran-USCTR* 78-9.

¹⁷⁸ *Lillian Byrdine Grimm v the Government of the Islamic Republic of Iran*, *Award No 25-71-1*, Iran-USCT (22 February 1983) 4, reprinted in 2 *Iran-USCTR* 78, 80; *Alexander Lyons Lianosoff v the Government of the Islamic Republic of Iran*, *Award No 104-183-1*, Iran-USCT (20 January 1984) 5, reprinted in 5 *Iran-USCTR* 90, 93; *Iranian Customs Administration v United States of America*, *Award No 105-B16-1*, Iran-USCT (24 January 1984) 3, reprinted in 5 *Iran-USCTR* 94, 95; and *The United States of America v the Islamic Republic of Iran*, *Award No 106-B24-1*, Iran-USCT (24 January 1984) 4, reprinted in 5 *Iran-USCTR* 97, 99.

¹⁷⁹ *Award No 597-A11-FT*, Iran-USCT (7 April 2000) [195].

¹⁸⁰ *Decision No DEC 32-A18-FT*, Iran-USCT (6 April 1984) 9.

factors to be taken into account’ in determining the meaning of the terms of the treaty’.¹⁸¹ The Tribunal seems to take a relatively strict approach to subsequent practice, stating that it ‘may be relevant in shedding light on the original 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’.¹⁸² This understanding was confirmed in the recent Partial Award No 604 in Case A15(II:A), in which the Tribunal stated that ‘[t]he threshold for finding that the conduct of the parties established an “agreement” concerning the interpretation of a treaty is high’.¹⁸³ In keeping with Article 32 of the VCLT, the Tribunal defines subsidiary means of interpretation as the preparatory work of the Algiers Declarations and the circumstances of their conclusion.¹⁸⁴

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. In a similar vein, in Partial Award No 604 in Case A15(II:A), the Tribunal stated that: ‘It is an accepted principle of treaty interpretation that, depending on the circumstances of a specific case, certain probative value may be ascribed to the unilateral conduct of a State when it relates to the performance of a treaty obligation that relates to that State; as an element of interpretation, such unilateral conduct might assist in shedding light on that State’s understanding of its treaty obligations’.¹⁸⁵ However, the Tribunal seems in practice to have rarely given weight to either affidavits or unilateral conduct.¹⁸⁶ More broadly, the Tribunal has drawn on the jurisprudence of the ICJ in order to inform its interpretative approach.¹⁸⁷

x. International Investment Tribunals¹⁸⁸

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

¹⁸¹ *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.

¹⁸² *Case IIL 83-B1-FT*, Iran-USCT (9 September 2004) [116].

¹⁸³ *Award No 604-A15(II:A)/A26 (IV)/B43-FT*, Iran-USCT (10 March 2020) [112]. For this reason, the Tribunal held that the Treasury Regulations ‘cannot be considered “subsequent practice” within the meaning of the Vienna Convention, since they do not establish any agreement between the Parties as to the interpretation of the Algiers Declarations’.

¹⁸⁴ *Award No 597-A11-FT*, Iran-USCT (7 April 2000) [200].

¹⁸⁵ *Award No 604-A15(II:A)/A26 (IV)/B43-FT*, Iran-USCT (10 March 2020) [121].

¹⁸⁶ *Award No IIL 11-39-2*, Iran-USCT (30 December 1982) 4-5; *Award No IIL 2-51-FT*, Iran-USCT (5 November 1982) 5–6; *Award No 604-A15(II:A)/A26 (IV)/B43-FT*, Iran-USCT (10 March 2020) [121].

¹⁸⁷ *Award No 597-A11-FT*, Iran-USCT (7 April 2000) [4]; *Decision No DEC 1-A2-FT* (26 January 1982) 4.

¹⁸⁸ Based on a report submitted by Julian Arato and Andreas Kulick (see relevant Final Report available on the ILA website of the Study Group).

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’,¹⁸⁹ ‘integral’,¹⁹⁰ ‘all-encompassing’¹⁹¹ rule that takes a ‘holistic approach’¹⁹² without creating a hierarchy between different elements of the provision.

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 US* consider that ordinary meaning was not coextensive with literal meaning, and that such interpretation could not ‘be decided on a purely semantic basis’.¹⁹³ 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.¹⁹⁴ 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

¹⁸⁹ *Posťtová banka, as and Istrokapital SE v Hellenic Republic*, ICSID Case No ARB/13/8 (Award, 9 April 2015) [282-3].

¹⁹⁰ *Garanti Koza LLP v Turkmenistan*, ICSID Case No ARB/11/20 (Dissenting Opinion of Laurence Boisson de Chazournes, 3 July 2013) [11].

¹⁹¹ *HICEE BV v The Slovak Republic* (Partial Award, 23 May 2011) [135].

¹⁹² *Daimler Financial Services AG v Argentine Republic*, ICSID Case No ARB/05/1 (Award, 22 August 2012) [254].

¹⁹³ *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].

¹⁹⁴ *DC Affiliate Limited and ADC & ADMC Management Limited v The Republic of Hungary*, ICSID Case No ARB/03/16 (Award, 2 October 2006) [359].

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’.¹⁹⁵

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.

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.

xi. Aarhus Convention Compliance Committee¹⁹⁶

The Aarhus Convention Compliance Committee (ACCC) was created in October 2002 by States Parties to the 1998 Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice In Environmental Matters as the main body to address issues of alleged non-compliance with that Convention.¹⁹⁷ The ACCC consists of nine independent experts who serve in their personal capacity and who have recognized expertise in the field.¹⁹⁸ Should the Committee makes a provisional finding that the Party concerned is not in compliance,

¹⁹⁵ *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].

¹⁹⁶ Based on a report submitted by Catherine Brölmann (see relevant Final Report available on the ILA website of the Study Group).

¹⁹⁷ *Guide to the Aarhus Compliance Committee* [2], available online at: https://www.unece.org/fileadmin/DAM/env/pp/compliance/CC_Guidance/Guide_to_the_Aarhus_Convention_Compliance_Committee__2019.pdf (last accessed on 20 September 2020).

¹⁹⁸ Annex to Decision 1/7 (UN Doc ECE/MP.PP/2/Add.8) [1-2].

it will refer its conclusions to the Meeting of Parties accompanied by feasible measures and recommendations.¹⁹⁹ To date, the ACCC has issued just over 40 ‘findings’.²⁰⁰

Direct references to the VCLT rules of interpretation in the Findings of the ACCC are sparse, with merely four explicit citations of the corresponding VCLT articles in three separate cases.²⁰¹ In these four instances the ACCC limits itself to a mere statement of the provision, without providing substantive insights into the interpretative process. There are, however, indications that the ACCC has integrated the rules and methods of interpretation contained in the VCLT into its reasoning, as may be gleaned from the references to elements of the provisions of Articles 31 - 33, such as ‘object and purpose’, ‘ordinary meaning’, or similar terms.²⁰² While there are limited express references to the rules of interpretation in the VCLT, it is possible to identify some trends in the interpretative practice of the Committee. The ACCC appears to give a prominent role to the teleological approach (here taken as synonymous with the interpretation based on ‘object and purpose’), combined with a focus on the ‘effective’ application of the provisions of the Convention, and is inclined to a contextual, case-by-case assessment of each case.

The ACCC does not make explicit mention of any classic maxims of interpretation that are not explicitly referred to in the VCLT. However, it does put considerable emphasis on ensuring that the interpretation of the Convention results in the effective implementation of its provisions, which is generally inspired by the object and purpose of the Convention as a whole. The principle of effectiveness, or *effet utile*, is evidenced by a prominent presence of the term ‘effective’ not only in multiple locations in the text of the Convention itself,²⁰³ but also in (nearly all) analyses by the Committee, where it is often accompanied by a reference to the object and purpose of the Convention.²⁰⁴ The ACCC has, however, been cautious of states’ discretion to implement the Convention as they see fit, as long as that does not contravene the object and purpose of the Convention.²⁰⁵

¹⁹⁹ *Ibid.*

²⁰⁰ Available online at: https://www.unece.org/fileadmin/DAM/env/pp/compliance/CC_Compilation_of_Findings/Compilation_of_C_C_findings_23.04.2019.pdf (last accessed on 20 September 2020).

²⁰¹ 1ACCC/A/2014/1 (Belarus) [35, 40]; ACCC/C/2013/85 and ACCC/C/2013/86 (United Kingdom) [69]; ACCC/C/2014/102 (Belarus) [67].

²⁰² ACCC/C/2005/13 (Hungary) [70].

²⁰³ Preambular paragraph 18; Arts 3(9), 5(2), 6(2)-(4), 8, 9(4)-(5) of the Convention.

²⁰⁴ See eg ACCC/C/2005/11 (Belgium) [34].

²⁰⁵ ACCC/C/2010/48 (Austria) [61].

One notable element of the ACCC's practice is that it frequently refers not only to its own Findings, but also to the Aarhus Convention Implementation Guide, to reports of the Meetings of the Parties, and to sources developed under the auspices of the Aarhus Convention, such as the *Maastricht Recommendations on Promoting Effective Public Participation in Decision-making in Environmental Matters*,²⁰⁶ to assist it in interpreting the Convention. For example, in ACCC/A/2014/1 (Belarus), when the meaning of the term 'manifestly unreasonable' was disputed, the ACCC referred to the Implementation Guide to inform its interpretation.²⁰⁷

Concluding Remarks

This Final Report by necessity was quite selective as to the interpretative issues to be highlighted with respect to the practice of each IC. Nonetheless, it has to be noted that the individual final reports (available on the ILA website of the Study Group) offer a veritable smörgåsbord of issues and in-depth analysis on a number of topics using the Questionnaire that had been sent to the members (also available on the ILA website of the Study Group) as a springboard. This short Final Report can by no means do justice to the research, insights and findings of all the reports, for which the members of the Study Group should be commended, and the reader is advised to consult these individual reports for any topic or IC that piques their interest.

In order to ensure the feasibility of the work undertaken, the Study Group, focused mainly on treaty interpretation. However, in their research the members came also across interesting examples of interpretation of customary international law and of acts of States and international organizations (eg optional clause declarations, Security Council and General Assembly resolutions etc.). Although the interpretation of these rules and acts bears similarities to treaty interpretation, there are points of divergence that deserve more meticulous study in order to paint a complete picture of interpretation in international law.

This being said, a common theme that emerged from all reports is that interpretation remains as pivotal as always in the exercise of the international judicial function. Although, not all ICs engage in a conscious and/or exegetic discussion of the interpretative process, nonetheless it is always present and felt, even though sometimes implicitly, in the texts of the judgments or decisions.

²⁰⁶ Cf ACCC/A/2014/1 (Belarus) [5].

²⁰⁷ ACCC/A/2014/1 (Belarus) [26], referring to UNECE, *The Aarhus Convention: An Implementation Guide* (2nd edn United Nations 2014) 84, available online at: https://www.unece.org/env/pp/implementation_guide.html (last accessed on 20 September 2020).

More often than not, a more detailed discussion of the content and purpose of the rules of interpretation occurs in the individual opinions of judges and members.

The adoption and entry into force of the VCLT has had an undeniably significant impact on the form that the discussion on interpretation takes, with most ICs referring to Article 31-33 VCLT and its elements (also using the language adopted in the VCLT) even in cases where customary rules of interpretation were the applicable law. This acceptance, of course, has occurred incrementally rather than in a spontaneous fashion.

Incremental is also the refinement and clarification of the content of the various elements of the interpretative exercise with ICs sometimes even reaching different conclusions as to the content of the rule (see, for instance, the interpretation of Article 31(3)(c) VCLT). Judicial dialogue is becoming increasingly important in this context, with some judges and members of ICs arguing, as a matter of policy, in favour of consistency between the interpretations offered between different international courts.

Despite the VCLT's dominant position in the interpretative discourse interpretative rules/maxims not explicitly included in the VCLT continue to appear both in the pleadings of the parties, and the texts of the judgments of ICs. Although on occasion, their place within the VCLT framework is discussed (with mixed results) most of the times they are simply utilized as interpretative tools without examining their normative status and/or their relationship with the VCLT. A wide variety of material is also resorted, of both binding and non-binding nature (eg declarations, draft codes, dictionaries, scientific publications etc.).

Although some ICs may, on occasion, show a reference for a particular method of interpretation – this is usually the case with ICs interpreting human rights instruments and a preference for teleological and/or evolutive interpretation – the prevailing attitude is to consider, as the ILC has also noted, interpretation as a 'holistic exercise' with no inherent hierarchy between the different approaches to interpretation.

The interpretative choices made by the various ICs can on occasion be attributed to a number of internal and external factors (such as contract incompleteness, statute of the court, drafting limitations, the background of judges, the subject area, political constellations or situations, concerns about the court's legitimacy, or about implementation of the judgment). However, this

is often difficult to discern merely from the text of the judgment and often relies on consideration of the wider context (eg political and social) across multiple judgments/decisions.

In conclusion, the Study Group has found interpretation and its rules to be in a constant state of refinement, development and flux across all courts and tribunals. Such evolution and cross-fertilization is nothing to be feared but rather to be celebrated as an indication of the increasing maturity of the international judicial system and the international legal system as a whole.

Although the Study Group has now concluded its work, it would recommend to the Executive Committee that if the International Law Association deems further work on interpretation appropriate, it may wish to establish an international committee, with the mandate to undertake further study on the interpretation of non-treaty rules (eg customary rules), unilateral instruments and acts. As was suggested in a number of the individual reports, this work could yield extremely interesting and important results as to exact points of divergence and convergence between those rules and the rules on treaty interpretation.