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(p. 804) 1969 Vienna Convention

Article 31
General rule of interpretation

1. **A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.**

2. **The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:**

   (a) **any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;**

   (b) **any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.**

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

   (a) **any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;**

   (b) **any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;**

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

4. **A special meaning shall be given to a term if it is established that the parties so intended.**

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1. Article 31 is indisputably a central clause of the Vienna Convention. This provision can serve as a guide for all authors of the present work, commenting on the other Articles of the Convention.[1] Whilst the scarcity of references and practical applications is the lot of certain clauses, Article 31 has been so frequently mentioned that only an abbreviated study of its various aspects is possible.[2] Indeed, States and courts (international or domestic) have abundantly used the interpretation guides contained in this Article. Its success is undoubtedly due to the relative lucidity of its terms as well as the consensus to which it gives rise. One may even claim that the obviousness of its provisions endows it with automatic acceptance from its users.

2. Nevertheless, the success of Article 31 on treaty interpretation follows a codification operation often qualified as delicate.[3] According to Paul Reuter, the Article is 'une des réussites les plus remarquables de la Convention de Vienne',[4] dealing with an issue which was, according to Roberto Ago,[5] one of the most difficult faced in the entire body (p. 806) of treaty law. This Article therefore benefits from a general approbation that doctrine and the ensuing practice of States and courts seem to confirm.[6]

3. It is true that interpretation in general and the interpretation of treaties in particular, is of fundamental importance in law since it results in 'releasing the exact meaning and the content of the rule of law that is applicable to a given situation',[7] and that:

> Controversies regarding interpretation would not be so strong if they did not translate into a battle for mastering the legal system, which turns the interpretive process into a variant of the battle for the law.[8]

This is how we measure the stakes attached to the interpretative process, a sort of 'logique au service du droit'[9] concretized by an intellectual operation aiming to extract the legal solution that stands out at a given moment in time. But above all, the importance lies not in the interpretation *stricto sensu* but in what the interpretation requires: the application of law according to an extremely lucid adage: 'Il n'y a pas d'application sans interpretation'.[10]

4. To decipher this complex phenomenon successfully, it is necessary to return to the reality of interpretative principles preceding and coinciding with the *travaux* leading to the Vienna Convention. It is difficult to pinpoint how principles were exactly codified in those days because practice remained

relatively confused (even if the Article's constitutive elements were already present) and the construction of Article 31 was fairly unstable and lively. It is however easier to link plethoric practice subsequent to the Convention with the latter's prescriptions, in order to assess to what extent the Articles have been observed.

References

A. A difficult gestation process

General characteristics

5. The first obstacle that the analysis of interpretation comes across is the oft-repeated statement that interpretation appeals to the artistic rather than scientific qualities of a (p. 807) lawyer.[11] In the great debate on whether law is art, science, or mere technique, interpretation occupies a prime position on the crossroads between law and politics, a true 'instrument for measuring' legal coherence.[12] This debate is based on the uncertainty concerning the polymorphous nature of interpretation, for this term is an umbrella expression that designates both the interpretative process and its result. This ensemble is even more complex if we make a distinction between the means of interpretation (a list of which is drawn up by Art. 31), the methodology of interpretation, and the interpretative policy followed by States or international or domestic courts. Interpretative policy remained long marked by the traditional—although poorly formulated—statement that the interpretation given by concerned parties is an 'authentic' interpretation, as opposed to an interpretation given by a third party which is considered 'non-authentic'. As the Vienna Convention indistinguishably addresses all those who aim to interpret a treaty, the question of the value of interpretation is hardly resolved except by its guidance to achieve a harmonization of interpretations.

6. The issue of treaty interpretation also aroused fresh interest due to the establishment of numerous international courts in the course of the last decade (the Dispute Settlement Body of the WTO, the International Tribunal for the Law of the Sea, the international criminal courts). Whilst States and international organizations continue to be the prime 'consumers' of interpretation, international courts, by dint of their function, perpetually find themselves pushed up against the wall of interpretation. As reflected by the *travaux* of the ILC during the drafting of the Convention, only arbitral awards and judgments of the International Court of Justice (ICJ) served as references at the time but this would probably not be the case today. Not only have the interpretative methods diversified but also the coherence of specific interpretations has often been brought into question, despite a certain conciliatory harmony, for the moment, between the courts.

7. As a result, the interpretation of treaties which always occupied States, courts, and arbitration tribunals in the past, remains and will remain a current issue. We can therefore understand the sensitivity expressed during the ILC *travaux* and the Conference. Originating from a recognized practice, the means of interpretation codified in 1969 are endlessly repeated references on which users lean (even if they end up ignoring them in the end), like sacred texts that are often difficult to apply but are constantly invoked.[13]

8. Article 31, a type of 'sacrosanct' core, is set out in four paragraphs which must not be read in hierarchical order but according to an overall logic. The first paragraph lays the foundation of the interpretative process, which is to give priority to the treaty text through invoking a few general guidelines: good faith, the ordinary meaning of terms as intended at the time of the treaty's conclusion,[14] in its context and in the light of its object and purpose, that is, according to the content and end result attributed to (p. 808) it. The second paragraph specifies what should be understood by 'context', a term also employed in the first paragraph. It is understood that this automatically includes the text of the treaty itself, the preamble (a section that should not be neglected when seeking to understand the intention of the parties), and any possible annexes (which often prove to be important and extremely weighty in a number of modern treaties, notably in technical domains). However, the context also includes agreements between the parties at the time when the treaty was concluded: agreements with a bearing on the treaty as well as similar agreements between certain parties to the treaty which have been approved by the other parties.[15] Since this context does not suffice for the interpretation of a treaty, paragraph 3 requests that account be taken, 'together with the context' (thus indicating that no hierarchy exists between paragraphs 2 and 3), of subsequent interpretative agreements, the subsequent practice of parties, as well as any relevant rule from

international law applicable between the parties. In reality, this relatively wide-scale ensemble can be qualified as the external context of the treaty if the entire context were represented as concentric circles. This results in an evolutive approach towards the treaty interpretation thereby addressing—without explicitly naming the concept—the issue of inter-temporal law.[16] Finally, the last paragraph reintroduces the notion of the specific intention of the parties by mentioning the possibility of detecting a special meaning for a term if this was indeed their intention. This possibility has been widely used, notably by the European Court of Justice (ECJ),[17] in the context of teleological interpretation which is not mentioned as such in Article 31. The specification in Article 31(4) therefore does not render the previous paragraphs useless but complements these when there exists a clearly manifested intention to give a particular meaning to a certain clause.

9. It is thus fairly obvious that the text of Article 31 is a true example of a compromise: a compromise between the defenders of textual interpretation, of subjective interpretation based on the parties' intention, and of ends-focused or teleological interpretation which attempts to extract those meanings from the text which might be intended beyond the formulation used.[18] This Article intertwines different means of interpretation (text, context, and circumstances) and ways to perceive these means, in other words, methods. The objective is to find an interpretation that is simultaneously obvious (the ordinary meaning of terms), logical (an *acte clair*), and effective (a useful effect).[19] To this end, Article 31 contains a method for evaluating elements resembling case law precedent, a method applied by case law subsequent to the Convention.[20] The next step in this commentary is to examine how the ILC and the Conference arrived at this result and to what extent Article 31 was subsequently appreciated in practice and case law.

References

(p. 809) The status of principles of interpretation before the 1969 Convention: custom or mere practice?

10. Rules of interpretation, already widely used in their current form before the 1969 Convention, were marked by the seal of caution. There was a general wariness of rigid rules as reflected by the debates during the ILC *travaux*.[21] The work of the Special Rapporteur was based on previous case law and doctrine in order to establish a framework in which caution had its place, beginning with the necessity to codify such rules. Reserve is reflected in the following statement: 'No canons of interpretation can be of absolute and universal utility…'.[22] It was thus advisable to codify only '*prima facie* guides',[23] given that it would scarcely be possible to cover principles and methods in detail. It would only be feasible to codify what was at first glance the object of an agreement. This generalized prudence has ultimately proven to provide a contested customary grounding of rules in relation to treaty interpretation. While practice, largely emanating from the interpretation of contrasts, and therefore general principles of law, is abundant and well established, no method seems to have received the anointing of an infallible *opinio juris*.

11. The ILC was able to rely on the findings of the Institute of International Law which had made a timid attempt at drawing up a synthesis during its 1950 and 1956 sessions.[24] The first draft of the future Articles on interpretation drew widely on these findings as well as on the synthesis proposed by Sir Gerald Fitzmaurice,[25] which was based on case law from arbitration tribunals and the Hague Court (Permanent Court of International Justice (PCIJ), then ICJ). We can thus once again gauge the crossbreed influence of doctrine and case law on the codification *travaux*. Nevertheless, since former practice demonstrated an attachment to the text because it is, first, an authentic expression of the parties' will, secondly, a reflection of the parties' intention as a subjective element distinct from the text, and, thirdly, a reflection of the purpose and object—declared or apparent—of the treaty, no clear dividing line emerged. We can schematize this debate in terms of the tension between the *declared* intention emanating from the terms of the treaty, versus the *real* intention emanating from the intention of the parties. Article 31 would reflect the necessary compromise between these different points of view often characterized as textual, subjective, or teleological.

12. The practice of chancelleries or tribunals did not shed any light on the debate. As observed by the ILC, a whole range of maxims on interpretation was used variably and often discretionarily (with nevertheless a slight 'advantage' accorded to the textual approach),[26] hence the statement that interpretation is more an art than a science. The ILC's work would therefore itself be hybrid: this codification task was also answerable to the evolutive development of international law while ultimately providing an adroit synthesis of scattered positions.

(p. 810) **13.** Case law preceding the ILC *travaux* reflects this diversity. Reading this case law helps to grasp the feelings of doubt that may have filled various Special Rapporteurs in the face of a dispersed reality, sometimes within a single court. It is moreover striking that the PCIJ, followed by the ICJ, opened their awards with opinions on interpretation, each of which contained most of the possibilities open to interpretation. The Advisory Opinion of 12 August 1922 on the *Competence of the ILO in regard to International Regulation of the Conditions of the Labour of Persons Employed in Agriculture* rested on an objective textual approach to interpret the Versailles Treaty of 28 June 1919 while taking into account the context, the parties' intention, subsequent practice, and, in a subsidiary manner, the *travaux préparatoires*: everything—or almost everything—can be found there.[27] As for the ICJ, its Advisory Opinion of 28 May 1948 on the *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter)* privileged a textual interpretation based on the ordinary meaning of terms.[28] However, it also referred to the necessity to examine the parties' intention (notably if there is no *acte clair*) and mentioned a possible use of *travaux préparatoires*. This overlap of interpretative methods used at both courts also occurs in subsequent case law. Successively or cumulatively, the PCIJ pronounced its opinion on the 'effectiveness' to be accorded to the clauses of a treaty,[29] on textual or objective interpretation,[30] on the subsequent practice of parties to a treaty,[31] on the role of *travaux préparatoires*,[32] on the context of the treaty,[33] on interpretation in the light of the treaty's object or purpose,[34] not to mention teleological interpretation which began to anchor itself in the minds of judges through the influence of implicit powers.[35] Even if the future Vienna Convention would not retain these restrictions, the PCIJ issued a reminder that it was necessary to interpret restrictions to a State's independence restrictively,[36] and that authentic interpretation was not within a court's jurisdiction.[37] It is thus beyond dispute that the codified means in Article 31 pre-existed the Convention (p. 811) and that they were known and used by States and courts. Nevertheless, what might be surprising is the extreme diversity of these means, their somewhat disorderly usage, and finally, the low level of confidence placed in their consecration. We are dealing with a global practice in which each element cannot truly be given a customary character.

References

14. Until the beginning of the 1960s (a critical date for the ILC to take into consideration its case law), the ICJ would demonstrate no firmer resolve in its line of conduct. Other than the Advisory Opinion of 28 May 1948 mentioned *supra* which sums up its former practice, the Court would also pronounce on the 'effectiveness' which had to be accorded to treaty clauses. This somewhat limits the treaty,[38] and had an effect on the interpretation of subsequent practice,[39] the role of *travaux préparatoires*,[40] the context of the treaty,[41] the 'natural and ordinary meaning' to give the terms of the treaty,[42] the notion of *acte clair*, and the intention of the parties.[43] It also influenced the interpretation in the light of the treaty's object or purpose, a point on which the Court developed a tendency towards teleological interpretation in respect of international organization powers, notably the UN.[44] In other words, this case law did not constitute a linear guide to detecting interpretative norms that could be imposed in absolute terms. Examination of the case law of several courts emerging at that time does not alter this point of view. In its judgment of 1 July 1961 in the *Lawless* case, the European Court of Human Rights (ECtHR) relied on codification *travaux* in progress to back up its preference for an interpretation taking the treaty's context into account and advocating a teleological vision which in this particular case allowed it to confirm a textual interpretation.[45] After a rather diffident debut in which it restricted itself to textual interpretation,[46] the ECJ increasingly asserted the autonomy of Community law by taking into account the context of the treaty, implicit (p. 812) powers,[47] and finally, the 'communitarian' meaning that should be attributed to the treaty's terms.[48] Already one could foresee what would become a quasi-constant in the case law of all courts: the affirmation of a teleological interpretation for constitutional acts of international organizations.

References

15. Indisputably, the PCIJ, the ICJ and, in their wake, the ECtHR and the ECJ, played a role in the development of the teleological method and the notion of effectiveness. However, this case law was still not widely affirmed at the time when debates took place in the ILC, and the other interpretative means were generally used cumulatively without any clear line of action standing out. The ILC would thus have to navigate between multiple obstacles. For example, it appeared difficult to detect a dividing line between 'effectiveness', evocation of the treaty's 'object and purpose', and a purely teleological approach towards

the reading of the treaty. In short, the ILC was confronted with important, though not always compatible, factors which allowed it to elaborate on the codification of interpretative rules without any certainty that the basis was solidly customary. A statement from the award in the 1957 *Lake Lanoux* case sums up these uncertainties: 'Le droit international ne consacre aucun système absolu d'interprétation'.[49] The ILC would thus give the impression of codifying customary principles of interpretation whilst the basis for this remained fragile. Instead, it would be the Convention itself which would render these principles customary and project them into the future as if they had always been customary.[50]

References

The difficult emergence of Article 31 via the ILC *travaux* and the Vienna Conference

16. Even though the drafting of the Articles on the law of treaties commenced in 1949, it was not until the beginning of the 1960s that any real progress was made after several interrruptions during the 1950s. In the ILC report of spring 1964,[51] with Sir Humphrey Waldock as Special Rapporteur, the topics of the future Articles 31 to 33 were first divided over six Articles (70 to 75) which were much more detailed and fairly redundant, under an overarching Section 3 on the interpretation of treaties. These Articles, exposed to the scrutiny of critics, would undergo various evolutions.[52] The subject was judged so delicate (p. 813) that the alternatives seemed to be either to remain silent on aspects concerning treaty interpretation, or to cover only a very limited number of rules. This second solution was retained with the proposition of four general Articles (70 to 73) and two Articles on special problems (74 and 75 on treaties in several languages or several versions). However, it was, for example, deemed useless to establish a distinction between 'law-making treaties' and 'contract-treaties'.[53]

17. Article 70 of the draft Articles constituted the general reference Article;[54] it was composed of 'General rules' based on the primacy of the text as evidence of the intention of the parties. It seems that there was a desire to minimize the tendency towards subjective interpretation via reliance on the intention of the parties. The three paragraphs of the Article illustrated this general principle more precisely. By virtue of the first paragraph, interpretation should be carried out in good faith, according to the ordinary and natural meaning of terms (which constituted, according to the Special Rapporteur, the 'basis of interpretation'), taken in its global context (which the PCIJ and the ICJ abundantly illustrated), and according to the common usage at the time when the text was drafted. This last point, which raised the question of inter-temporal law, had been the object of lengthy discussions, for draft Article 56 had already targeted inter-temporal law in the context of the application and effects of treaties. The first paragraph of Article 56 dealt specifically with interpretation: 'A treaty is to be interpreted in the light of the law in force at the time when the treaty was drawn up', whilst paragraph 2 privileged, for the application of a treaty, the law in force at the time when the treaty was applied.[55] The dilemma appeared difficult to resolve, not only with regard to Article 56, but also between Article 56 and the section dedicated to interpretation. The redundancy (similar to that which existed with Art. 73) was thus deliberate and destined to persist until this point was clarified. The second and third paragraphs of Article 70 qualified the principles in the first paragraph by providing that, if the ordinary meaning did not lead to a coherent result, or if it was not clear, account should be taken of the context of the treaty or other means of interpretation (which were then mentioned in Art. 71). Similarly, if parties intended to give a 'special meaning' to a term, the ordinary meaning should be ruled out.

References

18. Article 71 aimed to define the application of the 'General rules' set out in Article 70. This concerned above all the context of the treaty which was specified to include the preamble, documents annexed to the treaty, as well as supplementary agreements made at the time of the treaty's conclusion or serving as a basis for interpretation.[56] Paragraph 2 allowed interpretation to be supplemented by taking into account the *travaux préparatoires* or the subsequent practice of parties which could confirm or weaken the meaning given to certain terms. Subsequently these elements would be separated, with the *travaux (p. 814) préparatoires* relegated to the rank of subsidiary or supplementary (according to the point of view) means of interpretation while interpretative practice remained an element of the general rule of interpretation.

19. Article 72 put 'effectiveness' into a category of its own, even though the Special Rapporteur did not hide his hesitations about including a specific provision on this topic, or even merely mentioning it in the draft Articles.[57] On the one hand, there was a fear that this notion would be confused with teleological interpretation and, on the other hand, it was considered that 'good faith' sufficed to produce effectiveness. Article 72 appeared redundant as it merely recalled that effectiveness should be compatible with the natural and ordinary meaning of the terms of the treaty, as well as with its object and purpose. Finally, Article 73 returned to the question of inter-temporal law already mentioned in Article 56 and Article 70(1)(b), but this time from the perspective of the influence of customary rules emerging after the adoption of the treaty, the conclusion of a subsequent agreement, or the development of a subsequent practice. Articles 74 and 75 finished off this panorama by covering the issue of treaties in several languages or several versions.[58]

20. It is true that this was a preliminary step in formulating a final set of draft Articles but the confused tangle, at which the ILC had at this stage arrived, evidenced the great difficulties involved in putting together elementary rules for treaty interpretation. A sort of precautionary principle imposed itself and meant that only a limited number of legal principles on interpretation would be codified. Even so, this minimum would be subject to endless discussions, as proven by the 1966 phase during which the observations of States would be studied following a remodelling of the 1964 draft.

21. Following the report of 1964, new draft Articles were elaborated on until 1966. In its second version, the draft limited interpretation to three Articles (69 to 71) dealing respectively with the 'General rule of interpretation', 'Further means of interpretation', and the 'Term taken according to a specific meaning'. It bears a closer resemblance to the final version which would nevertheless include numerous modifications. What is striking, at first glance, is the singular form that replaces, in Article 69, the plural of 'General rules' of the former Article 70. The reason—not formally disclosed—for placing 'General rule' in the singular in the title may well stem from the difficulty of perceiving unity in 'Rules' whereas the plural form hints at multiplicity and dispersion.

22. At that time, States made many proposals but these globally converged towards simplifying the Articles' presentation.[59] The United States thus expressed a desire that 'directing principles' (and not 'rules') be set out successively in a single Article, leaving the door open for 'other means of interpretation'. Certain governments (Israel, Hungary) wanted to give the *travaux préparatoires* the same status as subsequent practice as a means for determining the intention of the parties, whereas the draft placed the *travaux préparatoires* in Article 70 dealing with further means of interpretation. Finally, others (notably Greece) were wary of an order of priority in the statement of different means. The Special Rapporteur drew one certainty from this discussion—it would be impossible to codify in too rigid a manner—and warded off a popular criticism by pointing out that just as for Article 38 of the ICJ Statute, the order of enumeration would not entail a hierarchical (p. 815) order but simply a logical one.[60] The singular in the title of Article 69 should therefore be taken to mean that interpretation involved a complex single operation.

References

23. Other more specific criticisms would arouse debate within the ILC, from which several precisions would emerge. Subsequent practice would remain an element in the central Article (provided that it established an understanding between all the parties), whereas *travaux préparatoires* would be relegated to the category of further means of interpretation.[61] Ultimately, the issue regarding treaties in several languages attracted a great deal of attention. All these ingredients led to the draft Articles presented in the July 1966 report which, this time, were reduced to two Articles (Art. 27, which grouped together Arts 69 and 71, and Art. 28, corresponding to Art. 70 in the previous incarnation) on the general rule and further means of interpretation. The simplification was clear-cut (the draft evolved from five Articles to three in 1964 and henceforth two) and the result was slowly approaching the definitive version. The only division that subsisted was the one between principal means and further means of interpretation. Therefore, while hierarchy was erased within Article 27, it reappeared in the addition of another Article. It nevertheless seemed that a fairly clear vision of what was desired in relation to interpretation had been achieved.

24. Article 27 very clearly expressed a preference for textual interpretation, making the text the authentic expression of the parties' will. Paragraph 1 recalled the necessity of good faith interpretation according to the ordinary meaning of terms in the context of the treaty and in the light of its object and purpose. The context was then defined as systematically including the text, the preamble and annexes, as well as

agreements made at the time of the conclusion of the treaty between the parties or other agreements accepted by the parties. Finally, paragraph 3 specified that account would be taken 'at the same time as of the context' of subsequent interpretative agreements, subsequent practice (accepted by all, even if only applied by some), and relevant rules of international law (which furtively reintroduced the issue of inter-temporal law, evacuated as such). The fourth and final paragraph of the Article dealt with the 'special meaning' given to a term by the parties (with the burden on the latter to prove this). Finally, Article 28 reintroduced a form of doubt by returning—in a covert manner—to a more subjective form of interpretation by taking into consideration, as supplementary means, the *travaux préparatoires* and the circumstances in which the treaty was concluded, when ambiguity or an absurd outcome resulted from use of the means of Article 27. The 'exceptional' character surrounding the use of this Article was made clear but a compromise had been reached and would be consolidated by the practice of States and international courts. It was on this basis that the debate would be opened at the Vienna Conference in 1968.

25. During the first session from March to May 1968, the dominant impression was that State representatives were returning to the doctrinal squabbles that the slow elaboration of the draft Articles seemed to have buried. The United States, represented by Professor McDougal, did not renounce their less rigid and more subjective vision of interpretation, and continued to propose the fusion of the two Articles into a single one in order to avoid instilling a form of hierarchy that evidenced little inclination to take into (p. 816) account the real intention of the parties (notably by placing the *travaux préparatoires* in the background or by placing the burden of proof upon the party invoking the 'special meaning of a term').[62] Vietnam and Ghana, for example, backed up the United States but the mighty struggle between the primacy of the text and that of the subjective intention of the parties was also raised by other representatives, some siding more or less openly with the 'camp' of the ILC *travaux*. The Ukrainian representative thus regretted that the text was expressly privileged,[63] whilst Uruguay (represented by Professor Jiménez de Aréchaga), Poland, Spain, Sweden, Argentina, and the United Kingdom, etc. declared themselves globally favourable to the ILC *travaux*.[64] Apart from these oppositions, there were also those who maintained that codification of interpretation was useless (such as Greece). France also declared itself favourable to the presented text for, no doubt recalling the words of Paul Valéry, it did not wish to give priority to subsequent motives.[65] In the face of this opposition which appeared irreconcilable, the Expert Consultant Sir Humphrey Waldock attempted to 'take the heat out of' the doctrinal debate by bringing the ILC *travaux* back onto the terrain of practice itself. He notably justified the intended absence of hierarchy between the different methods of interpretation, the non-inclusion of inter-temporal law as this was too vast a question which affected all the relationships between the law of treaties and customary law, and also indicated that the 'special meaning of a term' was ultimately no different from the 'natural meaning' in a special context, a skilful way of turning around the argument.[66]

26. The debate would barely move beyond that stage, except for several minor modifications, and the future Article 31 would correspond well to draft Article 27 as it had been defined. Finally, the three Articles on interpretation would be adopted unanimously during the second session of the Conference, on 6 May 1969.[67]

27. Following this chaotic elaboration, Article 31 leaves several aspects unclarified which have not been resolved in the meantime due to a lack of capacity or will. Effectiveness is not mentioned as it is considered implicit in good faith, as well as in the statement on interpretation in the light of the object and purpose of the treaty—an absence that leaves the possibility open for an interpretation with a teleological leaning. Inter-temporal law is also ousted to avoid presumption in favour of the rule in force at the time when the treaty was concluded or interpreted. Silence also surrounds the adage according to which 'restrictions to independence cannot be presumed', no doubt because its connotations were too strong despite a basis in case law. Otherwise, the ILC contented itself with following the paths signposted by case law and practice (the 'context', for example, clearly corresponds with case law trends). Perhaps its most significant innovation resides in its affirmation of the singular for the title of Article 31, a way of preventing the establishment of a hierarchy in favour of a single but complex operation. Nevertheless, the (p. 817) separation from the means codified in Article 32 implies that the supplementary means are first and foremost subsidiary.

B. An overwhelming practice

28. Practice flowing from Article 31 is difficult to circumscribe because there is such an overwhelming amount of it on the part of States, international organizations, and domestic or international courts. It is

thus impossible to make any claims of providing here a thorough analysis of practice. We can only—by means of a 'survey'—observe that all subjects and players in international law seem to conform to the letter and spirit of this provision, notwithstanding divergences springing from the choices that methods of interpretation allow. As the result par excellence of a consensus, the provisions of Article 31 allow enough latitude for all bodies to draw on their own method. This implies that the possible means for arriving at a certain interpretation are numerous. Thus, effectiveness (itself a mixture of the criteria of the object and purpose and of the principle of good faith), the object and purpose of the treaty, or a directly teleological approach (such as that of the ECJ) can—depending on the interpreter—allow for an ends-focused interpretation. Clearly, object and purpose are often confused with effectiveness, while the whole process commands a teleological approach. In the same way, for inter-temporal law or the intention of the parties, the provisions of Article 31 allow several 'openings', and it is sometimes difficult to find a specific aspect standing out in case law. Finally, while textual interpretation tends to flow from Article 31 and intentional interpretation from Article 32, the divide is far from clear-cut: other than the fact that numerous aspects of Article 31 can lead towards an analysis of the intention of the parties, paragraph 4 seems to make a connection between the two Articles. This is the observation that we are going to examine here by proceeding on the basis of the provisions of Article 31.[68] It must nevertheless be pointed out that, by definition, this practice only relates to unilateral or adjudicative interpretations that are in reality the main —or even the only—ones targeted by the Vienna Convention. When one reduces the scope of Article 31, one notices that practically the only interpreters concerned are judges to whom the States or organizations delegate 'le règlement de leurs prétentions contradictoires'.[69] Once again, therefore, the case law of the principal international courts will be the main indicator of this practice.[70] Focus will be placed on this case law because it has largely inspired the practice of States, which is impossible to circumscribe.

The basis of interpretation (paragraph 1)

29. Paragraph 1 remains the foundation of the method of interpretation: good faith,[71] the ordinary meaning of terms, the context, and the object and purpose of the treaty are (p. 818) gathered here in order to secure a soundly-based interpretation. Despite the fact that these elements may appear obvious, it is striking to notice to what extent practitioners of interpretation do not hesitate to refer to it. Nevertheless, it must be noted that good faith should cover, in the spirit of the ILC *travaux*, the rule of effectiveness which, as already indicated, no longer appears expressly in Article 31. One is actually confronted with different realities: while good faith—a largely meta-legal element—is a notion that applies above all to the parties to treaties, effectiveness is instead derived from the method followed by the judge.

30. Paragraph 1 thus consists of a statement followed by specifications that by themselves can give rise to multiple interpretations and lead to vastly different results. As some authors correctly put it:

> Dans cette phrase se trouvent énoncés à la fois un principe de portée absolument général et plusieurs règles, qui sans doute peuvent toutes être considérées comme découlant de ce principe, mais dont la mise en œuvre, normalement complémentaire, peut parfois conduire à proposer de donner des sens différents aux termes du traité.[72]

31. Cautious by nature, the major international courts have unceasingly relied on this basis. The case law of the ICJ provides a good illustration. Hence, the judgment of 12 November 1991 in the case of the *Arbitral Award of 31 July 1989* (*Guinea-Bissau v Senegal*) recalled that textual interpretation should prevail according to 'the natural and ordinary meaning [of provisions] in their context', and that it is only if the words 'are ambiguous or lead to an unreasonable result [that the Court should,] by resort to other methods of interpretation, seek to ascertain what the Parties really did mean when they used these words'.[73] The judgment of 14 June 1993 on the *Maritime Delimitation in the Area between Greenland and Jan Mayen* also emphasized the necessity of reading a treaty 'in its context, and in the light of the object and purpose'.[74] But it was perhaps in its judgment of 3 February 1994 on the *Territorial Dispute* between Chad and Libya that the Court most forcefully recalled the rules on interpretation of treaties when applying them to the interpretation of the agreement of 10 August 1955 between France and Libya, which served as a basis for the judgment:

> The Court would recall that, in accordance with customary international law, reflected in Article 31 of the Vienna Convention on the Law of Treaties, a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose.[75]

It is not possible to be more explicit than this. The Court applied this method to reject supplementary means of interpretation which it perceived as useless in this particular case and sought to give an *effet utile* to the treaty. The primacy of textual interpretation if the treaty is clear is moreover a leitmotiv that the Court has not hesitated to repeat each time the opportunity has arisen, that is to say, frequently. One finds this statement once again in the judgment of 15 February 1995 in the case of the *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (p. 819) (Jurisdiction and Admissibility)*[76] and in the judgment of 12 December 1996 in the case of *Oil Platforms* between Iran and the United States.[77] Another strikingly clear illustration emerged from the case of *Kasikili/Sedudu Island* between Botswana and Namibia where the principles of Article 31 were confirmed as being applicable as customary international law, although neither State was a party to the 1969 Vienna Convention.[78] This allowed the Court to use the methods of the Vienna Convention to interpret a treaty dating back to 1890, a situation that raises some problems of inter-temporal law. In many respects, this judgment constitutes a pedagogical and reasoned application of methods of interpretation as they are set out by Article 31. But beyond this, the lesson is simple: it serves little purpose to examine other aspects of interpretation if the treaty text is clear. In this case, it suffices to follow the ordinary meaning of the terms. Subsequently, the cases of *LaGrand*[79] and *Avena*,[80] as well as those relating to the *Israeli Wall*[81] or the *Application of the Convention on Genocide*,[82] also provided opportunities for the ICJ to reconfirm its attachment to paragraph 1 of Article 31.

References

32. The International Tribunal for the Law of the Sea has not departed from this constant for, since its initial judgment in the *M/V 'Saiga' Case* of 4 December 1997, it has examined its own jurisdiction by relying on a literal interpretation of the Montego Bay Convention, then proceeding to an interpretation of Articles 290 (provisional measures) and 292 (prompt release) for the needs of the case in question.[83] Even if the Tribunal does not expressly mention the Vienna Convention, it draws wide inspiration from the latter when determining the 'context' in which it should interpret certain provisions of the Convention on the Law of the Sea.[84] In the *MOX Plant* case, the Tribunal furthermore considered that:

> the application of international law rules on interpretation of treaties to identical or similar provisions of different treaties may not yield the same results, having regard to, *inter alia*, differences in the respective contexts, objects and purposes, subsequent practice of Parties and *travaux préparatoires*[85]

(p. 820) thus showing its attachment to rules of interpretation codified elsewhere.[86] In the famous *Tadic* case,[87] the International Crime Tribunal for the former Yugoslavia (ICTY) widely used the methods of Article 31 for a quite specific purpose: to justify its own existence in relation to its act of establishment. Its subsequent case law also borrowed on several occasions from the methods listed in Article 31, notably by referring to interpretation in harmony with the object and purpose of its Statute.[88] However, the Tribunal also referred explicitly to the Vienna Convention to interpret its Statute,[89] a not entirely problem-free move as this Statute is not a treaty but results from a Security Council resolution. In this respect, the ICTY operated largely by assimilation, notably because the Statute itself reproduced the content of some provisions that originated in multilateral treaties.[90] By imitating the ICTY, the same attitude has been taken by the International Crime Tribunal for Rwanda (ICTR), since the judgment of 18 June 1997 in the case of *Joseph Kanyabashi*[91]—a replication of the ICTY's *Tadic* decision. In turn, the ICTR expressly invoked Article 31 of the Vienna Convention to justify a method of interpretation according to the ordinary meaning of the terms of its Statute.[92]

References

33. Reference to the 1969 Vienna Convention is almost an automatism for the Dispute Settlement Body (DSB) of the World Trade Organization (WTO). There exists practically no other option since according to Article III: 2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes, the rules of the WTO should be interpreted so as 'to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law'. There are thus barely any cases where this reference is missing from reports of the Appellate Body,[93] since the procedure has been legitimated in this way although this procedure may not always be justified in respect to Article 31. Since

the *Gasoline* case in 1996, the Appellate Body has refused to isolate the rules of the General Agreement (GATT-94) from other rules of interpretation in public international law, by stating that 'the *General Agreement* is not to be read in clinical isolation from public international (p. 821) law'.[94] Through multiple references to the case law of the ICJ and to doctrine, the DSB has earned a reputation for strictly complying with existing international rules on the law of treaties as codified in 1969. It was in this light that the Appellate Body explicitly recognized the Vienna Convention as expressing customary law.[95] The Appellate Body would go as far as characterizing the Vienna Convention as a priority reference text for interpretation, thus implying that rules contrary to Article 31 would be rejected, notably when it comes to identifying the ordinary meaning of terms,[96] or interpreting the meaning of the object and purpose of the treaty.[97] The resulting impression is that there is a type of incantatory reference to this 'sacred text'; this situation, however, does not necessarily imply that the ensuing reasoning always conforms strictly to this reference which, it must be said, leaves many doors open.[98]

References

34. Does this heartening unanimity come to an end when one examines the case law of regional international courts? Focusing on the two major courts in Europe, it appears that this is not the case, even if one of these bodies seems to use Article 31 flexibly. For the ECtHR, reference to—and consequently, application of—Article 31 appears indisputable. Since 1975, at a time the 1969 Convention was not yet in force, the Court expressly referred to Article 31, considering that it expressed 'generally accepted principles of international law'.[99] Its case law largely confirms this submission to Article 31. Whether in relation to the 'context' of the treaty,[100] or the ordinary meaning of terms in (p. 822) the light of the object and purpose of the treaty,[101] the Strasbourg Court has been a 'good pupil' in the application of Article 31. The same cannot exactly be said of the ECJ which rapidly took a slightly off-track path or, to be more precise, privileged a teleological interpretation for Community treaties, whilst resorting to other possibilities when dealing with non-Community treaties. This means that there was hesitation to consecrate the customary character of the principles of Article 31 although the ECJ has been compelled to make use of the provision for Community treaties. Indeed, suspicion characterizes the attitude of the ECJ with regard to Article 31.[102] The starting point may be found in the case of *De Gezamenlijke Steenkolenmijnen in Limburg v ECSC High Authority* of 23 February 1961, in which the Court rejected the ordinary meaning of terms in favour of the 'Community meaning' which it constructed itself.[103] The ECJ naturally relied on the Vienna Convention in its opinion of 14 December 1991 by virtue of Article 228(1)(2) of the EEC Treaty, but only for the interpretation of a non-Community agreement.[104] It did the same in contentious proceedings by distinguishing between Community treaties to which it attributed a 'communitarian meaning', as opposed to other international treaties.[105] It was finally half-heartedly, and with an abundance of precautions, that it recognized certain provisions of the Vienna Convention as having customary value.[106] However, when the opportunity presented itself, the Court did not hesitate to refuse international treaties the consequences that it attributed to Community treaties. Thus, concerning the WTO agreements 'interpreted in the light of their object and purpose', the ECJ considered that these did not determine the legal means appropriate for assuring their execution in good faith in the domestic legal order of States.[107]

References

35. This rapid and non-exhaustive survey demonstrates that the general statements of the first paragraph of Article 31 do not seem to have met with any resistance from international courts, except for the ECJ, which very early on developed a teleological interpretation in favour of Community treaties, often leading it to consider any other rule of interpretation as suspicious and liable to conflict with its own objectives.

(p. 823) **36.** The growing role played by international law in domestic law has often led domestic judges to focus more carefully on treaties and their interpretation. While Ministries of Justice were previously called to the rescue by way of preliminary procedure to formulate the State's 'authentic' interpretation, judges no longer refrain from interpreting treaties when this appears necessary. Of course, the degree of power of the domestic judge will depend on the prescriptions specific to each State according to the procedure for the treaty's introduction, its role in the hierarchy of norms, and the extent of its control in the application of the treaty.[108] Thus to study this question in detail is out of the question. However, one may notice that the tendency—notwithstanding several significant counter-examples—is to recognize the

domestic judge as competent for interpreting treaties, and that the judge generally does so in conformity with the international obligations of his or her State, according to a sound sense of logic.[109]

37. Domestic judges often use the methods provided for in Article 31,[110] sometimes even making the effort to carry out interpretations in the text's official language. Nevertheless, the evaluation of this procedure will vary according to the system into which the treaty was received and the system in which it would eventually be transformed into domestic law. The example of France nevertheless evidences that this recognition was chaotic and remained subject to uncertainty. The French Conseil d'État displayed an ambiguous attitude, by considering that if the treaty was an '*acte clair*', it was not necessary to ask for its interpretation from the Ministry of Foreign Affairs. This would have been logical if the clarity of the act had not been the subject of (widely) differing appreciations. In this particular case, Community acts were often considered as 'clear', although evidence invited observations to the contrary.[111] A certain coherence was found from 1990 onwards in France,[112] for since that time, the administrative judge has been granted the possibility of interpreting treaties and can refuse to stay a ruling when he or she considers being able to make it him or herself. This attitude raises another problem: does the domestic judge possess a real competence (in the professional sense) to do so, and does he or she use the right methods for interpretation? One has to admit that the answer is extremely variable.

References

Taking into account the 'internal' context (paragraph 2)

38. The way in which context is taken into consideration in interpretation is sometimes difficult to determine, for the general formula used—'the context'—refers as much to the context globally referred to in paragraph 1, as to the context specified in paragraph 2. Moreover, sub-paragraphs (a) and (b) of paragraph 2 have only given rise to a relatively limited number of case law applications, since this type of agreement is more widespread and less specific than subsequent interpretative agreements (which are mentioned in (p. 824) para. 3). This is the reason why context is often mentioned without going into great detail: it is considered obvious when it is understood to include the text, preamble, and annexes of the treaty. Moreover, the context is sometimes understood as being 'the state of mind' in which a certain provision should be envisaged. In this case, it does not refer to objective elements but rather to the intention of the parties. This does not mean that agreements included in the context do not exist. On the contrary, these are numerous.[113] This being the case, and as the reader will no doubt have noticed, it should once again be noted that the line of division between 'context' in Article 31 and 'the circumstances in which the treaty was concluded' in Article 32 is not always clear.

References

39. We have already had the opportunity to point out instances of context in the case law of the ICJ.[114] These are most often general and imprecise statements, such as the one consisting in declaring that the agreement 'should be read in its context, in the light of its object and purpose'.[115] Nevertheless, the Court has had the opportunity, in certain cases, to apply the reference to supplementary agreements found in paragraph 2 of Article 31. Thus, in the *Territorial Dispute* case, the Court used the Convention of Good Neighbourliness concluded between the parties at the same time as the relevant treaty in this particular case. This Convention of Good Neighbourliness confirmed the interpretation that the Court made of the principal treaty, and therefore reinforced its finding.[116] Moreover, in the case relating to the *Sovereignty over Pulau Ligitan and Pulau Sipadan*, the Court had the opportunity to specify what it understood by an 'instrument related to the treaty' in sub-paragraphs (a) and (b) of paragraph 2 in Article 31. The Court refused to attribute this character to some documents presented as such by Indonesia, which it deemed to be mere internal documents of the Dutch government at the time when the treaty was concluded.[117]

References

40. The International Tribunal for the Law of the Sea also relied on the context of the 1982 Convention to deduce that Article 292 (prompt release procedure) should be interpreted as an independent procedure.[118] In the *Blaškic* case, the ICTY referred to the context of the provision in question of the 1977 Protocol to the 1949 Conventions, in order to characterize the conflict in the former Yugoslavia.[119] As for the DSB, in its

quest for an interpretation as faithful as possible to the principles of Article 31, it has made fairly (p. 825) abundant use of the reference to the context,[120] sometimes with a more specific reference, such as that of the preamble to an agreement which was used to interpret Article 12 of the Agreement in the *Hormones* case.[121] It should also be noted that reference to the context was used to point out the gaps in a Panel report when the Appellate Body considered its usage necessary,[122] or when it was essential to refer to the 'most relevant' document for interpreting the text.[123] In the *Gambling* case, the Appellate Body furthermore specified quite restrictive conditions in which certain documents could be qualified as context in the meaning of sub-paragraphs (a) and (b) of paragraph 2 of Article 31, thereby criticizing the reasoning followed by the Panel on this point.[124]

References

41. International courts with a regional vocation provide no shortage of examples. The ECtHR has made ample use of context which it frequently explains in detail, as in the *Golder* case where it clearly indicated that the preamble is part of the context, given that the preamble is 'generally very useful for the determination of the 'object' and 'purpose' of the instrument to be construed'.[125] More recently, in the *Saadi* case, the Court considered that it should

> have regard to the fact that the context of the provision is a treaty for the effective protection of individual human rights and that the Convention must be read as a whole, and interpreted in such a way as to promote internal consistency and harmony between its various provisions.[126]

The Court has thus frequently interpreted a provision in its context, often referring to this principle in the process.[127] As for the ECJ, following its reasoning previously set out, it logically distinguishes between the context in which an international agreement is set and the context in which Community objectives are pursued.[128] The context is then envisaged in a wider manner since it includes the whole of Community law, including secondary law.[129]

References

Taking into account the 'external' context (paragraph 3)

42. Paragraph 3 refers more directly to means which are not characterized as 'supplementary', in that they are considered 'at the same time as the context', but which are (p. 826) nevertheless inscribed into a logical order of consideration in the absence of a clear solution based on the means of interpretation enunciated in the previous paragraphs. Subsequent interpretative agreements, subsequent practice, or reference to relevant rules of public international law therefore seem more in the order of confirmation rather than assertion. This is why their use is unequal in case law with, nevertheless, a certain predilection for the subsequent practice of the parties to the treaty. According to doctrine and practice,[130] this subsequent practice reflects what the parties intended. This is therefore a matter of reintroducing the intention of the parties to allow the definition of an objective that remains vague in the text, but only if practice is concordant and common to all parties. Pushed to the extreme, this approach could lead to modifications of the treaty. This is a type of treaty 'pathology' which was discussed at length during the ILC *travaux* under the names of 'modifying practice' or 'repealing practice'. There exists an uncertainty in this domain, of which the case law seems to be wary, though it is not completely rejected by certain courts.[131]

43. The idea of confirmation is clearly expressed in the case law of the ICJ. Thus, in its 1984 judgment in *Military and Paramilitary Activities*, the Court observed that its vision of the interpretation of Article 36(5) of its Statute was 'confirmed by the subsequent conduct of the Parties to the treaty in question, the Statute of the Court'.[132] Similarly, in the case opposing Indonesia and Malaysia over the *Sovereignty over Pulau Ligitan and Pulau Sipadan*, the Court proceeded to analyse the subsequent practice of the parties at length but did not recognize in this practice a 'confirming' role in the interpretation of Article IV of the 1891 Convention.[133] Furthermore, the expression 'subsequent practice' is sometimes understood in a broad sense, to include unilateral acts as well as subsequent (non-interpretative) agreements.[134] At times, the Court has also studied this practice before ruling out its existence, notably in the case of a long-established treaty. This is the approach taken by the Court in the *Kasikili/Sedudu Island* case.[135] However, the Court has refused to examine such practice if the absence of a provision in the treaty prevents it from

judging this practice. In other words, in order to examine its subsequent practice, there must nevertheless be a provision allowing it to be evaluated.[136]

References

(p. 827) **44.** Other tribunals have followed—*mutatis mutandis*—a similar path. The International Tribunal for the Law of the Sea has made a direct—though ambiguous—use of subsequent interpretative agreements. In the judgment of 1 July 1999 in the case of the *'Saiga'*, the Tribunal drew on the 1993 agreement aiming to privilege respect of international measures for the conservation and management of fish stocks by ships on the high seas, as well as the 1995 New York agreement on straddling and migratory fish stocks characterized as an 'implementation' agreement of the 1982 Convention, to confirm its interpretation of an agreement. In this particular case, as these agreements were not in force, the Tribunal expressed doubts about this means of interpretation.[137] The subsequent practice of the Security Council and of members of the United Nations was abundantly drawn on by the ICTY in the *Tadic* case to confirm that an armed conflict, even internal, can fall within the qualification of Article 39 of the Charter as a 'threat to the peace'.[138] As for the DSB, it used the technique of confirmation by subsequent practice in the *Alcoholic Beverages* case, with regard to the practice of Panel Reports at the time of the GATT-47 (in which it distinguished between adopted and non-adopted reports), confirmed by the subsequent practice of the contracting parties.[139] Inversely, the DSB dismissed examination of subsequent practice, either because it was not uniform, and hence not relevant,[140] or because the lapse of time was too short to observe a genuine relevant practice.[141] As for interpretative agreements, these would be judged according to their obligatory force for those subject to the agreements, as shown by the *Hormones* case.[142] One may therefore notice a certain amount of prudence on the part of the DSB in this domain.[143]

References

45. The ECtHR, for its part, has referred very widely to agreements or to the subsequent practice of the parties to a treaty. It has done so, for example, in its interpretation of Article 14 of the European Convention on Human Rights,[144] by referring to the European Convention of 15 October 1975 on the legal status of children born outside wedlock with regard to the European Convention on Human Rights,[145] or concerning (p. 828) confirmation by practice of the Convention in general.[146] At the same time, the ECtHR has shown that it can reject subsequent practice if it does not prove conclusive,[147] or simply relativize it.[148] Its evaluation of subsequent practice nevertheless remains fairly flexible since the Court does not demand, in order to take it into consideration, that the practice be followed 'unanimously' by the contracting parties, but merely by a 'great majority' of the latter.[149] As far as the ECJ is concerned, this Court has made moderate use of the subsequent practice of parties for it clearly privileges a teleological and ends-focused interpretation which minimizes this practice in favour of the intentions underlying Community treaties. It has even dismissed this practice if it is contrary to its vision of the treaties.[150] Nevertheless, it is possible to find use of this technique in certain cases, such as *International Fruit Company and others* of 1972.[151]

References

46. Case law reveals that subsequent practice is classified as an element for the interpretation of a treaty, but that it is out of the question to envisage an amendment or a termination of the treaty by lapse, with the help of this procedure—an approach confirmed by the ICJ in its judgment of 1997 in the *Gabčíkovo-Nagymaros Project* case.[152]

References

47. As for Article 31(3)(c), which allows interpretation to be situated amongst the relevant rules of international law, the ECtHR has long seemed to be one of the few courts to make explicit use of it. Since the *Golder* case, the Court has thus referred to the general principles of law as envisaged by Article 38 of the ICJ Statute, in order to interpret Article 6(1) of the Convention.[153] Ever since, there have been numerous examples where the ECtHR has drawn from the international normative environment with the aim of interpreting the Convention.[154] Today, however, it is no longer the only court to do so. In its judgment of 6 November 2003 in the case of the *Oil Platforms* opposing Iran and the United States, the

ICJ decided to interpret Article XX of the Friendship Treaty concluded between these two States in the light of the 'relevant rules of international law on the use of force', in conformity with Article 31(3)(c) of the Vienna Convention.[155] In the same way, without expressly mentioning this Article, the DSB has always insisted on (p. 829) the fact that the General Agreement should not be read 'in clinical isolation from public international law'.[156] Yet even though Article 31(3)(c) has not been totally forgotten, the DSB nevertheless applies it moderately.[157] This provision however appears essential in the opinion of some authors who regret its 'under use', since it would in fact allow the 'operationalization' of the link between conventional international law and customary international law, and thus, the avoidance of fragmentation in international law.[158]

References

Reintegration of the intention of the parties (paragraph 4)

48. The Vienna Convention places priority on textual interpretation. Nevertheless, as reflected by the history of the ILC *travaux*, proponents of interpretation based on the intention of the parties (or 'subjective' interpretation) have not surrendered. Moreover, it is not always obvious in practice to distinguish between the 'declared' intention of the parties resulting from a reading of the text, and the search for the true intention of the parties, a much more subjective exercise. The compromise represented by Article 31 therefore makes space for the intention of the parties in a somewhat subsidiary manner, but that space has proven crucial for certain courts. Indeed, while logic may imply that the discovery of a 'special meaning' should lead to an analysis of the intention of the parties, the reality is sometimes limited to affirming the existence of a 'special meaning' to privilege this intention, without always paying attention to the veracity of this specificity. The ECJ has notably been a fine example of this approach.

49. In conformity with its line of conduct privileging textual interpretation, the ICJ has accorded minimal space for the intention of the parties. The Court has applied this method in a strictly supplementary manner in order not to give fodder to critics. Therefore, in the case of the *Land, Island and Maritime Frontier Dispute* of 1992, the Court sought the intention of the parties in the 1980 general Peace Treaty referred to by the Special Agreement bringing the case before the Court. As the Special Agreement contained several vague provisions, the Court did not hesitate to 'have regard to the common intention as it is expressed in the words of the Special Agreement', while continuing to underline that this analysis should 'constitute no more than a supplementary means of interpretation'.[159] Nevertheless, it did not hesitate to seek the intention of the parties in order to confirm an interpretation;[160] a relatively prudent approach which has been (p. 830) followed by other international courts. We can point to only one fairly clear reference to the intention of the parties in the context of the ICTR to confirm the interpretation of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide,[161] or scant examples from the case law of the DSB where this has proven necessary.[162]

References

50. The intention of the parties to determine a special meaning for a term has ultimately been more frequently used in the European case law, no doubt because common intention is easier to pin down in the more limited and uniform European context. The ECtHR thus rapidly identified an 'autonomous character' in a large number of the Convention's provisions, many of these being attached to Article 6,[163] but also in other Articles of this treaty as well as its Protocols.[164] It is hardly surprising that the ECJ has made considerable use of the 'special meaning' to give to a term since its case law is largely based on the specificity of 'Community meaning'. From 1961 onwards, that is to say, before the adoption of the Vienna Convention, the Court began to develop its case law, which would widen towards a teleological approach.[165] It then had the opportunity on several occasions to confirm the 'Community' meaning of words.[166]

References

Silences, implications, and gaps in Article 31

51. A reading of the *travaux préparatoires* of Article 31 clearly demonstrates that in the interests of obtaining an acceptable compromise, certain principles were not expressly included in the final version of the Article. *Effet utile* was considered as implicit, the boldness of teleological interpretation was too overwhelming, inter-temporal law was deemed too complex to integrate, and the presumption in favour of the State in the process of interpretation met with tenacious resistance. Nevertheless, it is remarkable that the practice of interpretation, notably that of international courts, has overlooked these silences or gaps to integrate some of these elements as if they had been mentioned in Article 31. This is particularly true for teleological or ends-focused interpretation, of which certain courts have become ardent proponents in the context of constituent treaties of international organizations (the ECJ is the prime example). (p. 831) It is fitting to recall that these different 'incursions' can take place by different means, and that there exists no clear schema orchestrating the mechanisms foreseen by Article 31 and those simply induced. Each court has managed to find an angle allowing it to confirm its solution according to the legal syllogism that it has chosen and that it manipulates to this end.

52. *Effet utile*—the principle *ut res magis valeat quam pereat*[167]—which it was feared, during the elaboration of the Convention, would develop into a stepping stone to teleological interpretation, has been mentioned in numerous decisions of international courts. In these cases, it has emerged that effectiveness can be used widely in a simple appeal to logic, or it can serve as a lever towards a broader interpretation. The ICJ has often sought to support preceding statements by relying on effectiveness, as a type of confirmation.[168] The Court thus made careful use of the concept in the case of the *Territorial Dispute* between Chad and Libya,[169] and in that of *Kasikili/Sedudu Island*.[170] The ICTY, on the other hand, has used the concept to provide a wide interpretation of some notions, such as torture or rape.[171] Conversely, the ICTY judged that a provision of its Regulations was deprived of effectiveness (and therefore that it was not necessary to use it) because of the attitude of Yugoslavia.[172] However, amongst the courts with a universal vocation, it is perhaps the DSB that stands out by a quasi-systematic usage of *effet utile*. It is often invoked to support the search for the meaning of a treaty, as in the *Alcoholic Beverages, Underwear, Poultry, and Shrimp* cases, as well as the *Cotton* case.[173] Effectiveness was also implicitly invoked in the *Hormones* case to narrow down the interpretation sought of an Agreement on the application of sanitary and phytosanitary measures ('SPS Agreement').[174] The concept has also recurred in the case law of the ECtHR, in the often-cited formula according to which the European Convention aims to protect 'rights that are not theoretical or illusory, but practical and effective',[175] or in the theory of 'elements necessarily (p. 832) inherent to a law'.[176] The ECtHR has also referred to the principle of effectiveness more directly in the *Mamatkulov* case, to support its interpretation of the scope of provisional measures,[177] and in various other cases to underline that the 'effectiveness' of Article 6(1) of the Convention can be 'seriously diminished' as a result of the non-execution of a definitive court judgment.[178] Even though the ECJ has also invoked effectiveness in numerous cases, it goes beyond the stage of merely applying this means to favour ends-focused interpretations.[179]

References

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53. It is in fact teleological or ends-focused interpretation that has been more or less explicitly the focal point of numerous decisions. Apart from Article 31,[180] this method of interpretation has lost none of its power thanks to certain courts that have transformed it into a veritable leitmotiv. In its 1971 Opinion concerning Namibia, the ICJ broadly interpreted the Charter provisions so that the General Assembly was able to exercise certain powers.[181] In the same way, in its 1996 Opinion on the *Legality of Nuclear Weapons*, a long passage was dedicated to the constituent treaties of international organizations and their speciality notably linked to their ensuing implicit powers.[182] In the *LaGrand* case, the Court also relied on ends-focused considerations to affirm the obligatory character of provisional measures provided for in Article 41 of its Statute.[183] The Court therefore seems to take into account teleological interpretation in the context of international organizations, a position that it instigated in its 1949 Opinion, and that it temporarily questioned during the famous *South West Africa* case in 1966.[184] It also relied on this method to put forward a wide interpretation of Article 1 of the 1948 Convention on genocide and confirm that 'the obligation to prevent genocide necessarily implies the prohibition of the commission of genocide', although this implication is not specified by the text.[185] Regarding the agreement transferring to the International Tribunal of the Law of Sea the settlement of a dispute initially submitted to an arbitral tribunal, the Tribunal also interpreted the possibilities of this agreement broadly according to a teleological method.[186] The Tribunal also had direct recourse to teleological interpretation, for (p. 833) example in the *Camouco* case.[187] As for the ICTY, ever since it has begun to function, it has distinguished

itself with teleological interpretation which it has principally used to justify its own existence.[188] It was also thanks to this method that this Tribunal arrived at a wide interpretation of the concept of protected persons in Article 4 of the Fourth Geneva Convention.[189] The ICTY has sometimes demonstrated a degree of reservation in its vision of implicit powers, notably when it reaches certain limits, as in the *Blaškic* case.[190] The DSB also immersed itself, though somewhat timidly, in the sphere of ends-focused interpretation, with the help of the concept of effectiveness when the opportunity arose.[191]

References

54. However somewhat unsurprisingly, it is within the European sphere that a visceral attachment by certain courts to teleological interpretation can be found. The ECtHR uses teleological interpretation for the purpose of confirming, in the sense that it sometimes uses this means to prove that its textual interpretation is correct. It was thus that the Court proceeded in the cases of *Schiesser, Pretto and others and Johnston and others*,[192] in which it confirmed textual interpretation using the object and purpose, the *travaux préparatoires*, and the ends of the text. Providing a type of summary of the methods of interpretation and the objectives of the Convention, the ECtHR offered a resolutely dynamic and ends-focused vision in the case of *Loizidou v Turkey*.[193] It was also on the basis of a teleological approach that, in the *Mamatkulov* case, the Grand Chamber confirmed the obligatory character of temporary measures ordered by the Court,[194] inspired by the ICJ in the *LaGrand* case. As far as the ECJ is concerned, it would no doubt be fastidious (and not necessarily constructive) to cite the decisions which depend on a teleological approach for this means has been, for several years now, a well-known characteristic of this jurisdiction, allowing the Court to build a considerable proportion of Community law. The broad and teleological interpretations made by the ECJ in the judgments of *Van Gend en Loos v Administratie der belastingen, Costa v ENEL*, and *Commission v Council (AETR)*, are well known.[195] In the latter case, the Court established a link between effectiveness and implicit powers to produce an ends-based interpretation. Later (p. 834) cases confirmed this reasoning, each time putting forward the idea that teleological interpretation should preside over literal interpretation,[196] while being combined most of the time with a systematic interpretation (a method qualified as 'teleo-systematic'). It thus appears that the ECJ has turned the objectives of Community treaties into real principles of interpretation for these treaties.[197]

References

55. After attempting to sum up in its draft Articles—which were not consistently clear—the issue of inter-temporal law, the ILC finally cast this aspect aside. It therefore fell upon the courts to fill in the gap. Quite clearly, the courts have established in their case law different means allowing this delicate problem to be tackled. These means were at times cumulative, at times alternative: essentially consisting of the techniques of 'fixed reference' or 'mobile reference'. These techniques are lodged within the problematic of evolutive interpretation, of which the mention of effectiveness was already a precursory sign. During the *South West Africa* case, the ICJ wished to situate itself exclusively at the date of the situation prevailing at the time the mandate was established.[198] However, this rigidity would rapidly give way to more flexibility, as proven in the 1971 Opinion on Namibia where, on the same point, the Court favoured the evolution of rules, and therefore mobile reference, to interpret Article 22 of the Covenant of the League of Nations 'within the framework of the entire legal system prevailing at the time of the interpretation'.[199] The Court confirmed its position distinctly in the case of the *Aegean Sea Continental Shelf* by interpreting a provision as it should be understood at the time of the conflict and not at the time when it was drafted.[200] Recent case law does not seem to contradict this evolution,[201] provided that transformations in the law are genuine, that they are accepted by the parties, and that a form of *opinion juris* in favour of this evolution has already emerged (nonetheless without a need for the recognition of a genuine customary norm requirement which, if this were the case, would be imposed in any event). Other international courts have also followed the way of evolutive interpretation. This was the case of the DSB which in the *Shrimp* case had the opportunity to interpret in an evolutive manner, on the basis of effectiveness, the concept of exhaustible natural resources in the light of the prevailing law.[202]

References

56. It is perhaps the ECtHR which has made the greatest use of evolutive interpretation, doing so in numerous domains. In its judgment in the *Guzzardi* case of 6 November 1980, the Court considered that: 'the Convention is to be interpreted in the light of the notions currently prevailing in democratic States'.[203] Equally clearly, it considered in 1990 (p. 835) that the treaty should 'reflect…societal changes'.[204] In 2005, in the *Mamatkulov* case, the Court once again recalled that the Convention is 'a living instrument which must be interpreted in the light of present-day conditions'.[205] Furthermore, while evolutive interpretation seemed initially to necessitate a consensus between all States parties to the European Convention,[206] case law today reflects the particularly constructive character of this method of interpretation as it is used by the Court, which sometimes anticipates this consensus.[207] Finally, it should be of little surprise that the mobile reference method has been taken up by the ECJ, as it is a concept supplementary to the Court's ends-focused vision.[208]

References

57. Article 31 also left aside the traditional adage according to which 'restrictions upon the independence of States cannot be presumed', a proactive adage which case law has had the opportunity to recall (notably in the *Lotus* case before the PCIJ in 1927). The postulates which have prevailed in the post-war UN model have forced this statement into the background, even if it continues to be an underlying principle. At the very least, this type of maxim has been pronounced less easily; it has taken several specific occasions for this adage to resurface (often in a sweetened form), possibly stemming from the principle of good faith since 'no presumption can be made on bad faith', meaning that a State is always presumed to act in good faith. In 1974, the ICJ, confronted by the delicate problem of the French *Nuclear Tests*, considered that French declarations should be interpreted in a restrictive manner. What became evident, however, was that this precaution was a means to confront the State with its own declarations: it operated as a type of precautionary principle to more effectively bring the State face to face with its obligations.[209] As for the ECtHR, it has used an *a contrario* reasoning to consider that the postulate should be inversed when dealing with the European Convention on Human Rights,[210] thus allowing it to follow a narrow interpretation of restrictions to the rights guaranteed by the Convention.

References

58. The rules of interpretation are subject to controversies. This explains the stormy debates and the lack of clear-cut position resulting from the *travaux* leading to the 1969 Convention. A compromise emerged whereby everyone would find argument to defend their own opinion: priority to the text but an underlying allowance for the intention of the parties in numerous passages, and an easy reintegration of ends-focused interpretation into (p. 836) the overall procedure. It is therefore necessary to point out that the Convention juxtaposes sometimes contradictory principles that can lead—by means of the same instruments—to very different conclusions.[211] This is all the more true because different means of interpretation inevitably become the objects of interpretations which in turn will vary depending on the interpreter, the case, or the treaty, thereby giving commentators the impression of attempting to square a circle—and a vicious one at that.[212] The absence of hierarchy between the different means of interpretation, their malleability, and the multiple ways of combining them, leave the door open to countless variations in this complex operation that constitutes treaty interpretation. Interpretation and legal integrity therefore at times seem antonymic, so great is the freedom left to interpreters who are left ample room to demonstrate creativity in their handling of texts.[213] These aspects probably explain why this basis and the codified methods have never really been questioned. Only the *travaux préparatoires*, because they are uncertain, unstable, and difficult to contest for States which join subsequently, have raised more lively debates.[214]

59. Reference to the 1969 Convention legitimates interpretation even if, once the reference is made, the result hardly corresponds to the method announced. Here, there no doubt exists a form of misunderstanding regarding the intentions of the ILC members during the elaboration of Article 31. It has become clear that codification has not exhausted the methods and techniques for treaty interpretation. Functioning as a mere guide, Article 31 has become a reference that must be cited, even if it will then be twisted. Courts act as if it is absolutely essential to build on its elements to construct any type of interpretation. Fully enshrined and set on high, this Article is nevertheless no more than a set of scattered principles which make no claims to exhaustiveness.

60. The form of unanimity that can ultimately be detected is not the product of chance. Other than the consensus already mentioned leading to Article 31, it is truly much more a matter of the art or spirit of subtlety, than a matter of legal technique. Here, rules are not 'steadfast'—indeed, they cannot be so in a domain where individual judgment depends on a web of considerations, often tending towards subjectivity. The key is to understand the 'truth' of the treaty, its meaning, much more than to manipulate technical and contradictory legal norms. Methodological constraints are weak because the range is very wide and interpreters must set their own limits depending on their own (p. 837) purpose or position. What ultimately makes a difference is not the manner of interpretation but the competence of the one who interprets. The only possible conflicts are those between different non-hierarchical interpretations, as seems to be illustrated by certain tendencies amongst international courts, conflicts of which—wrongly for the moment—much ado is made.[215] However, on this point, Article 31 remains silent and the absence of hierarchical order between 'non-authentic' interpreters must be noted.

References

61. As rightly pointed out by Michel Rosenfeld, in a post-modern society, all interpretations appear to be correct interpretations, that is to say, no more than interpretations; said otherwise, they are interpretations which merely correspond to the aspirations and interests of different social groups.[216] In this way, everything depends on the opinion one may form of the interpretative phenomenon, on the interpretation of interpretation.

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Footnotes:

1 See the introduction to the present work for support for this observation.

2 Evidence of this can be found by consulting the impressive list of references concerning Arts 31 and 33 in *ILR*—Consolidated Tables of Cases and Treaties (vols 1–100), pp 800–1. This abundance urges the authors of this commentary to specify that no claims of exhaustiveness will be made here. Given the prolific nature of literature on, and practice of, interpretation, only a transversal analysis is possible.

3 Neither Art. 32 nor 33 will be dealt with here—except incidentally, given that for a time, the draft Articles of the ILC confused these stipulations—even if these three Articles 'naturally' form a single unit on the issue of interpretation. For these two Articles, see the commentaries specifically on Arts 32 and 33 in the present work.

4 *Introduction au droit des traités* (Paris: Armand Colin, 1972), p 103.

5 Quoted by M. K. Yasseen, 'L'interprétation des traités d'après la convention de Vienne sur le droit des traits', *RCADI*, 1976-III, vol. 151, p 15.

6 Confirmed by Nguyen Quoc Dinh, P. Daillier, and A. Pellet who qualify Arts 31–33 as a 'remarkable synthesis'. Unofficial translation by the editor. Original text: 'synthèse très remarquable' (p 265, no. 170), adding:

> the body of arbitral awards and recent judgments moreover reflect the exceptional success of the provisions of the Vienna Convention on the Law of Treaties: they refer to it at least in an implicit manner and often explicitly, even if the parties to the dispute have not ratified the convention. (translation of the editor)
>
> L'ensemble des sentences arbitrales et des arrêts récents témoignent du reste de la réussite exceptionnelle des dispositions de la convention de Vienne sur le droit des traités: au moins de façon implicite et, très souvent, explicitement, elles s'y réfèrent même si les Parties au litige n'ont pas ratifié la convention. (*Droit international public* (7th edn, Paris: LGDJ, 2002), p 266, no. 170)

7 Unofficial translation by the editor. Original text: 'dégager le sens exact et le contenu de la règle de droit applicable à une situation donnée', ibid, p 253, no. 162.

8 Unofficial translation by the editor. Original text:

> Les controverses relatives à l'interprétation ne seraient pas si vives si elles ne traduisaient pas une lutte pour la maîtrise du système juridique, qui fait du processus interprétatif une variante de la lutte pour le droit. (J. Combacau and S. Sur, *Droit international public* (7th edn, Paris: Montchrestien, 2006), p 170)

9 Nguyen Quoc Dinh, P. Daillier, and A. Pellet, *supra* n 6, p 260, no. 168.

10 Recalled notably by G. Scelle, *Précis de droit des gens* (Paris: Sirey, 1932–34), vol. II, p 488.

11 See eg the statement according to which interpretation is a matter of 'principles that must be understood as standards rather than rigid rules, so that it is true that it is a question of art and less than ever a question of science', unofficial translation by the editor. Original text: '...principes qu'il faut comprendre comme des standards plus que comme des règles rigides, tant il est vrai que c'est d'un art qu'il est ici question et moins que jamais d'une science', D. Alland (ed.), *Droit international public* (Paris: PUF, 2000), p 237.

12 S. Sur, *L'Interprétation en droit international public* (Paris: LGDJ, 1974), p 12.

13 See *infra* Section B.

14 This is what P.-M. Dupuy describes as the prima facie intention, specifying that it is now habitual to include, in treaties, Articles on the definitions of terms employed, *Droit international public* (8th edn, Paris: Dalloz, 2006), p 325.

15 See the examples cited *infra* Section B.

16 See *infra* para. 17.

17 See the examples cited *infra* Section B.

18 See the commentary on Art. 32 in the present work, as well as O. Corten, *L'utilisation du 'raisonnable' par le juge international* (Brussels: Bruylant, 1997), pp 45–56 and 309–10.

19 On this subject, see the comments of P. Daillier and A. Pellet (Nguyen Quoc Dinh), *supra* n 6, pp 263–4, no. 169.

20 See eg the demonstration in the *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Jurisdiction and Admissibility)*, Judgment of 26 November 1984, *ICJ Reports 1984*, p 407, paras 32–3.

21 *YILC*, 1964, vol. II, pp 52–65.

22 Harvard Law School, *Research in International Law*, Part III, *Law of Treaties*, Art. 19, p 946, quoted in ibid, p 53 (fn 253).

23 Lord A. McNair, *Law of Treaties* (Oxford: Clarendon Press, 1961), p 366, quoted in ibid, p 53 (fn 254).

24 *Ann IDI*, 1950, pp 433–4; *Ann IDI*, 1956, pp 358–9. The resolution adopted by the IIL on 19 April 1956 in Grenada was considered a remarkable synthesis since an accepted system of treaty interpretation did not previously exist (see M. K. Yasseen, *supra* n 5, p 11).

25 *BYIL*, 1957, vol. 35, pp 211–12.

26 *YILC*, 1964, vol. II, pp 54–5.

27 Series B, no. 2.

28 *ICJ Reports 1947–48*, p 57.

29 Advisory Opinion of 15 September 1923, *Acquisition of Polish Nationality*, Series B, no. 7; Advisory Opinion of 21 February 1925, *Exchange of Greek and Turkish Populations*, Series B, no. 10; order made on 19 August 1929, *Free Zones of Upper Savoy and the District of Gex*, Series A, no. 22.

30 Advisory Opinion of 16 May 1925, *Polish Postal Service in Dantzig*, Series B, no. 11; Advisory Opinion of 21 November 1925, *Interpretation of Article 3, Paragraph 2, of the Treaty of Lausanne*, Series B, no. 12; Judgment of 7 September 1927, *Factory at Chorzow*, Series A, no. 9; Advisory Opinion of 15 November 1932, *Interpretation of the Convention of 1919 concerning Employment of Women during the Night*, Series A/B, no. 50.

31 Again in the Advisory Opinion of 21 November 1925 previously cited; Advisory Opinion of 3 March 1928, *Jurisdiction of the Courts of Dantzig*, Series B, no. 15; Judgment of 22 July 1929, *Serbian* and *Brazilian Loans*, Series A, nos 20 and 21.

32 Advisory Opinion of 23 July 1926, *Competence of the ILO to Regulate Incidentally the Personal Work of the Employer*, Series B, no. 13; Judgment of 7 September 1927, *Lotus*, Series A, no. 10, in which the Court rejected the use of these *travaux préparatoires* if the convention is clear; judgment of 7 June 1932, *Free Zones of Upper Savoy and the District of Gex*, Series A/B, no. 46; in the previously cited Advisory Opinion of 15 November 1932 and in the Judgment of 17 March 1934, *Lighthouses case between France and Greece*, Series A/B, no. 62.

33 Notably in the Opinion of 15 November 1932 previously cited.

34 Advisory Opinion of 31 July 1930, *Greco-Bulgarian 'Communities'*, Series B, no. 17; Advisory Opinion of 6 April 1935, *Minority Schools in Albania*, Series A/B, no. 64.

35 Advisory Opinion of 8 December 1927, *Jurisdiction of the European Commission of the Danube*, Series B, no. 14; Judgment of 10 September 1929, *Territorial Jurisdiction of the International Commission of the River Oder*, Series A, no. 23; Advisory Opinion of 15 November 1932 previously cited.

36 Notably in the *Lotus* case previously cited, but also in the Judgment of 6 December 1930 in the case of the *Free Zones in Upper Savoy and the District of Gex*, Series A, no. 24.

37 Advisory Opinion of 6 December 1923, *Jaworzina*, Series B, no. 8.

38 Notably in the Judgment of 9 April 1949 on the *Corfu Channel, ICJ Reports 1949*, p 4; and the Advisory Opinion of 18 July 1950 on the *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (second phase), ICJ Reports 1950*, p 221.

39 Again in the Judgment previously cited on the *Corfu Channel*, and in the Advisory Opinion of 11 July 1950 on the *International Status of South West Africa, ICJ Reports 1950*, p 128.

40 In its Judgment of 26 May 1959, *Aerial Incident of 27 July 1955* (*Israel v Bulgaria*), *ICJ Reports 1959*, p 127.

41 In its Advisory Opinion of 3 March 1950, *Competence of the General Assembly for the Admission of a State to the United Nations, ICJ Reports 1950*, p 4; in its Judgment of 27 August 1952, *Rights of Nationals of the United States of America in Morocco, ICJ Reports 1952*, p 176, in which it clearly included the treaty preamble in the context; in its Advisory Opinion of 8 June 1960, *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organisation, ICJ Reports 1960*, p 150; in its Judgment of 26 May 1961, *Temple of Preah Vihear, ICJ Reports 1961*, p 17; and in its Judgment of 20 July 1962, *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), ICJ Reports 1962*, p 151.

42 In the Judgment of 3 March 1950 previously cited, and in the Judgment of 21 December 1962, *South West Africa, ICJ Reports 1962*, p 6, in which it put into perspective the scope of this method.

43 In its Judgment of 28 May 1951 on the *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, ICJ Reports 1951*, p 15; and in its Judgment of 1 July 1952, *Ambatielos, ICJ Reports 1952*, p 28.

44 The 'famous' opinion of 11 April 1949 on the *Reparation for Injuries Suffered in the Service of the United Nations, ICJ Reports 1949*, p 174, was of course the foundational act, but this tendency was continued in the Opinion of 13 July 1954, *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal, ICJ Reports 1954*, p 47, or the Opinion of 20 July 1962 previously cited.

45 Series A, no. 3, pp 50 ff, paras 11–15.

46 Cases 1 and 2/54, 21 December 1954, *French Republic v High Authority of the European Coal and Steel Community* and *Italian Republic v High Authority of the European Coal and Steel Community,* ECJ, ECR 1954–1955, vol. I, pp 13–14; Cases 3 and 4/54, 11 February 1955, *Associazione Industrie Siderugiche Italiana (Assider) v High Authority of the European Coal and Steel Community* and *Industrie Siderurgiche Associate (ISA) v High Authority of the European Coal and Steel Community,* ECJ, ECR 1954–1955, vol. I, p 69.

47 Case 8/55, 16 July 1956, *Fédération charbonnière de Belgique v High Authority of the European Coal and Steel Community,* ECJ, ECR 1956; Case 8/57, 21 June 1958, *Hauts Fourneaux et Aciéries Belges v High Authority of the European Coal and Steel Community,* ECJ, ECR 1958.

48 Case 30/59, 23 February 1961, *De Gezamenlijke Steenkolenmijnen in Limburg v High Authority of the European Coal and Steel Community,* ECJ, ECR 1961, p 19.

49 Award of 16 November 1957, *RIAA*, vol. XII, p 285.

50 See the examples cited *infra* (Section B) where the ICJ considered these as cases where pre-existing customary principles had been codified. The Judgment of 21 June 2001 in the *LaGrand* case confirmed this view as the Court declared that it made its interpretation here 'in accordance with customary international law, reflected in Article 31 of the 1969 Vienna Convention on the Law of Treaties', *ICJ Reports 2001*, p 501, para. 99. See also the Judgment of 31 March 2004, *Avena and other Mexican Nationals* (*Mexico v United States of America*), *ICJ Reports 2004*, p 48, para. 83; the Advisory Opinion of 9 July 2004, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, ICJ Reports 2004*, p 174, para. 94; and the Judgment of 26 February 2007, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Croatia v Serbia*), *ICJ Reports 2007*, p 60, para. 160.

51 *YILC*, 1964, vol. II, pp 52–65.

52 On the complex evolution of Art. 31, see S. Rosenne, *The Law of Treaties, a guide to the legislative history of the Vienna Convention* (Leiden: Sijthoff; New York: Oceana, 1970), pp 216–18 (for the *travaux* of the ILC) and 218–19 (for the Vienna Conference).

53 *YILC*, 1964, vol. II, p 55.

54 Corresponding to Art. 1 of the ILC draft Articles, and to principles I to IV proposed by Sir G. Fitzmaurice.

55 This position is justified by old case law, such as the *Grisbadarna* case of 1909 (*RIAA*, vol. XI, pp 159 and 160), the *North Atlantic Fisheries* case of 1910 (*RIAA*, vol. XI, p 196), the *Island of Palmas* case of 1928 (*RGDIP*, 1935, p 172), or more recent cases, such as the case of *Rights of Nationals of the United States of America in Morocco* (*ICJ Reports 1952, supra* n 41, p 189).

56 Sub-paragraph (a) specifies: 'any agreement arrived at between the Parties as a condition of the conclusion of the treaty or as a basis for its interpretation', and sub-para. (c) specifies: 'any other instrument related to, and drawn up in connexion with the conclusion of, the treaty'. In this regard, a certain confusion seems to exist between sub-paras (a) and (c) of para. 1.

57 *YILC*, 1964, vol. II, p 60, para. 27.

58 See the commentary on Art. 33 in the present work.

59 *YILC*, 1966, vol. II, pp 91–4.

60 Ibid, p 95, para. 4.

61 *YILC*, 1966, vol. II, pp 98–100, paras 18–20.

62 United Nations Conference on the Law of Treaties, 1st session, Vienna, 26 March–24 May 1968, Official Records, Summary Records, pp 181–2, paras 38–50.

63 Ibid, p 183, para. 54.

64 Lord Sinclair however was not opposed to a merger of the two Articles if the balance was maintained, ibid, p 193, para. 10.

65 Ibid, p 190, para. 47. For Paul Valéry, 'Les seuls traités qui compteraient sont ceux qui se concluraient entre les arrière-pensées', *Regard sur le monde actuel* (Paris: Folio Essais re-edn, 1945), p 30.

66 Ibid, pp 199–200, paras 66–74.

67 United Nations Conference on the Law of Treaties, 2nd session, Vienna, 9 April–22 May 1969, 13th session, 6 May 1969, p 61.

68 It is perhaps helpful to specify that we exclude from this presentation interpretative declarations explored in the context of the study on Articles concerning reservations to treaties (cf the commentaries on Arts 19–23 in the present work).

69 According to the expression used by D. Alland, *supra* n 11, p 237.

70 We have subjectively chosen to concentrate on the case law of the ICJ, the International Tribunal for the Law of the Sea, ad hoc criminal tribunals, the WTO Dispute Settlement Body, the ECtHR, and the Court of Justice of the European Union, since these Courts and tribunals represent a significant sample.

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71 For a general analysis, see R. Kolb, *La Bonne foi en droit international public. Contribution à l'étude des principes généraux de droit*, publication of the IUHEI, Geneva (Paris: PUF, 2000); ibid, 'La bonne foi en droit international public', *RBDI*, 1998/2; E. Zoller, *La Bonne foi en droit international public* (Paris: Pedone, 1977).

72 J. Dehaussy and M. Salem, *Jurisclasseur*, Fasc. 12–6, 3, 1995, *Sources du droit international*, p 6.

73 *ICJ Reports 1991*, p 69, para. 48. On this occasion, the Court unambiguously sanctifies the customary value of Arts 31 and 32 of the Vienna Convention.

74 *ICJ Reports 1993*, p 50, para. 26.

75 *ICJ Reports 1994*, pp 21–2, para. 41.

76 *ICJ Reports 1995*, p 18, para. 33.

77 *ICJ Reports 1996*, p 812, para. 23, and p 818, para. 45.

78 Judgment of 13 December 1999, *ICJ Reports 1999*, pp 1059–60, paras 18–20. See also the case relating to the *Sovereignty over Pulau Ligitan and Pulau Sipidan* (*Indonesia v Malaysia*) in which the Court applied the rules of Art. 31 to interpret a 1891 convention although Indonesia was not a party to the 1969 Vienna Convention (Judgment of 17 December 2002, *ICJ Reports 2002*, pp 645–6, paras 37–8).

79 Judgment of 27 June 2001, *ICJ Reports 2001*, p 501, para. 99.

80 Judgment of 31 March 2004, *Avena and Other Mexican Nationals* (*Mexico v United States of America*), *ICJ Reports 2004*, p 48, para. 83.

81 Advisory Opinion of 9 July 2004, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, ICJ Reports 2004*, p 174, para. 94.

82 Judgment of 26 February 2007, *Application of the Convention on the Prevention and Punishment of the Crime on Genocide* (*Bosnia-Herzegovina v Serbia-and-Montenegro), ICJ Reports 2007*, p 60, para. 160.

83 Case no. 1 of the *'Saiga'* (*Saint Vincent and the Grenadines v Guinea*), see the Judgment of 4 December 1997, available on the website of the Tribunal at: 〈http://www.itlos.org〉.

84 Other than the Judgment mentioned *supra*, see also the second episode of the '*Saiga*' case (Judgment of 1 July 1999, para. 80). See also, on the Tribunal's website, the Judgment of 23 December 2002 in the *'Volga'* case (*Russian Federation v Australia*), prompt release, para. 77. In this case, the Tribunal also considered that Art. 73(2) of the Convention should be examined 'in the light of its object and purpose'.

85 Order of 3 December 2001, *MOX Plant* case (*Ireland v United Kingdom*), provisional measures, para. 51.

86 This tendency is also evidenced by opinions attached to different judgments in which judges have not hesitated to refer directly to Art. 31. See eg in the Judgment of 1 July 1999 in the *'Saiga' (No. 2)* case, the Individual Opinions of Judges Laing (paras 1 ff), Vukas (para. 17), and Nelson, as well as the Dissenting Opinion of Judge Malick Ndiaye (para. 12). See also in the Judgment of 18 December 2000 in the *'Monte Confurco'* case (*Seychelles v France*), *prompt release*, the Individual Opinion of Judge Nelson or in the Judgment of 20 April 2001 in the *'Grand Prince'* case (*Belize v France*), *prompt release*, the Individual Opinion of Judge Anderson.

87 Appeals Chamber, 2 October 1995, IT-94–1-AR72.

88 See eg the *Slavko Dokmanovi´c* case, Trial Chamber, Judgment of 22 October 1997, IT-95–13a-PT, para. 40.

89 Notably in the *Aleksovski* case (Appeals Chamber, Judgment of 24 March 2000, IT-95–14/1-T, para. 98); this was already implicit in the previously cited *Tadic* case, paras 71–95.

90 See eg the *Mucic* case, Judgment of 20 February 2002, IT-96–21, paras 67 ff. Here, the Appeals Chamber interpreted certain provisions of the Fourth Geneva Convention referred to in Art. 2 of its Statute, explicitly referring to the rules of interpretation of the Vienna Convention on the Law of Treaties.

91 ICTR-96–15-T, paras 13 ff.

92 *The Prosecutor v Théoneste Bagosora*, Appeals Chamber, Judgment of 8 June 1998, ICTR-98–37-A, paras 28 and 29.

93 As pointed out by H. Ruiz Fabri:

> De rapport en rapport, l'Organe d'appel dresse le portrait du parfait interprète, celui qui utilise la Convention de Vienne, qui devient la référence cardinale, et celui qui ne modifie pas l'acquis négocié, qui devient la considération axiale', in: 'L'appel dans le règlement des différends de l'O.M.C. (*RGDIP*, 1999, vol. 1, p 77)

94 Case of the *Standards for Reformulated and Conventional Gasoline*, Report of the Appellate Body of 29 April 1996, WT/DS2/AB/R, p 17. The Appellate Body Report of 4 October 1996 in the case of *Taxes on Alcoholic Beverages*, WT/DS8/11, WT/DS10/11, WT/DS11/8, is also very clear and pedagogical in this respect.

95 eg in the case of the *Regime for the Importation, Sale and Distribution of Bananas* (*Banana* case), WT/DS27/AB/R, Report of the Appellate Body of 9 September 1997. In the *Carbon Steel* case, the Appellate Body would confirm that '[i]t is well settled in W.T.O. case law that the principles codified in Articles 31 and 32 of the *Vienna Convention on the Law of Treaties* are such customary rules' (Report from 28 November 2002, *Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, WT/DS213/AB/R, p 23, para. 61).

96 eg in the *Pharmaceutical Patents* case (*Patent Protection for Pharmaceutical and Agricultural Chemical Products*), Report of the Appellate Body of 16 January 1998, WT/DS50/AB/R, paras 58 ff; or in the *Hormones* case (*Measures Concerning Meat and Meat Products (Hormones)*), WT/DS26/AB/R and WT/DS48/AB/R, a Common Report of the Appellate Body of 16 January 1998, paras 104 and 163; or again in the *Shrimp* case (*Import Prohibition of Certain Shrimp and Shrimp Products*), WT/DS58/AB/R, Report of the Appellate Body of 12 October 1998, paras 114 ff, in which the Appellate Body sought to systematize the interpretation procedure on the basis of the rules from the Vienna Convention which was clearly envisaged as the priority reference (para. 116). The principle of good faith was clearly recalled on this occasion. In the *Softwood Lumber* case, the Appellate Body recalled that '[t]he meaning of a treaty provision, properly construed, is rooted in the ordinary meaning of the terms used' (Report of 19 January 2004, *Final Countervailing Duty Determination with respect to certain Softwood Lumber from Canada*, WT/DS257/AB/R, p 21, para. 58).

97 Notably in the *Measures Affecting Agricultural Products*, WT/DS76/AB/R, Report of the Appellate Body of 22 February 1999, concerning Annex B of the SPS Agreement. In the *Softwood Lumber* case cited in the previous note, the Appellate Body also considered that in this particular case, 'to accept Canada's interpretation of the term "goods" would, in [its] view, undermine the object and purpose of the *SCM Agreement*' (p 24, para. 64).

98 See the *Gambling* case and the divergence between the Panel and the Appellate Body concerning the manner to determine the 'ordinary meaning' of the term 'sporting' (Report from 7 April 2005, *Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R, pp 52 ff).

99 Judgment of 21 February 1975, *Golder*, Series A, no. 18, paras 29 ff. Ever since, explicit references have been made regularly to Art. 31 in numerous judgments, such as the Judgment of 21 February 1986, *James and others*, Series A, no. 98, paras 42 and 61; the Judgment of 23 March 1995, *Loizidou v Turkey*, Series A, no. 310, para. 73; or the recent judgment handed down in the Grand Chamber on 29 January 2008 in the case of *Saadi v United Kingdom* (Application no. 13229/03, paras 61 ff).

100 Judgment of 7 December 1976, *Handyside*, Series A, no. 24.

101 Judgment of 28 November 1978, *Luedicke, Belkacem and Koç*, Series A, no. 29, para. 42; Judgment of 16 December 1992, *Niemietz*, Series A, no. 251-B, para. 31, where the Court privileged a wide interpretation founded on the object and purpose of the treaty; the *Loizidou* Judgment previously cited, paras 72 and 73. See also the Judgment of 4 February 2005, *Mamatkulov and Askarov v Turkey*, in which, to determine the scope of temporary measures, the Court underlined 'that Article 31 para. 1 of the Vienna Convention on the Law of Treaties provides that treaties must be interpreted in good faith in the light of their object and purpose' (ECR 2005-I, para. 123).

102 And even more so for Art. 32, for the *travaux préparatoires* can constitute an obstacle for teleological interpretation that the ECJ wishes to give to community treaties (see the commentary on Art. 32 in the present work).

103 Case 30/59, ECJ, ECR 1961, p 19.

104 Opinion C-1/91, ECJ, ECR 1991, p I-6079, para. 14. See also Opinion 2/00 of 6 December 2001, *Opinion Pursuant to 300 EC*, ECJ, ECR 2001, p I-9713, para. 24 (regarding the interpretation of the Cartagena Protocol).

105 Case C-312/91, 1 July 1993, *Metalsa Srl, penal procedure v Gaetano Lo Presti*, ECJ, ECR 1993, p I-3751, para. 12; Case C-416/96, 2 March 1999, *Nour Eddine El-Yassini v Secretary of State for Home Department*, ECJ, ECR 1999, para. 47; Case C-268/99, 20 November 2001, *Aldona Malgorzata Jany and others v Staatssecretaris van Justitie*, ECJ, ECR 2001, p I-8615, para. 35.

106 See eg a relevant passage from Case C-162/96 of 16 June 1998, *A. Racke GmbH and Co v Hauptzollant Mainz*, ECJ, ECR 1998, p I-3688, where it is mentioned that 'even though the Vienna Convention does not bind either the Community or all its Member States, a series of its provisions, including Article 62, reflect the rules of international law…' (para. 24). The Court then cites case law from the ICJ which considers this principle as customary, nonetheless without explicitly relying on this statement.

107 Case C-149/96, 23 November 1999, *Portugal v Council of the European Union*.

108 For a general presentation of these issues, see J.-M. Sorel, 'Le destin des normes internationales dans le droit interne: perspectives européennes', *XXIV Curso de Derecho Internacional* (Washington DC: Secretary General of the OAS, 1998), pp 247–71.

109 See P.-M. Eisemann (ed.), *L'intégration du droit international et communautaire dans l'ordre juridique national, étude de la pratique en Europe* (The Hague: Kluwer Law International, 1996).

110 With the exception of several States. In Europe, France and Belgium stand out by adhering to this point of view, ibid, p 23.

111 See eg the judgment of the Conseil d'État of 14 June 1964, *Société des pétroles Shell-Berre, Lebon*, p 344.

112 Since the judgment of the Conseil d'État (Assemblée) on *GISTI* of 26 June 1990, *Lebon*, p 171.

113 As can be seen, eg, in numerous provisions and annexes parallel to the 1982 Convention on the Law of the Sea, the interpretative annexes of Articles in the Marrakesh Agreements creating the WTO, or the numerous Protocols of the European Convention of Human Rights. In general, it is most commonly a matter of protocols, declarations, or resolutions attached to the initial text.

114 See *supra*, Section B, paras 29 ff.

115 Case of the *Maritime Delimitation in the Area between Greenland and Jan Mayen Affaire, supra* n 74, p 50, para. 26; case of the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Croatia v Serbia*), *ICJ Reports 2007*, p 60, para. 160.

116 *ICJ Reports 1994*, p 26, para. 53.

117 Judgment of 17 December 2002, *Sovereignty over Pulau Ligitan and Pulau Sipadan* (*Indonesia v Malaysia*), *ICJ Reports 2002*, pp 648–51, paras 44–8. Indonesia referred to the 'interaction' between the British government and the Dutch government concerning the map accompanying the Explanatory Memorandum that the latter had attached to the draft law presented to the States-General of the Netherlands, with a view to the ratification of the 1891 convention.

118 Judgment of 4 December 1997 in case no. 1 of the ship *'Saiga', supra* n 83, para. 50. For other references to the context, see also the second episode in the case of the *'Saiga'* (Judgment of 1 July 1999, para. 80), as well as the Judgment of 23 December 2002 in the case of the *'Volga'* (*Russian Federation v Australia*), *prompt release*, para. 77.

119 Trial Chamber, Judgment of 3 March 2000, IT-95–14-T, paras 327 and 329.

120 The context was thus mentioned in the *Underwear* case (*Restrictions on Imports of Cotton and Man-made Fibre Underwear*), WT/DS24/AB/R, Report of the Appellate Body of 10 February 1997, pp 16–17; and in the *Poultry* case (*Measures Affecting the Importations of Certain Poultry Products*), WT/DS69/AB/R, Report of the Appellate Body of 13 July 1998, para. 146.

121 *Supra* n 96, para. 172.

122 *LAN* case (*Customs Classification of Certain Computer Equipment*), WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, Report of the Appellate Body of 5 June 1998, para. 89.

123 Case of the *Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, WT/DS202/AB/R, Report of the Appellate Body of 15 February 2002, paras 172–3.

124 Report of 7 April 2005 quoted *supra* n 98, paras 165 ff. According to the Appellate Body, there are sufficient elements of proof when these documents constitute an 'agreement relating to the treaty' between the parties and when they have been 'accepted by the…Parties as an instrument related to the treaty', which was not the case in that particular situation.

125 Series A, no. 18, *supra* n 99, para. 34.

126 Judgment of 29 January 2008, *supra* n 99, para. 62.

127 As in the judgments *supra* of *Handyside*, and in the Judgment of *Klass*, 6 September 1978, Series A, no. 28, in the judgment *B v Austria* of 28 March 1990, Series A, no. 75, para. 36, and also in the judgment of *Mamatkulov and Askarov v Turkey* of 4 February 2005, ECR 2005-I, para. 39.

128 See, notably, *supra* the Opinion of 14 December 1991, paras 19 ff; or *supra* the Judgment of 1 July 1993, paras 11 ff.

129 Case 22/70 *Commission v Council (AETR)*, Judgment of 31 March 1971, ECR 1971, p 263.

130 See M. K. Yasseen, *supra* n 5, pp 48 ff.

131 The ILC had an Art. 38 in its final draft which envisaged the possibility of modifying the treaty by subsequent practice, but it was finally rejected. The discussion surrounding this Article was described as a 'calvary' (G. Distefano, 'La pratique subséquente des Etats Parties à un traité', *AFDI*, 1994, p 55. The latter describes this draft at length, pp 55–61). Sir Gerald Fitzmaurice raises this issue in the form of an '*emergent purpose*' ('The Law and Procedure of the International Court of Justice: Treaty Interpretation and Certain Other Treaty Points', *BYBIL*, 1951, p 8).

132 *Supra*, the Judgment of 24 November 1984, *Military and Paramilitary Activities in and against Nicaragua (Jurisdiction and Admissibility), ICJ Reports 1984*, p 411, para. 42.

133 Judgment of 17 December 2002, *supra* n 117, paras 59–80.

134 Thus the practice observed between Norway and Denmark in the *Jan Mayen* case, *supra* n 74, *ICJ Reports 1993*, p 51, para. 28. However, subsequent practice was equally an important element for the interpretation of the constitutent acts of international organizations such as in the Advisory Opinion of 8 July 1996, *Legality of the Use by a State of Nuclear Weapons in Armed Conflicts, ICJ Reports 1996*, pp 74–5, para. 19. Here, the Court takes into consideration not only the subsequent practice of the parties, but also that of the organization's bodies. Similarly in this respect, see the Advisory Opinion of 9 July 2004 on the *Israeli Wall, supra* n 81, paras 25 ff (concerning the interpretation of Art. 12(1) of the UN Charter).

135 *ICJ Reports 1999, supra* n 78, pp 1075–96, paras 47–80.

136 A reasoning that is followed by the Court in the case of the *Land, Island and Maritime Frontier Dispute between El Salvador and Honduras (Nicaragua intervening)*, Judgment of 11 September 1992, *ICJ Reports 1992*, p 586, para. 380.

137 Case of the ship *'Saiga' (No. 2), supra* n 84, para. 84.

138 Appeals Chamber, 2 October 1995, *supra* n 87, para. 30.

139 *Taxes on Alcoholic Beverages*, WT/DS8/11, WT/DS10/11, WT/DS11/8, and Report of the Appellate Body of 4 October 1996, p 14. In its report, the Appellate Body specified that a practice is considered as subsequent when it is 'a 'concordant, common and consistent' sequence of acts or pronouncements which is sufficient to establish a discernable pattern implying the agreement of the Parties regarding its interpretation' (p 11). See also the *Banana* case, *supra* n 95, WT/DS27/AB/R, Report of the Appellate Body of 9 September 1997, paras 203 ff.

140 *LAN* case, *supra* n 122, Report of the Appellate Body of 5 June 1998, para. 96 regarding a community practice. See also the case of the *Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, WT/DS207/AB/R, Report of the Appellate Body of 23 September 2002, para. 272.

141 *Underwear* case, *supra* n 120, Report of the Appellate Body of 10 February 1997, where the DSB refused to take into account the practice of the parties relating to WTO agreements judged as too recent.

142 In which the Appellate Body was led to judge the restrictive character of interpretation of Art. 3 of the SPS Agreement, which it would reject in this particular case (*supra* n 96), paras 162–8. See also the

Gambling case (*supra* n 98), in which the Appellate Body relied on the 'non-restrictive' character of the 2001 Scheduling Guidelines adopted by the Council for Trade in Services, to consider that these Guidelines could not 'in and of themselves' constitute a 'subsequent practice' according to the meaning of Art. 31(3)(b) of the Vienna Convention (paras 180 ff).
143 On this point, see E. Canal-Forgues, 'Sur l'interprétation dans le droit de l'OMC', *RGDIP*, 2001, vol. 1, p 21.

144 Judgment of 8 June 1976, *Engel and others,* Series A, no. 22, para. 72.

145 Judgment of 13 June 1979, *Marckx v Belgium*, Series A, no. 31, paras 41 ff.

146 Judgments of 28 November 1984, *Rasmussen*, Series A, no. 87, paras 40–1; of 28 October 1987, *Inze*, Series A, no. 126, para. 41; of 25 November 1991, *Toth*, Series A, no. 224, para. 77.

147 Judgment of 21 February 1986, *James and others*, Series A, no. 98, para. 65.

148 Judgment of 26 October 1988, *Martins Moreira*, Series A, no. 43, para. 54.

149 See the case of *Loizidou v Turkey, supra* n 99, paras 79–80, where the Court also speaks of 'a practice denoting practically universal agreement amongst Contracting Parties'.

150 For examples, see Case 232/78, Judgment of 25 September 1979, *Commission v France*, ECR 1979, p 2729, in which the conduct of the States and the absence of application of secondary law by the States or institutions were not considered as an element of interpretation of the treaty.

151 Cases 21–24/72, 12 December 1972, ECR 1972, p 1219.

152 Judgment of 25 September 1997, *ICJ Reports 1997*, pp 66–9, paras 100 and 114. On this aspect, see M. Kohen, 'La codification du droit des traités: quelques éléments pour un bilan global', *RGDIP*, 2000, vol. 3, pp 598–9. Nevertheless, the interpretation of Art. 27 of the UN Charter by the ICJ in the Advisory Opinion of 21 June 1971 (*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*) is based on interpretative practice in a wide enough manner to confirm the validity of the vote of the Security Council, *ICJ Reports 1971*, paras 19–41.

153 Judgment of 21 February 1975, *supra* n 99, para. 35.

154 See, amongst others, the Judgment of 7 July 1989, *Soering*, Series A, no. 169, para. 88; the Judgment of 21 November 2001, *Al-Adsani v United Kingdom*, ECR 2001-XI, para. 55; the Judgment of 4 February 2005, *Mamatkulov and Askarov v Turkey*, ECR 2005-I, para. 111; the Judgment of 30 June 2005, *Bosphorus v Ireland*, ECR 2005-VI, para. 150; the Judgment of 22 June 2006, *Bianchi v Switzerland*, Application no. 7548/04, para. 81; and the Judgment of 29 January 2008, *Saadi v United Kingdom*, Application no. 13229/03, para. 62.

155 Judgment of 6 November 2003, *ICJ Reports 2003*, p 182, para. 41.

156 The *Gasoline* Report of 29 April 1996, *supra* n 94, p 19. See also the *Banana* Report of 9 September 1997, *supra* n 95, para. 10, as well as the *Poultry* Report of 13 July 1998, *supra* n 120. On this refusal of 'clinical isolation', see G. Marceau, 'A Call for Coherence in International Law. Praises for the Prohibition against "Clinical Isolation" in WTO Dispute Settlement', *Journal of World Trade*, 1999, vol. 5, esp. pp 115 ff.

157 See eg the case of *Measures Affecting Government Procurement*, WT/DS163/R, Panel Report of 19 June 2000, para. 7.96: the Panel recognized that customary international law can be taken into consideration in the relationships between WTO members, but only on condition that WTO Agreements do not contain contrary provisions. See also the case of *Measures Affecting the Marketing and Approval of Biotech Products*, WT/DS291/R, WT/DS292/R, WT/DS293/R, Panel Report of 29 September 2006, para. 7.75: in spite of an invocation of Art. 31(3(c), the Panel refused, in this particular case, to take into consideration the Cartagena Protocol, given that none of the complainant parties was a party to this treaty.

158 See the detailed developments of Ph. Sands on this aspect in: 'Vers une transformation du droit international? Institutionnaliser le doute', *Droit international 4* (Paris: IHEI-Pedone, 2000), pp 213 and 220 ff. Also see studies relating to the issue of the 'fragmentation of international law' carried out by the ILC, and notably the report from its 57th session (2005), A/60/10, pp 204 ff.

159 Judgment of 11 September 1992, *ICJ Reports 1992*, p 584, para. 376.

160 See eg the Judgment of 14 June 1993 in the case of *Jan Mayen, ICJ Reports 1993, supra* n 74, p 51, para. 28.

161 Case of *The Prosecutor v Jean-Paul Akayesu*, Trial Chamber, Judgment of 2 September 1998, ICTR-96–4-T, paras 507 ff. In this particular case, the ICTR sought the intention of the parties in the *travaux préparatoires*.

162 Notably in the *Gasoline* report (*supra* n 94), para. 50, or in the *Hormones* report (*supra* n 96), para. 187.

163 See eg the Judgment of 8 June 1976, *Engel and others v The Netherlands*, Series A, no. 22, paras 81 ff ('autonomy' of the notion of 'penal matters'). For an explanation of the autonomous nature of the notion of 'penal matters', see the Judgment of 9 October 2003, *Ezeh and Connors v United Kingdom*, ECR 2003-X, paras 100 ff. As for the notion of 'rights and obligations of civil character', see eg the Judgment of 11 July 2002, *Goc v Turkey*, ECR 2002-V, no. 30, para. 41.

164 An autonomous scope is eg recognized in the notion of 'penalty' mentioned in Art. 7 of the Convention: see the Judgment of 12 February 2008, *Kafkaris v Cyprus*, Application no. 21906/04, para. 142. The notion of 'expulsion' (Art. 1 of Protocol no. 7) is also considered by the Court as 'an autonomous concept which is independent of any definition contained in domestic legislation' (Judgment of 5 October 2006, *Bolat v Russia*, Application no. 14139/03, para. 79), similarly to the notion of 'goods' raised in Art. 1 of Protocol no. 1 (Judgment of 22 June 2004, *Broniowski v Poland*, ECR 2004-V, para. 129).

165 Previously cited case of 23 February 1961, Case 30/59, ECR 1961, p 39.

166 Notably in Cases 75/63, 19 March 1964, *Unger*, ECR 1964, p 362; C-277/87, 11 January 1990, *Sandoz Prodotti Farmaceutici v Commission,* ECR 1990, p I-45; C-188/00, 19 November 2002, *Kurz*, ECR 2002, p I-10691, para. 32 (about the concept of a 'worker' mentioned in Art. 39 EC Treaty, ex Art. 48); or the related Cases C-187–190/05, 7 September 2006, *Agorastoudis and others*, ECR 2006, p I-7775, para. 28 (the communitarian scope of the concept of 'redundancy').

167 Effectiveness being defined in the following way:

> Règle—parfois invoquée au titre de principe—selon laquelle l'interprète doit présumer que les auteurs d'un traité, en adoptant les termes d'une disposition, ont entendu leur donner une signification telle que cette disposition puisse recevoir une application effective. (J. Salmon (ed.), *Dictionnaire du droit international public* (Brussels: Bruylant/AUF, 2001), p 416)

168 With, nevertheless, a certain suspiciousness which the Court had the opportunity to express in its Opinion of 18 July 1950 concerning the *Interpretation of Peace Treaties* where it specified that this could not lead to the revision of the treaty under the pretext of interpretation (*ICJ Reports 1950*, pp 228–9).

169 *ICJ Reports 1994*, pp 23–4, para. 47.

170 *ICJ Reports 1999, supra* n 78, para. 93.

171 *Celebici* case, Trial Chamber, Judgment of 16 November 1998, IT-96–21, paras 459 ff; *Furundžija* case, Trial Chamber, Judgment of 10 December 1998, IT-95–17/1, paras 162 and 181–2.

172 *Slavko Dokmanovic, supra* n 88, Trial Chamber, Judgment of 22 October 1997, IT-95–13a-PT, para. 42.

173 The *Alcoholic Beverages* case (*supra* n 94), Report of the Appellate Body of 4 October 1996, p 16; the *Underwear* case (*supra* n 120), Report of the Appellate Body of 10 February 1997, p 15; the *Poultry* case (*supra* n 120), WT/DS69/AB/R, Report of the Appellate Body of 13 July 1998, paras 151–2; the *Shrimp* case (*supra* n 96), Report of the Appellate Body of 12 October 1998, para. 116; Case of *Subsidies on Upland Cotton*, WT/DS267/AB/R, Report of the Appellate Body of 3 March 2005, para. 429.

174 *Supra* n 96, Report of the Appellate Body of 16 January 1998, para. 164. In this last case, the DSB broached the issue of the precautionary principle as a means of interpretation, which it did not uphold *in casu*.

175 See, amongst the numerous judgments passed, that of 23 March 1995, *Loizidou v Turkey* (preliminary objections), Series A, no. 310, para. 72; that of 5 February 2002, *Conka v Belgium*, Series A, para. 46; or that of 9 October 2003, *Biozokat A.E. v Greece*, Application no. 61582/00, para. 31.

176 See the *Golder* judgment, *supra* n 99, paras 34–6, and the Judgment of 28 June 2007, *Wagner and J.M.W.L. v Luxembourg*, Application no. 76240/01, para. 118.

177 Judgment of 4 February 2005, *supra* n 101, para. 123.

178 See eg the Judgment of 25 January 2007, *Rompoti and Rompotis v Greece*, Application no. 32141/04, para. 26, and the Judgment of 24 April 2008, *Milionis and others v Greece*, Application no. 41898/04, para. 48.

179 For mentions of effectiveness, see Case 187/87, 22 September 1988, *Land de Sarre v Ministre de l'industrie, des P et T et du tourisme*, ECJ, ECR 1988, p 5013; Case C-416/96, *supra* n 105, 2 March 1999, *Nour El-Yassini v Secretary of State for Home Department*, ECJ, ECR 1999, p I-1209, para. 66; Case C-440/00, 13 January 2004, *Kühne & Nagel*, ECR 2004, p I-787, para. 46.

180 Teleological interpretation nonetheless underlies the rule according to which a treaty should be interpreted 'in the light of its object and purpose' (Art. 31(1)).

181 Advisory Opinion of 21 June 1971, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), ICJ Reports 1971*, p 50, para. 104.

182 Case of 8 July 1996 (*supra* n 134), *Legality of the Use by a State of Nuclear Weapons in Armed Conflicts, ICJ Reports 1996*, pp 78–9, para. 25.

183 Judgment of 27 June 2001, *supra* n 50, para. 102. The ICJ subsequently confirmed this approach in its Judgment of 31 March 2004 in the *Avena* case, *supra* n 50.

184 In its Judgment of 18 July 1966, the Court qualified the principle of teleological interpretation as 'a principle the exact bearing of which is highly controversial' (*ICJ Reports 1966*, p 48, para. 91). Admittedly, this judgment took place while discussions on the future Vienna Convention of the States were in full swing.

185 Judgment of 26 February 2007, *supra* n 50, para. 166.

186 Judgment of 1 July 1999, *Saiga' (No. 2), supra* n 84, paras 51 ff.

187 Case of the *'Camouco'* (*Panama v France*), *prompt release*, Judgment of 7 February 2000, para. 58 (available on the website of the Tribunal, *supra* n 83).

188 This of course refers to the *Tadic* case (*supra* n 87), Appeals Chamber, Judgment of 2 October 1995, paras 19 ff and 72–8. In the *Milutinovic* case, the Trial Chamber would also refer to a teleological interpretation of Ch. VII of the United Nations Charter (IT-99–37, decision of 6 May 2003, para. 48).

189 See notably the second episode of the *Tadic* case (IT-94–1-4, Judgment of the Appeals Chamber of 15 July 1999, para. 168); the *Aleksovski* case (IT-95–14/1, Judgment of the Appeals Chamber of 24 March 2000, para. 152); as well as the *Mucic* case (IT-96–21, Judgment of the Appeals Chamber of 20 February 2001, para. 73).

190 Trial Chamber, Judgment of 18 July 1997, in which the Tribunal justified a system of constraint (order to execute) for States on the basis of the Statute and Regulations. This judgment would later be overturned by the Appeals Chamber (Judgment of 29 October 1997) which would nevertheless recall the Tribunal's inherent powers (para. 33), IT-95–14-AR 108*bis*.

191 Previously cited case of *Measures Affecting Agricultural Products*, WT/DS76/AB/R, Report of the Appellate Body of 22 February 1999. In this particular case, it broadly interpreted Annex B of the SPS Agreement.

192 Judgment of 4 December 1979, Series A, no. 34, para. 30; Judgment of 8 December 1983, Series A, no. 71, paras 26 ff; Judgment of 18 December 1986, Series A, no. 112, para. 52.

193 Judgment of 23 March 1995 (*supra* n 99), Series A, no. 310, paras 70 ff.

194 Judgment of 4 February 2005 (*supra* n 101), para. 123.

195 Respectively Case 26/62, Judgment of 5 February 1963, ECJ, ECR 1963, p 1; Case 6/64, Judgment of 15 July 1964, ECJ, ECR 1964, p 585; Case 22/70 (*supra* n 129), Judgment of 31 March 1971, ECJ, ECR 1971, p 263.

196 Notably with Case 36/74 *Walrave v Union cycliste internationale*, Judgment of 12 December 1974, ECJ, ECR 1974, p 1405; Case 43/75 *Defrenne v Sabena*, Judgment of 8 April 1976, ECJ, ECR 1976, p 455;

Case 104/81 *Kupferberg*, Judgment of 26 October 1982, ECJ, ECR 1982, p 3641. And, more recently, Case C-212/04 *Adeneler and others*, Judgment of 4 July 2006, ECR 2006, p I-6057.
197 P. Pescatore, 'Les objectifs de la Communauté européenne comme principe d'interprétation de la jurisprudence de la Cour de justice', *Mélanges W.J. Ganshof Van der Meersch* (Paris: LGDJ; Brussels: Bruylant, 1972), pp 325 ff.

198 *ICJ Reports 1966, supra* n 184, pp 23 ff, paras 16 ff.

199 *ICJ Reports 1971, supra* n 181, p 31, para. 53.

200 Judgment of 19 December 1978, *ICJ Reports 1978*, pp 33–4, para. 80.

201 Notably in the case of the *Gabcíkovo/Nagymaros Project*, Judgment of 25 September 1997, *ICJ Reports 1997, supra* n 152, p 67, para. 112 and pp 77–8, paras 139–40; or in the case of *Kasikili/Sedudu Island*, Judgment of 13 December 1999, *ICJ Reports* 1999, *supra* n 78, pp 1060 ff, paras 20 ff.

202 *Supra* n 96, para. 113.

203 Series A, no. 39, para. 95.

204 Judgment of 27 September 1990, *Cossey v United Kingdom*, Series A, no. 184, para. 35.

205 Judgment of 4 February 2005, *supra* n 101, para. 121. For a similar point of view, see the Judgment of 21 February 1986, *James and others* (*supra* n 99), paras 46 ff (concerning transsexualism); Judgment of 9 December 1994, *Lopez Ostra v Spain*, Series A, no. 303-C, para. 51 (concerning individual rights in environmental matters); Judgment of 28 July 1999, *Selmouni v France*, ECR 1999-IV, para. 105 (evolutive interpretation of the concept of torture). See also the case, amongst others, of *E.B. v France*, Judgment of 22 January 2008, Application no. 43546/02, para. 92 (regarding the access of homosexuals to adoption).

206 The Court refused on that basis an evolutive interpretation on transsexualism (see the Judgment of 26 March 1992, *B. v France*, Series A, no. 232-C, para. 48).

207 See eg the Judgment of 11 July 2002, *Goodwin v United Kingdom*, ECR 2002-VI, para. 74 (the Court evoked the necessity of reacting to the 'evolving convergence as to the standards to be achieved'; see also the Judgment of 9 April 2003, *L and V v Austria*, ECR 2003-I, para. 39 (the Court referred to a growing consensus in Europe to lower the age of consent for homosexual relations).

208 See eg Case 61/77 *Commission v Ireland*, Judgment of 16 February 1978, ECJ, ECR 1978, p 417, which illustrates application of the mobile reference method to the geographic scope of community powers.

209 Judgments of 20 December 1974, *ICJ Reports 1974*, p 267, para. 44.

210 Judgment of 6 September 1978, *Klass* (*supra* n 127), para. 42. See also the Judgment of 5 February 2002, *Conka v Belgium*, Series A, ECR 2002-I, para. 42.

211 On the contradiction between the rules of interpretation and the absence of a 'hierarchical structuring' between them which would bring certitude to the interpretation, see D. Simon, *L'Interprétation judiciaire des traités d'organisations internationales (morphologie des conventions et fonction juridictionnelle)* (Paris: Pedone, 1981), pp 130–4.

212 See V. Boré Eveno, 'L'Interprétation des traités par les juridictions internationales (étude comparative)', thesis, Université Paris 1 Panthéon-Sorbonne, 2004, notably pp 118 ff. Added to this necessity of interpreting the rules of interpretation is that of determining the meaning of the data to which these rules refer. For example, if the interpreter has recourse in the 'purpose' of the treaty to interpret one of its provisions and if he or she considers that this purpose should be found in the preamble to the treaty, it will also be necessary for him or her to then interpret the relevant provisions of this preamble (idea of the 'double degré d'interprétation' raised by Denys Simon in his thesis, *supra* n 211, pp 134–6).

213 Before the 1969 Vienna Convention was definitively adopted, Ioan Voïcu had already suggested, in his thesis on the authentic interpretation of international treaties, that:

> les avantages relatifs, le gage de sécurité, qu'entraînerait un hypothétique code d'interprétation seraient dépassés proportionnellement par les difficultés qu'il susciterait, du fait que ce code n'échapperait pas non plus à l'interprétation et pourrait engendrer le risque d'un subjectivisme accentué en la matière. (I. Voïcu, *De l'interprétation authentique des traités internationaux* (Paris: Pedone, 1968), p 62)

214 See the commentary on Art. 32 in the present work.

215 We can eg cite the *Loizidou* case (*supra* n 99) in which the ECtHR refused the reservations of Arts 25 and 46 of the Convention, although this matter concerned a system close to Art. 36(2) of the ICJ Statute which the Court accepted. Also note the Judgment of the Appeals Chamber of 15 July 1999 in the *Tadić* case, in which the effective control criteria used by the ICJ in its 1986 judgment in the case between the United States and Nicaragua, was declared 'unconvincing', IT-94–1-4, judgment of *The Prosecutor v D Tadić* of 15 July 1999, paras 114 ff. The ICJ however confirmed this strict criteria of the attribution of an illicit deed to the responsibility of the State, in its Judgment of 26 February 2007 (case of the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, supra* n 50, paras 398 ff), thereby categorically refuting the doctrine of global control developed by the *Tadić* case law. However, this judgment dissipated fears of diverging understandings of 'the crime of genocide' stemming from the 1948 convention between the ICTY and the ICJ since the latter explicitly relied on the decisions taken by international criminal tribunals, at least in the establishment of criminal deeds and their qualification.

216 *Les interprétations justes* (Paris: LGDJ, 2001).

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