II Treaty Interpretation and Other Treaty Points, Division A: Treaty Interpretation, Fitzmaurice's Principles

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(p. 1244) Fitzmaurice's Principles

1. Principle of Actuality (or Textuality)

As stated by Fitzmaurice, this is the principle that 'Treaties are to be interpreted as they stand, and on the basis of their actual texts', that is to say '*prima facie*, without reference to extraneous factors'.[130] In the *Territorial Dispute* between Libya and Chad, the Court stated that 'interpretation must be based above all on the text of a treaty'.[131]

It will be convenient to treat this principle together with the following one (as was done in the earlier article).

2. Principle of Natural and Ordinary Meaning

Fitzmaurice's statement of this principle is more lengthy: essentially it corresponds to the principle stated in Article 31 of the VCLT that treaties are to be interpreted 'in accordance with the ordinary meaning to be given to [their] terms'. The position of this phrase at the beginning of Article 31 is usually taken to signify that interpretation should begin with a determination of the 'ordinary meaning', only thereafter proceeding to consider questions of, for example, the object and purpose of the treaty.[132]

When the Court refers to the Vienna Convention as reflecting customary law as regards the interpretation of treaties, it summarizes the essence of Articles 31 and 32 in such a way as to preserve the relationship between the importance of the text, and the relevance of the object and purpose.

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(1) The Principle Stated and Applied

(a) The 'natural and ordinary' meaning

Since questions of treaty-interpretation referred to the Court are by definition controversial, it is not often that the Court can declare, as it did in the case of the *Territorial Dispute* between Libya and Chad, that 'it has no difficulty either in ascertaining the natural and ordinary meaning of the relevant terms of the… Treaty, or in giving effect to them'.[133] One possible approach is to start by consulting a dictionary, as was done in the *Aegean Sea* case, discussed in the earlier article in this series,[134] as well as in the *Avena* case; though in the latter case those dictionaries consulted offered 'various meanings' of the disputed term ('without delay'), so that, as the Court concluded, it was necessary to (p. 1245) 'look elsewhere'.[135] In the *Kasikili/Sedudu* Island case, the Court consulted specialized technical dictionaries for the meaning of the words 'the main channel' of a river, as well as an arbitral award.[136] The 'terms' of the treaty normally consist of the words used, but account may also have to be taken of the punctuation, as in the case of *Sovereignty over Pulau Ligitan and Pulau Sipadan*.[137]

The natural and ordinary meaning must in principle be the meaning attached to the term at the time of the conclusion of the treaty; but this does not exclude the possibility that the term may have been intended to have a meaning which could develop with the development of international law, or even with factual developments.[138] This aspect will be considered further under the heading of the Principle of Contemporaneity, below.

Independently of the question whether a term in a treaty may have been intended to have a 'special meaning' attributed to it by the parties, a hypothesis contemplated by Article 31, paragraph 4, of the Vienna Convention, it is to be assumed that any term of substantive importance in a treaty was intended to have a precise meaning. This was the approach adopted by the Court in the case of *Kasikili/Sedudu Island*, where the disputed boundary had been agreed by an 1890 treaty to follow the 'centre of the main channel' (in the English text), or the *Thalweg des Hauptlaufes* (in the German text); the Court observed that 'by introducing the term "main channel" into the draft treaty, the contracting parties must be assumed to have intended that a precise meaning be given to it'. It was on that basis, the Court indicated that it would 'seek to determine the ordinary meaning of the term "main channel" '.[139] This apparent derogation from the generality of the 'ordinary meaning' rule is apparently to be explained by the existence of the possibility that the term 'main channel' had been used in a rather imprecise way, e.g. to indicate the line of deepest soundings, as had been suggested by Botswana.

Even the 'natural and ordinary meaning' of a word may be dependent on the context in which it is used. This evident truth was illustrated in the *Land, Island and Maritime Frontier Dispute*, where the question arose whether, under the special agreement by which the Court was seised, the Chamber dealing with the case was empowered to delimit the maritime spaces of the parties. The special agreement requested the Chamber to 'determine the legal situation' of those spaces *('Que determine la situación juridica…'*). The Chamber observed that:

> No doubt the word 'determine' in English (and, as the Chamber is informed, the verb *'determinar'* in Spanish) can be used to convey the idea of setting limits… But the word must be read in its context; the object of the verb 'determine' is not the maritime spaces themselves but the legal situation of the spaces.[140]

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(p. 1246) The Chamber also examined the question of 'natural and ordinary meaning' from the other side, as it were: if a particular result were intended by a treaty, what would be the 'natural and ordinary' words used to achieve it? The Chamber thus pointed out that:

> In considering the ordinary meaning to be given to the terms of the treaty, it is appropriate to compare them with the terms generally or commonly used in order to convey the idea that a delimitation is intended. Whenever in the past a special agreement has entrusted the Court with a task related to delimitation, it has spelled out very clearly what was asked of the Court…[141]

Other treaties stated specifically that a delimitation was what was wanted; the Chamber therefore concluded that in the instant case it had not been asked to effect a delimitation of the areas concerned.

It was noted in the earlier article that 'When examining the words which were used in a treaty, the Court has felt entitled also to take into account the absence of words which might have been used but were not'.[142] In the case of the *Arbitral Award of 31 July 1989*, the Court had to interpret an arbitration agreement which provided for the Arbitral Tribunal to answer a second question if the answer to the first question put to it was in the negative, the problem being what was the position when the answer was partly negative and partly positive. The Court regarded it as significant that 'the Parties could have used some such expression as that the Tribunal should answer the second question "taking into account" the reply given to the first, but they did not'. It even went on to compare the Agreement with another Arbitration Agreement concluded by one of the parties with a third State, which had used different wording.[143]

In other cases, a similar approach was adopted to the interpretation of a declaration made under the optional clause of Article 36, paragraph 2 of the Statute.[144] In the case of the *Land and Maritime Boundary between Cameroon and Nigeria*, Nigeria claimed that its optional clause declaration had been framed so as to exclude the possibility of its being taken unawares by an application made against it immediately following the filing by the applicant State of a similar declaration (the 'lightning-strike' technique employed by Portugal in the *Right of Passage* case[145]). The Court did not accept this reading of the relevant text: 'In order to protect itself against the filing of surprise applications, in 1965, Nigeria could have inserted in its Declaration an analogous reservation to that which the United Kingdom added to its own Declaration in 1958. Ten or so other States proceeded in this way. Nigeria did not do so at that time'.[146]

(p. 1247) In the judgment on the preliminary objections of Yugoslavia in the case of *Application of the Genocide Convention*, the Court rejected an objection to jurisdiction *ratione temporis* on the grounds that the Convention contained no clause that would have the effect sought, nor had the parties made any reservation to that effect.[147] This is however a somewhat odd decision, as explained below,[148] the significance of which is correspondingly doubtful.

In its judgment on the preliminary objections in the *Oil Platforms* case, when examining Article I of the 1955 Treaty of Amity there in question, the Court noted that some 'Treaties of Friendship' contained not only similar provisions to Article I, but also 'clauses aimed at clarifying the conditions of application', and the Court instanced the 1955 Franco-Libyan Treaty which had been central to the *Territorial Dispute* between Libya and Chad. However, the Court drew no conclusions from its observations, stating simply 'However, this does not apply to the present case', so that the reader is left wondering.[149]

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Again, in the *Fisheries Jurisdiction* case between Spain and Canada, which referred to ‘vessels fishing’ in a particular sea area, Spain argued that this was directed only at stateless vessels, and could not therefore apply to a Spanish vessel; but the Court pointed out that ‘It clearly would have been simple enough for Canada, if that had been its real intention, to qualify the word “vessels” so as to restrict its meaning in the context of the reservation’. Since it had not done so, the text as it stood was clear and ‘appears to express the intention of its author’.[150]

The use of this reasoning is of course dependent on an assumption, normally implicit, that the missing’ words would have been, if not necessary, at least to be expected, in the text. In the *Nauru* case, the Court held that the text of a 1976 Agreement could not be construed as containing a waiver by the Nauruans of their right to rehabilitation of the phosphate lands. Thus for the Court, the silence of the Agreement signified there had been no waiver, and the rights were retained. Judge Oda took the opposite view: for him, ‘it was imperative for the Nauruans to reserve the claim to rehabilitation in this crucial document [the 1967 Agreement], drawn up at a critical date, if it were not to be held abandoned’. His conclusion from this was that ‘while it is literally true that the *text* of the Agreement cannot be construed to imply a waiver, the *silence* of the Agreement remains, in my view, open to that conclusion’.[151] For Judge Oda, therefore, silence implied waiver (or rather non-assertion of a claim), and thus the rights were lost.

If it is appropriate when interpreting a treaty-text to take into account words which might have been used to convey a certain meaning but which were not included, so as to deduce that that was not the meaning intended, one would suppose that, *a fortiori*, this would be a legitimate deduction if it were shown that such words had been included in a draft of the text being interpreted, but had been removed from that text before it was adopted.[152] This was not however the reasoning followed by the Court in the case of *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*. The disputed (p. 1248) text was that of the Doha Minutes, regarded by Qatar but not by Bahrain as an agreement permitting the bringing of the dispute before the Court by either party unilaterally. The key passage provided for recourse to the Court by the two parties’ (according to one translation of the disputed Arabic expression *al-tarafan* employed in the Minutes). Both parties recognized that during the negotiations over the dispute, the text that became the Doha Minutes had included an expression in Arabic that indisputably meant either of the two parties’, and that this had been deleted, and *al-tarafan* substituted, on the initiative of Bahrain.

Bahrain contended that this and another amendment constituted ‘clear evidence of its consistent adoption of an approach excluding any possibility of referring the dispute to the Court by means of a unilateral application’, and pointed out that Qatar had not objected to the amendments. Qatar’s position was that it had not ‘considered that those amendments substantially altered the rights and obligations of the Parties or the aims pursued by the draft’.[153] The Court in effect upheld the Qatari view:

> The Court is unable to see why the abandonment of a form of words corresponding to the interpretation given by Qatar to the Doha Minutes should imply that they must be interpreted in accordance with Bahrain’s thesis. As a result, it does not consider that the *travaux préparatoires*, in the form in which they have been submitted to it—i.e. limited to the various drafts mentioned above—can provide it with conclusive supplementary elements for the interpretation of the text adopted; whatever may have been the motives of each of the Parties, the Court can only confine itself to the actual terms of the Minutes as the expression of their common intention, and to the interpretation of them which it has already given.[154]

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This decision was strongly criticized by the dissenting judges, particularly Vice-President Schwebel,[155] and it is indeed puzzling. If the principle of effectiveness requires that a provision in a treaty be read as having some effect rather than none, common sense suggests an analogous approach to *travaux préparatoires:* if a party insists on the deletion of a form of words with a clear meaning, and the substitution of an alternative form not evidently bearing that meaning, it must be supposed that it did so for a purpose, ie in order that the text to be adopted should not be interpreted as bearing that meaning.

The Court also justified its decision in the *Qatar/Bahrain* case by emphasizing the subsidiary nature of recourse to *travaux préparatoires* as a means of interpretation; this raises an interesting question on the use of negative interpretation, or the approach of the 'incident of the dog in the nighttime',[156] just referred to. To argue that certain words could have been inserted during the negotiation of a text if a party had wanted to achieve a certain result, and to deduce from their absence that that was not the result aimed at, is in fact to refer to invisible or hypothetical *travaux préparatoires*. If the *travaux* had not existed, or not been examined, a natural argument would have been: if Bahrain had wanted it to be made clear that only joint seisin of the Court was to be possible, why didn't it insist on appropriate terminology? As the examples given above show, such an argument would not necessarily have been treated as merely a 'supplementary means of interpretation' on a par with reference to the *travaux*. When Bahrain seeks to prove, by reference to the *travaux*, that that argument is unfounded, and that in fact the contrary deduction is justified, it would seem strange that such a contention could be rejected or (p. 1249) undermined on the basis that the text prevails over the product of the supplementary means of interpretation.

(b) Use of terms in a special sense

Mention has already been made above (subsection (a)) of *Kasikili/Sedudu Island*, in which the Court considered that the parties to an 1890 Treaty who had used the term 'main channel' in relation to a river 'must be assumed to have intended that a precise meaning be given to it'.[157] A precise meaning' may not necessarily be different from the natural and ordinary meaning' if the term itself is of such a nature that it is normally used with a specific and precise signification, as in the case of most scientific terms; but the 'natural and ordinary meaning' of many if not most words in the language covers at least a spectrum of meanings, and in some cases and contexts a penumbra of uncertainty. In the instant case, it appeared that the centre of the main channel' meant the same as the *'Thalweg des Hauptlaufes'* in the German text of the Treaty, and that this amounted to a narrower definition than the English term alone.[158]

(c) The context of the words to be interpreted *

The context of the words to be interpreted clearly includes first and foremost the other provisions of the treaty in which they appear. When interpreting, in the *Legality of the Use of Force* cases, Article 35, paragraph 3, of the ICJ Statute, the Court took account of the use of similar terms in Article 36, paragraph 1.[159] Another example was the approach of the Court to the Treaty of Amity relied on as jurisdictional basis for the claims of Iran against the United States in the *Oil Platforms* case. The essence of Iran's claim was that the United States had used unlawful force against it, unlawful, that is, according to customary international law. However, in order to found a claim before the Court, a jurisdictional basis had to be put forward, and this was found in Article XXI of the Treaty of Amity, which related to disputes as to the interpretation or application of the present Treaty'. It was therefore necessary to establish that the unlawful use of force was also a breach of the Treaty. Article I of the Treaty stated that There shall be firm and enduring peace and sincere friendship' between the two States. Iran's contention was thus that Article I imposed as a 'minimum requirement' that the parties 'conduct themselves with regard to

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the other in accordance with the principles and rules of general international law in the domain of peaceful and friendly relations'.[160]

It is perhaps unsurprising that the Court, in its decision on the preliminary objections raised by the US, did not accept this bold argument; invoking its finding on a similar treaty between the US and Nicaragua, it found that the objective of a treaty of friendship was 'the effective implementation of friendship in the specific fields provided for in the Treaty, not friendship in a vague general sense'.[161] However, the Court emphasized the special role of Article I as revealing the context in which the other articles of the Treaty were to be read: 'the objective of peace and friendship proclaimed in Article I (p. 1250) of the Treaty of 1955 is such as to throw light on the interpretation of other Treaty provisions, and in particular of Articles IV and X'.[162]

Article X provided for 'freedom of commerce' between the parties. Since the attacks by US forces had disabled oil drilling platforms, Iran argued that this was an interruption of freedom of commerce, and therefore a matter of the 'application' of the Treaty. The Court accepted that argument, but found confirmation of this conclusion in Article I.

> The spirit and intent set out in this Article animate and give meaning to the entire Treaty and must, in case of doubt, incline the Court to the construction which seems more in consonance with its overall objective of achieving friendly relations over the entire range of activities covered by the Treaty.[163]

The contextual impact of Article I on the interpretation of the other articles of the Treaty was however felt more dramatically when the Court reached the merits stage of the proceedings. The United States invoked Article XX, paragraph i(d), of the Treaty, which provided that 'The present Treaty shall not preclude the application [by a party] of measures…necessary…to protect its essential security interests',[164] and relied on the law of self-defence as justifying the attacks on the oil installations. When considering this argument, the Court recalled what it had said in its previous decision, that Article I was 'such as to throw light on the interpretation of the other Treaty provisions', and observed that 'It is hardly consistent with Article I to interpret Article XX, paragraph i(d), to the effect that the "measures" there contemplated could include even an unlawful use of force by one party against the other'.[165] The implications of this were considerable; it enabled the Court to find that 'The application of the relevant rules of international law to this question thus forms an integral part of the task of interpreting entrusted to the Court by Article XXI, paragraph 2, of the 1955 Treaty'.[166] The Court was therefore able to find that the US had been guilty of an unlawful use of force, even though it dismissed the claim of Iran for other reasons.[167]

The context of the words to be interpreted is not however limited to the rest of the text of the treaty in which they appear: it may include another contemporaneous treaty between the parties. Thus in the *Territorial Dispute* between Libya and Chad, the conclusions reached by the Court as to the meaning and effect of a 1955 Treaty of Friendship and Good Neighbourliness between Libya and France were 'reinforced by [its] (p. 1251) examination of the context of the [1955] Treaty, and, in particular, of the Convention of Good Neighbourliness between France and Libya, concluded between the parties at the same time as the Treaty'.[168] Libya had contended that the 1955 Treaty did not provide for an actual frontier in certain regions; the Court pointed out that this view was refuted by the fact that one of the appended Conventions [to the Treaty] contained…provisions governing the details of the trans-frontier movements of the inhabitants of the region'.[169]

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In that case, the instrument treated as part of the context of the treaty being interpreted was itself a treaty; but an instrument may rank as context' without itself having any binding force. In the case of the *Land and Maritime Boundary between Cameroon and Nigeria*, the Court had to interpret a joint declaration by the predecessors in title of the parties (France and Great Britain), the Thomson-Marchand Declaration of 29 December 1929/31 January 1930. A map was annexed to this Declaration; but in one sector of the disputed boundary the map did not correspond to the terms of the Declaration. It did however correspond to a document of 16 October 1930 signed by a British District Officer and a representative of the French administration: the 'Logan-Le Brun procès-verbal', which had been drawn up after the Thomson-Marchand Declaration was prepared, but before it was signed; according to Nigeria, this had been intended to set out a solution on the ground to the difficulties created by the text of the Thomson-Marchand Declaration…'.[170] The Court's conclusion was that 'in this area the Thomson-Marchand Declaration should be interpreted in accordance with the intention of its authors, as manifested on the map appended thereto and on the ground, namely so as to make the boundary follow the course described in the Logan-Le Brun procès-verbal'.[171] The 'intention of its authors' was thus sought, not in the text of the treaty itself, but in an instrument that could not rank higher than part of the 'context' in which it was adopted.

(2) Recourse to *travaux préparatoires**

(a) Justification for such recourse: ambiguity or confirmation

The provisions of Article 32 of the Vienna Convention are expressed limitatively: recourse to the 'supplementary means of interpretation', in particular the *travaux préparatoires*, is only to be had if interpretation according to Article 31 'leaves the meaning ambiguous or obscure' or 'leads to a result which is manifestly absurd or unreasonable'. As Klabbers has forcefully pointed out, 'neither is a finding many interpreters would be willing to (p. 1252) draw lightly' and in consequence 'the only way out is not to take the injunction of Article 32 too seriously and to resort to the *travaux préparatoires* even where there is no obvious problem with the text itself'.[172] The accuracy of this observation may be seen in the Court's use of *travaux* in the cases to be examined.

(i) Ambiguity

The conditions laid down by Article 32 of the VCLT for recourse to *travaux préparatoires*, when treated as a reflection of customary law, may to some extent be expressed in over-restrictive terms. The Court has not, when turning to the *travaux préparatoires* of a treaty, systematically prefaced this step with a finding that the text is 'ambiguous or obscure', or 'leads to a result which is manifestly absurd or unreasonable'.[173] In the case of *Maritime Delimitation in the Area between Greenland and Jan Mayen*, the Court was comparing the concepts of 'special circumstances' in the 1958 Geneva Convention on the Continental Shelf and the concept of 'relevant circumstances' which had been employed in 'the customary law'—or more exactly, the case-law—'based upon equitable principles'.[174] It noted that the concept of 'special circumstances' had been discussed at length at the 1958 Geneva Conference, and concluded, on the basis of this and other circumstances, that 'It was and remains linked to the equidistance method…contemplated' in the Conventions adopted at Geneva in 1958. It would be an exaggeration to say that this was a case of an ambiguity' in the Conventions, and there was no question of an unreasonable result of a particular interpretation.[175]

It also does not appear to be the case that the submission to the Court of an absurd or unreasonable interpretation of a treaty necessarily imposes on it the duty of examining the *travaux préparatoires*, if an alternative interpretation is equally possible and more convincing. In the *Oil Platforms* case, the question arose whether the attacks on the platforms by the United States had interfered with 'commerce' between Iran and the United States, so as to constitute a breach of the Treaty protecting such commerce. The US argued

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that the platforms, on the Iranian continental shelf, were not on the *territory* of Iran, and that therefore the export to the US of oil from the platforms was not commerce between the two territories. The Court would have none of this, regarding such an interpretation of the Treaty as simply not 'tenable'.[176]

(ii) Confirmation

A use of *travaux préparatoires* recognized in the VCLT which is much more common in the case-law of the Court is reference to them in order to confirm an interpretation already arrived at on the basis of the text, the context, or the object and purpose of the treaty or some combination of these. Since by the time the Court includes in its judgment an account of the process of examination of the *travaux* it will already know what the result of that process was, and will presumably have preferred to leave the *travaux* (p. 1253) undisturbed if they prove to contradict rather than to confirm,[177] the process rather recalls the words which Pascal imagined God addressing to him: 'tu ne me chercherais pas si tu ne m'avez déjà trouvé.'[178]

During the drafting of the Vienna Convention, an acute comment was made by Rosenne on the then-existing case-law in which the Court had referred to *travaux préparatoires* to confirm the meaning of a treaty text. As reported in the ILC Yearbook, he observed that:

> case-law would be much more convincing if from the outset the Court or tribunal had refused to admit consideration of *travaux préparatoires* until it had first established whether or not the text was clear, but in fact, what had happened was that on all those occasions the *travaux préparatoires* had been fully and extensively placed before the Court or arbitral tribunal by one or other of the parties, if not by both. In the circumstances, to state that the *travaux préparatoires* had been used only to confirm an opinion already arrived at on the basis of the text of the treaty was coming close to a legal fiction. It was impossible to know by what processes judges reached their decisions and it was particularly difficult to accept the proposition that the *travaux préparatoires* had not actually contributed to form their opinion as to the meaning of a treaty which, nevertheless, they stated to be clear from its text, but which, as the pleadings in fact showed, was not so.[179]

The question was raised squarely by Judge Schwebel in his dissenting opinion appended to the 1995 decision in the case of *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*. He pointed out that the possibility of the *travaux* proving to contradict an otherwise convincing interpretation had not in fact been overlooked at the Vienna Conference, having been raised by the representative of Portugal,[180] who had suggested that good faith would require the embarrassing discovery to be taken into consideration.

In the *Qatar/Bahrain* case, the Court had examined the *travaux* of the Doha Minutes, the text that it found to constitute an agreement conferring jurisdiction on it, but did not consider that they can provide it with conclusive supplementary elements for the interpretation of the text adopted'.[181] Judge Schwebel found this position 'unconvincing'; he considered that 'the Court's construction of the Doha Minutes is at odds with the rules of interpretation prescribed by the Vienna Convention', and was not a good faith interpretation: [i]t does not implement the Convention's provision for recourse to preparatory work, because, far from confirming the meaning arrived at by the Court's interpretation, it vitiates it.'[182] Clearly there could be two views as to the significance of the *travaux* in this case,[183] and it is to the Court's credit that it reported on its examination of them, (p. 1254) and its conclusion that they were unhelpful, rather than passing over the

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whole matter in silence. Whether it would have chosen the latter course had Judge Schwebel not gone into the matter in his opinion must remain a matter of speculation.[184]

In the case of the *Gabčíkovo/Nagymaros Project*, it was ironically the *travaux préparatoires* of the Vienna Convention itself that were cited by the Court in order to reject an argument of Hungary on the concept of impossibility of performance. The Court did not suggest that Hungary's interpretation involved an ambiguity, or was absurd or unreasonable: it simply stated that that interpretation was 'not in conformity with the terms of that Article [61], nor with the intentions of the Diplomatic Conference which adopted the Convention'.[185] The case is also notable for the fact that the Court had recourse to the *travaux préparatoires* of a multilateral convention which was not as such applicable to the case, in order to clarify a question of customary law which it recognized to have been reflected in the convention.[186]

Recourse to the *travaux préparatoires* of the arbitral agreement that led to the *Arbitral Award of 31 July 1989* was required to resolve the problem of the relationship between the two questions that had been put to the Arbitration Tribunal. Having decided whether or not a 1960 maritime delimitation agreement was binding on the parties, the Tribunal was empowered, 'in the event of a negative answer to the first question,' to decide the course of the relevant delimitation line. The Tribunal's answer to the first question was a *réponse normande*, a Yes-and-No, since it held that the 1960 Agreement was binding, but only partially. On that basis, it declined to answer the second question. The Court first found that the words 'in the event of a negative answer' were categorical, so that the Arbitral Tribunal had correctly interpreted the Agreement.[187] Guinea-Bissau however contended that the object of the agreement was to obtain a comprehensive delimitation, and since the partial answer to that question would not achieve this end, the Tribunal was bound to answer the second question also.

The circumstances of the conclusion of the Agreement, as the Court found, were that Senegal relied on the 1960 Agreement, while GuineaBissau rejected it, and sought a delimitation *de novo*. The Agreement thus contained the two questions, linked by the disputed phrase. It was true that the shared objective was a comprehensive delimitation, but the two States intended to achieve this each by a different route.

> Senegal was counting on achieving this result through an affirmative answer to the first question, and Guinea-Bissau through a negative answer to that question. No agreement had been reached between the Parties as to what should happen in the event of an affirmative answer leading only to a partial delimitation.[188]

(p. 1255) The Court's conclusion was that 'The *travaux préparatoires* accordingly confirm the ordinary meaning' of the disputed phrase,[189] as distinct, presumably, from a reading of it as signifying 'unless a comprehensive delimitation results from the reply to the first question'.

The decision in this case could however be seen as a recourse to *travaux préparatoires* not so much to arrive at an understanding of particular words used in a text, as to refute a contention as to the object and purpose of the treaty. The question was perhaps not so much, 'What do these words mean?' as 'Why were these words included at all?'

More straightforward examples of recourse to the *travaux* for purposes of confirmation of a conclusion already arrived at are afforded by the *Territorial Dispute* between Libya and Chad, and the case of *Sovereignty over Pulau Ligitan and Pulau Sipadan*. In the first of these cases, the issue in dispute was whether a 1955 Treaty had been intended to define a complete frontier between Libya and French possessions in Africa; the Court held that it had, and that there was no need to refer to the *travaux préparatoires*. However, 'as in previous cases', not specified, 'it finds it possible by reference to the *travaux* to confirm its reading of the text'.[190] Similarly in the *Pulau Ligitan and Pulau Sipadan* case, having

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arrived at a conclusion as to the correct interpretation of the disputed Article of an 1891 Convention, the Court continued:

> In view of the foregoing, the Court does not consider it necessary to resort to supplementary means of interpretation, such as the *travaux préparatoires* of the 1891 Convention and the circumstances of its conclusion, to determine the meaning of that Convention; however, as in other cases, it considers that it can have recourse to such supplementary means in order to seek a possible confirmation of its interpretation of the text of the Convention.[191]

Apart from the problem, noted above, of the *travaux* proving to contradict the interpretation already arrived at, this practice of the Court seems to contradict the principale underlying Articles 31 and 32 of the Vienna Convention. If the recourse to the *travaux* is 'to confirm the meaning' arrived at by applying the principal criteria of interpretation, it must be because that meaning seems to need confirmation; because it could only be reached with some hesitation. If confirmation is sought in every case: if the Court, having examined the ordinary meaning of the words, their context, and the object and purpose, is then going to seek additional reassurance from the *travaux*, then the limitation defined in the first paragraph of Article 32 threatens to become a dead letter. In addition, the more this confirmatory recourse to the *travaux* becomes normal practice, the more it will throw into relief such cases as there may be in which the practice is *not* followed: the informed observer will suspect that this was because the *travaux* proved, on inspection, to point the 'wrong' way.

(b) Modalities of reference to travaux préparatoires

The purpose to be served by consulting the *travaux préparatoires* of a treaty, whether this is in the context of ambiguity or by way of confirmation, is to establish what the terms of the treaty were intended to mean; why those terms were used is, in principle, a different question, and not necessarily a relevant one.

(p. 1256) In its examination of Article 41 of the Statute in the *LaGrand* case, the Court sought confirmation in the *travaux préparatoires* of the PCIJ Statute of its view that the indication of provisional measures created binding legal obligations, to be complied with by the party or parties to whom they were addressed. At an early stage of the drafting, the expression used in the French text was 'ordonner…des mesures conservatoires', in English 'order…protective measures', whereas the final text adopted—and the text of the post-War Statute—used and uses the much weaker word 'indiquer' in French and 'indicate' in English. When the text reached the Sub-Committee of the Third Committee of the Assembly of the League, the text had already become 'indiquer' and 'indicate'. The Brazilian delegate, Raoul Fernandes, 'suggested again to use the word "ordonner" in the French version. The Sub-Committee decided to stay with the word "indiquer", the Chairman of the Sub-Committee observing that the Court lacked the means to execute its decisions'.[192]

The Court in the *LaGrand* case commented as follows on this:

> The preparatory work of Article 41 shows that the preference given in the French text to '*indiquer*' over '*ordonner*' was motivated by the consideration that the Court did not have the means to assure the execution of its decisions. However, the lack of means of execution and the lack of binding force are two different matters. Hence, the fact that the Court does not itself have the means to ensure the execution of orders made pursuant to Article 41 is not an argument against the binding nature of such orders.[193]

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Whatever the reasons for the change in 1920, the fact remains that it was decided not to include the word 'ordonner', which would at least have implied a system of binding measures, and to include the word 'indiquer', which did not lend itself to such an interpretation. The Committee Chairman, assuming he was accurately reported, may well have confused 'lack of means of execution' and 'lack of binding force', and so may his colleagues. Nevertheless, for good or ill, they chose not to take up Mr Fernandes' suggestion that provisional measures should be 'ordered', with the implication that they would be binding; and that is the text to be interpreted. The *LaGrand* finding prompts the question: is it legitimate for the Court in such circumstances to interpret the text as though it contained the rejected term rather than the accepted term? To say that the draftsman, or the original parties, made a mistake, is one thing; it is another for the Court to claim the power to correct the mistake retrospectively, and make the treaty say what the Court thinks that the parties ought to have made it say.[194] The ILC, when drafting what became the Vienna Convention, was alert to the danger of interpretation surreptitiously becoming revision.[195] If it were shown by the *travaux préparatoires* that the draftsman made a mistake in thinking, for example, that a certain technical term had a particular sense when it meant something different,[196] then it would seem proper to interpret the treaty in the sense that the draftsman had intended—a case of a 'special meaning' under Article 31, paragraph 4, of the Convention. But if he chose a term which (p. 1257) he knew had a specific meaning, but chose it for a policy reason which was mistaken, it is not a departure from the intentions embodied in the treaty to interpret the term according to that specific meaning.

3. Principle of Integration: The 'Object and Purpose' Criterion*

As was explained in the earlier article, Fitzmaurice's 'principle of integration' has been applied in this series of articles taking into account his first formulation of it: 'Treaties are to be interpreted as a whole, and with reference to their declared or apparent objects, purposes and principles',[197] so as to harmonize the analysis with Article 31, paragraph 1, of the Vienna Convention, referring as it does to interpretation of a treaty 'in the light of its object and purpose'. The balance struck by the Convention between strict construction on the basis of the text, and broader, almost sociological considerations enabling the interpreter to implement what may be seen (if only by him) as what the parties were trying to achieve, has in general been reflected in the case-law of the Court; though, as Fitzmaurice would have wished, the Court has made it clear that 'interpretation must be based above all on the text of the treaty'.[198] The test of the 'object and purpose' has been invoked for the interpretation also of unilateral acts such as declarations under the optional clause,[199] and employed by the Court to interpret its own Rules of Court.[200]

It has however still been objected, in relation to this provision of Article 31, that 'this is a vague and ill-defined term, making it an unreliable tool for interpretation'.[201] Furthermore, it is normally appropriate to discern the object and purpose of a treaty by looking at the text, so that the reference to the object and purpose may be thought to add nothing to the requirement that it is the text, first and foremost, that directs the interpretation. A similar line of thought led Judge Shahabuddeen, in the *Territorial Dispute* between Libya and Chad, to point out that to invoke the principle of the stability of international boundaries as something contemplated by the object and purpose of a (p. 1258) boundary treaty does not help in determining whether the treaty was a boundary treaty in the first place.[202]

It is however in relation to treaties fixing, or alleged to fix, a boundary that the Court has found it appropriate to invoke the 'object and purpose' of a treaty in order to decide upon its proper interpretation.[203] In this respect one may contrast the decisions in the *Territorial*

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Dispute between Libya and Chad, referred to above, and the case of *Sovereignty over Pulau Ligitan and Pulau Sipadan*.

In the first case, there was no doubt that the treaty—a 1955 Franco–Libyan Treaty—dealt with land boundary matters, but it did so in an unusual way. Article 3 of that Treaty provided that the parties 'recognized' that the frontiers between the French possessions in Africa and the newly-independent Libya 'are those that result from the international instruments in force on the date of the constitution of the United Kingdom of Libya as listed in the attached Exchange of Letters (Annex I)'.[204] However, not all the instruments listed, which dated from the colonial period, were agreements establishing frontiers; one had merely delimited spheres of influence; one had allegedly never been opposable to Libya's predecessor in title; and one was alleged to be no longer in force. The issue was thus whether, as contended by Libya, the parties to the 1955 Treaty had intended to recognize only the frontiers that had previously been fixed by international instruments, but not to create a frontier where one had previously never existed; or, as argued by Chad, to establish, as from the date of the 1955 Treaty, a complete frontier whatever the previous status of the lines identified in the instruments listed in Annex I. The Court had 'no difficulty…in ascertaining the natural and ordinary meaning of the relevant terms of the 1955 Treaty', namely that no relevant frontier was to be left undefined and no instrument listed in Annex I was superfluous'.[205] In the course of its subsequent reasoning, it found that 'Article 3 of the 1955 Treaty was aimed at settling all the frontier questions, and not just some of them',[206] an apparent allusion to the idea of the 'object and purpose' of the Treaty. The Court again stated, a little further on, that The text of Article 3 clearly conveys the intention of the parties to reach a definitive settlement of the question of their common frontiers'.[207]

In the *Pulau Ligitan and Pulau Sipadan* case, the treaty to be interpreted was a Convention of 1891 between the Netherlands and Great Britain for the purpose of 'defining the boundaries between the Netherland possessions in the Island of Borneo and the States in that island which [were] under British protection'. The Convention defined a boundary line across the island from west to east; then, from the terminus at '4° 10" north latitude' on the east coast, the boundary-line shall be continued eastward along that parallel, across the Island of Sebittik'.[208] The issue between the parties was whether the agreed boundary line had been intended to be drawn across to the east coast of the island of Sebittik, and no further, as claimed by Malaysia; or whether it was to cross the island and continue eastwards along that parallel so as to (p. 1259) attribute sovereignty over the disputed islands of Pulau Ligitan and Pulau Sipadan to the Netherlands, and thus to Indonesia as its successor State.

After finding unconvincing the position of Indonesia in the light of the text of the Convention and the context, the Court turned to the object and purpose of the Convention. Contrary to the contentions of Indonesia, and in contrast to its decision in the *Territorial Dispute (Libya/Chad)*, it considered that the object and purpose had not been to settle all possible, or even all anticipated, territorial disputes, but simply to define the frontier within the area indicated by the Convention—the Island of Borneo and the island of Sebittik.[209]

The nature of the dispute was such that the parties were in fact arguing essentially, or even solely, about the 'object and purpose' of the Convention rather than about its text. The question was, how much of their respective possessions had the parties to it intended to delimit? On this point, the text of the actual operative clause was consistent with either interpretation advanced. It was nevertheless in the text of the Convention that the Court found the key to the problem: the 'object and purpose' was:

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> shown by the preamble to the Convention, which provides that the parties were 'desirous of defining the boundaries between the Netherlands possessions *in* the Island of Borneo and the States *in that island* which are under British protection' (emphasis added by the Court).[210]

This finding was 'supported', as the Court found, by 'the very scheme' of the Convention: by this the Court apparently meant the context, in the sense of the difficulties over boundaries that had been encountered by the parties to the Convention, which that instrument was intended to solve. The Court also took into account, in this connection, the contemporary factual background:

> [T]he terms of the preamble to the 1891 Convention are difficult to apply to [the disputed] islands as they were little known at the time, as both Indonesia and Malaysia have acknowledged, and were not the subject of any dispute between Great Britain and the Netherlands.[211]

The Court's conclusion was strictly in line with Article 31 of the Vienna Convention: the relevant article of the 1891 Convention, 'when read in context and in the light of the Convention's object and purpose, cannot be interpreted' as claimed by Indonesia. As noted above,[212] it nevertheless went on to look for confirmation of its conclusion in the *travaux préparatoires*.

The 'object and purpose' test may also be invoked in order to distinguish what are in effect different types of Treaty, where this affects the interpretation of their provisions. In the *Oil Platforms* case, the clause to be interpreted was Article I of a 1955 Treaty of Amity, Economic Relations and Consular Rights between the United States and Iran, which provided 'There shall be firm and enduring peace and sincere friendship' between the two countries. The Treaty also contained a disputes settlement clause providing for recourse to the International Court. Iran sought to invoke the clause in order to bring (p. 1260) before the Court what was in essence (as the Court in effect found at a later stage[213]) a dispute about the alleged use by the United States of unlawful force against Iranian oil installations. It therefore appealed to Article I as imposing on the parties at least a minimum requirement 'to conduct themselves with regard to the other in accordance with the principles and rules of general international law in the domain of peaceful and friendly relations'.[214] The Court however found that:

> the object and purpose of the Treaty of 1955 was not to regulate peaceful and friendly relations between the two States in a general sense. Consequently, Article I cannot be interpreted as incorporating into the Treaty all the provisions of international law concerning such relations. Rather, by incorporating into the body of the Treaty the form of words used in Article I, the two States intended to stress that peace and friendship constituted the precondition for a harmonious development of their commercial, financial and consular relations and that such a development would in turn reinforce that peace and that friendship.[215]

The Court concluded that 'Article I must be regarded as fixing an objective, in the light of which the other Treaty provisions are to be interpreted and applied'.[216] If the Court was making a conscious distinction between 'the object and purpose' of a treaty and an 'objective' fixed by a provision of a treaty,[217] this was presumably in the sense that the object and purpose of the 1955 Treaty as a whole was the furtherance of economic and consular relations, while the objective of Article I, in isolation, was to define the background, or the context, in which those relations could develop. It could thus be said that the use of the 'object and purpose' test was here negative: the interpretation of the Treaty as a whole advanced by Iran, and the definition of the 'object and purpose' on which

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its was based, was rejected; and the text on which Iran relied was shown to define, not the ‘object and purpose’ of the Treaty, but the ‘objective’ of that particular Article.

A similarly negative application of the principle was made in the case of *Avena and other Mexican Nationals*. The question was whether the requirement in Article 36 of the Vienna Convention on Consular Relations that the consular authorities of the national State of a foreign national who has been arrested be notified ‘without delay’ meant, as Mexico argued, that the notification should be given ‘prior to any interrogation of the foreign detainee, so that the consul may offer useful advice about the foreign legal system and provide assistance in obtaining counsel’.[218] After commenting on the ‘ordinary meaning’ of the text, the Court continued:

> As for the object and purpose of the Convention, the Court observes that Article 36 provides for consular officers to be free to communicate with nationals of the sending State, to have access to them, to visit and speak with them, and to arrange for their legal representation. It is not envisaged, either in Article 36, paragraph 1, or elsewhere in the Convention, that consular functions entail a consular officer himself or herself acting as the legal representative or more directly engaging in the criminal justice process.[219]

(p. 1261) It may however be questioned whether this argument—sound enough in itself— is truly an application of the ‘object and purpose’ criterion. The object of the Vienna Convention was to regulate’ consular relations, and *inter alia* to define the nature of consular functions, which are enumerated elsewhere in the Convention’ ie in Article 5 (to which the Court did not refer). The question whether a particular function is or is not one contemplated by the Convention is to be determined by reference to the text; the object and purpose—to regulate consular relations—does not help in determining the modalities of those relations; it might at most be helpful if the function alleged is so outside the nature of ‘consular’ activities that a convention dealing with consular activities cannot be supposed to have been intended to include it. The Court’s argument in fact contains a concealed assumption, not based on the Convention itself, that consuls should not directly engage’ in the criminal justice process;[220] it is this, not the object and purpose’ that underlay the finding quoted above.

It is in fact very easy to see as the object and purpose’ of a treaty a conception of it which points to the interpretation regarded as desirable; unless the ‘object and purpose’ can be traced in the text itself (in which case, as noted above, the matter can be seen as simply one of textual interpretation), it may have to be plucked out of the air. In the *LaGrand* case, the Court was considering whether orders indicating provisional measures under Article 41 of the Statute give rise to binding legal obligations. One of the arguments it employed was as follows:

> The object and purpose of the Statute is to enable the Court to fulfil the functions provided for therein, and in particular, the basic function of judicial settlement of international disputes by binding decisions in accordance with Article 59 of the Statute. The context in which Article 41 has to be seen within the Statute is to prevent the Court from being hampered in the exercise of its functions because the respective rights of the parties to a dispute before the Court are not preserved. It follows from the object and purpose of the Statute, as well as from the terms of Article 41 when read in their context, that the power to indicate provisional measures entails that such measures should be binding, inasmuch as the power in question is based on the necessity, when the circumstances call for it, to safeguard, and to avoid prejudice to, the rights of the parties as determined by the final judgment of the Court. The contention that provisional measures indicated under

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> Article 41 might not be binding would be contrary to the object and purpose of that Article.[221]

The conclusion to be arrived at is in fact already contained in the second sentence of this passage. Article 41 provides for measures to preserve the respective rights of the parties, but it does not indicate that this is 'to prevent the Court from being hampered in the exercise of its functions', and the experience since the days of the Permanent Court has been that non-compliance by a party with provisional measures, however regrettable, does not noticeably hamper the Court in the exercise of its functions.[222]

(p. 1262) In the judgment on the preliminary objections of Yugoslavia in the case of *Application of the Genocide Convention*, the Court appealed to the 'object and purpose' of the Genocide Convention in support of its decision to reject the objections to the jurisdiction *ratione temporis* of the Court. However the main reason for rejection was the simple observation that the Convention, and specifically the compromissory clause (Article IX), contained no such limitation, and neither party had made a reservation to that effect.[223] These two arguments are uneasy yoke-fellows. If it was conceivable that the Convention should have been temporally limited in its operation, and *a fortiori* if reservations as to temporal extent of commitment were permitted, how does the object and purpose of the Convention—of the greatest humanitarian importance as it undoubtedly is—have anything to say as to the interpretation of the text on the point? The question was simply whether the Convention *was* so limited, and whether there *was* a reservation by either party.[224]

4. Principle of Effectiveness

(1) The two meanings of the principle

During the period under consideration, the Court has had little occasion to apply the principle of effectiveness, as such, possibly because matters in this category were argued and dealt with under the heading of interpretation in the light of the 'object and purpose' of the treaty.

Attention was drawn in the earlier article to the point that this principle incorporates two distinct principles, or has two distinct aspects: first the rule that all provisions of the treaty must be supposed to have been intended to have some effect, so that an interpretation which reduces a provision to surplussage must be suspect; and secondly the rule that the text as a whole, and each provision, must have been intended to achieve some end, and an interpretation which would make the text incapable of achieving the object in view is similarly suspect.[225] At the same time, mention was also made of Fitzmaurice's warning that the principle, as enshrined in the phrase *ut res magis valeat quam pereat*, 'is all too frequently misunderstood as denoting that agreements should always be given their maximum *possible* effect, whereas its real object is merely…to prevent them failing altogether'.[226]

A case in which the Court's use of the principle of effectiveness may be thought to have gone too far in this direction is the *Territorial Dispute* between Libya and Chad. Article 3 of a 1955 Franco-Libyan Treaty had provided that the parties recognized 'that the frontiers between Libya and the French colonial territories in Africa are those that result from the international instruments in force at the date of the constitution of the United Kingdom of Libya as listed' in an annex to the Treaty. It was observed by Libya that some of the instruments in question had not themselves fixed a frontier (though they had defined a line); the issue in dispute was whether the 1955 Treaty had simply (p. 1263) preserved the legal position, or had produced a complete set of frontiers, by transforming the less formal lines into legal boundaries.

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The Court took the view that the latter interpretation was correct.

> The text of Article 3 clearly conveys the intention of the parties to reach a definitive settlement of the question of their common frontiers. Article 3 and Annex I are intended to define frontiers by reference to legal instruments which would yield the course of such frontiers. Any other construction would be contrary to one of the fundamental principles of interpretation of treaties, namely that of effectiveness.[227]

It may well be more likely that the parties in 1955 intended their Treaty to produce a complete set of frontiers, but a treaty that merely recorded the *status quo* would not have been a dead letter, or totally useless. While accepting the Court's interpretation of the Treaty as correct, and as arrived at appropriately as a matter of the intention of the parties, one may doubt whether it is supported by the principle of effectiveness as correctly understood.[228]

A similar argument was advanced in the case of *Sovereignty over Pulau Ligitan and Pulau Sipadan*, but was not in this case accepted by the Court. The question was whether a treaty which drew a boundary line between Dutch and British possessions in Borneo along a parallel of longitude extended further along that parallel than the treaty expressly indicated, so as to determine sovereignty over an island further to the west than the endpoint indicated in the treaty. Indonesia (as successor to the Netherlands) argued that the intention of the treaty had been to resolve the [boundary] uncertainties once and for all so as to avoid future disputes', and relied on the principle of 'the finality and completeness of a boundary settlement'.[229] The Court found it sufficiently clear that the object and purpose of the treaty had been to determine boundaries simply, as the treaty indicated, within the island of Borneo and in relation to the disputed island of Sebatik,[230] and therefore did not deal specifically with the Indonesian argument based essentially on the principle of effectiveness.

In the *Fisheries Jurisdiction* case between Spain and Canada, the interpretation of an Optional Clause declaration was in issue. The Court had already, in the case of the *Border and Transborder Armed Actions*, applied what was, in effect, the principle of effectiveness to a unilateral declaration accepting jurisdiction.[231] In the *Fisheries Jurisdiction* case, the Court noted that it was addressed by both Parties on the principle of effectiveness,' and added that Certainly, this principle has an important role in the law of treaties and in the jurisprudence of this Court'. It then however brushed this aspect aside, emphasizing that what was required was that the declaration be interpreted in a manner compatible (p. 1264) with the effect sought by the reserving State'.[232] The significance of the distinction is not evident: as Canada pointed out, the interpretation of the declaration advanced by Spain would deprive the reservation of any practical effect'; and the practical effect in question was the effect aimed at by Canada.[233] It may be that the Court meant simply to distinguish a declaration from a treaty; the emphasis on the intention of the reserving State appears to lay the foundation for the subsequent decision that the Canadian reservation was valid. The argument against its validity was a sort of public policy' argument, essentially that States ought not to be allowed to exclude from judicial scrutiny activities which might be regarded as contrary to general international law; and the Canadian declaration might, from this angle, be seen as robbing the Statute of effectiveness.

The principle of effectiveness contains a built-in danger: the temptation towards rewriting the treaty rather than interpreting it. Nowhere has this been more effectively pointed out than in the dissenting opinion of Judge Shahabuddeen in the case of *Maritime Delimitation and Territorial Questions between Qatar and Bahrain:*

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> [T]he fact that a treaty has a discernible object does not mean that it has to be interpreted so as to accomplish that object at all costs. A treaty must of course be interpreted 'in the light of its object and purpose'; but it is not for the Court to make it more effective for achieving its apparent purpose than the parties themselves saw fit to do.[234]

The passage in the Court's judgment that inspired Judge Shahabuddeen's vigorous dissent was that in which it interpreted the Doha Minutes as authorizing unilateral seising of the Court by either party. The text referred to a period for the exercise of good offices by Saudi Arabia, and continued Once that period has elapsed, the two parties may submit the matter to the International Court of Justice'; the question at issue was whether the Arabic expression *al-tarafan*, here translated 'the two parties', meant either of them individually or both of them jointly.[235] The expression cited, in the Court's view, suggests in the first place, and in its most natural sense, the option or right for them to seise the Court. Taken as such, in its most ordinary meaning, that expression does not require a seisin by both Parties acting in concert, but, on the contrary, allows a unilateral seisin'.[236] Judge Shahabuddeen considered that

> 'it does not follow that a unilateral application was the only method' by which the parties intended that the Court could have been seised; and he firmly rejected 'recourse to the principle of effectiveness in order to support a right of unilateral application'.[237]

The judgment in the *Qatar/Bahrain* case does not refer in so many words to the principle of effectiveness, but the following passage amounts to an unavowed application of that principle. After stating that any interpretation of the text other than as authorizing (p. 1265) unilateral seisin 'would encounter serious difficulties: it would deprive the phrase of its effect and could well, moreover, lead to an unreasonable result', the Court continued:

> In fact, the Court has difficulty in seeing why the 1990 Minutes, the object and purpose of which were to advance the settlement of the dispute by giving effect to the formal commitment of the Parties to refer it to the Court, would have been confined to opening up for them a possibility of joint action which not only had always existed but, moreover, had proved to be ineffective. On the contrary, the text assumes its full meaning if it is taken to be aimed, for the purpose of accelerating the dispute settlement process, at opening the way to a possible unilateral seisin of the Court in the event that the mediation of Saudi Arabia—sometimes referred to, as in the text under discussion, as 'good offices'—had failed to yield a positive result by May 1991.[238]

Judge Shahabuddeen refrained from saying so, but this passage contains a *petitio principii:* the question was whether the Minutes were intended to advance the settlement of the dispute' by authorizing a unilateral seisin of the Court, so that question could not be resolved by assuming that such was the object in view.

In this case, Judge Shahabuddeen was, and the Court was not, following the wise counsel of Fitzmaurice, cited above, that the principle of effectiveness does not denote that agreements should always be given their *maximum possible* effect, merely that they be prevented from failing altogether.

(2) Impossibility and its relationship to the principle

As a pendant to the discussion in the previous article of the presumptions that a treaty will not have been 'intended to achieve the impossible', nor have been 'intended to achieve nothing at all',[239] it may be noted that effectiveness is to be assessed at the time of the conclusion of the treaty, and on the basis of what was the *intended* effect of the treaty, not

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what in fact happened subsequently. Thus in the cases concerning *Legality of the Use of Force*, the Court did not consider that the reference to 'treaties in force' in Article 35, paragraph 3, of the Statute of the post-war Court, which was modelled on the same Article in the Statute of the PCIJ, referred to treaties in force at the time of the institution of proceedings on the basis of the Article. On the contrary, the Court considered the text as 'intended to refer to treaties in force at the date of the entry into force of the new Statute, and providing for the jurisdiction of the new Court', in the same way as the PCIJ provision had (as the Court had found) contemplated treaties in force in 1920. The Court then went on to say that

> In fact, no such prior treaties, referring to the jurisdiction of the present Court, have been brought to the attention of the Court, and it may be that none existed. In the view of the Court, however, neither this circumstance, nor any consideration of the object and purpose of the text, nor the *travaux préparatoires*, offer support to the alternative interpretation that the provision.[240]

Article 35, paragraph 3, of the post-war Statute was thus in fact an empty gesture; but it was not therefore justifiable, in the name of the principle of effectiveness, to read it as referring to 'treaties in force' at a different date from the one contemplated by the authors of the treaty.

(p. 1266) 5. Principle of Subsequent Practice of the Parties*

(1) Varieties of practice

The Vienna Convention refers to 'any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation' as an element to be taken into account for interpretation purposes. The expression 'in the application of the treaty' is more specific than, for example, 'in relation to the treaty'; it appears to contemplate, at least primarily, the sort of practice which will occur in the day-to-day operation of a treaty designed to regulate ongoing transactions or operations between the parties, eg a consular convention.[241] Practice of this kind will normally be highly significant as to the intentions of the parties (though not necessarily their intentions at the time of conclusion of the treaty—a point to be discussed below); but at the same time the smooth workings of the continuing relationship resulting from established practices of this kind will usually mean little chance of a dispute requiring international judicial (or other) settlement. It is therefore hardly surprising that the practice invoked in a number of cases before the Court has been of a rather different kind.

A first example is afforded by the *Land, Island and Maritime Boundary* case, in which Honduras relied on practice in application of a different treaty between the same parties. The treaty to be interpreted was the Special Agreement by which the case had been brought before the Court, dated 24 May 1986; it referred in its Preamble to a General Treaty of Peace concluded by the parties on 30 October 1980, an earlier stage in the process of reaching agreement for the settlement of their boundary dispute. That Treaty had established a Joint Frontier Commission, and had included in its mandate that of determining the legal situation of the islands and maritime spaces'. When the work of the Commission had not resulted in a settlement, the matter was referred to the Court by the Special Agreement, which also required the Court to determine 'the legal situation of the islands and maritime spaces', that is to say, the territorial waters and EEZ. Before the Court, the parties disagreed over whether this meant that the Court was to delimit the maritime spaces. One of the arguments used by Honduras to support its view that the Court should carry out such a delimitation was that the Joint Frontier Commission [had] examined, *inter alia*, proposals [of the parties] aimed at the delimitation of the maritime spaces'. This, for Honduras, constituted 'subsequent practice of the Parties in the

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application of that Treaty', and since the wording of the two instruments was identical on the point, the practice could be relied on for interpretation of the Special Agreement.[242]

The Court did not accept the argument of Honduras because it considered that the ordinary meaning' of the Special Agreement was clearly to the contrary. It did however expressly state that 'both customary law and the Vienna Convention on the Law of (p. 1267) Treaties (Art. 31, para. *3(b))* contemplate that *such practice* may be taken into account for purposes of interpretation'.[243]

A further example is the case of *Maritime Delimitation in the Area between Greenland and Jan Mayen*, in which the Court found it 'appropriate to take into account, for purposes of interpretation of the 1965 Agreement' between Denmark and Norway, 'the subsequent practice of the Parties', omitting the phrase 'in the application of the treaty'.[244] The 1965 Agreement had provided that 'the boundary between those parts of the continental shelf over which Norway and Denmark respectively exercise sovereign rights shall be the median line'; in a subsequent Article it defined straight lines between specified points so as to demarcate the maritime boundary between the mainland territories of the two States.[245] The issue before the Court was whether the parties had agreed in 1965 that the median line should be the boundary between all their territories, and in particular between Greenland (under Danish sovereignty) and the Norwegian territory of Jan Mayen, as contended by Norway, or whether the 1965 Agreement had only been intended to relate to the mainland territories, as contended by Denmark. The most 'significant' practice examined was a subsequent Treaty, of 1979, for delimitation between Norway and the Danish territory of the Faroe Islands, which also employed the median line. The Court observed that 'if the intention of the 1965 Agreement had been to commit the Parties to the median line in all their ensuing shelf delimitations, it would have been referred to in the 1979 Agreement'.[246]

Rather than 'subsequent practice in the application of the treaty', the practice asserted in the *Jan Mayen* case was practice in the nonapplication of the 1965 Agreement, at least with the meaning that Norway was trying to attach to that Agreement. This subsequent practice can however be viewed either as negative or positive: the parties did not act as though they had already agreed on universal use of the median line in 1965; or they acted as though they had not agreed in 1965 on universal use of the median line.

A similar approach, though in rather different circumstances, was adopted in the *Oil Platforms* case, with regard to the interpretation of the 1955 Treaty of Amity relied on by Iran as founding the Court's jurisdiction. Iran contended that Article I of that Treaty, providing for 'firm and enduring peace and sincere friendship' between the two States, coupled with the disputes-settlement clause of Article XXI, paragraph 2, gave the Court wide jurisdiction over alleged breaches of the 'friendship' there provided for. The Court was not convinced, and backed its finding by noting that each of the two parties had invoked the Treaty against the other in a previous case before the Court,[247] but neither of them had on those occasions relied (as, it was suggested, they could have done if Iran's interpretation was correct) on Article I.[248]

(p. 1268) This again was a deduction from non-action which pointed to a particular interpretation as invalid, and consequently the rival interpretation as valid. It is however possible for alleged practice to add up to zero, in the sense that it neither confirms nor invalidates the interpretation that it is invoked to support. In the case of *Kasikili/Sedudu Island*, considerable practice was put forward to support a particular interpretation of the term centre of the main channel' of the River Chobe, designated as the boundary by a Treaty of 1890; the Court however took the view that the events cited 'demonstrate the absence of agreement' between the parties' predecessors in title 'with regard to the location of the boundary'. It concluded:

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> Those events cannot therefore constitute ‘subsequent practice in the application of the treaty [of 1890] which establishes the agreement of the parties regarding its interpretation’ (1969 Vienna Convention on the Law of Treaties, Art. 31, para. 3(6)). *A fortiori*, they cannot have given rise to an ‘agreement between the parties regarding the interpretation of the treaty or the application of its provisions’ *(ibid.*, Art. 31, para. 3(a)).[249]

(2) Practice of which parties?

It should be evident that when the interpretation of a bilateral treaty is in question, the practice of the parties that may be prayed in aid must normally be the practice of both parties; though the practice of one party that affects the other, and is accepted by that other party without protest, may be equivalent to the practice of both for this purpose. In the *Kasikili/Sedudu Island* case, the Court had occasion to point out that the practice must be the practice of the parties, not of one of them. The British Government called for a report from the High Commissioner for Bechuanaland a report on the location of the ‘main channel’, and this was prepared by a Captain Eason; but the Report remained an internal document, and was not used in further discussions with the other government concerned, that of Germany. The Court indicated that it ‘share[d] the view’, expressed by Botswana, which had originally put forward the Report as being practice, ‘that the Eason Report and its surrounding circumstances cannot be regarded as representing “subsequent practice, in the application of the treaty” of 1890, within the meaning of Article 31, paragraph 3(b), of the Vienna Convention’.[250] Similarly, at a later point in the judgment, the Court referred to the contention that the presence of tribesmen from one side of the frontier on the island could be considered subsequent practice’ of the parties, and found that:

> To establish such practice, at least two criteria would have to be satisfied: first, that the occupation of the Island by the Masubia was linked to a belief on the part of the Caprivi authorities that the boundary laid down by the 1890 Treaty followed the southern channel of the Chobe; and, second, that the Bechuanaland authorities were fully aware of and accepted this as a confirmation of the Treaty boundary.[251]

Considered in this light, there is clearly little difference between practice in confirmation of an interpretation and acquiescence or lack of protest; and the emphasis on the belief on the part of the Caprivi authorities’ is suggestive of the well-known definition of the *opinio juris* required for the creation of a customary rule.[252] The Court’s dictum may (p. 1269) also be seen as the other side of the coin from the rules as to the relationship between title and *effectivités* in boundary matters: the occupation of the island by the tribesmen might in itself constitute an *effectivité*, but in view of the existence of the Treaty, it would be legally inoperative, inasmuch as the principle is that where there is a title, the title prevails over the *effectivité*.[253]

A more delicate question is that of the interpretation of a multilateral or plurilateral convention; it is *a priori* unlikely that a common practice, shared by all parties, can be identified, except perhaps in fields where no dispute is likely to have occurred. Where there is a dispute over interpretation, may the practice of only some of the parties be relied on for purposes of interpretation, or is it essential to show universal agreement indicated by universal practice? It was suggested in the previous article that it is necessary to distinguish between the practice and the intention: the practice may be limited to some of the parties, but the intention to which it points must have been common to all; if it is clear that the intention was that of only some parties, this is insufficient’.[254]

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This was a question that arose, but was passed over in silence, in the case of the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*. The specific issue was the applicability of the Fourth Geneva Convention, to which Israel was a party, to the occupied territories. Israel's position (not presented to the Court directly, as Israel chose to take no part in the advisory proceedings) was that it was not so applicable: it based its stand on a narrow, and perhaps legalistic, interpretation of the reference to the case of total or partial occupation of the territory of a High Contracting Party' in common Article 2 of the Conventions, asserting that at the time the occupation began, the territory was not under the sovereignty of any Party. In rejecting Israel's interpretation, the Court relied on the fact that:

> the States parties to the Fourth Geneva Convention…at their Conference on:5 July: 999…issued a statement in which they 'reaffirmed the applicability of the Fourth Geneva Convention to the Occupied Palestinian Territory…' and 'Subsequently, on 5 December 2001, the High Contracting Parties…once again reaffirmed the 'applicability of the Fourth Geneva Convention to the Occupied Palestinian Territory'.[255]

The first point to be noted is that the language used is inaccurate, bordering on the tendentious: on neither occasion were all parties to the Conventions present (in particular, Israel was absent), and the 2001 Statement was issued by the '*Participating* High Contracting Parties' ie those participating in the Conference, not the whole body of High Contracting Parties; the Court omits the word 'Participating'.

Under what heading of 'customary law as expressed in Article 31 of the Vienna Convention', which the Court expressly invoked as guiding its interpretation of the Geneva Convention, does this argument fall? It can apparently only have been presented as 'subsequent practice in the application of the treaty which establishes the (p. 1270) agreement of the parties regarding its interpretation' (Article 31, paragraph 3(6)). If the two Statements cited had been unanimously adopted by all the parties to the Fourth Geneva Convention, this might have ranked as a subsequent agreement between the parties regarding the interpretation of the treaty' (Article 3i(3)(a)). But this was not the case. Is the lack of unanimity 'cured' by treating the Statements as 'practice'? The conduct of Israel had, at the very least, an equal claim to be regarded as practice', since Israel was the occupying power,[256] the other States parties being merely spectators, however much interested. Nor had the specific legal point relied on by Israel arisen in any other set of circumstances, in relation to any other State party in occupation of a territory. In terms of 'practice', one would expect that the attitude, and the experience, of a State party for whom the issue had arisen as a practical matter to be treated as more significant of the meaning intended to be attributed to a convention than the well-intentioned, but theoretical, views of other States parties. It is impossible to avoid the belief that this part of the reasoning of the 2004 Opinion is an example of 'hard cases make bad law': that it was the humanitarian nature of the Geneva Conventions, coupled with the view that Israel was evading its responsibilities by clinging to a technicality, that inspired the passage quoted. If the question is posed in more general terms—Should a majority of States parties to a multilateral convention be entitled to impose their interpretation of it on a dissenting minority, through a practice' consisting solely of a statement of the desired interpretation?—how many international lawyers would subscribe to this as sound law, or a desirable development?

Where the treaty to be interpreted is the constituent instrument of an international organization (and the same considerations would probably apply to what Article 34, paragraph 3, of the ICJ Statute refers to as 'an international convention adopted thereunder'), the 'subsequent practice of the parties' includes the practice of the organs of the organization as separate entities, as well as the States parties to the treaty.[257] The practice of the WHO organs was relied on in the case concerning *Legality of the Use by a*

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State of Nuclear Weapons in Armed Conflict to support the contention that the request by WHO for an advisory opinion on the question was on a legal question 'arising within the scope of [the] activities' of the Organization, as required by Article 96, paragraph 2, of the Charter. In fact the Court held that None of the reports and resolutions referred to in the Preamble' to the resolution requesting the opinion, which had been relied on for this purpose, was in the nature of a practice of the WHO in regard to the legality of the threat or use of nuclear weapons', and that 'Nowhere else does the Court find any practice of this kind'.[258] However, the Court did not turn to the question of practice until, following the approach of the Vienna Convention, it had satisfied itself that the terms of the relevant text —the WHO Constitution—'[i]nterpreted in accordance with (p. 1271) their ordinary meaning, in their context and in the light of the object and purpose' of the Constitution, could not be read as justifying the request as within the scope of the activities of the Organization.[259] Before examining the alleged practice, it had then examined the principle of speciality and the question of implied powers, in order to find that to ascribe to the WHO the competence to address the legality of the use of nuclear weapons…would be tantamount to disregarding the principle of speciality; for such competence could not be deemed a necessary implication of the Constitution'.[260] Since by definition any implied powers would not be part of the text of the constituent convention, this of course is not a matter of interpretation (except to the extent that the literal terms of the Constitution might in some cases suggest the existence of certain implied powers, which was not the case).

What then would be the position if there was clear subsequent practice of the parties, including the organs of the organization, to support an interpretation of the constituent instrument as incorporating a particular power of the organization, which could not by any stretch of the imagination be deduced from the ordinary meaning' of the terms of the instrument? Would the principle of speciality be a bar to reliance on such practice to arrive at an interpretation upholding the existence of that power? It is suggested that there is no reason in theory why this should be so. A subsequent practice invoked for purposes of interpretation is relied on as showing, through later conduct, what the parties at the time of the conclusion of the treaty intended it to mean.[261] The principle of speciality signifies that an international organization 'only has the functions bestowed upon it by' its constitutive instrument;[262] but it may be necessary to apply the normal rules of interpretation in order to establish just what functions were so bestowed, and those rules include appeal to subsequent practice where appropriate. Nor did the Court in the *WHO* case hold otherwise; its reference to the principle of speciality was the logical starting-point for its examination of the question whether the WHO possessed implied powers to concern itself with nuclear weapons, and was not invoked in support of its findings on the alleged practice.

(3) The *contemporanea expositio* and evolving practice

The significance for the interpretation of a treaty of the subsequent practice of parties to it is, in the terms of the Vienna Convention, that it 'establishes the agreement of the parties regarding its interpretation'. The implied assumption is that such practice is not only shared, but also consistent over time. According to one view, the highest significance should be given to practice immediately following the conclusion of a treaty, the *contemporanea expositio*, as equivalent in terms of action to the making of interpretative declarations at the time of becoming bound by the treaty; but later practice may still indicate what was the intention at the moment of conclusion of the (p. 1272) treaty.[263] What then is to be made of a practice of the parties to a treaty that has begun by pointing consistently to one particular interpretation, but has then developed in a different direction, so as to point to a totally different interpretation?

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This was a question that arose in the case of the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*. The text to be interpreted was Article 12, paragraph 1, of the UN Charter, debarring the General Assembly from making any recommendation in respect of any dispute or situation while the Security Council is exercising its Charter functions in respect of that dispute or situation. As the Court explained,

> As regards the practice of the United Nations, both the General Assembly and the Security Council initially interpreted and applied Article 12 to the effect that the Assembly could not make a recommendation on a question concerning the maintenance of international peace and security while the matter remained on the Council's agenda…
>
> However, this interpretation of Article 12 has evolved subsequently…
>
> Indeed, the Court notes that there has been an increasing tendency over time for the General Assembly and the Security Council to deal in parallel with the same matter concerning the maintenance of international peace and security… It is often the case that, while the Security Council has tended to focus on the aspects of such matters related to international peace and security, the General Assembly has taken a broader view, considering also their humanitarian, social and economic aspects.[264]

The parties to a treaty are of course free to adopt, through practice or otherwise, whatever interpretation they agree on in respect of a specific treaty provision; but there is at least a theoretical difficulty. If it is assumed that the relevant provision of the treaty was, at the time it was concluded, intended to have a particular meaning, the practice of the parties may well be a pointer to what that meaning was intended to be. But if the practice then 'evolves', to use the Court's term, so that the implied interpretation is replaced by a different one, then either the new practice reflects, not an interpretation, but a variation, of the terms of the treaty; or the new interpretation is the 'correct' interpretation, ie the one intended by the parties when the treaty was concluded, and the previous interpretation was erroneous. The second possibility is unrealistic: so long as the first practice lasts, there is nothing to warn the observer that it is incorrect, and doomed to be replaced; transactions under the initial interpretation would presumably remain valid, or at most voidable, rather than invalid. Furthermore, it is also *a priori* unlikely that parties to a treaty will begin, immediately after its conclusion, by misapplying it, only to discover and correct their mistake at a later stage.[265] It is surely much more consistent with legal logic to treat the initial practice as confirmatory of the intention of the parties, and the subsequent practice as revelatory of a *modification* of the terms of the treaty.

This is however apparently not the conclusion reached by the Court in the *Wall* case: The Court considers that the accepted practice of the General Assembly, as it (p. 1273) has evolved, is consistent with Article 12, paragraph 1, of the Charter.'[266] 'As it has evolved' is slightly ambiguous, but presumably refers to the *later* practice as distinct from the earlier: unless the Court meant that *both* practices were, while they were in operation, consistent with the text of the Article. In the particular context, this would however amount to the same thing, since the first interpretation was more restrictive than the later: if the correct interpretation was that the General Assembly was free to act provided the Security Council was not actively pursuing the matter (later interpretation), it would not have been infringing the Article by deciding (mistakenly) that it was not free to act in those circumstances (on the basis of the earlier interpretation). For these reasons, it is suggested that it is preferable to regard the practice of the General Assembly identified in the *Wall* case as effecting a modification by agreement of Article 12, paragraph 1, of the Charter, which had previously been correctly interpreted as imposing greater restrictions on the action of the General Assembly.[267] The possibility of modification by simple practice was

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recognized in the *Air Services Agreement* arbitration,[268] and is generally approved in doctrine, though some writers have doubts as to the appropriateness of a text agreed after careful negotiation at government level being (in effect) amended by the practice of officials, possibly of quite lowly rank.[269] The non-inclusion in the Vienna Convention of the ILC's draft article 38, contemplating modification by subsequent practice establishing the agreement of the parties to modify its provisions' was however not motivated by any general view that such a process could never occur.[270]

6. Principle of Contemporaneity*

In the relevant previous article in this series, the principle was stated in the following terms:

> The terms of a treaty must be interpreted according to the meaning which they possessed, or which would have been attributed to them, and in the light of current linguistic usage, at the time when the treaty was originally concluded.
>
> Provided that, where it can be established that it was the intention of the parties that the meaning or scope of a term or expression used in the treaty should follow the development of the law, the treaty must be interpreted so as to give effect to that intention.[271]

(p. 1274) The first paragraph of this statement is taken from Fitzmaurice[272]: the second was added in the light of, in particular, the jurisprudence of the *Aegean Sea Continental Shelf* case,[273] discussed in the first article of the series.[274]

(1) The principle applied

In the context of the interpretation of treaties, the question was discussed in the previous article,[275] under the heading of the intertemporal law principle, reference there being made to the cases of *Kasikili/Sedudu Island* and the *Land and Maritime Boundary between Cameroon and Nigeria*.

An argument amounting in effect to an application of the proviso in the second paragraph of the statement, though in respect of matters of fact rather than law, was advanced in the case of the *Legality of the Threat or Use of Nuclear Weapons*. It would be reasonable to suppose that no prohibition of the use of nuclear weapons could have been contained in treaties concluded before those weapons were invented. However, it was argued that nuclear weapons would in effect be prohibited under the Second Hague Declaration of 1899, Article 23(a) of the Regulations respecting the laws and customs of war on land (1907), and the Geneva Protocol of 17 June 1925, all of which contained prohibitions on the use of poisoned weapons.[276] This interpretation was based on the implicit contention that when the parties referred to 'poison or poisoned weapons', they were not limiting the scope of the prohibition to such poisons as had by then been discovered or invented. As the Court noted, the texts did not define what was meant by the terms; and this would therefore be a reasonable application of the proviso to the contemporaneity principle.

The Court's rejection of the contention that nuclear weapons were caught by these prohibitions was based on the observation that The terms have been understood, in the practice of States, in their ordinary sense as covering weapons whose prime, or even exclusive, effect is to poison or asphyxiate', adding that '[t]his practice is clear, and the parties to those instruments have not treated them as referring to nuclear weapons'.[277] Interestingly, the Court did not link its finding on the point to its discussion, later in the advisory opinion, of the development of humanitarian law, where it noted that the appearance of new means of combat has—without calling into question the longstanding principles and rules of international law—rendered necessary some specific prohibitions of the use of certain weapons'.[278] The result had been a series of conventions outlawing specific weapons: this practice might be read as indicating that, in this field, States have

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never regarded interpretation on the basis of intertemporal renvoi, or the *conflit mobile*,[279] as sufficient to be a reliable means of extending prohibitions to new weapons, even those that might be regarded as *eiusdem generis*. As for nuclear weapons themselves, the Court also noted that they 'were invented after most of the principles and rules of humanitarian law applicable in armed conflict had already come into existence', and that there is a qualitative as well as quantitative difference between nuclear weapons and all conventional arms'.[280]

(p. 1275) (2) Intertemporal *renvoi*[281]

Much that might be said under this heading has already been said in the previous article, in the section devoted to 'Intertemporal Law', by reference principally to the case of the *Gabčíkovo/Nagymaros Project*.[282] In connection with Fitzmaurice's principles for treaty interpretation, however, it is of interest to note here that in that case Judge Weeramantry devoted a lengthy section of his separate opinion to 'The Principle of Contemporaneity in the Application of Environmental Norms'.[283] In essence, his argument was that a 1977 Treaty that 'was to operate for decades into the future', and had an impact on the environment, had to be applied on the basis that 'the standards in force *at the time of application* would be the governing standards',[284] not the standards in force at the time of conclusion of the Treaty. He did not base this view on any implied or presumed intention of the parties, but on the basis that Environmental concerns are live and continuing concerns whenever the project under which they arise may have been inaugurated', and an assimilation of 'environmental rights' to human rights.[285]

The Court did not go so far as this. Its indications as to the current and future obligations of the parties were based on the idea that the 1977 Treaty, despite breaches on both sides, was still in force, but its implementation had to be adapted to the new situation created by, in particular, Slovakia's putting into operation part of the original plan, under the title of 'Variant C'. As regards environmental considerations, the Court noted that 'the Project's impact upon, and its implications for, the environment are of necessity a key issue'; and it found that:

> In order to evaluate the environmental risks, current standards must be taken into consideration. This is not only allowed by the wording of Articles 15 and 19 [of the 1977 Treaty], but even prescribed, to the extent that these articles impose a continuing—and thus necessarily evolving—obligation on the parties to maintain the quality of the water of the Danube and to protect nature.[286]

The primary justification for making an exception to the normal rule of intertemporal law is thus affirmed to be the intention of the parties stated in the Treaty; but the parenthetical indication that an obligation that is continuing is therefore necessarily evolving is disturbing, as suggests a more radical rejection of the intertemporal principle.

An intertemporal *renvoi* may be quite unobtrusive, in the sense that a treaty-defined term may become such a familiar concept that, as it develops, the application of the treaty to the developed form may be so natural as to attract no attention. An example of this can be seen in the case of *Maritime Delimitation between Greenland and Jan Mayen*.[287] For the first time in the series of maritime delimitation cases that have come before the Court, both parties to the case were also parties to the 1958 Geneva Convention on (p. 1276) the Continental Shelf, and recognized that, so far as delimitation of their shelves was concerned, the Convention provided the applicable law. The Court duly applied the Convention, though at the same time it took into account the customary law of maritime

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delimitation applying, in particular, to the EEZ.[288] The continental shelf defined by the 1958 Convention was:

> the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas.[289]

However, in the area where the Court was asked to effect a delimitation, the sea-depth is 'for the most part rather less than 2,000 metres; it varies…between 3,000 metres in the north of the area and 1,000 metres in the south'.[290] Both parties claimed 200-mile continental shelves,[291] consistently with Article 76 of the 1982 UN Convention on the Law of the Sea; both parties had signed that Convention, but neither had ratified it, so it was not in force between them as a treaty-instrument.[292] The Court thus delimited continental shelves as defined in customary law in 1993, avowedly in application of the 1958 Convention which referred to a much more limited concept of the continental shelf.[293] The Court gave no explanation on the point, but a reasonable interpretation of its decision was that it was tacitly regarding the definition of the continental shelf given in the 1958 Convention as intended by the parties to it to develop with the development of customary law. The terms of the Convention itself showed a link with the development of technology, as shown by the second half of the definition quoted above; when in general law the idea of the continental shelf became detached from the depth criterion and that of potential for exploitation to become primarily a matter of distance from the coast,[294] the Convention definition (and thus the Convention itself) had either to be treated as obsolete, or as automatically adapted on the basis of the *conflit mobile*, or the idea of intertemporal renvoi.[295]

This was in fact the approach of the Arbitral Tribunal in the Award of 31 July 1989 in the dispute between Guinea-Bissau and Senegal, which held that the criterion of exploitability was a 'dynamic criterion' which was included in the 1958 concept of the continental shelf, so that a 1960 Franco-Portuguese Agreement 'delimits the continental shelf between the Parties over the whole of that maritime space as defined at present' ie in 1989.[296]

Footnotes:

130 (1957) *BYIL* 211–12.

131 [1994] ICJ Rep 6, para 41.

132 Not that this is always the order in which the Court approaches questions of interpretation: see for example the case of *Certain Property (Liechtenstein v Germany)* where the Court turned directly to cases in which *similar* wording had been judicially interpreted: [2005] ICJ Rep 22 ff, paras 39 ff.

133 [1994] ICJ Rep 22, para 43.

134 [1978] ICJ 21, para 51, discussed in (1991) *BYIL* 22–4; in the Award in the case of the Maritime Delimitation between Guinea and Guinea-Bissau, the Tribunal emphasized that it had consulted a dictionary contemporaneous with the 1886 Treaty being interpreted: Award para 49.

135 [2004] ICJ Rep 48, p 84. 'Elsewhere' seems to have signified recourse to the object and purpose of the treaty, and the *travaux préparatoires:* ibid paras 85 and 86. For another recourse to the dictionary see the dissenting opinion of Judge Ajibola in the *Lockerbie* cases, [1992] ICJ Rep 84, 189. It was a US judge interpreting a statute who observed that 'it

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is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary': *Cabell* v. *Markham*, 148 F.(2nd) 737, 739, *per* Learned Hand J.

136 [1999-II] ICJ Rep 1064, para 30.

137 [2002] ICJ Rep 646–8, paras 39–41. See also the role of a comma in the *Aegean Sea Continental Shelf* case [1978] ICJ Rep 22, para 53, and the earlier article in (1991) *BYIL* 22.

138 See T Georgopoulos, 'Le droit intertemporel et les dispositions conventionnelles évolutives: quelle thérapie contre la vieillesse des traités?' (2004) *RGDIP* 123, 138–9, who suggests that 'interpretation évolutive' is thus the norm rather than the exception.

139 [1999-II] ICJ Rep 1062–63, para 27.

140 [1992] ICJ Rep 583, para 373; see also ibid 432, para 115. For the relevance of grammatical considerations, cf *Anglo-Iranian Oil Co* [1952] ICJ Rep 104 (cited in [1998] ICJ Rep 299, para 44).

141 [1992] ICJ Rep 586, para 380, citing the *North Sea Continental Shelf, Continental Shelf (Tunisia/Libya), Continental Shelf (Libya/Malta)* and *Gulf of Maine* cases, and the *Anglo-French Arbitration of 1977* for good measure.

142 (1991) *BYIL* 26, citing the *Right of Passage* case. Note in this context the view of Judge Oda as to the significance of what was not said in the 1967 Agreement in the *Nauru* case: above, text and n 21. A similar comparison of a text with texts typical of the more usual way of achieving the end alleged to be in view was effected by the ITLOS in the *Volga* case: Application for Prompt Release, Judgment of 23 December 2002, para 73. For an earlier appeal to the same principle, see the joint dissenting opinion of Judges Guerrero, McNair, Read and Hsu Mo in the case of *Reservations to the Genocide Convention* [1951] ICJ Rep 43.

143 [1991] ICJ Rep 70, para 51.

144 For the applicability of the rules of treaty interpretation to these instruments, see p 27 above.

145 [1957] ICJ Rep 125; see also H Thirlway, 'Reciprocity in the Jurisdiction of the International Court' (1984) *Netherlands Yearbook of International Law* 117–20.

146 [1998] ICJ Rep 300, para 45.

147 [1996-II] ICJ Rep 617, para 34.

148 See Chapter III, Section 1(1) *in fine*.

149 See [1996-II] ICJ Rep 813, para 27.

150 [1998] ICJ Rep 464, para 76.

151 ibid 311, para 13.

152 *Gabčíkovo/Nagymaros Project* [1997] ICJ Rep 63, para 102. For the more complex question of the significance, for the interpretation of a General Assembly resolution requesting an advisory opinion, of the rejection of a proposed amendment to the resolution, see *Certain Expenses of the United Nations* [1962] ICJ Rep 156–7.

153 [1995] ICJ Rep 22, para 41.

154 ibid.

155 ibid 27 ff; see below p 41.

156 See A Conan Doyle, *The Adventures of Sherlock Holmes*, '*Silver Blaze*'.

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[157] [1999-II] ICJ Rep 1062, para 27.

[158] See also Chapter III, Section 3(2) below.

* For relevant jurisprudence subsequent to 2006, see *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge*, [2008] ICJ Rep 44, paras 97–98; *Dispute regarding Navigational and Related Rights (Costa Rica* v. *Nicaragua)* [2009] ICJ Rep 238–239, 246, paras 52, 77; and *Application of the Interim Accord of 13 September 1995*, Judgment of 5 December 2011, para 70 (provision limiting party's rights).

[159] [2004] ICJ Rep 318–19, para 101.

[160] [1996-II] ICJ Rep 812, para 24.

[161] *Military and Paramilitary Activities in and against Nicaragua* [1986] ICJ Rep 137, para 273, quoted in [1996-II] ICJ Rep 814, para 28.

[162] [1996-II] ICJ Rep 815, para 31. The Court went on to reject Iran's arguments based on Article IV, and did not invoke Article I in that connection.

[163] [1996-II] ICJ Rep 820, para 52.

[164] Quoted at [2003] ICJ Rep 178–9, para 32.

[165] ibid 182, para 41. This dictum is criticized by F Berman, who points out the theoretical possibility of providing in a treaty that certain eventualities would not represent breaches of the treaty relationship, without impact on the question whether they might give rise to a claim under general international law: 'Treaty 'Interpretation' in a Judicial Context', 29 *Yale Journal of International Law* (2004) 319–20. The point is, in the abstract, a valid one; but it is difficult to imagine a treaty of this kind being negotiated on the express understanding that the unlawful use of force would not be at the same time a breach of the treaty.

[166] [2003] ICJ Rep 178–9, para 32.

[167] The decision has been the subject of forthright criticism on this ground, particularly since, as has been pointed out, a different structure of the judgment would have enabled the Court to dismiss the claim while leaving the question of the use of force open, which—it has been suggested—would have been a more judicial course. See for example E Jouannet, 'Le juge international face aux problèmes d'incohérence et d'instabilité du droit international: Quelques réflexions à propos de l'arrêt CIJ du 6 novembre 2003, Affaire des Plates-formes pétrolières', 108 *Revue générale* (2004) 917; DH Small, 'The *Oil Platforms* case: Jurisdiction through the—Closed—Eye of the Needle', *The Law and Practice of International Courts and Tribunals*, vol 3 (2004) 113.

[168] [1994] ICJ Rep 26, para 53.

[169] ibid 37, para 54.

[170] [2002] ICJ Rep 382, para 141. The document could perhaps, by some stretch of terminology, be termed also part of the *travaux préparatoires* of the Thomson-Marchand Declaration; see Subsection 2 of this Section, below.

[171] ibid 383, para 144. The meaning of 'as manifested…*on the ground*' is obscure; the landscape could not itself indicate the position of an agreed boundary. cf. however the observations of the Chamber in the *Land, Island and Maritime Frontier* case, rejecting the concept of 'natural boundaries', but recognizing 'the suitability of certain topographical features to provide an identifiable and convenient boundary' as basis for a presumption in the case of a lack of evidence of the line actually chosen: [1992] ICJ Rep 390, para 46, and 422, para 101. In another sector of the Cameroon/Nigeria boundary, the Court did in fact appeal to a consideration of this kind: [2002] ICJ Rep 374–5, para 128.

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* For relevant jurisprudence subsequent to 2006, see *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge*, [2008] ICJ Rep 42–44, paras 92–99 (relevance of omission from treaty of clause in *travaux préparatoires*).

172 J Klabbers, 'International Legal Histories: the Declining Importance of *Travaux Préparatoires* in Treaty Interpretation?' (2003) *Netherlands International Law Review* 285.

173 In an early case, the Permanent Court in an advisory opinion gave an example to show how a suggested interpretation of a treaty would operate, to conclude that 'such a result is enough to condemn the interpretation which would make it possible…': Advisory Opinion, *PCIJ* Series B, No 1, p 23.

174 [1993l ICJ Rep 62, para 54.

175 ibid para 55. Cf the unsolicited reference to the *travaux préparatoires* of the VCLT in *Gabčíkovo/Nagymaros Project* [1997] ICJ Rep 63, para 102.

176 [2003] ICJ Rep 200, para 82.

177 One or both of the parties to the case may of course have drawn the Court's attention to the *travaux préparatoires*, but the Court is not therefore obliged to mention them, relying on its 'freedom to select the ground upon which it will base its judgment': *Guardianship of Infants* [1958] ICJ Rep 62, quoted in *Oil Platforms* [2003] ICJ Rep 180, para 37.

178 This is traditionally attributed to Blaise Pascal, but the author has been unable to trace a precise reference.

179 *ILC Yearbook 1964*, I, 283, para 17; quoted by Vice-President Schwebel in *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* [1995] ICJ Rep 30–31.

180 UN Conference on the Law of Treaties, 1st Session, 1968, *Official Records*, p 183; cited in [1995] ICJ Rep 31–2.

181 [1995] ICJ Rep 22, para 41.

182 ibid 36.

183 M Mendelson considers that one element in the *travaux* would have 'clinched the point' against the Court's interpretation, but the Court brushed it aside': The Curious Case of *Qatar v Bahrain* in the International Court of Justice' (2001) *BYIL* 196.

184 The question was the subject of an exchange of scholarly gunfire in the pages of two academic *Festschriften:* Judge Schwebel re-argued it in his contribution to the Skubiszewski *Festschrift* 'May Preparatory Work be Used to Correct Rather than Confirm the "Clear" Meaning of a Treaty Provision?' in Makarczyk (ed), *Theory of International Law at the Threshold of the 21st Century* (1996) 544), and S Torres Bernárdez, judge *ad hoc* in the *Qatar/Bahrain* case, countered with observations in 'Interpretation of Treaties by the International Court of Justice following the adoption of the 1969 Vienna Convention on the Law of Treaties' in Hafner (ed), *Liber Amicorum Professor Ignaz Seidl-Hohenveldern* (1998) 721, 739. Torres Bernárdez insisted that since the *travaux* are only to be consulted if the ordinary meaning of the text is not clear, there is no 'contradiction or oversight' in the provisions of the Convention, a view which seems rather to miss Schwebel's point.

185 [1997] ICJ Rep 63, para 102.

186 See ibid 38, para 46.

187 [1991] ICJ Rep 70, para 49.

188 [1991] ICJ Rep 72, para 54.

189 ibid.

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[190] [1994] ICJ Rep 27, para 55.

[191] [2002] ICJ Rep 653, para 53; the Court added a citation of, 'for example': *Territorial Dispute (Libyan Arab Jamahiriyaj/Chad)* [1994] ICJ Rep 27, para 55; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar* v. *Bahrain), Jurisdiction and Admissibility, Judgment* [1995] ICJ Rep 21, para 40.

[192] [2001] ICJ Rep 505, para 106.

[193] ibid para 107.

[194] As Judge Torres Bernárdez observed in another context, 'The motivations for choosing [a particular] formula are alien to the interpretation except as a possible 'supplementary means' linked to the circumstances of its adoption': dissenting opinion, *Land, Island and Maritime Frontier Dispute* [1992] ICJ Rep 727, para 203.

[195] See for example the Commentary in *ILC Yearbook* 1966, *vol II*, 219, para(6) *in fine*.

[196] cf for example the use of the term *thalweg* in the treaty that fell to be interpreted in the *Kasikili/Sedudu Island* case [1999-II] ICJ Rep 1061–2, para 24.

* For relevant jurisprudence subsequent to 2006, see *Dispute regarding Navigational and Related Rights (Costa Rica* v. *Nicaragua)* [2009] ICJ Rep 237–238, para 48 (no presumption against limitation of sovereignty); *Maritime Delimitation in the Black Sea (Romania* v. *Ukraine)* [2009] ICJ Rep 237, paras 26–30; and *Application of the Interim Accord of 13 September 1995*, Judgment of 5 December 2011, para 36; ibid, paras 91–98.

[197] (1951) *BYIL* 9, quoted in (1991) *BYIL* 37. The modified version of the principle to be found in (1957) *BYIL* 211 was set out, and the reasons for the change discussed, in the previous article: (1991) *BYIL* 38.

[198] *Territorial Dispute (Libya/Chad)* [1994] ICJ Rep 21–2, para 41.

[199] *Fisheries Jurisdiction (Spain* v. *Canada)* [1998] ICJ Rep 452, para 43; cf above, Introduction, Section 2. A different question is of course the 'object and purpose' of Article 36(2) of the Statute or of 'the Optional Clause system' (cf Koroma in ibid 381).

[200] *Land and Maritime Boundary between Cameroon and Nigeria* [1998] ICJ Rep 318, para 98; see also the joint declaration of Judge Guillaume and Fleischhauer in the *Lockerbie* case, ibid 49. The criterion has also been invoked for interpretation of the Statute, but that is of course itself a treaty: see, eg *LaGrand* [2001] ICJ Rep 501, para 99; 502–03, para 102.

[201] M Fitzmaurice, 'The Practical Working of the Law of Treaties' in MD Evans (ed), *International Law* (2nd edn, 2006) 202. The origin of the term is of course the Court's advisory opinion in the case of *Reservations to the Genocide Convention*, where it was used, and perhaps devised, as a touchstone for the acceptability of a reservation to a multilateral convention: [1951] ICJ Rep 24. The apparent redundancy of the double term 'object and purpose' may possibly derive from the phrase having been coined in French—'l'objet et le but de la Convention', where ''objet'' could also mean, or carries an idea of, the 'subject-matter' rather than the 'object in view'. It is however far too late to challenge a term which has an almost mystic status in the language of international law.

[202] Separate opinion, [1994] ICJ Rep 45.

[203] A striking phenomenon in the field of international dispute settlement over the last 50 years has been the number of problems arising from the application of boundary and other treaties of the 19th and early 20th century as bases for claims to maritime areas. An island or other geographical feature which was, at the time of conclusion of such a treaty, regarded as of no interest or significance whatever may now turn out to provide a key

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basepoint to determine appurtenance of a substantial area of seabed. The classic example is of course *Territorial Questions and Maritime Delimitation between Qatar and Bahrain*.

[204] Quoted in [1994] ICJ Rep 20–1, para 39.

[205] ibid 22, para 43.

[206] ibid 24, para 48.

[207] ibid 25, para 51.

[208] Quoted in [2002] ICJ Rep 645, para 36.

[209] [2002] ICJ Rep 652, para 51. See further below in connection with the principle of effectiveness.

[210] [2002] ICJ Rep 652, para 51.

[211] ibid. This is of course an application of the intertemporal principle in treaty interpretation, requiring that a treaty be interpreted through the eyes of the original parties, since what they intended must have been based upon what they saw and they knew: see the previous article in this series, (2005) *BYIL* 67 ff.

[212] Section 2(2)(a)(ii).

[213] See the subsequent judgment on the merits [2003] ICJ Rep 180–81, para 37.

[214] [1996-II] ICJ Rep 812, para 24.

[215] [1996-II] ICJ Rep 814, para 28.

[216] ibid.

[217] In the *Use of Nuclear Weapons* advisory opinion requested by the WHO, the Court distinguished between the 'object and purpose' of the WHO Constitution and the 'objective' of the Organization, but did not draw any conclusion from the distinction: the latter provided, as it were, the justification of the former: [1996-I] ICJ Rep 76, paras 20, 21.

[218] [2004] ICJ Rep 47, para 78.

[219] ibid 48, para 85. So far as the argument of Mexico is reproduced in the judgment, it does not seem to include a claim that the consular officer should be enabled to 'directly engage in the criminal justice process'.

[220] The functions defined in Article 5 include '*representing* or arranging appropriate representation for nationals of the sending State before the tribunals and other authorities of the sending State' (para *(i));* and may also include any other functions not prohibited or objected to by the receiving State (para (*m*)).

[221] [2001] ICJ Rep 502–3, para. 102.

[222] For a fuller critique of the *LaGrand* decision on this aspect, see a previous article in this series: [2002] ICJ Rep iii-26. The innovatory character of the decision is underlined by the announcement made by the Court in its contemporaneous Press Release that 'The Court finds, for the first time in its history, that orders indicating provisional measures are legally binding': Press Release 2001/16, reproduced on the Court's website.

[223] [1996-II] ICJ Rep 617, para 34.

[224] This is not the only difficulty with this passage: see also below, Chapter III, Section 1(1) *in fine*.

[225] (1991) *BYIL* 44.

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[226] GG Fitzmaurice, '*Vae victis* or woe to the negotiators: Your treaty or our "interpretation" of it?' (1971) 65 *AJIL* 373; quoted in (1991) *BYIL* 47, n 223 (emphasis original).

[227] [1994] ICJ Rep 25, para 51, citing the *Lighthouses* case, PCIJ Series A/B, No 62, p 27; *Namibia* [1971] ICJ Rep 36, para 66; *Aegean Sea Continental Shelf* [1978] ICJ Rep 22, para 52.

[228] Judge Shahabuddeen considered that the Court had been influenced by the principle of stability of international boundaries: he pointed out, correctly, that that principle 'comes into play only after the existence of…an agreement [for the establishment of a boundary] is established and is directed to giving proper effect to the agreement. It does not operate to bring into existence a boundary agreement where there was none': [1994] ICJ Rep 45. The Court however only cited that principle expressly in connection with the question whether the expiration of the Treaty by lapse of time affected the boundaries it had established: ibid 37, paras 72–3.

[229] [2002] ICJ Rep 651, para 49.

[230] ibid 652, para 51.

[231] The declaration was not made under Art 36 of the ICJ Statute, but under the Pact of Bogotá: see [1988] ICJ Rep 86, para 38.

[232] [1998] ICJ Rep 455, para 52.

[233] See, eg *Canadian Counter-Memorial*, paras 182 ff.

[234] [1995] ICJ Rep 59. Judge Shahabuddeen quotes H Lauterpacht and Lord McNair as recognizing that a treaty may not in fact achieve what was attempted, in which case the treaty will 'fail—and rightly fail' (McNair, *The Law of Treaties* (1961) 383).

[235] On the problems presented by the fact that the text was in a language other than the official languages of the Court, see Chapter III, Section 3(1) below.

[236] [1995] ICJ Rep 18–19, para 35.

[237] ibid 58–9. Judge Oda took a similar view, but did not discuss the principle of effectiveness as such: ibid 48–9, para 20. Judge Schwebel thought that the Court's view was refuted by reference to the *travaux préparatoires:* ibid 38–9 and pp 35, 41 above.

[238] [1995] ICJ Rep 19, para 35.

[239] (1991) *BYIL* 45 ff.

[240] *Legality of the Use of Force (Serbia and Montenegro* v. *Belgium)* [2004] ICJ Rep 324, para 113.

* For relevant jurisprudence subsequent to 2006, see *Application of the Interim Accord of 13 September 1995*, Judgment of 5 December 2011, paras 99–101.

[241] In an excellent study in 1994 of the whole question, G Distefano discusses the distinction between 'la pratique applicative' and 'la pratique interprétative', and apparently recognizes its validity while emphasizing that the dividing-line between the two is extremely thin, since, *pace* E de Vattel, no text is clear of itself, so that continuous interpretation is required in the act of application: 'La pratique subséquente des États parties à un traité' (1994) *AFDI* 43–4.

[242] [1992] ICJ Rep 585–6, para 379.

[243] ibid 586, para 380.

[244] [1993] ICJ Rep 51, para 28.

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[245] See ibid 48–9, para 23.

[246] ibid 51, para 28. The practice examined also included a 1965 Norwegian press release referring to the 1965 Agreement as effecting a delimitation ‘in the North Sea’, and a communication of the 1979 Agreement to the Norwegian parliament referring to the 1965 Agreement as not having covered the area between Norway and the Faroe Islands. For a somewhat similar argument to that based on the relation between the 1965 and 1969 Agreements, cf the Award of the Arbitral Tribunal for the Maritime Delimitation between Guinea and Guinea-Bissau, para 59.

[247] The United States in the case of *United States Diplomatic and Consular Staff in Tehran*; and Iran in the case of the *Aerial Incident of 3 July 1988*.

[248] [1996-II] ICJ Rep 815, para 30. For an example of the practice of the parties in the nonapplication of certain multilateral treaties, see the opinion in the *Legality of the Threat or Use of Nuclear Weapons*, discussed in connection with the Principle of Contemporaneity in Section 6(1) below.

[249] [1999-II] ICJ Rep 1087, para 63.

[250] ibid 1077–8, para 55.

[251] ibid 1094, para 74.

[252] It could even be argued that, like the *opinio juris*, the belief that an act is in accordance with the existing legal rule (derived from the treaty) is creative of law, as productive of an authoritative interpretation; but this would imply that the act is, in some sense, contrary to a previous ‘correct’ interpretation, which is by definition incapable of proof.

[253] *Frontier Dispute* [1986] ICJ Rep 586–7, para 63; quoted with approval in *Land Island and Maritime Frontier Dispute* [1992] ICJ Rep 398, para 61.

[254] (1991) *BYIL* 52. The ILC explained in its commentary to the draft that became the Vienna Convention that it had originally proposed to refer to a practice which establishes the understanding of all the parties’, and the deletion of the word ‘all’ had not been intended to change the rule. ‘It considered that the phrase “the understanding of the parties” necessarily means “the parties as a whole”. It omitted the word “all” merely to avoid any possible misconception that every party must individually have engaged in the practice where it suffices that it should have accepted the practice’ *(ILC Yearbook 1996*, vol II, 222, para (15)).

[255] [2004] ICJ Rep 175, para. 96.

[256] There was in fact some evidence that Israeli authorities did apply ‘the humanitarian provisions’ of the Convention in the Occupied Territory, but Israel insisted that *de jure* the Convention was not applicable: ibid 173–4, para 93.

[257] See the previous article (1991) *BYIL* 49 ff, referring to the *Certain Expenses* case, the *Maritime Safety Committee (IMCO)* case, and the *Namibia* case. In the WHO case, the practice relied on was essentially that of the organs of the WHO; Judge Weeramantry (dissenting) relied on the fact that there had been no opposition to WHO action, on the basis of a transgression beyond the bounds of its mandate’: [1996-I] ICJ Rep 153; he does not indicate from whence such opposition might have come, but if he had the member States in mind, this would amount to an argument that the practice was, by toleration, shared by those members.

[258] [1996-I] ICJ Rep 81, para 27. Judge Koroma dissented *(inter alia)* on the facts, considering that the Court had erred in its appraisal of the practice: ibid 207.

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[259] ibid 76, para 21.

[260] ibid 79, para 25.

[261] A distinction should be made between practice amounting to an agreed *modification* of the instrument and practice relied on for its *interpretation* (see Section (3) below); though the Court seems at one point to contemplate something between the two, when it observes that the relevant WHO resolution could not be taken to express or to amount on its own to a practice establishing an agreement between the members of the Organization to interpret its Constitution as empowering it to address the question of the legality of the use of nuclear weapons': [1996-I] ICJ Rep 81, para 27.

[262] *See Jurisdiction of the European Commission of the Danube, PCIJ* Series B, No 14, p 64, cited in [1996-I] ICJ Rep 78–9, para 25.

[263] See G Distefano, 'La pratique subséquente des États parties à un traité' (1994) *AFDI* 50–52, who cites an early case as an extreme example of rigid attachment solely to practice virtually contemporary with the treaty: *Archdukes of the Hapsburg-Lorraine House* v. *Polish State Treasury, Annual Digest 1929–30*, Case No 248, 396–7.

[264] [2004] ICJ Rep 149, para 27.

[265] This is of course a possibility which is conceivable if the interpretation involves, for example factual—and in particular technological—matters on which the parties may be misinformed: e.g. as to the position of a geographic feature referred to in a boundary treaty. See the discussion of the case of the *Temple of Preah Vihear* in the earlier article in this series: (1991) *BYIL* 54–5.

[266] [2004] ICJ Rep 150, para 28.

[267] 'In looking back over the development of Art. 12 (i), a change in meaning is clearly evident': B Simma (ed), *The Charter of the United Nations*, vol I, Article 12, para 31 (p 295).

[268] (1963) *ILR* 38.

[269] eg MG Kohen, 'La codification du droit des traités: quelques éléments pour un bilan global' (2000) *RGDIP* 577, 598.

[270] For an account of the '*calvaire'* of Article 38, see G Distefano, 'La pratique subséquente des États parties à un traité' (1994) *AFDI* 55 ff. That article was intended to apply to cases 'where the parties by common consent in fact apply the treaty in a manner which its provisions do not envisage' *(ILC Yearbook 1966*, vol II, 236); as the *Wall* case shows, discussion of whether the treaties do or do not envisage a particular application may depend on interpretation from practice, and thus turn out to be circular.

* For relevant jurisprudence subsequent to 2006, see *Dispute regarding Navigational and Related Rights (Costa Rica* v. *Nicaragua)* [2009] ICJ Rep 242–244, paras. 63–70, 89

[271] (1991) *BYIL* 57.

[272] (1957)*BYIL* 212; *Collected Edition*, I, 346.

[273] [1978] ICJ Rep 3.

[274] (1989) *BYIL* 135–3.

[275] (2005) *BYIL* 73–6.

[276] [1996-I] ICJ Rep 248, para 54.

[277] ibid para 55. This is an example of the practice of the parties in the non-application of a treaty as revelatory of its interpretation, discussed above, Section 5(1).

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[278] ibid 256, para 76.

[279] For these terms, see (1989) *BYIL* 135; (2005) *BYIL* 71.

[280] [1996-I] ICJ Rep 259, para 86.

[281] It has been suggested that a distinction should be made between the 'renvoi mobile', whereby a norm or concept stated in a treaty is linked with an element of international law, so as to develop with it, and a treaty disposition as a 'texte ouvert' whereby it is contemplated and intended that the application of the disposition may change and develop with changes in the *factual* situation contemplated by the treaty: see T Georgopoulos, 'Le droit intertemporel et les dispositions conventionnelles évolutives: quelle thérapie contre la vieillesse des traités?' (2004) *RGDIP* 123, 132–4. The distinction is real, but the effect appears to be the same in each case.

[282] (2005) *BYIL* 71 ff.

[283] [1997] ICJ Rep 113–15.

[284] ibid 115 (emphasis in original).

[285] ibid 114.

[286] [1997] ICJ Rep 77–8, para 140.

[287] Some aspects of this case, as regards the law of the sea, were discussed in a previous article: (1993) *BYIL* 17–18, 39–40.

[288] See below, Chapter III, Section 1(1).

[289] Convention on the Continental Shelf, Art 1.

[290] *Maritime Delimitation in the Area between Greenland and Jan Mayen* [1993] ICJ Rep 44, para 11.

[291] ibid 47, p 19.

[292] ibid 59, para 48.

[293] In this sense, Y Tanaka, *Predictability and Flexibility in the Law of Maritime Delimtation* (2006) 96, n 72. Note the revealing reference to 'customary law' in [1993] ICJ Rep 69, para 70—a Freudian slip?

[294] While as late as 1985 the Court was reluctant to admit that 'the idea of natural prolongation [of the land territory] is now superseded by that of distance [from the coast]' as the basis of title, it conceded that in certain circumstances 'natural prolongation…is in part defined by distance from the shore': *Continental Shelf (Libya/Malta)* [1985] ICJ Rep 33, para 34. The distance criterion was effective in customary law well before the conclusion of the 1982 United Nations Convention on the Law of the Sea.

[295] For a general survey of intertemporal law in relation to the law of the sea, see S Sucharitkul, '—The Intertemporal Character of International law Regarding the Ocean' in N Ando, E McWhinney, R Wolfrum (eds), *Liber Amicorum Judge Shigeru Oda*, vol 2 (2002) 1287. The author does not however examine the problem of the adaptation of existing treaties in the field.

[296] Award of 31 July 1989, para 85 (translation by the ICJ Registry). For a case in which the object and purpose of a provision was such as to exclude any presumption of an evolutive interpretation, see the European Court decision in *Commission* v. *United Kingdom*, Case C-146/89, decision of 9 July 1991, 100 ILR 114.

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