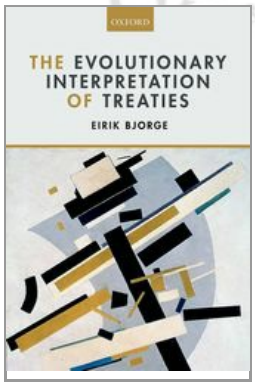

The Evolutionary Interpretation of Treaties
Eirik Bjorge

Print publication date: 2014
Print ISBN-13: 9780198716143
Published to Oxford Scholarship Online: September 2014
DOI: 10.1093/acprof:oso/9780198716143.001.0001

The Means of Interpretation Admissible for the Establishment of the Intention of the Parties

Eirik Bjorge

DOI:10.1093/acprof:oso/9780198716143.003.0003

[–] Abstract and Keywords

Chapter 3 takes issue with the perceived wisdom that the approach to treaty interpretation opted for in the Vienna Convention has been that the general rule of interpretation put paid to the notion of the 'intention of the parties'. Instead, the Chapter argues that the search for that intention, objectively defined, is the very aim of the process of treaty interpretation. In doing so, the Chapter adopts the view according to which the 'intention of the parties' refers to the will of the parties as determined through the application of the various means of interpretation recognized in Articles 31–33 of the Vienna Convention. Through an analysis of how the means of interpretation act together in the establishment of the intention of the parties, the Chapter shows that the evolutionary interpretation of treaties is in no way different from other types of interpretation.

Keywords: consent, good faith, means of interpretation, rule of interpretation, Articles 31–33 VCLT, intention of parties

'If we want things to stay as they are, things will have to change.'

—Giuseppe Tomasi di Lampedusa, *The Leopard*

(Archibald Colquhoun tr, Random House, 1960), 26

3.1 Introduction

A treaty represents consent to be bound. It is the intention to enter into legal relations by agreement that gives a treaty its legal force.[1] This may seem a self-evident truth but it is useful to begin by making this clear. In fact one of the expressions that appears the most in the Vienna Convention on the Law of Treaties (VCLT) is the description of a treaty as a 'consent to be bound'.[2] The Vienna Convention takes a classical approach in the sense that its approach is founded on the principle of state sovereignty, with state consent being the expression of that sovereignty. A state is bound only to that to which it has expressed intention to bind itself.[3]

As will be seen, this chapter argues that the very taproot of treaty interpretation is the objective establishment of the intentions of the parties. This is closely bound up with the whole nature of what is a treaty obligation. The Permanent Court of International Justice gave expression to this (obvious but nonetheless important) insight when it held, in *Free Zones of Upper Savoy and the District of Gex*, that no obligations ensuing from a treaty instrument can bind a state without the state's consent.[4] Similarly, in **(p.57)** *Daimler v Argentina*[5] the Tribunal took as a point of departure that all international treaties—whether bilateral, plurilateral, or multilateral—are essentially expressions of the contracting states' consent to be bound by particular legal norms: 'Consent is therefore the cornerstone of all international treaty commitments'.[6]

This consent being the conceptual point of departure in the law of treaties, it is no surprise that treaty interpretation has as its main objective to establish the extent of that consent in relation to a set of facts. It will thus be argued here that it follows naturally from the pre-eminence in international law of state consent that the object of the exercise of treaty interpretation is the establishment of the intention of the parties. As will be seen, given that what is in issue is the *common* intention of the parties,[7] that establishment needs to rely on objective factors. It is thus an 'objectivized intention' that is sought.[8] While Chapter 2 focused on the unity and coherence of the method of treaty interpretation applied by international courts and tribunals, this chapter sets out in more detail what that method is, and how it relates to the evolutionary interpretation of treaties.

The received wisdom about the approach to treaty interpretation opted for in the VCLT has been that the general rule of interpretation put paid to the notion of the 'intention of the parties'.[9] It will be argued here, however, that such an understanding of treaty interpretation does not sit comfortably with the Vienna rules nor with the jurisprudence of the International Court, not least in cases where the Court has arrived at what could be termed evolutionary interpretations.

The approach which the International Court takes to treaty interpretation was foreshadowed by the jurisprudence of the Permanent Court, which held in *Interpretation of the Treaty of Lausanne* that a Tribunal interpreting a convention clause must:

in the first place, endeavour to ascertain from the wording of this clause what the intention of the Contracting Parties was; subsequently, it may consider whether—and, if so, to what extent—factors other than the wording of the Treaty must be taken into account for this purpose.[10]

(p.58)

It is important to remember, however, that the rules of treaty interpertation are 'a single set of rules of interpretation';[11] they are in principle to be applied 'simultaneously'.[12] This approach has aptly been summarized by former President of the International Court, Gilbert Guillaume:

The ICJ's main canon of interpretation focuses on the parties' intention. It decrypts such intentions by having recourse to the methods and tools enumerated in the Vienna Convention, most notably in Articles 31 and 32. Although such methods potentially cover a broad range of legal references, the ICJ refers first to the actual terms of the treaty, but always considers them in their context and in the light of the object and purpose of the treaty.[13]

Thus, in *Namibia*, the International Court referred to 'the primary necessity of interpreting an instrument in accordance with the intentions of the parties',[14] and used this as a basis on which to make its evolutionary interpretation of the treaty terms at issue. The same was the case in *Aegean Sea*,[15] *Gabčíkovo–Nagymaros*,[16] *Navigational Rights*,[17] and *Pulp Mills*,[18] the International Court arriving at an evolutionary interpretation of the instrument at issue specifically by stressing the importance, within the law of treaties, of the intentions of the parties. As is clear from this selection of cases (ranging from the *traité-contrat* in *Navigational Rights* to the *traité-loi* in *Namibia*),[19] this approach is taken by the Court regardless of the type of treaty to be interpreted.[20]

It will be argued here that the search for the intention of the parties, objectively defined, is the very aim of the process set out in Articles 31–33 of the VCLT. The **(p.59)** Vienna rules, in the words of the International Law Commission (ILC), codify 'the means of interpretation admissible for ascertaining the intention of the parties'.[21] The best way in which to explain evolutionary interpretation is to rely on the most traditional of concepts in the law of treaties—the intention of the parties.

There are good reasons, however, for treating assumptions regarding treaty interpretation with some care. Lowe has warned that 'treaty interpretation is an area in which the returns on abstract theorizing are low, and diminishing'.[22] On this view the rule 'interpret the treaty as reasonable parties would have interpreted it if they had faced the questions now before the court'[23] is as good a distillation as any.

Perhaps we are wrong therefore to make too much of the methodological questions bearing upon treaty interpretation? In respect of the evolutionary interpretation of treaties we can, however, take heart from the fact that the single issue which Lowe sees as eluding oversimplification is the settlement of 'questions that the parties could not have foreseen, such as the question whether a reference to disputes over "territory" in an early twentieth-century treaty should be interpreted so as to include the continental shelf of a State—a legal concept that did not come into existence until the middle of that century'.[24] As will be seen, in this Chapter and in Chapter 4, this is very much the territory of the evolutionary interpretation of treaties.

Yet another possible ground for restraint, however, is that questions of treaty interpretation are notoriously difficult. What is clear is that some questions of interpretation seem so elusive as to be beyond resolution—hence McNair's oft-quoted assertion that 'there is no part of the law of treaties which the text writer approaches with more trepidation than the question of interpretation'.[25] But we should not be deterred, if for no other reason than that difficult questions, too, need an answer. Rather we should, in the mode of Beckett's *Worstward Ho*, 'Try Again. Fail again. Fail better'.[26]

In that spirit it is appropriate to begin by defining the terms. In this book, the words 'evolutionary interpretation' are taken to mean situations in which an international court or Tribunal concludes that a treaty term is capable of evolving, that it is not fixed once and for all, so that allowance is made for, among other things, developments in international law. This is, in other words, a situation where account is taken of the meaning acquired by the treaty terms when the treaty is applied.[27]

Some writers have taken a narrow, and very nearly subjective, approach to the concept. Classically, Basdevant's *Dictionnaire de le terminologie du droit international* defined 'intention' as 'ce que l'auteur ou les auteurs d'un acte ont eu réellement en vue de convenir, de faire, d'obtenir ou d'éviter, que cela soit révélé par **(p.60)** l'acte lui-même ou par d'autres éléments'.[28] Salmon's more recent *Dictionnaire de droit international public* defines intention as 'pensée ou ensemble des pensées qui ont inspiré les parties', 'notamment le but qu'elles se sont proposé de poursuivre'.[29] On this approach, the intention of the parties is not just a thought shared by them; it can be a set of thoughts that inspired them in their conclusion of the treaty. As is clear from the last element pointed to by the definition given in Salmon's *Dictionnaire de droit international public*, it is not unreasonable to conceive of this set of thoughts inspiring the treaty parties as an object which they have proposed to seek to attain by concluding the convention.

One thing is clear from international jurisprudence, however, and that is that what we are talking about is not an intention held by one of the parties only. A treaty will by definition involve the consent of more than just one state. In issue, therefore, is the objective establishment of the *common* intention of the parties. Judge Schwebel made this point in *Maritime Delimitation and Territorial Questions*:

'The intention of the parties', in law, refers to the common intention of both parties. It does not refer to the singular intention of each party which is unshared by the other. To

speak of 'the' intention of 'the parties' as meaning diverse intentions of each party would be oxymoronic.[30]

The ILC has taken the same line in its work on the law of treaties. The intention to be established is 'not a separately identifiable original will, and the *travaux préparatoires* are not the primary basis for determining the presumed intention of the parties';[31] the *travaux préparatoires* are simply evidence to be weighed against any other relevant evidence of the intentions of the parties, and 'their cogency depends on the extent to which they furnish proof of the *common* understanding of the parties as to the meaning attached to the terms of the treaty'.[32]

What is central therefore, as the International Court put it in a slightly different context, is a 'meeting of minds'.[33] It could reasonably be asked how one goes about establishing this meeting of minds. In principle one may ascertain the meeting of minds which makes up the common intention of the parties, or their common will,[34] by analysing all the different interpretive factors which, according to the **(p.61)** established method of interpretation, the treaty interpreter may take into account. The International Court stated in *Navigational Rights* that a treaty provision must be interpreted 'in accordance with the intentions of its authors as reflected by the text of the treaty and the other relevant factors in terms of interpretation'.[35] These are the factors set out by the general rule of interpretation, as codified in Article 31 of the VCLT.

The Tribunal in *Palena* made the important point that the intention of the parties may certainly be found outside the treaty text. In a discussion of the difference between interpretation of judgments and of treaties it observed, with respect to the latter, that in establishing the common will of the parties: 'it may be helpful to seek evidence of that common will either in preparatory documents or even in subsequent actions of the Parties'.[36] Thus treaty interpretation, according to the practice of international courts and tribunals, is 'a logical operation that seeks to establish with the maximum possible certainty what the common intention of the Parties was'.[37]

This begs one important question, which will nonetheless help us in arriving at a working definition of 'the intentions of the parties': on what level of abstraction are the parties to be understood to have wanted to bind themselves in relation to later questions of fact that are to be subsumed under the treaty?

Dworkin, in the context of statutory and constitutional interpretation in the United States, says about the intention of Congress or of the framers of the US Constitution that we must distinguish between 'different levels of abstraction at which we might describe that intention'.[38] He draws up the example of a congressman who votes for an amendment requiring 'equal protection' because he believes that government ought to treat people as equals, and that this must mean treating them differently with respect to their fundamental interests. The congressman believes that the clause for which he is voting would be violated by criminal **(p.62)** laws providing different penalties for black and whites guilty of the same crime, as he believes that liability to punishment touches a fundamental interest. He also believes, however, that separate and unequal public

schools would not violate the clause, as he does not consider education to be a fundamental interest. Dworkin here distinguishes an abstract and concrete formulation of the congressman's intention. Under the abstract formulation the intention is that whatever is in fact a fundamental interest must be protected, so that if a court is itself convinced that education is (or has become) a fundamental interest then that court must believe it is serving his intention by outlawing segregation. Under the concrete formulation, however, his intention is to protect what he himself understands to be a fundamental interest, and a court that abolishes segregation opposes rather than serves his intention. It would rarely be the case, however, that a congressman or treaty party has only one of these two types of intention when he enacts legislation or drafts a treaty. Both statements about his or her intention may be true, though at different levels of abstraction, so that the question is not which statement is historically accurate but which statement to use in constructing a conception of intention.[39]

Letsas has applied this Dworkinian distinction to treaty interpretation. In the context of interpretation of the European Convention on Human Rights (ECHR)[40] Letsas has argued that the drafters of the European Convention in 1950 had an *abstract* intention to promote and safeguard human rights in Europe and that they also had a more *concrete* intention about which situations such human rights ought to cover. Which intention, he asks, is the more important: their intention to protect a list of fundamental freedoms of their citizens, whatever these may be (what he terms 'intentions of principle'), or their intention to protect what they, in 1950, believed these freedoms to be (what he terms 'intentions of detail')? Letsas replies that it is possible that the drafters felt more strongly about their abstract intention to protect the fundamental moral rights that people are indeed entitled to rather than their concrete intention to protect those rights to which they, in 1950, believed individuals are morally entitled. In this regard the question is not whether states' (or drafters') intentions are relevant but *which* of their intentions we ought to accord importance to.[41] This book follows Dworkin and Letsas in assuming that abstract intentions must be more important than concrete ones, and that intentions of principle ought to trump intentions of detail. This seems to fit well with that which Judge Higgins said in *Kasikili/Sedudu*, where she held that the object of treaty interpretation 'is not to discover a mythical "ordinary meaning" within **(p.63)** the Treaty'; rather the object of this exercise is 'to give flesh to the intention of the parties', 'to decide what general idea the parties had in mind, and then make reality of that general idea'.[42]

Thus, if we want to be true to what international courts and tribunals do, one possible way in which to define 'the intention of the parties' is the following *functional* definition: the intention of the parties could be defined as the result which one reaches if the general rule of interpretation is applied correctly. This, of course, comes close to being a *petitio principii*, that is, it assumes that which has to be explained.

Whilst one may criticize this circular definition, it should nonetheless be retained, if for no other reason than that it is also the best definition which the ILC has been able to produce. The concepts of the intention of the parties, according to the ILC, 'refers to the intention of the parties as determined through the application of the various means of

interpretation which are recognized in articles 31 and 32';[43] it 'is thus not a separately identifiable original will, and the *travaux préparatoires* are not the primary basis for determining the presumed intention of the parties'.[44] 'Intention' is thus a construct to be derived from the articulation of the 'means of interpretation admissible'[45] in the process of interpretation—and not a separately identifiable factor. This objective approach is probably, to appropriate Churchill's quip about democracy,[46] the worst one, except all those others that have been proffered.

This Chapter now turns, first, to good faith and its relation to evolutionary interpretation; secondly, it sets out the establishment of the common intentions of the parties and the meaning of that for evolutionary interpretation.

3.2 Evolutionary Interpretation and Good Faith

It is difficult to overstate the importance of good faith in treaty interpretation generally; this is no less so with respect to evolutionary interpretation. The possible styles of interpretation to which Article 31 gives rise are all directly linked to one essential rule: the rule of interpretation in good faith. It may be that in formulating *the* general rule of interpretation Article 31 engages to some extent in over-simplification, as the provision is capable of giving rise to a number of different **(p.64)** styles of interpretation. Nonetheless, it is clear that the possible styles of interpretation to which Article 31 gives rise are all directly linked to one essential rule: the rule of interpretation in good faith.[47]

Good faith is at the origins of the diverse means of interpretation, and it is as a function of this fundamental rule that the choice of how to weigh the interpretive factors must be made.[48]

The evolution of treaty concepts—and the limits within which terms may properly be implied in a treaty as necessarily inherent in the instrument—is to be considered as covered by the requirement of interpretation in good faith. Thus Waldock said of the evolution of treaty concepts, and the limits within which terms may properly be implied in a treaty as necessarily inherent in it, that 'both these points are to be considered as covered by the requirement of interpretation "in good faith"'.[49] With regard to both these points, so much depends on the particular context and on the intentions of the parties in the particular treaty that it would be difficult to lay down any specific rules. These questions can be resolved only through the normal interpretation of the terms of the treaty in good faith in the light of its object and purpose.[50]

The International Law Commission considered that the 'correct application of the temporal element would normally be indicated by interpretation of the term in good faith'.[51] The view will be taken here too that evolutionary interpretation must be seen as being closely linked to the principle of good faith: evolutionary interpretation may be required by good faith.[52] This is a potentially important point, as the limits to interpretation drawn by the ordinary meaning of the words interpreted in good faith is often relied on as an argument *against* evolutionary interpretation. The view taken here therefore stands that perspective on its head by showing the potential that lies in good faith as a factor leading to evolutionary interpretation.

An important facet of this is the relationship between good faith and legitimate expectations, and what this entails for evolutionary interpretation. Evolutionary interpretation may be explained through the principle of good faith because of the legitimate expectations engendered by the promises which the parties made in the treaty. In this sense we can safely take as applying to treaty obligations in general that which the International Court held in a more specific context (about provisions of so-called host agreements between international organizations and host states) in *WHO Regional Office*: 'Clearly, these provisions', said the Court, 'are based on an obligation to act in good faith and have reasonable regard to the interests of the other party to the treaty'.[53] **(p.65)**

The principle makes its influence felt in all areas of international law. The Charter of the United Nations[54] provides, in Article 2(2), that all members, in order to ensure to all of them the rights and benefits resulting from membership, 'shall fulfil in good faith the obligations assumed by them in accordance with the present Charter'. The Declaration on Principles on International Law Concerning Friendly Relations and Co-operation Among Sates in Accordance with the Charter of the United Nations[55] goes further, adopting 'the principle that States shall fulfill in good faith the obligations assumed by them in accordance with the Charter', not, it will be seen, 'under' the Charter but 'in accordance with the Charter'.[56] It plays an important role, too, in state contracts;[57] 'foreign investment agreements freely entered into by, or between, sovereign States shall be observed in good faith'.[58]

Good faith in this way acts as a guarantor of expectations legitimately held by the parties to the treaty; treaties must thus be interpreted in conformity with loyalty and reciprocal confidence.[59] It is, as will be seen in more detail later in this chapter, obvious that at times it would be contrary to good faith to frustrate the legitimate expectations created by treaty obligations, and this applies with no less force to evolutionary interpretation too. Thus, in *Loizidou* (Preliminary Objections), Turkey had argued that good faith required a contemporaneous, as opposed to an evolutionary, interpretation. The European Court rejected this, however, holding instead that the elements of the general rule of interpretation, of which good faith is one, required in the event an evolutionary interpretation.[60]

It is, as the Tribunal held in the *North Atlantic Fisheries* case, a principle of international law 'that treaty obligations are to be executed in perfect good faith'.[61] In the same vein, the International Court said in *Nuclear Tests* that: 'One of the basic principles governing the creation and performance of legal obligations, whatever their source, **(p.66)** is the principle of good faith.'[62] This has later been affirmed and developed by the International Court. In *Pulp Mills* it held that:

according to customary international law, as reflected in Article 26 of the 1969 Vienna Convention on the Law of Treaties, '[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith'. That applies to all obligations established by a treaty, including procedural obligations which are essential to co-operation between States.[63]

Obviously there is a connection between the obligation upon states, on the one hand, to create and perform their legal obligations and, on the other hand, to interpret the same legal obligations, as creation, interpretation, and performance are closely interlinked. Just as interpretation depends upon creation, performance depends upon interpretation.

The valuable point has been made that if one thinks that the International Court seems hesitant to discuss the requirement of good faith stated at the outset of Article 31, this has a simple explanation: that which may be in question is the good faith of the parties; an interpretation by the International Court in which the Court itself should be animated by something other than good faith is not to be thought of.[64] Furthermore, if the International Court should be thought to be hesitant to reject an interpretation advanced by a party on the sole ground that it was not made in good faith, that could conceivably be because such an interpretation would in most cases also offend against some specific canon of interpretation, and the Court will be slow to accuse a state in its judgment of bad faith.[65]

The proposition that treaties are to be interpreted in good faith has received universal acceptance in legal doctrine.[66] Thus McNair, for example, said that 'the performance of treaties is subject to an overriding obligation of mutual good faith';[67] Reuter referred to the obligation of good faith as fundamental in international legal commerce and in the execution of all obligations of international law.[68] Others have seen the notion of good faith as underpinning all the rules on treaty interpretation, even to the extent that one may say that good faith dominates the whole interpretive process.[69]

The import of this in the law of treaties has certainly not been lost on international courts and tribunals. Judge Schwebel, in his dissenting opinion in *Maritime Delimitation and Territorial Questions (Qatar v Bahrain)*, referred to the good faith **(p.67)** provision in the general rule on interpretation in Article 31(1) as 'the cardinal injunction of the Vienna Convention's rule of interpretation'.[70] The Tribunal in the *Rhine Chlorides arbitration* pointed to 'the fundamental role of good faith and how it dominates the interpretation and application of the entire body of international law'.[71]

Lauterpacht argued that the rule that treaties are to be interpreted in accordance with good faith was perhaps the only uncontested rule of interpretation,[72] and that most of the current rules of interpretation, whether in relation to contracts or treaties, are no more than the elaboration of the fundamental theme that contracts must be interpreted in good faith.[73] The principle according to which interpretation must be done in good faith flows directly from the principle of *pacta sunt servanda*; therefore the process of examining the relevant materials and assessing them must be done in good faith.[74] This, in the present context, underlines the importance we ought to accord in the interpretation of treaties to strict adherence to good faith.

3.2.1 Good faith as the cardinal rule of treaty interpretation

The pride of place given to good faith specifically in Article 31 is no coincidence. As was seen above, the principle of good faith dominates and underlies the whole of the

interpretive process; good faith is the most important element that goes into the crucible of treaty interpretation. The possible diverse styles of interpretation to which Article 31 gives rise are thus, as stated above, all directly linked to one essential rule: that of interpretation in good faith. In that sense most current rules of interpretation are no more than the elaboration of the fundamental theme that contracts must be interpreted in good faith.[75]

The point is sometimes made that although at first sight the enumeration in Article 31 of the factors to be taken into account may seem to create a hierarchy of legal norms, that is not so: the factors represent a logical progression, nothing more. While it has been claimed in the literature that the principle of good faith has not, when it comes to treaty interpretation, played an important role in the jurisprudence of international tribunals,[76] the principle of good faith has in fact, and as we **(p.68)** have already seen, been at the fore in the jurisprudence of international tribunals. If this body of jurisprudence shows one thing, it is that in treaty interpretation the standard of good faith is a permanent gravitation point which draws the interpretation of treaty texts in the direction of the object of the treaty as well as the spirit by which the treaty is underlain.[77]

The principle of good faith furthermore imposes on the international judge an obligation to adjudicate reasonably.[78] The demands of good faith are thus incompatible with formalism, that is, a system whereby form prevails over substance.[79] Good faith, by its nature, abhors such unreasonableness.

Rivier already in the nineteenth century stressed this point: 'La bonne foi dominant toute cette matière, les traités doivent être interprétés non pas exclusivement selon leur lettre, mais selon leur esprit'.[80] The International Court held in *Barcelona Traction* that in all fields of international law 'it is necessary that the law be applied reasonably'.[81] In the same vein Judges Lauterpacht, Wellington Koo, and Spender in *Aerial Incident of 27 July 1955* held that:

It is consistent with enlightened practice and principle to apply the test of reasonableness to the international instruments—a test which follows from the ever present duty of States to act in good faith. However, the test of reasonableness must itself be applied in a reasonable way; it must not be applied by reference to contingencies which are in themselves of a manifestly exaggerated character; it must not be applied by reference to examples bordering on absurdity.[82]

Although good faith forbids unreasonable interpretations, and interdicts arriving at absurd constructions, the exigencies of good faith do not, however, demand that the judge adjudicate according to equity.[83] As we shall see, this point is sometimes somewhat exaggerated, in a way that may end up giving to good faith a smaller ambit than what ought to follow from the sources of international law.

This was developed in an interesting way by Judge *ad hoc* Torrez Bernandez in *Land, Island and Maritime Frontier Dispute*, where he made the point that when one begins to interpret a treaty one must start 'as provided for in the Vienna Convention, that is to say

from the "ordinary meaning" of the terms used in the provision'. He went on to say that this could, however, not happen in isolation: **(p.69)**

For treaty interpretation rules there is no 'ordinary meaning' in the abstract. That is why Article 31 of the Vienna Convention refers to 'good faith'...It is, therefore a fully qualified 'ordinary meaning'.[84]

This approach must be correct,[85] and it shows how in fact according to the general rule of interpretation, if one insists on the different factors mentioned in Article 31(1) being sequenced, good faith must come first, metaphorically as well as literally. The text is not capable of having a meaning divorced from the demands of good faith.

This was made explicit in *Rhine Chlorides*, where the Tribunal commented on the oft-quoted dictum from the International Court's judgment in *Territorial Dispute* that 'interpretation must be based above all upon the text of the treaty'.[86] The Tribunal said in this regard that:

In the *Territorial Dispute (Libyan Arab Jamahiriya/Chad)* case, the Court stated that 'interpretation must be based above all upon the text of the treaty'. In this regard, the Tribunal emphasises that the text of the treaty is a notion distinct from, and broader than, the notion of 'terms'. Relying on the text does not mean relying solely, or mainly, on the ordinary meaning of the terms. Such a solution would effectively ignore the references to good faith, the context, and the object and purpose of the treaty. The ordinary meaning of the terms is even itself determined as a function of the context, object and purpose of the treaty. Lastly, as paragraph 2 of Article 31 of the Vienna Convention provides, the text of the treaty (including the preamble and annexes) is itself part of the context for the purposes of interpretation.[87]

By pointing out that the 'text' of the treaty is distinct from and broader than the notion of the 'terms' of the treaty, and that basing oneself on the text does not mean to base oneself only on the ordinary meaning of the terms, the Tribunal underscored the point that the treaty interpreter is in no way looking for an isolated meaning of the treaty terms. Such an approach would indeed be contrary to the principle of good faith as it would give pre-eminence to form over substance.

This aspect of the principle of good faith has a long pedigree. It was given a vivid form in the 1926 *Cayuga Indians* case, where the arbitrator referred to the principle of good faith as 'the elementary principle of justice that requires us to look at the substance and not stick in the bark of legal form'.[88] The Chapter now turns to the relationship between good faith and intent.

3.2.2 Good faith impels assumption of a common intention of the parties

It is plain that, as Lowe has put it, 'in international law literal interpretations and applications of legal instruments must not be allowed to defeat the evident **(p.70)** intentions of those who made them'.[89] This core injunction of international law has been interpreted as meaning that good faith incites the interpreter to search for the common

intention of the parties. The Tribunal in *Diverted Cargoes* thus determined that 'the principle of good faith, which governs both the interpretation and the execution of treaties, leads to the search for the common intention of the parties'.[90]

This was rendered by Lauterpacht as meaning that 'the principle of good faith impels the assumption of a common purpose'; 'good faith and consideration of the general purpose of the treaty may legitimately provide a substitute for any lack of common intention'.[91] It is clear from Lauterpacht's choice of words that that intention, by necessity, would have to be an objecticized intention.

When a treaty interpreter is faced with a treaty in relation to which it is impossible to establish the intention of the parties, good faith requires the interpreter to act according to what one would imagine the common intention to have been.

This type of approach has been criticized by Kolb, as this in his view would mean not interpreting but in fact revising the treaty.[92] This criticism has been underpinned by reference to the traditional reticence of the International Court and its predecessor to revise treaties.[93] Such criticisms are linked, as will be seen below, to the ambit which one is willing to give to the principle of good faith.

It is pertinent here to address this criticism in some detail. While it is of course true that international tribunals exercise great reticence when it comes to revising treaties,[94] and no doubt rightly so, it is difficult to see the justification of this criticism of good faith applied in the search for a common intention of parties.

First, it is not clear that the approach suggested above (that the principle of good faith impels the assumption of a common purpose) would amount to treaty revision. If, as this book argues, treaty interpretation is concerned first and foremost to establish, objectively, that which the parties actually intended, or their common will,[95] then the approach suggested, on the basis of good faith, seems the only possible option. Indeed, the matter could be turned on its head: straying away from that which must be taken to have been the intention of the parties would be the option the most resembling revision of the treaty. To state this is in reality to state little more than **(p.71)** what was said above: that good faith requires one to look not so much at the letter of the treaty as to the treaty's spirit, which of course is nothing if not underlain by the intention of the parties.

Secondly, and following from the first point, if it is not accepted that this (ie the broader approach taken by international courts and tribunals to good faith) ought to be seen as treaty revision, then there is little that suggests that the practice of the International Court and its predecessor have been reticent in this regard, as the cases mentioned by Kolb all bear on the impossibility of treaty revision in *general* and not specifically in relation to the point of how good faith impels the assumption of a common purpose where none seems to be found.

The principle of good faith, taken together with a treaty's object and purpose, may in a

legitimate way provide a substitute for what seems to be a lack of common intention. When the principle of good faith impels the assumption of a common purpose, it relies also on the fact that the intention of the parties is to be presumed not to be in breach of other international law; to assume anything else (without any clear indications to the contrary) would be a breach of good faith.

3.2.3 'If we want things to stay as they are, things will have to change'

This has a side to a related point, namely, the conservatism that is inherent in good faith and the good faith requirement of protecting legitimate expectations. As the Tribunal in *Rann of Kutch* observed in connection with good faith and the stability required in interstate commerce: 'International public policy requires that there should be stability and good faith between nations.'[96] The proposition could just as well have been put the other way around: good faith requires, in international law, there to be stability, in the sense of protection against the frustration of legitimate expectations.

Thus, in *Affaire relative à l'interprétation du traité de commerce conclu entre l'Italie et la Suisse le 13 juillet 1904*,[97] the Tribunal decided the whole treaty dispute on the basis of the good faith requirement of protecting legitimate expectations: As Italy at no point had remonstrated with that which Switzerland understood to be the common understanding of the treaty term 'vin nouveau', a legitimate expectation had been created on Switzerland's part which could not be frustrated by Italy, the latter having thus bound itself by its subsequent practice.[98] It is on this background not difficult to see the frontiers which the principle of good faith in treaty interpretation shares with teleology and with effectiveness. **(p.72)**

The nexus between teleology and effectiveness on the one hand and good faith on the other was clearly brought out in the arbitral award *Baer*.[99] This case also goes some way in addressing the point discussed above about what the treaty interpreter is to do in the *prima facie* absence of a common intention of the parties on a particular question.

The Tribunal in *Baer* had to decide whether the claimant had been treated as an enemy under the laws in force in Italy during World War II. Italy claimed that the laws of the Italian Social Republic, Benito Mussolini's Republic of Salò, did not count as 'law in force in Italy during the war', the effects of which was that the claimant, a Jewish Italian national (later to become a US national), whose factory had been confiscated, was not entitled to receive compensation for the war damages suffered by him. The Tribunal did not accept this claim by Italy, which it found to be in bad faith.

The interpretation proposed by Italy would have led to introducing into the treaty 'a restriction which is not to be found therein and which would altogether change the very text thereof'; this would breach, the Tribunal continued, 'the fundamental rules of the Law of Nations on the art of interpreting international treaties'.[100] It went on to say that a teleological interpretation would not lead to a different conclusion, as the purpose of the treaty had been that of according the benefits of the Treaty of Peace to persons whose property, rights, and interests sustained damages under the laws in force in Italy during the war. Seeing as the treaty did not indicate by which Italian power these laws were to

have been enacted, 'this gap must be filled', the Tribunal concluded, 'in accordance with good faith and in the light of the principles of international law; the principle that must be applied in the instant case is that of effectiveness'.[101] As will be seen, the way in which the Tribunal in *Baer* filled this gap is very much in line with the position taken in this study: the principle of good faith impels, together with the background principles of international law, a common intention of the parties. It is moreover no coincidence that the Tribunal also in this connection found support in the principle of effectiveness. Good faith comprises the principle of effectiveness.[102]

The role given in *Baer* to good faith interpretation, as well as the effective interpretation to which this led, has however been criticized. This criticism addresses the debate entered into above—the role of the principle of good faith in filling in gaps where there is said to be no common purpose. Thus Zoller has argued that the role played by good faith in *Baer* went much further than merely aiding in shedding light on the intention of the parties; good faith instead filled a gap where there was said to be no common intention of the parties. Seeing as good faith here plays a creative role, we are, on Zoller's reading, really dealing with equity rather than good faith interpretation. She therefore argues that *Baer* ought to be seen as **(p.73)** having been decided on a particular set of facts, and that the case cannot be seen as contributing to the development of general rules of interpretation.[103] This criticism of the Tribunal's judgment in *Baer* may come across as precipitate.

While it will not be attempted here to theorize on the basis of this single judgment by the Tribunal of the Italian–United States Conciliation Commission, it should be pointed out that Zoller's criticisms seem ill founded given both the general importance which the principle of good faith enjoys in international law and the particular application which was made of the principle in *Baer*.

Furthermore, the wording of the treaty provision in issue was perfectly capable of accommodating the adopted interpretation; in fact it would seem to be to go against the wording if such an interpretation were not to be adopted. It was plain enough that the object and purpose of the provision to be interpreted was to give effective protection to individuals, and that the interpretation which it seems that Zoller is advocating would fail to do so. It is true as the Tribunal implicitly said, that *not* to view the laws of the Social Italian Republic as 'law in force in Italy during the war', would in effect be to revise the treaty, and this of course the Tribunal was not competent to do. It may seem supererogatory to say so, but it should be pointed out that it is not only when it comes to giving rights to an individual (to the detriment of the state, so to speak), that a treaty interpreter may not revise the treaty before them; by the same token the same applies when a state, in bad faith as was the case in *Baer*, asks the interpreter to revise the treaty by giving an interpretation that (to the detriment of the individual, so to speak) renders the rights protection nugatory.[104] This should perhaps be seen in relation to a broader point made by Zoller, namely that the role of good faith has been seen to have what she calls a conservative function. Zoller has propounded the thesis that the demands of good faith most usually leads the treaty interpreter to maintain an

equilibrium between the obligations of the parties. Thus, she maintains, good faith has a conservative function, in the sense that it stabilizes legal situations.[105]

On the one hand, it is obviously true that this is the function of good faith: as discussed above the principle of good faith protects legitimate expectations and in that way plainly has a conservative function. By conservative I here mean cautious towards or averse to change, aiming to preserve where it is possible. Here too it seems appropriate to refer to that which the Tribunal said about good faith in *Kutch of Rann*: **(p.74)**

International public policy requires that there should be stability and good faith between nations. It is not good, it is not right, it is bad faith when one party, having acted in one way throughout, at some later stage says, 'By error or otherwise I claim to go back upon it'.[106]

On the other hand, the proposition that good faith has a conservative function must not be taken to mean that good faith counsels conservatism in the crudest sense of that concept. For what is 'conservative' and what does the protection of legitimately held expectations mean when it was the commonly held and good-faith intention of the parties to contract in a way that was open to development?

Surely then it would go against good faith, and also go against a conservative approach, somehow to conclude that one should not include in the meaning of the treaty term changes which have occurred since the treaty was concluded. In such a case it becomes clear that to conserve is to allow for change. The wily Tancredi, in di Lampedusa's *The Leopard*, gave expression to the complex relation which exists between change and conservation, when he quipped that it is sometimes the case that: 'If we want things to stay as they are, things will have to change'.[107] This captures what happens when the phenomena of good faith and evolutionary interpretation meet.

3.2.4 Good-faith conservatism in practice

In the same mode the International Court in *Navigational Rights* said of interpretation for the purposes of treaty interpretation and compliance in good faith that:

It is true that the terms used in a treaty must be interpreted in light of what is determined to have been the parties' common intention, which is, by definition, contemporaneous with the treaty's conclusion. That may lead a court seised of a dispute, or the parties themselves, when they seek to determine the meaning of a treaty for purposes of good-faith compliance with it, to ascertain the meaning a term had when the treaty was drafted, since doing so can shed light on the parties' common intention.[108]

It went on to hold that this did *not*, however, signify that, where a treaty term's meaning is no longer the same as it was at the date of conclusion, no account should ever be taken of its meaning at the time when the treaty is to be interpreted for purposes of applying it.[109] Good faith—or what the Court called the determination of 'the meaning of a treaty for purposes of good-faith compliance with it'—may steer the interpretation away from what could be termed wrong-footed conservatism. The right type of conservative

approach, the one taken by the International Court in *Navigational Rights*, is conservative in the sense that it acknowledges that for things to stay as they were (in light of what is determined, on the basis of good faith, to have been the parties' common intention when the treaty was concluded), things will indeed have to change (the term's meaning no longer being the same as it was **(p.75)** at the time of conclusion, and account must, in accordance with the intentions of the parties, be taken of this).

In much the same way the principle of good faith played a role in the International Court's judgment in *Namibia*,[110] which led the Court's interpretation away from conservatism in the sense that it made an evolutionary interpretation. It is important to note in respect of *Namibia* that which was seen above, that is, the principle of good faith is enshrined in the Charter of the United Nations as,[111] according to Article 2(2), all the members of the United Nations, 'in order to ensure to all of them the rights and benefits resulting from membership, shall fulfill in good faith the obligations assumed by them in accordance with the present Charter'.[112]

The Court in *Namibia* underlined that the mandatory powers had bound themselves to exercise their functions of administration in conformity with 'the relevant obligations emanating from the United Nations Charter, which member States have undertaken to fulfil in good faith in all their international relations'.[113] There can be little doubt that the Court was guided by the demands of good faith in reaching its interpretation of the Mandate agreement: questions of international tutelage have always had a particularly intimate relationship with the demands of the principle of good faith.[114] It is not surprising that there should exist an affinity between fiduciary duties and *bona fides*; etymologically the relation is certainly clear enough. Thus Judge Lauterpacht observed in *South West Africa—Voting Procedure* that 'a principle of good faith is particularly appropriate in relation to an instrument of a fiduciary character such as a mandate or a trust in which equitable considerations acting upon the conscience are of compelling application'.[115]

This good-faith requirement, and the particular importance it is deemed to have in connection with an instrument of a fiduciary character, came to the fore in *Namibia* as the International Court found in the concepts embodied in the terms of the Mandate agreement evolving elements which led it to arrive at an evolutionary interpretation of the agreement.[116] If one contrasts the judgment of the Court, which clearly places a premium on good faith, with the dissenting opinion of Judge Fitzmaurice (that went against an evolutionary interpretation in that case), which though it runs to 206 pages in the law reports nowhere mentions the principle of good faith in the case in issue,[117] one sees with clarity the important nexus **(p.76)** between good faith and the evolutionary interpretation adopted by the majority of the Court.

3.2.5 Conclusion

Evolutionary interpretation may, as will have been seen, be required by good faith. This is partly due to the importance that good faith accords to the protection of legitimate expectations. It is obviously contrary to good faith to argue that a treaty term must be interpreted contemporaneously (ie as not having evolved)[118] when it follows from what

must be held to have been the common intention of the parties that the treaty terms were to be interpreted evolutionarily. The conservative element inherent in good faith is thus, in that type of situation, one which encompasses change in order to conserve, and what is to be conserved is the object of the parties' agreement. The principle of good faith in treaty interpretation in this way brings out that there is more than just an accidental affinity between the intention of the parties and evolutionary interpretation. This interplay —between the common intention of the parties and evolutionary interpretation—is the topic in the next part of this chapter.

3.3 Evolutionary Interpretation and the Intention of the Parties

3.3.1 Introduction

This part turns to the pre-VCLT approach to treaty interpretation and shows what in that approach was codified in Articles 31–33 and what was not. The intention is to make clear that what the ILC codified in Articles 31–33 were the means admissible in the objective establishment of the intention of the parties. It is no surprise therefore that, as will be seen, the International Court has been prominent in putting a premium upon the intention of the parties in cases bearing on evolutionary interpretation.

The International Court in *Navigational Rights* made clear that the treaty interpreter may arrive at an evolutionary interpretation in two types of case. On the one hand, the Court said, the subsequent practice of the parties, within the meaning of Article 31(3)(b) of the VCLT, can result in a departure from the original intent on the basis of a tacit agreement between the parties.[119] On the other hand, continued the Court, there are situations in which the common intention of the parties was, or may be presumed to have been, to give some or all of the terms used a meaning or **(p.77)** content capable of evolving, not one fixed once and for all, so as to make allowance for, among other things, developments in international law:

In such instances it is indeed in order to respect the parties' common intention at the time the treaty was concluded, not to depart from it, that account should be taken of the meaning acquired by the terms in question upon each occasion on which the treaty is to be applied.[120]

This bifurcation provides a possible starting-point for the analysis of evolutionary interpretation. The topic here is evolutionary interpretation, and not the subsequent agreements and practice of the parties, and the analysis deals in principle only with the second type of case: evolutionary interpretation based on 'the parties' common intention at the time the treaty was concluded'.[121] It will, however, be necessary to deal to some extent also with the subsequent agreements and practice of the parties.

In *Navigational Rights*, evolutionary interpretation and the subsequent agreements and practice of Nicaragua and Costa Rica could be seen as leading to the same conclusion. Judge Skotnikov in his separate opinion observed that the result which the Court had reached should instead be reached by way of reliance upon the subsequent practice of the parties: 'In my view', he said, 'the subsequent practice in the application of the Treaty

suggests that the Parties have established an agreement regarding its interpretation: Costa Rica has a right under the 1858 Treaty to transport tourists'.[122] The result which the Court had reached by way of evolutionary interpretation could also be reached by basing the interpretation upon the subsequent practice of the parties.

This important point has also been underscored by the ILC's Special Rapporteur Georg Nolte, who has pointed out, the evolutionary interpretation of treaties and the taking into account of subsequent conduct are in principle mutually complementary, and are often used that way in practice,[123] as the example of *Navigational Rights* also bears out. The same was the case with *Namibia*, where the International Court referred to the practice of United Nations organs and of states in order to specify the conclusions which it derived from what it saw as the inherently evolutionary nature of the right to self-determination,[124] and in *Aegean Sea*, where the Court found support for its evolutionary interpretation in the administrative practice of the United Nations and in the subsequent practice, in a different context, of the party which in the case had argued for a more restrictive interpretation.[125]

It is, however, important to note that in addition to this justificatory role subsequent conduct can also limit evolutionary interpretation. The limiting role of subsequent conduct emerges more clearly with the growing recognition of the possibility **(p.78)** of an evolutionary interpretation. Thus it is certainly possible to find examples of cases in which international courts have been faced with cases where a number of the means of interpretation would have led to an evolutionary interpretation but where, in the event, the court in issue opted for another result by reason of the subsequent practice of the parties.

One such example is *Mangouras v Spain*,[126] where arguably the Grand Chamber of the European Court of Human Rights (which was split 10–7) decided to lower the protection offered by Article 5 of the European Convention on Human Rights[127] to the individual claimant, who had caused great harm to the environment in the form of an oil spill. The Spanish courts had set a bail of €3 million, a sum which, according to the minority of the Grand Chamber, was 'far beyond the means of the applicant, with the consequence that he continued to be detained on remand for a total of eighty-three days'.[128] One could thus certainly see *Mangouras* as a case which, taken out of context, could be judged a lowering of the standards of protection in Article 5 of the Convention concerning the setting of bail against the applicant.

The Grand Chamber stated that in principle 'the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies'.[129] But this did not lead the Grand Chamber to the conclusion that the Article 5 rights involved had undergone an evolution that meant a higher level of rights protection for the individuals in the applicant's situation. Instead the Grand Chamber stated that it could not 'overlook the growing and legitimate concern both in Europe and internationally in relation to environmental offences'.[130] The subsequent practice in *Mangouras* was evidenced in particular by states' powers and

obligations regarding the prevention of maritime pollution and the unanimous determination by European states to identify those responsible and imposing sanctions on them, sometimes using criminal law as a means of enforcing environmental law obligations.

The Grand Chamber in *Mangouras* admittedly did not follow the exacting test as to what is subsequent practice drawn up by the International Court in *Kasikili/Sedudu*, that a subsequent practice can be seen as being established only when the parties to a treaty, through their authorities, engage in common conduct, and that they acted wilfully and with awareness of the consequences of their actions.[131] Nonetheless this case is an example of an international court shying away from giving to a provision of a treaty an interpretation that would have gone with the grain of the object and purpose of the treaty, and instead found guidance in the subsequent agreements and practice of the states, which seemed in the event to go in the **(p.79)** other direction. The Grand Chamber in *Mangouras* in other words gave precedence to the subsequent practice of the states members of the Convention, thus avoiding a divergence between the jurisprudence of the Court and of the practice of the states.

Nonetheless the three examples from the jurisprudence of the International Court, *Namibia, Aegean Sea*, and *Navigational Rights*, are evidence that we may be standing on its feet a false dichotomy if we assume without more that the use by international courts and treaty bodies of evolutionary interpretation will more often than not go against the grain of the subsequent agreements and practice of states. It is true that the constraints which exist in international law make many of the concerns about judicial law-making overblown.[132] The same is the case here, as it turns out that only rarely in the cases where international courts have arrived at an evolutionary interpretation has the subsequent practice of the states in issue acted as a constraint on the court or Tribunal reaching the result arrived at.[133]

Mangouras notwithstanding, this is the case in the jurisprudence of the European Court of Human Rights, as that court practically never arrives at an evolutionary interpretation without basing such an interpretation also upon a 'consensus' among the state members. This approach goes back to *Tyrer*[134] and was succinctly summed up by the Grand Chamber in *A, B & C v Ireland*:

The existence of a consensus has long played a role in the development and evolution of Convention protections beginning with *Tyrer v the United Kingdom*, the Convention being considered a 'living instrument' to be interpreted in the light of present-day conditions. Consensus has therefore been invoked to justify a dynamic interpretation of the Convention.[135]

The ILC's Special Rapporteur on Treaties over Time has also pointed out this aspect of the jurisprudence of the European Court, going so far as to state that whenever the Court has recognized that it is engaging in evolutionary interpretation 'it has *invariably* referred to state, social or international legal practice'.[136] This perspective seems at times to be lost on some of those who analyse the dynamics of intention and consent in relation to the European Convention. Rather than to deemphasize the intention of the

parties by way of a particularly 'sovereignty-limiting approach', which is the view Helfner takes of the interpretive approach of the European Court,[137] this is an approach which develops the Convention by taking a broad view both of the intention of the parties and their subsequent practice, and where an evolutionary interpretation is based equally upon both elements.

The reason we are faced with a false dichotomy in this regard is partly due to the affinity between, on the one hand, the point which this study endeavours to make **(p.80)** about evolutionary interpretation and the intention of the parties and, on the other hand, the traditional reason given for why one ought to give weight to the subsequent practice of the states. As has already been stated, and as will be seen in more detail below, this book argues that evolutionary interpretation can only happen to the extent that it follows from the intention of the parties, and the traditional reason given for why one ought to accord importance to the subsequent practice of the parties is, classically, that 'l'exécution des engagement est, entre États, comme entre particuliers, le plus sûr commentaire du sens de ces engagements'.[138] The Permanent Court in *Interpretation of Article 3(2) of the Treaty of Lausanne* went even further, saying that 'the facts subsequent to the conclusion of the Treaty' could only concern the Court 'in so far as they are calculated to throw light on the intention of the Parties of the time of the conclusion of the Treaty'.[139] This element has undergone some development in the practice of the International Court.[140] We ought nonetheless not to exaggerate the extent to which evolutionary interpretation and interpretation based upon the subsequent practice of the parties are likely to diverge.

Another condition ought to be entered as well, and that is that the analysis here does not deal specifically with Article 31(3)(c) of the VCLT and the conduit that that provision provides for the evolutionary interpretation of treaties. This provision, requiring account to be taken of any relevant rules of international law applicable in the parties' relations, certainly has an important side to the evolutionary interpretation of treaties.[141] Article 31(3)(c) was part of a development from the ILC's consideration of 'intertemporality'. While this study does not focus on the inter-systemic aspects of evolutionary interpretation, intertemporality is examined in Chapter 4.

In *Navigational Rights*, the International Court imputed an intention to be bound by an evolving interpretation of the terms of the treaty.[142] In that sense, as adumbrated above, the case is of a feather both with earlier and later cases to have reached the Court. In post-VCLT cases such as *Namibia*,[143] *Aegean Sea*,[144] *Gabčíkovo–Nagymaros*,[145] and *Pulp Mills*,[146] the Court arrived at an evolutionary interpretation of the instrument at issue specifically by stressing the importance in treaty interpretation of the intentions of the parties.

In this regard it is worth considering the interpretation which the International Court made in *Whaling*.[147] There the International Court observed by way of background that, the aims of the 1946 Conference leading to the International **(p.81)** Convention for the Regulation of Whaling,[148] as described in the Conference's opening address by Mr Dean Acheson, then Acting Secretary of State of the United States, were 'to provide for the

coordinaton and codification of existant regulations' and to establish an 'effective administrative machinery for the modification of these regulations from time to time in the future as conditions may require'.[149] In contrast to the preceding Convention for the Regulation of Whaling[150] and International Agreement for the Regulation of Whaling,[151] the text of the Whaling Convention does not contain substantive provisions regulating the conservation of whale stocks or the management of the whaling industry, as these are to be found in the Schedule which, according to Article I(1), 'forms an integral part' of the Convention. The Schedule is subject to amendments, to be adopted by the International Whaling Committee (IWC), which under Article III(1) is given a significant role in the regulation of whaling. The Commission has amended the Schedule several times.

On this background the International Court observed that, 'the functions conferred on the Commission have made the Convention an evolving instrument'.[152] The Court underlined the importance of the object and purpose of the Convention in this regard by observing that 'amendments to the Schedule and recommendations by the IWC may put an emphasis on one or the other objective pursued by the Convention, but cannot alter its object and purpose'.[153] Thus the Convention itself set up a system which provided for its own evolution. Judge Lauterpacht observed in *South West Africa—Voting Procedure* that:

a proper interpretation of a constitutional instrument must take into account not only the formal letter of the original instrument, but also its operation in actual practice and in the light of the revealed tendencies in the life of the Organization.[154]

Thus, in *Whaling*,[155] the formal letter of the original instrument itself set up a system which, in a fashion, formalized the 'revealed tendencies in the life of the Organization'. The power to amend the Schedule gave the Commission scope for adapting the Convention to changing circumstances; this, as Judge Greenwood observed, was the Convention's way of accommodating 'the need to interpret and apply the treaty as a "living instrument"'.[156] Within the bounds of the object and purpose of the Convention,[157] which according to the Preamble included **(p.82)** 'both conservation and ensuring a future for sustainable whaling',[158] the whole Convention was thus from the outset intended to be 'an evolving instrument'.[159]

Thus Redgwell must be right in saying that it cannot be the case that environmental treaty-making—such as the treaties in issue in cases such as *Gabčíkovo–Nagymaros* and *Pulp Mills, Kishenganga*,[160] and *Whaling*[161]—has engendered new rules of treaty interpretation applicable only in that sphere. Rather the development of such treaties and attendant techniques of interpretation should be seen as contributing to the development of the *general* law of treaties.[162]

The International Court was reluctant in the 1970–80s to having explicit recourse to the VCLT more generally in cases bearing upon treaty interpretation; it was only in the 1990s that the Court began referring to Article 31 in its judgments.[163] Other examples, post-VCLT but not specifically dealing with evolutionary interpretation, such as *Continental Shelf (Libya/Malta)*[164] and *Frontier Dispute (Burkina Faso/Mali)*,[165] could be given too

of the International Court, or a Chamber of the Court, seemingly going directly to the notion of the intention of the parties without, overtly at any rate, having recourse to Articles 31–33. The tendency is, however, strikingly pronounced in cases bearing upon evolutionary interpretation.

Lately it is especially the Court's ruling in *Navigational Rights* which has been criticized for the way in which the Court in that case dealt with the issues of evolution and intent.[166] Commentators have wondered whether, in interpreting the **(p.83)** convention at issue evolutionarily, the Court was in fact applying the general rule of interpretation as laid down in Article 31 of the VCLT. Thus Palchetti has observed that the International Court and other international courts and tribunals[167] in reaching evolutionary interpretations generally 'do not refer to the general rule stated in the Vienna Convention in order to justify their solution, preferring, instead, to rely on an argument which is based on the identification of the presumed intentions of the parties at the time of the conclusion of the treaty'.[168]

On this background, the question arises whether the International Court does or does not follow the general rule of interpretation when, in interpreting an instrument evolutionarily, it seeks above all to give effect to the intentions of the parties. Interestingly, Palchetti makes the observation that although, in his view, searching for the intention of the parties is *not* the approach laid down in Article 31, there is some similarity between the approach taken by the International Court in such cases and the approach of the general rule of interpretation. As he says: 'The presumed intention is deduced from objective factors which are substantially the same factors on which one should rely when interpreting a treaty according to the general criterion stated in the Vienna Convention'.[169] As will be seen, this way of putting the matter—the reliance upon objective factors in order to establish the intention of the parties—is very apt indeed.

3.3.2 A conservative approach?

A more general caveat might here seem to be in place. It could be thought that the approach here argued for is overly 'conservative'. This relates to that which was discussed above—how good faith conservatism might in fact demand change. If the quip that 'if we want things to stay as they are, things will have to change' is relevant to the demands that flow from good faith, then the same is certainly true with the **(p.84)** intentions of the parties. As this chapter bears out, focusing on giving full and fair import to the common intention of the parties is not in any way in itself a conservative approach. First, the point can be made, as it has been with regard to the old debate as to whether international tribunals may have recourse to preparatory work,[170] that there is nothing inherently conservative or progressive in the approaches taken; that will vary with the treaty situation in issue. Thus, if we here remain with the example of the debate on preparatory work, Lauterpacht explicates how on the one hand conservative international lawyers opposed the use of preparatory work on the basis of the conviction that the intention of the parties must be the decisive consideration and that recourse to *travaux préparatoires* was likely to render more difficult, if not to frustrate, the task of discovering the true intention of the parties. Opposition to resort to that instrument had,

however, 'also been prompted by considerations of a diametrically opposite character'.[171] Thus Judge Alvarez, too, opposed resort to preparatory works, on the view that the treaty, once adopted, possesses a life of its own independent of the common intention of the parties. Alvarez observed in *Reservations to the Convention on Genocide* that the treaties in issue 'must not be interpreted with reference to the preparatory work which preceded them; they are distinct from that work and have acquired a life of their own; they can be compared to ships which leave the yards in which they have been built, and sail away independently'.[172]

The same can be said of focusing on the intentions of the parties: there is nothing inherently conservative or progressive in giving pride of place to the common intention of the parties. Whether that is the case or not will of course depend on what *was* in point of fact the common will of the parties. This might have been a will to reach a result which could be described as very progressive indeed, as was the case in *Jurisdiction of the Courts of Danzig*,[173] which is analysed in more detail below, where the common intention of the parties was so revolutionary as to lead the Permanent Court, by way of what has been called 'a revolutionary pronouncement',[174] to leave behind old statist orthodoxies and embrace for the first time the notion that treaties can in international law confer rights directly on individuals. It could not be disputed, observed the Permanent Court, 'that the very object of an agreement, according to the intention of the contracting parties, may be the adoption by the parties of some definite rule creating individual rights and obligations'; the Court, giving full and fair effect to the common intention of the parties in the way that was typical of the jurisprudence of the Permanent Court,[175] could do nothing else **(p.85)** but say that the solution to the question before it 'depends upon the intention of the contracting Parties'.[176]

Another example is the European Convention on Human Rights,[177] the founding document of the Council of Europe. It is well known that in the law of treaties the preamble of a treaty (in addition, of course, to the actual provisions of the treaty) is an important place to search for the common intention of the parties.[178] It is plain from the preamble of the European Convention that 'the aim of the Council of Europe is the achievement of greater unity between its members and that one of the methods by which this aim is to be pursued is the maintenance and further realisation of human rights and fundamental freedoms'. Another point in respect of the intentions of the parties and the European Convention bears on the relation to the 'general principles of law recognized by civilized nations' as mentioned in Article 38(1)(c) of the Statute of the International Court of Justice.[179] These principles have been an important factor in the jurisprudence of the European Court; it referred to them both in *Golder*[180] and in *Demir and Baykara*[181] where it drew a connection between Article 38(1)(c) of the Statute of the International Court of Justice and Article 31(3)(c) of the Vienna Convention, stating that:

Article 31 para. 3 (c) of the Vienna Convention indicates that account is to be taken, together with the context, of 'any relevant rules of international law applicable in the relations between the parties'. Among those rules are general principles of law and especially 'general principles of law recognized by civilized nations'. Incidentally, the Legal

Committee of the Consultative Assembly of the Council of Europe foresaw in August 1950 that 'the Commission and the Court must necessarily apply such principles' in the execution of their duties and thus considered it to be 'unnecessary' to insert a specific clause to this effect in the Convention.[182]

It is in this regard significant that during the preparatory work it was specifically said that the Court must rely in its interpretation of the Convention on general principles not such as they were when the Convention was concluded but 'at any given moment':

We state that organised international protection shall have as its aim, among other things, to ensure, that internal laws on guaranteed freedoms are in conformity with the fundamental principles of law recognised by civilised nations. What are these principles? They are laid down in much doctrinal work and by a jurisprudence which is their authority. These are the principles and legal rules which, since they are formulated and sanctioned **(p.86)** by the internal law of all civilised nations *at any given moment*, can therefore be regarded as constituting a principle of general common law, applicable throughout the whole international society.[183]

On the background of these two points, the intention of the parties is thus not only the maintenance and safeguarding of human rights as set out in the articles of the Convention; it also involves the further realization and the development of these rights. This must be taken seriously by the treaty interpreter. As former President of the European Court of Human Rights Jean Paul Costa has put it:

le Préambule de la Convention indique que le but du Conseil de l'Europe, et donc de la Cour, est non seulement la sauvegarde des droits et libertés, mais encore leur *développement*. Cela implique une conception évolutive et progressive du contenu des droits reconnus, et la Cour manquerait à une partie de ses devoirs si elle ne veillait qu'à la sauvegarde des droits en néglieant l'impératif de leur développement.[184]

It would be a mistake to see this approach as inherently conservative; nothing could, in respect of the European Convention, be more progressive than faithful reliance upon the intention of the parties to the Convention.

Making the point that Article 31 does not mention the intention of the parties, Sir Gerald Fitzmaurice, sitting as a judge of the European Court of Human Rights, underlined in *Belgian Police* that, 'though it does not in terms mention it', Article 31 'implicitly recognises the element of intentions'.[185] This is correct. But whilst it is true that the VCLT 'implicitly recognises the element of intentions', as the next section will explain, putting the matter in this way nonetheless runs the risk of confusing the issues.

3.3.3 A re-reading of Article 31?

Already in 1949 the ILC began to concern itself with the law of treaties, and eventually also the interpretation of treaties. In 1966 it adopted 75 draft articles that formed the basis for the VCLT of 22 May 1969, which entered into force on 27 January 1980.[186] The Special Rapporteurs were all British: first Brierly, then Lauterpacht, Fitzmaurice, and in

the last, and most important, stages Waldock.[187] To some extent, running in parallel with the work of the ILC was the work on treaty interpretation undertaken by the Institut de droit international, which elected as **(p.87)** their Special Rapporteurs first Lauterpacht and then, on the latter's elevation to the International Court, Fitzmaurice.[188]

Fitzmaurice held, in an important contribution,[189] that any analysis of the jurisprudence of the International Court or indeed the pronouncements of any Tribunal on treaty interpretation can only be properly evaluated against the backdrop of the various theories of interpretation that are or recently have been current.[190] He drew up three possible approaches to treaty interpretation: the textual approach, the intentions approach, and the teleologic approach. Fitzmaurice never presented these schools of interpretation as authorities on their own, still less in terms of balancing policies and perceptions. Rather, they were rational attempts on Fitzmaurice's part at explication and taxonomization of the approaches taken in the doctrine.[191]

The tripartite split drawn up by Fitzmaurice[192] became influential and made up the backdrop of the debates in the ILC in its work on the law of treaties.[193] Thus Special Rapporteur Waldock in his 'Third Report on the Law of Treaties' saw the question as a matter of writers differing in their basic approach to the interpretation of treaties according to the relative weight they were willing to 'give to' the text of the treaty, the intentions of the parties, and objects and purposes of the treaty.

The ILC took as a point of departure that an attempt to codify the conditions of the application of those principles of interpretation whose application in any given case depends on the particular context and on a subjective appreciation of varying circumstances would clearly be inadvisable.[194] It accordingly confined itself to isolating and codifying the comparatively few general principles which appeared in its view to constitute 'general rules for the interpretation of treaties'.[195]

Among many important choices which had to be made was the choice of how best to balance the different factors, or means of interpretation, to be taken into account. Special Rapporteur Waldock wanted to go far in giving pre-eminence to the terms of the treaty,[196] but his initial proposal was on this point made to give way to a more balanced approach.

The three Special Rapporteurs preceding Waldock had been fairly unison in this regard. Special Rapporteur Brierly had in a private capacity put the matter in the following way: the object of treaty interpretation is 'to give effect to the intention of the parties as fully and fairly as possible'.[197] Special Rapporteur Fitzmaurice stated that: 'The view that the intentions of the parties are relevant, and that to ascertain and give effect to them is the prime and sole legitimate object of interpretation, is not only the traditional but also the juridically natural view'.[198] And if there is *one* **(p.88)** common thread running through the works on treaty interpretation of Special Rapporteur Lauterpacht it is that 'the ultimate object of the work of interpretation is to explain and classify legal transactions according to the declared will of both parties'.[199] It is clear that to the extent that Waldock set out as Special Rapporteur on the law of treaties to change this he did not in

the end succeed.

Special Rapporteur Waldock's initially proposed general rule of interpretation provided that:

The terms of a treaty shall be interpreted in good faith in accordance with the natural and ordinary meaning to be given to each term—(a) in its context in the treaty and in the context of the treaty as a whole; and (b) in the context of the rules of international law in force at the time of the conclusion of the treaty.[200]

This proposed rule plainly focused on the 'terms' of a treaty and went very far in giving pre-eminence to a textual approach. It was voted down after an instructive debate among the members of the ILC.

Briggs agreed with Waldock's proposed rule, though he only saw an insistence upon the primacy of the text to be correct insofar as it was 'an expression of the intentions of the parties'.[201] Several other members of the ILC, however, took a different view of matters to the Anglo-American point of view. Citing the 1950 report for the Institute of International law by Lauterpacht,[202] Tabibi stated that he would rather have given 'greater weight to the intention of the parties'.[203] Amado, too, was critical; he pointed out that he thought the use in the opening passage of the article of 'The terms of a treaty' was too narrow, as 'a treaty consisted of a number of texts, contexts and terms; what had to be interpreted was the treaty itself, not its terms.[204] Pessou also felt that the intention of the parties must be given a more prominent place in the provision.[205] Verdross wanted to mention the intention of the parties in the article itself.[206] Bartos stated that the Special Rapporteur's draft articles 'were based on the general concept, so dear to the English school of legal thought that interpretation meant interpretation of the text rather than of the spirit of a treaty'.[207] He continued by underlining that, to his mind:

Where interpretation was concerned, the autonomy of the will of the parties was paramount. What the parties had intended was more important than what they had actually said in the treaty.[208]

(p.89)

The interpretation of a treaty ought therefore to be based on the general spirit of the treaty.[209] Chairman Ago voiced similar concerns. He would have preferred that the objects and purposes of a treaty had been given a more prominent place in the first paragraph of the general rule, than what had been the case with Waldock's initially proposed rule.[210] Bartos and de Luna, too, felt that it was unfortunate that the objects and purposes of a treaty had not been given a more prominent place.[211]

Pal expressed the matter in the following way: 'in order to find out the real meaning of a treaty, it was necessary to consider the intention of the parties in so far as those parties had succeeded in expressing it in the language used by them in the treaty'.[212] More generally, leading members of the ILC, such as Rosenne,[213] Jiménez de Aréchaga,[214]

and Chairman Ago,[215] made explicit statements during the debates to the effect that treaty interpretation was about the ascertainment of the intention of the parties, and that that needed to be reflected in the articles. In a fashion the divide between the approach of Waldock's initially proposed rule and the one which was in the end adopted is summarized by Lauterpacht:

The problem is to a large extent identical with the question whether the purpose of interpretation is to discover the intention of the parties or the meaning of the words which they used. It is possible to maintain that the intention of the parties is relevant only in so far as it supplies a clue to the true meaning of a disputed term or provision. The alternative and, probably, the correct view is that the discovery of the meaning of the words used in a treaty is only a means for ascertaining the intention of the parties.[216]

In line with this, Judge Higgins held in *Kasikili/Sedudu* that the object of treaty interpretation 'is not to discover a mythical "ordinary meaning" within the Treaty'; rather the object of the exercise is 'to give flesh to the intention of the parties', 'to decide what general idea the parties had in mind, and then make reality of that general idea'.[217] 'In the law of treaties', Higgins has observed elsewhere, 'the intention of the parties is really the key'.[218]

It is important, however, to keep in mind that Article 31, as it was finally agreed upon, does not implicitly recognize intentions as just another (unmentioned) means of interpretation; rather, it recognizes intention as the very *aim* of the whole process. De Visscher made this point about the intention of the parties, already before the VCLT was adopted, stressing the point that the discovery of the intention of the parties is the *object* of interpretation, and must not be thought to be anything else. It is, he said, the very thing to be proven, 'la chose à démontrer', and one cannot **(p.90)** regard as a means of interpretation that which can only be the result of the interpretive process itself.[219]

On this background it is instructive that Special Rapporteur Waldock made his approach clear by stating the reason why (in common with Lauterpacht's proposed articles for the Institut de droit international some 15 years earlier)[220] his approach, later qualified in 1966 by the ILC colleagues, relied on the 'primacy of the text':

It takes as the basic rule of treaty interpretation the primacy of the text as evidence of the intentions of the parties. It accepts the view that the text must be presumed to be the authentic expression of the intentions of the parties.[221]

In 1966, the ILC described treaty interpretation as geared towards 'appreciating the meaning which the parties may have intended to attach to the expressions that they employed in a document'.[222] Indeed, one of the main reasons why, more broadly, the ILC felt bound to tackle head on the difficult task of formulating the comparatively few general principles which appear to constitute general rules for the interpretation of treaties was, it said, to set out 'the means of interpretation admissible for ascertaining the intention of the parties'.[223]

This was later well summarized by Jennings and Watts: on the approach of the general rule of interpretation, they explained, 'it is the intention which is being sought'; 'the question is primarily one of determining what elements *may properly be taken into account* as indirect evidence of the parties' intention and what weight is to be given to those elements'.[224]

The ILC made it clear, however, that what it was codifying was an approach to treaty interpretation that relied in the first instance upon the text of the treaty as the starting point in ascertaining the common intention of the parties. The relation between text and intention has later been well brought out by Crawford, who describes what he calls the 'unitary process of interpretation'[225] outlined in the general rule of interpretation thus: 'Article 31 emphasizes the intention of the parties as expressed in the text, as the best guide to their common intention'.[226]

Yasseen, one of the leading members of the ILC during the drafting of the VCLT, made it clear that when the ILC took the text as the starting point for interpretation that was in no way to minimize the importance of the intention of the **(p.91)** parties: 'Going first to the text is inevitable; the text is taken to contain the common intention of the parties'.[227]

He continued by saying: 'What is the point of a text if, in order to interpret the treaty, the intention of the parties is to be searched *ab initio*? Taking the text as the point of departure is not to minimize the importance of the intention of the parties; rather, it means proceeding to discover it by examining the instrument by way of that through which it is expressed'.[228]

Reuter, another leading member of the ILC in the period leading up to the Vienna Convention, in his writings after 1969, made the same point as Yasseen about the close nexus between textuality and intentionality in the general rule: 'The purpose of interpretation', he said, 'is to ascertain the intention of the parties from a text'; 'interpretation means going backwards from the text to the initial intention'. In the interpretation of treaties, because of what he called the submission to the *expression* of the parties' intention it is, he said, essential to identify exactly how and when that intention was expressed; thus, Reuter said about the means of interpretation enumerated in Article 31, 'it is from these elements, since they primarily incorporate the parties' intention, that the meaning of the treaty should normally be derived'.[229]

Capotorti, one of the Italian representatives at the Vienna Conference, made the point in 1969 that although the general rule takes an objective approach 'the solution adopted in the Vienna Convention provides a keyhole through which to look for the common intention of the parties'.[230]

Far from minimizing the importance of the intention of the parties, then, the approach taken by Article 31 gives the treaty interpreter the admissible and agreed upon way of ascertaining it. That process begins, as virtually all interpretation of texts, with the text itself.[231] This gist is conveyed in the ILC's words, referred to **(p.92)** above, to the effect that the task of the ILC was to enumerate '*the means of interpretation admissible*

for ascertaining the intention of the parties'.[232]

As can be seen from Yasseen's words, too, the only real difference between what, in the run up to the VCLT, had been termed (slightly confusingly, as it turns out) the 'textual' and the 'intentions' method, therefore, is that the textual method takes, in the ascertainment of the intention of the parties, as its starting point the *text*, whereas the intentions approach investigates *ab initio* (that is, from the beginning) the intentions of the parties. The one defining difference, then, is that the textual approach is founded upon a presumption that, as Special Rapporteur Waldock put it, 'the signed text is, with very few exceptions, the only and the most recent expression of the common will of the parties'.[233]

Even Beckett, who in the debates of the Institut de droit international in 1950 registered probably the most critical view of the category of 'the intention of the parties' to have entered the debate, was of the view that when the text of a treaty was so important that was because 'treaties must be deemed to be drawn up with legal advice and *prima facie* to express completely the intentions of the parties'.[234]

On this background it must be correct to say that, as Gaja has explained, within the approach set out in Articles 31–33 of the VCLT, the treaty interpreter reconstructs the meaning of an 'objectivized intention of the parties'; the means of interpretation are 'objective elements' which guide the treaty interpreter to the establishment of the intention of the parties.[235]

3.3.4 The ILC approach and its antecedents

By searching for the intention of the parties in relation to evolutionary interpretation, the International Court is in fact nothing if not applying the framework of Article 31 of the VCLT. Although the general rule of interpretation does not mention in terms the intention of the parties—or what role, if any, this construction ought to play in treaty interpretation—all the elements of the general rule have one sole aim and that is to provide the basis for establishing the intention of the **(p.93)** parties. This is clear not only from the post-VCLT jurisprudence of the International Court and of arbitral tribunals. As has just been seen, it follows, too, from the approach taken by the International Law Commission in its work—most notably that of Special Rapporteur Waldock—leading up to the adoption of the VCLT.

The approach taken to treaty interpretation *before* the VCLT was squarely one in which, as the Tribunal in *Air Transport Services Agreement* put it on the eve of the Convention's adoption, the goal was to 'establish with the maximum possible certainty what the common intention of the Parties was'.[236]

In fact this was even clearer in the early twentieth century, tribunals at that time being quite prepared, in the ascertainment of the common intention of the parties, to interpret treaties *contra legem*.[237] Thus the Tribunal in *Island of Timor* expanded on the importance in the law of treaties of establishing that which the Tribunal called 'the actual and mutual intention' of the parties.[238] Treaties bind the parties to loyal and complete execution, the Tribunal said, 'not only of what has been literally promised but of that to

which a party has bound itself, and also that which conforms to the essence of any treaty whatsoever as to the harmonious intention of the contracting parties'.[239] Thus, concluded the Tribunal in *Island of Timor*, the interpretation of treaties ought 'to be made in conformity with the real mutual intentions of the parties, and also in conformity with what can be presumed between parties acting loyally and with reason, not that which has been promised by one to the other according to the meaning of the words used'.[240] **(p.94)**

Before the International Court, the Permanent Court took the same approach, such as when in *Lighthouses Case between France and Greece* it said that the end goal of the interpretative exercise was not to find the true meaning of the treaty term but that the Court must 'satisfy itself as to the true intention of the Parties'; 'it must determine the intention of the Parties as regards the scope of the contract'.[241] The approach of the Permanent Court was in fact so focused upon establishing the common will of the parties, sometimes to the detriment of the text, that some authors, both then and presently, have felt it necessary to caution against this perceived overreliance on trying to tease out what in fact the parties meant and thus *not* seeing treaty interpretation as an operation the object of which is to find the meaning of a treaty text.[242]

The writings of leading publicists were, from the nineteenth century onwards, squarely influenced by the view that treaty interpretation was determined by the intention of the parties.[243] Before the VCLT, virtually no writer took a different approach. Thus Rivier made clear that it is in the law of treaties necessary, above all, to establish the mutual intention of the parties: 'Il faut avant tout constater la commune intention des parties'; 'les traités doivent être interprétés non pas exclusivement selon leur lettre, mais selon leur esprit'.[244] Sørensen took as his point of departure that the words of a treaty have no meaning except as the expression of the intentions of the parties, and that the sole object of treaty interpretation is therefore to establish those intentions.[245]

De Visscher said as much when he stated that: 'La mission du juge est de dégager l'intention commune des Parties des termes employés par elles pour autant que ceux-ci ne trahissent pas manifestement cette intention'.[246] On this reading, international tribunals, when interpreting a treaty, set out to find: 'cette part des intentions des parties que des signes extérieurs révèlent'.[247] In fact de Visscher reinforced this by saying that some commentators have misinterpreted the jurisprudence of the Permanent and International Court on this score, a misinterpretation which has taken attention away from the intention of the parties and focused instead on **(p.95)** what he terms literal interpretation: 'On a quelque peu déformé la jurisprudence de la Cour permanente et celle de la Cour internationale de Justice en parlant à son sujet de méthodes d'interprétation littérale'.[248] The goal of the interpretative process, then, is to 'traduire fidèlement une volonté'.[249]

De Visscher in his discussion gives the example of the interpretation given by the Permanent Court in *Danzig Railway Officials*[250]—revolutionary in what it said about international human rights but nothing if not a copybook example of the general rule of interpretation[251]—where the Permanent Court addressed the issue of whether treaties can confer rights directly on individuals, in the instant case Danzig railway officials. Poland

contended that the agreement (a so-called *Beamtenabkommen*) between Poland and Danzig conferred no right of action upon the individuals in issue. The Permanent Court, though it could on the orthodox international law of the day very well have agreed with Poland's contention,[252] rejected, unanimously, an interpretation of the treaty which would have put a premium on well-established principles of international law instead of the common will of the parties: 'The answer to this question', said the Court, 'depends upon the intention of the contracting Parties'. The Court continued:

It may readily be admitted that, according to a well established principle of international law, the *Beamtenabkommen*, being an international agreement, cannot, as such, create rights and obligations for private individuals. But it cannot be disputed that the very object of an agreement, according to the intention of the contracting parties, may be the adoption by the parties of some definite rule creating individual rights and obligations and enforceable by national courts.[253]

Had the Court wished to adhere to the traditional view then it would have interpreted the controversial common intention of the parties in the light of the traditional doctrine; 'the issue must', as Lauterpacht said in his comments to the case, 'depend on the intention of the parties'.[254] It should parenthetically be mentioned that the result reached unanimously by the Permanent Court was, seeing as it was based foursquare on the intentions of the parties and thus administered with such judicial restraint, thought by one Legal Advisor to the Foreign Office to be a solemn affirmation of the orthodox doctrine; he plainly could not believe that it could be otherwise.[255] **(p.96)**

This dovetails neatly with that which McNair held to be 'the essential quest in the application of treaties'—'to search for the real intention of the contracting parties',[256] or as he said as President of the *Palena* Tribunal: the object of the process of treaty interpretation is 'to ascertain the common will' of the parties.[257] All the rules and maxims which have been taken to make up the canons of treaty interpretation, he observed, 'are merely *prima facie* guides to the intention of the parties, and must always give way to contrary evidence of the intention of the parties in a particular case'.[258]

It must be right therefore, as Watts said of the continuity of the law of treaties, that a reader of 'Lord McNair's magisterial *Law of Treaties*, published in 1961, is unlikely to be greatly surprised by the provisions of the Vienna Convention'; 'there was a broad international consensus as to the rule of international law applicable to treaties, and that consensus was reflected in the Convention'.[259]

In fact Lauterpacht had come to this conclusion in his 1927 study on private law sources and analogies of international law, where he said, of contracts and treaties alike, that: 'The ultimate object of the work of interpretation is to explain and classify legal transactions according to the declared will of both parties.'[260] The same contractual point was made by Huber, and later Waldock in the ILC debates: 'il est évident que l'essentiel d'un contrat, d'une convention, d'un traité est la volonté concordante des parties'.[261] It is apposite, therefore, to look at the possible analogy of contract interpretation, in order to see whether, as we are often told in the literature, it is the search for the meaning of the

text or the intention of the parties that is controlling in that area of the law.

Treaty interpretation was seen, in Brierly's words quoted above, as being about 'giv[ing] effect to the intention of the parties as fully and fairly as possible',[262] and nothing else. Rules on treaty interpretation were seen as obfuscating, and **(p.97)** detrimental to the search for the intention of the parties; logically, therefore, there could, in Brierly's words, be 'no technical rules in international law for the interpretation of treaties'.[263]

The debates in the ILC in the run-up to the Vienna Convention were closely linked to the question of what role to consign the *travaux préparatoires* in treaty interpretation. Lauterpacht had been an ardent advocate of giving pride of place to preparatory works.[264] As Special Rapporteur for the Institut de Droit International, Lauterpacht drew up 'projets de résolution' on the interpretation of treaties where, in number 2, he suggested in a text best rendered in the original that:

Le recours aux travaux préparatoires, lorsqu'ils sont accessibles, est notamment un moyen légitime et désirable aux fins d'établir l'intention des parties dans tous les cas où, malgré sa clarté apparente, le sens d'un traité prête à controverse. Il n'y a aucun motif d'exclure l'usage de travaux préparatoires dûment consignés et publiés, à l'encontre d'États ayant adhéré au traité postérieurement à sa signature par les parties originaires.[265]

This approach was criticized. Prominent in criticizing the approach was Beckett, who saw the reliance upon *travaux préparatoires* as a danger to the legal certainty which to his mind could be procured only if one stuck as closely as possible to the text of the treaty, even to the exclusion of other means of interpretation.[266] If, he averred, too ready admission of preparatory work was allowed, the state which had found a clear provision of the treaty inconvenient was likely to be furnished with a *tabula in naufragio*; there would always be something in the preparatory work fit to support their contention.[267]

It is worth mentioning, however, that Beckett made an important concession by taking a large view of what the treaty was; quite a number of the elements which he saw as being part of the treaty and not of the *travaux préparatoires* could very well have been seen as part of the preparatory works.[268] This of course considerably softens the brunt of his claims. **(p.98)**

Later, the problem with too ready a reliance upon the *travaux préparatoires* was summarized critically by the ILC in 1966 as being that 'it is beyond question that the records of treaty negotiations are in many cases incomplete or misleading, so that considerable discretion has to be exercised in determining their value as an element of interpretation'.[269] Nonetheless, as explained by Mortenson,[270] the VCLT is not as hostile to *travaux* as is sometimes thought,[271] Special Rapporteur Waldock having also stressed that *travaux*:

are simply evidence to be weighed against any other relevant evidence of the intentions of the parties, and their cogency depends on the extent to which they furnish proof of the

common understanding of the parties as to the meaning attached to the terms of the treaty.[272]

According to the approach taken by the ILC, and unanimously adopted by the initial parties to the Vienna Convention, in what would become Articles 31–33 of the Convention, the ILC made clear that to the extent that it was confronted with a choice between the textual approach, the intentions approach, and the teleologic approach, it chose the textual one.[273]

Leading authors have assumed that in choosing this approach the ILC had dismissed, in one fell swoop, the age-old principle according to which the aim of treaty interpretation was to ascertain what was the common intention of the parties.[274]

But whilst the ILC did indeed opt for that which it termed the textual approach it was not the case that the ILC jettisoned the idea that the object of treaty interpretation is the ascertainment of the intention of the parties.

It is, as explained above, plain enough that Article 31(1) does not mention in terms the intention or will of the parties. Only in Article 31(4) does the general rule have recourse to the intention of the parties: 'A special meaning shall be given to a term if it is established that the parties so intended'.[275] What is more, Waldock observed at the Vienna Conference that it had, within the later stages of the debates of the ILC, been said 'with some justice' that Article 31(4) was supererogatory, as Article 31(4) added nothing to Article 31(1).[276]

Conversely, in Lauterpacht's 1950 'projet de résolution', the intention of the parties enjoyed pride of place in the very terms of the first article:

La recherche de l'intention des parties étant le but principal de l'interprétation, il est légitime et désirable, dans l'intérêt de la bonne foi et de la stabilité des transactions international, de prendre le sens naturel des termes comme point de départ du processus d'interprétation.[277]

(p.99)

As will have become clear, by contrast, 'the intention of the parties' is conspicuous by its absence in Article 31(1). It is important to make the point, however, that what the general rule of interpretation does is to enumerate the means of interpretation; it does not set out to explicate what the aim of treaty interpretation is.

3.3.5 Treaty interpretation: contract interpretation writ large?

It is undoubtedly true that international tribunals have taken inspiration from national private law, both when it comes to the material principles they apply and when it comes to interpretation. Rivier went so far as saying that the principles of treaty interpretation are, in short and *mutatis mutandis*, those of the interpretation of agreements between individuals.[278] This seems like the application in the field of interpretation of the old adage

that international law is 'but private law writ large'.[279]

Lauterpacht observed that when a legitimate occasion arises to apply a private law principle common to all systems of private jurisprudence, then it is useless and misleading to oppose the recourse to a corresponding rule of private law. The question, 'When does such a legitimate occasion arise?' he answered by saying that it arises mainly in all cases in which the parties to a treaty have themselves deliberately made use of a conception of private law. This would for example be the case when the parties employ such technical terms of private law as lease, mandate, prescription, purchase, servitude, usufruct, trust, or due diligence. When it came to interpretation, however, what he saw as the fundamental identity of treaties and contracts to him meant that the techniques of contract interpretation could serve as analogy *en bloc*.[280]

The practice of international tribunals seems to bear out Lauterpacht's proposition. Thus the Tribunal in *Diverted Cargoes* held that:

les principes du droit international qui gouvernent l'interprétation des traités ou accords internationaux ainsi que l'administration des preuves, ont été dégagés par la doctrine et surtout par la jurisprudence internationale en correspondance étroite avec les règles d'interprétation des contrats adoptées à l'intérieur des nations civilisées.[281]

As much has been said by other international tribunals too. The Tribunal in *Boundaries in the Island of Timor* relied on analogies from the interpretation of contracts and spoke of 'the entire accord of private law and the law of nations on this point'.[282] In *Abu Dhabi* the Tribunal based its interpretation entirely on what it saw as the applicable rules of construction as taken from private law.[283] As Crawford has **(p.100)** observed, in a more general context, it is only natural that international tribunals should choose, edit, and adapt elements from other developed systems; the result is a body of international law the content of which has surely been influenced by domestic law but which is still its own creation.[284] This is surely also the case with treaty interpretation, and its relation to the construction of contracts. Much as we saw above, with regard to the literature on treaty interpretation and the role of the intention of the parties, it has been argued in the literature and in some arbitral awards that the analogy which may be drawn from the interpretation of contracts is mainly one which counsels a focus on the letter of the contract and not on the intention of the parties. This argument needs to be analysed.

The common law approach to the interpretation of contracts is sometimes portrayed as focusing on the terms of the contract, to the detriment of the intentions of the parties. Thus in French doctrine, for example, the common law approach is described as one where it would be contrary to good faith to try to escape the letter of the contract by arguing on the basis of the intentions of the parties.[285] This approach has also found an echo in English doctrine; one author recently expressed that contract construction 'is not concerned with identifying some (fictional) common intention of the parties'.[286] Examples may also be found of this in older arbitral practice. Thus Lord Asquith in *Abu Dhabi*, holding that though English municipal law was not as such applicable, some of its rules were so 'firmly grounded in reason, as to form part of this broad body of jurisprudence

—this "modern law of nature"' on which he felt the award must be based, said that 'the English rule which attributes paramount importance to the actual language of the written instrument in which the negotiations result seems to me no mere idiosyncrasy of our system, but a principle of ecumenical validity'.[287] As will become clear, this is certainly not an accurate description of how English courts interpret contracts today, and it is not entirely clear that this was an accurate description in the 1950s either.[288]

It is convenient to begin the analysis with French law, as English law has been contrasted with the French position. In French law the interpretation of contracts aims above all to find the common intention of the parties. Article 1156 of the Code civil is thus in the following terms: 'On doit dans les conventions rechercher quelle a été la commune intention des parties contractantes, plutôt que de s'arrêter au sens littéral des termes.' As one commentator has put it:

En droit français, l'interprétation sert principalement à rechercher quelle a été la commune intention des parties, c'est-à-dire quelles étaient les termes de leur accord réel. Dans **(p.101)** la mesure où la volonté interne est la source et la mesure de l'engagement des parties, c'est elle qu'il faut prioritairement analyser pour interpréter le contrat.[289]

Though rules exist with regard to how contracts are to be interpreted, the overarching rule according to which one must look for the common intention of the parties trumps all other considerations. This is also the approach taken in the UNIDROIT principles of international commercial contracts.[290] Article 4.1 of the UNIDROIT principles thus provides that 'A contract shall be interpreted according to the common intention of the parties'. The comment to Article 4 explicates that the provision is based upon

the principle that in determining the meaning to be attached to the terms of a contract, preference is to be given to the intention common to the parties. In consequence, a contract term may be given a meaning which differs both from the literal sense of the language used and from the meaning which a reasonable person would attach to it, provided that such a different understanding was common to the parties at the time of the conclusion of the contract.[291]

It can be seen, in the approach of French contract law and of UNIDROIT, that the spirit of a compound is more important than its letter. This has in French law been seen as a consequence of the principle of good faith; to be in good faith implies not hiding behind the letter of the contract.[292] If in other words a French court seized of a contractual dispute has reason to believe that the letter of the contract does not conform to the intention of the parties it cannot stop at the letter. This also applies where the terms of the contract are very general; the spirit of the contract must prevail.[293]

French contract law places, in common with international law,[294] a premium on effectiveness. Article 1157 of the Code civil codifies that which in the law of treaties is called the principle of effectiveness: 'Lorsqu'une clause est susceptible de deux sens, on doit plutôt l'entendre dans celui avec lequel elle peut avoir quelque effet que dans le sens

avec lequel elle n'en pourrait produire aucun.' All contract terms which may lead one to doubt the real intention of the parties must be checked in the sense that one must make sure that the latter conform to the intention of the parties.[295] In other continental law, too, this approach is prevalent.[296] Thus the German Civil Code makes clear, in Article 133, that 'in the interpretation of a **(p.102)** declaration of intent the true intention is to be ascertained without taking account of the literal meaning of the terms', and this is qualified by Article 157, which provides that: 'agreements must be interpreted according to good faith, ordinary usage being taken into account'. Article 1247 of the Italian Civil Code is in the following terms: 'Nelle convenzioni si deve indagare quale sia stata la commune intenzione delle parti contrahenti, anziché attenersi al senso letterale delle parole'. Thus in Italian law contract interpretation is about establishing the common intention of the parties, and the contract interpreter is in this endeavour aided considerably by the principle of good faith.[297]

In fact the English approach is very similar. In the common law the aim of interpreting a provision in a contract is to determine what the parties meant by the language used. An overview of the English approach was given by Lord Bingham, who observed that:

There are (or were) some who favour a very literal reading of the precise terms in which the parties have chosen to express their bargain. Others would interpret the contract in a broader contextual setting of facts known to the parties when contracting. The opinion currently prevailing in England and Wales is that the court should do both, starting with a careful consideration of what the parties have actually written but reading this in the light of what the parties knew and may objectively be taken to have intended. In this way, it is hoped, the reasonable intentions and expectations of honest businessmen, dealing in good faith, will be given effect.[298]

It was very much in this mode that Lord Hoffmann, in *Investors Compensation Scheme Ltd v West Bromwich Building Society*,[299] summarized the principles on which the interpreter of a contract is to rely in English law. The gist of Lord Hoffmann's judgment is conveyed by his first and fifth principles on contract construction. According to his first principle, interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties. His fifth principle says that if one can conclude from the background of the contract that something must have gone wrong with the language of the contract then the law does not require judges to attribute to the parties an intention which they plainly could not have had.[300]

These principles are well-established points of departure,[301] and have been approved in later jurisprudence.[302] They do not, however, necessarily provide a **(p.103)** solution set in stone. The leading Supreme Court authority is now *Rainy Sky SA and others v Kookmin Bank*, where Lord Clarke, with whom the rest of the Supreme Court agreed, said that: 'the ultimate aim of interpreting a provision in a contract, especially a commercial contract, is to determine what the parties meant'.[303] The principles of contract construction do not, however, said Lord Clarke, citing Hoffmann LJ in *Co-operative Wholesale Society Ltd v National Westminster Bank plc*, 'mean that one can

rewrite the language which the parties have used in order to make the contract conform to business common sense. But language is a very flexible instrument and, if it is capable of more than one construction, one chooses that which seems most likely to give effect to the commercial purpose of the agreement'.[304]

The relation between this business sense and the wording of the contract was discussed extrajudicially by Lord Steyn, who in an article said that, generally speaking:

commercially minded judges would regard the commercial purpose of the contract as more important than niceties of language. And, in the event of doubt, the working assumption will be that a fair construction best matches the reasonable expectations of the parties.[305]

Lord Clarke said in *Rainy Sky SA and others v Kookmin Bank* that he agreed with this approach and also with what Lord Steyn held in *Society of Lloyd's v Robinson*, where the latter observed that:

in the process of interpreting the meaning of the language of a commercial document the court ought generally to favour a commercially sensible construction. The reason for this approach is that a commercial construction is likely to give effect to the intention of the parties. Words ought therefore to be interpreted in the way in which a reasonable commercial person would construe them. And the reasonable commercial person can safely be assumed to be unimpressed with technical interpretations and undue emphasis on niceties of language.[306]

In English law, therefore, for the purposes of the interpretation of contracts, the intention of the parties is the meaning of the contract.[307]

The real object of contract interpretation, in the common law as in the civil law law, is to give effect to the intention of the parties. In no way are these principles new to the common law of contract or to the civil law. Upholding the common intention of the contracting parties has been presented as the defining philosophy of the **(p.104)** English common law of contract for upwards of 150 years,[308] and as we saw from the provisions of the French Civil Code, they represented the orthodox view also in early nineteenth-century France.

In spite of the variety of its objects, the treaty, as a concept of international law, has been mainly indebted in the course of its development to the contract of private law and of contract construction in contract law.[309] The Tribunal in *Azpetrol* was right to point out that 'in interpreting a contract, contemporary English law has few technical rules'.[310] This conclusion is strikingly similar to Brierly's classic proposition with respect to treaty interpretation: 'there are no technical rules in international law for the interpretation of treaties'.[311] It is true, as Clapham has said, that with the adoption of the detailed VCLT rules, this proposition may indeed be questioned,[312] but Brierly's proposition deserved to be retained to the extent that, in common with that which may be concluded from the perspective of contract law, it warns against a focus on maxims of construction that may

obscure the real objective of interpretation, which 'can only be to give effect to the intention of the parties as fully and fairly as possible'.[313] On this background it is easy to agree with the Tribunal in *Azpetrol*, when it concluded that in most respects the approach taken by English courts to contract construction 'is similar to that prescribed by international law for the interpretation of treaties'.[314] In *Eurotunnel* the Tribunal stated that the principles of interpretation laid down in the VCLT 'are declaratory also for agreements between States and private parties under international law and should be applied to resolve any discrepancies'.[315] Indeed, while there is a distinction between treaty and contract, they are part of the same one world;[316] or, as Fitzmaurice once said:

The view that the intentions of the parties are relevant, and that to ascertain and give effect to them is the prime and sole legitimate object of interpretation, is not only the **(p.105)** traditional but also the juridically natural view, derived from well-known principles of private contract law.[317]

3.3.6 Domestic law and evolutionary interpretation

While it used to be the case that authors would say that statutes were to be interpreted more strictly than treaties, this is hardly the case any more.[318] Many national systems could here be given as examples. The common law–civil law view adopted above could have been fruitful here too. In French law the courts have to a very large extent been willing to adopt evolutionary interpretations of legal terms, and this is not least due to the way in which French legislation has been drafted, certainly since the Napoleonic Codes but also before that.[319] The French Cour de cassation took an evolutionary approach to staute interpretation when, in a famous line of cases,[320] it interpreted Article 2279 of the Civil Code. This article provides that: 'En fait de meubles, la possession vaut titre' ('In matters of movables, possession is equivalent to a title'). When, in 1804, the article was drafted one could not have thought of non-corporeal property, as that did not at the time exist in the way in which it would come into existence in the nineteenth century. The question therefore arose as to whether such movables were to be seen as being covered by the terms of the article. The Cour de cassation, by way of evolutionary interpretation of the terms used by the legislator, held that these later phenomena were in fact covered, as the term 'meubles' was of itself capable of generalization and thus applicable to all types of movables.[321] German courts, too, have taken this approach, while admittedly it may have been less pronounced than it has been in France.[322] The German Federal Constitutional Court in a line of authorities beginning in the early 1950s developed German constitutional law by reliance upon a doctrine of 'Verfassungswandel', according to which terms in the Basic Law were interpreted evolutionarily.[323] In US law the courts take an approach to both statutory and constitutional interpretation which is very similar to the one taken by international tribunals to treaty interpretation and the evolution of treaty concepts, though of course that is a particularly fraught issue within US law.[324] **(p.106)**

In a famous case before the Dutch courts the District Court of Rotterdam was faced with the question of whether a provision which referred to 'telegraph cables' could be

interpreted as to include telephone cables, even though these had not yet been developed at the time that the 1884 Convention on the Protection of Submarine Cables[325] was concluded. The court thought that it was reasonable to include the later telephone cables in the interpretation of what was protected under the convention.[326]

Nonetheless, the present analysis will concentrate on the approach taken by the common law courts. In addition to the fact that space would preclude going into all the systems just mentioned in any depth, there is another reason why the common law case law has been chosen. It is the open way in which the Supreme Court of the United Kingdom and Wales (previously the Judicial Committee of the House of Lords) and the Privy Council argue and explicate the way in which they interpret and develop the law: they for this reason provide material that particularly easily lends itself to analysis in the present context. The style of judgment in the common law resembles the one adopted by international tribunals.

A striking example in this regard is *New Zealand Maori Council v Attorney-General*.[327] The New Zealand Court of Appeal in this case took the same approach to the Treaty of Waitangi, a convention signed in 1840 between the Maori and Great Britain. President Sir Robin Cooke, on behalf of a unanimous Court of Appeal, stated that 'the treaty has to be seen as an embryo rather than a fully developed and integrated set of ideas'; the correct approach would be to interpret the treaty 'widely and effectively and as a living instrument taking account of the subsequent developments of international human rights norms'.[328]

The Privy Council in *Edwards*[329] had to decide whether, for the purpose of section 24 of the British North America Act 1867 (the Act containing at the time the Canadian constitution) women were in fact 'persons', and whether by extension they could be members of the Canadian Senate. As late as 1909, in *Nairn v University of St Andrews*, the House of Lords had held that women graduates from Scottish universities were not 'persons' who were able to vote in the election of members of Parliament for the Scottish universities.[330]

It was plain enough that when the Act was adopted the term had referred to men only. In its judgment, written by Sankey LC, the board of the Privy Council lay the foundations of that which would later be referred to in Canadian **(p.107)** constitutional jurisprudence as 'living tree interpretation' and adopted an evolutionary interpretation.[331]

In fact the way in which the Privy Council interpreted the statute in *Edwards* could be thought to be surprisingly akin to the method used by international tribunals, such as the International Court in *Navigational Rights*.[332] In a two-step approach the Privy Council, first, took as its starting point the intentions of Parliament, which necessarily were contemporaneous with the adoption of the statute; then, secondly, it underlined that the taking of this as a starting point did *not*, however, signify that as the term's meaning was no longer the same as it was at the date of conclusion, no account should ever be taken of its meaning at the time when the statute was to be interpreted for the purposes of its application.

Thus the board of the Privy Council in its interpretation turned, at the outset, to the Act's 'object and purpose'. It took into account 'the facts existing at the time with respect to which the Legislature was legislating'[333] as a legitimate topic to consider in ascertaining what was the object and purpose of the Legislature passing the Act. Then it turned from the conditions contemporaneous with the adoption of the statute to the conditions required by the evolution of law. The account which the Privy Council gave of the passing of the Act was one which set the stage for evolutionary interpretation: it stressed that the communities of the Commonwealth 'embrace countries and peoples in every stage of social, political and economic development and undergoing a continuous process of *evolution*'.[334]

In view of this a restrictive interpretation was to be avoided; the board did not in any way wish to cut down the provisions of the Act by a narrow and technical construction, but rather to give it a large and liberal interpretation. It was plainly the demands of evolution that the Privy Council had in mind when it continued to say that the 'British North America Act planted in Canada a living tree capable of growth and expansion within its natural limits'.[335]

Lady Hale, in an analysis of *Edwards*, concluded that the common law is no stranger to the concept of evolutionary interpretation.[336] She focused on how common law courts when it comes to the interpretation of statutes in theory look for the 'intention of Parliament'. At times this may be somewhat of an illusion, however, 'because on most points which come before us Parliament did not have any intention at all'.[337] Common law judges then, in common with international judges, infer the intention of the legislation from the terms used, read in the light of the statutory purpose.[338] **(p.108)**

Many modern cases could be relied on here to underscore this point.[339] Two examples show the approach taken today by the courts in the United Kingdom to evolving statutory terms particularly clearly. These two examples show, generally, the affinity which exists between the evolutionary interpretations adopted by international tribunals and the interpretations adopted in a number of cases by common law courts, but they also each bring out a specific point with regard to evolutionary interpretation.

First, the UK Supreme Court in *Yemshaw*[340] gave an illustrative example of just how naturally evolutionary interpretation comes to common lawyers. In this case the generic statutory term in issue was 'violence'. This kind of generic statutory term is, the Supreme Court said, capable of accommodating change and development over time. This, as Lord Brown underscored, was nothing else than applying a '"living instrument", "always speaking" approach to statutory construction'.[341] The phrase 'always speaking' goes back to the Victorian draftsman Lord Thring, who exhorted draftsmen to draft legislation so that 'an Act of Parliament should be deemed to be always speaking'.[342] The intention on the part of those drafting legislation that the statute shall be capable of keeping up with the times obviously has a side to evolutionary interpretation, and Lord Brown was surely right to point that out.

Secondly, the House of Lords in *Quintavalle* had to consider whether a live human

embryo created by cell nuclear replacement by way of a technique not known at the time when the statute was enacted, fell within the Human Fertilisation and Embryology Act 1990.[343] Section 1(1) of that Act said that, except where otherwise stated, the term 'embryo' was to mean 'a live human embryo where fertilisation is complete'. Lord Bingham said the following about the relationship between evolutionary interpretation and the intention of Parliament:

There is, I think, no inconsistency between the rule that statutory language retains the meaning it had when Parliament used it and the rule that a statute is always speaking. If Parliament, however long ago, passed an Act applicable to dogs, it could not properly be interpreted to apply to cats; but it could properly be held to apply to animals which were not regarded as dogs when the Act was passed but are so regarded now. The meaning of **(p.109)** 'cruel and unusual punishments' has not changed over the years since 1689, but many punishments which were not then thought to fall within that category would now be held to do so.[344]

This type of interpretation has been explicated in the literature as a construction which does not alter the meaning of the original wording 'in ways which do not fall within the principles originally envisaged by that wording'.[345]

These two points—the close connection, pointed out by Lord Brown in *Yemshaw*, between 'living instrument' and 'always speaking' interpretation, and Lord Bingham's point in *Quintavalle* that statutory terms retain the meaning they always had when they are seen to be always speaking—lead us to a third one. There is in fact a presumption in English law that legislative language is to be interpreted evolutionarily, or as always speaking.[346] Lord Steyn summed the point up in the following way: 'Parliament must be deemed to contemplate that generally its statutes will endure for a considerable time, and that unless statutes evince a contrary intention, they will be judged to be constantly speaking'.[347] This, to no less a degree than in contract law, is then squarely based upon the establishment of an intention. For the purposes of comparison it is interesting that there is in fact a presumption in the common law that unless otherwise provided for the statute is to be interpreted evolutionarily, as 'always speaking'.

3.3.7 'Interpretation must be based above all upon the text of the treaty'

Akande has posed the question, should the ordinary meaning of a treaty text trump the intention of the parties with regard to that treaty? His answer to that question is yes. He continues to say that 'this is what the VCLT says'; 'the reason to prefer ordinary meaning to the supposed intention of the parties, particularly in a multilateral treaty, is because the intention of the parties can be and is often difficult to glean apart from the actual words used'.[348]

Similarly, Sorel and Eveno have argued that 'in conformity with its line of conduct privileging textual interpretation, the ICJ has accorded minimal space for the intention of the parties'.[349] The authors suggest that the International Court has placed weight on the intention of the parties only in a strictly supplementary manner, and that this choice has been made so as 'not to give fodder to critics'.[350] If **(p.110)** one takes this narrow an

approach to treaty interpretation it is clear that there may be times when an evolutionary interpretation becomes impossible, blocked by the precedence taken by the letter of the treaty.

This approach is certainly not without basis in the International Court's jurisprudence. In a much quoted dictum in *Territorial Dispute*, the International Court said that 'interpretation must be based above all upon the text of the treaty'.[351] The dictum follows in the same vein as that which the International Court said on an earlier occasion: 'if the relevant words in their natural and ordinary meaning make sense in their context, that is an end of the matter'.[352]

Crawford has warned that 'it may display a lack of caution to extract general propositions from opinions or judgments devoted to a specific problem or to the settlement of a dispute entangled with the special relations of two states'.[353] Nonetheless, as will be seen below, the dictum was for a period referred to by the International Court, as well as other courts, on several occasions, so it deserves to be taken seriously.

The passage just quoted from *Territorial Dispute* has indeed been taken as good law, and was for a while quoted regularly, both in international jurisprudence and in doctrine.[354] Nonetheless, and this ties in with Crawford's point about caution in respect of extracting general propositions from judgments settling specific problems,[355] it may be that focusing on judicial dicta in this way is less helpful than what might initially be thought. It is instructive here to advert to that which Lauterpacht said about the alluring but erroneous doctrine of 'clear meaning' (according to which 'il n'est pas permis d'interpréter ce qui n'a pas besoin d'interprétation'),[356] ie that: 'The rule thus formulated seems to be pre-eminently reasonable. Its obviousness explains the frequency with which it is invoked.'[357] The same is the case with the dictum that 'interpretation must be based above all upon the text of the treaty'.[358] It has an allure of obviousness but does in the final analysis not give a truthful picture of the interpretive technique used by the Court in the case where it appeared and more generally in the practice of international tribunals. If we take **(p.111)** this pronouncement at face value —'interpretation must be based *above all* upon the text of the treaty'[359]—then the following must certainly be pointed out.

As mentioned above in relation to good faith, the Tribunal in *Rhine Chlorides* commented on the dictum. The Tribunal (consisting of Guillaume, Koojimans, and Skubiszewski, the last of whom presided) said that:

In the *Territorial Dispute (Libyan Arab Jamahiriya/Chad)* case, the Court stated that 'interpretation must be based above all upon the text of the treaty'. In this regard, the Tribunal emphasises that the text of the treaty is a notion distinct from, and broader than, the notion of 'terms'. Relying on the text does not mean relying solely, or mainly, on the ordinary meaning of the terms. Such a solution would effectively ignore the references to good faith, the context, and the object and purpose of the treaty. The ordinary meaning of the terms is even itself determined as a function of the context, object and purpose of the treaty. Lastly, as paragraph 2 of Article 31 of the Vienna Convention provides, the text of

the treaty (including the preamble and annexes) is itself part of the context for the purposes of interpretation.[360]

The Tribunal made clear that if one were to adopt the approach summed up in the dictum from *Territorial Dispute* then that would not mean adopting an interpretation founded uniquely or even mainly on the ordinary meaning of the terms, seeing as this would run counter to the reference in the general rule to good faith, context, and to object and purpose, and finally the 'ordinary meaning of the terms' will in itself be a function of context as well as the treaty's object and purpose. In the mode of 2 Cor 3:6—'The letter killeth but the spirit giveth life'—these lines seem to caution against taking too seriously the International Court's dictum in *Territorial Dispute*. Nonetheless, as was seen above, it has indeed been quoted and followed in other decisions up until *Legality of the Use of Force*,[361] though not in later decisions on treaty interpretation.

If, however, one looks at what the International Court went on actually to do in *Territorial Dispute*, one sees that the conclusions to which one might be led by putting too much store upon the dictum are wrong. This shows that the International Court did in fact conduct its interpretation along the same lines as the Tribunal in *Rhine Chlorides* said must be the correct approach: The text of the provision in question was important to the interpretation in *Territorial Dispute* only in so far as it, in the words of the International Court, 'conveys the intention of the parties to reach a definitive settlement of the question' which they had sought to solve.[362] **(p.112)**

The Court then read the treaty 'in the light of its object and purpose', and found, after having extracted from the treaty's preamble the aims of the treaty, that the 'object and purpose of the Treaty thus recalled confirm the interpretation of the Treaty given above, inasmuch as that object and purpose led naturally to the interpretation of the Treaty' to which the intention of the parties, as well as the principle of effectiveness, had pointed.[363]

In other words even the interpretation in *Territorial Dispute* turns out to have been made on the basis of a broad range of means of interpretation. The Court began by going to the text, but also relied upon the object and purpose, as extracted from the preamble, and the principle of effectiveness in order to establish the common intention of the parties. Apart from the much quoted dictum, there is not much about the interpretation which the Court made in *Territorial Dispute* that is, in strict terms, text-focused.

A dictum which perhaps better describes the process of treaty interpretation in general international law is that which the panel (among others Simma, Tomka, and Higgins, the last of whom presided) gave in *Iron Rhine*: 'The object and purpose of a treaty, taken together with the intentions of the parties, are the prevailing elements for interpretation'.[364] Whilst it could be argued that this statement fails to make clear that the intention of the parties is not a means of interpretation but rather the result of the interpretive process, it is a better summation than the dictum from *Territorial Dispute* of the approach taken to treaty interpretation by international courts and tribunals.[365] There are competing views as to exactly how to square a treaty's text with its object and purpose; it is to this debate that the chapter now turns. **(p.113)**

3.3.8 Treaty interpretation and object and purpose generally

A few words should be said in introduction about the terminology 'object and purpose'. The two words are often used interchangeably. They may, however, lead to some confusion if they are used as synonyms. The 'object' of an instrument refers to the juridical effect of the instrument; the 'purpose' has a teleologic element which refers to the aims of the contracting parties.[366] Sometimes the distinction is clearer, and the confusion less evident, in French.

The following extract from the judgment of the Permanent Court in *Minority Schools in Albania* is sometimes used to shed light on the difference between the two concepts: 'Pour atteindre ce but deux choses surtout ont été considérées comme nécessaires et font l'objet des dispositions desdits traités'. The English version is perhaps less instructive in this regard but the point is made there too: 'In order to attain this object, two things were regarded as particularly necessary, and have formed the subject of provisions in these treaties.'[367]

The preamble of a treaty is an important place to search for the common intention of the parties.[368] The European Court of Human Rights put it thus in *Golder*: 'the preamble is generally very useful for the determination of the "object" and "purpose" of the instrument to be construed.'[369] Nonetheless, perhaps the most important place to search for the object and the purpose of a treaty is the text itself. All the means of interpretation available can in principle contribute to the establishment of the object and purpose of a treaty. As Villiger puts it:

The structure of Article 31 as a General Rule leaves no doubt that all the elements of Article 31 as well as the supplementary means of interpretation in Article 32 contribute to this end.[370]

In this sense one ought not to conceive of, on the one hand, the text and, on the other, the object and purpose as necessarily being at odds with one another or necessarily being altogether different entities. The point has been made by Combacau that reliance on object and purpose does not necessarily mean reliance on a 'constructive' interpretation; rather it means to interpret a particular term in the light of that which may be drawn from the treaty as a whole.[371] It would not therefore be **(p.114)** correct to assume that the text itself does not have an important role to play in the ascertainment of the object and purpose of a treaty.[372]

The VCLT brings out the particular importance of a treaty's object and purpose by its insistent mentioning of the object and purpose of a treaty; Articles 18, 20(2), 41, 58, 60(3)(b), as well as Article 31(1), all speak of the object and purpose of a treaty. For the purposes of treaty interpretation it is especially the relationship between a treaty's object and purpose and the intention of the parties in concluding the treaty that is of interest.

De Visscher said of the approach of the VCLT that, in common with the jurisprudence of the International Court, 'la Convention de Vienne adopte comme critère d'interprétation "l'objet et le but du traité"'.[373] In de Visscher's view the search for the intention of the

parties is intimately tied to the object and purpose; the International Court, he said, 'pour éclairer l'intention des parties, recherche l'objet ou le but du traité'.[374]

Similarly, Higgins has underlined this close relationship between the intention of the parties and the object and purpose of a treaty by saying that treaty interpretation must be conducted by application of the wider principle which guides the law of treaties—the search for the intention of the parties, 'reflected by reference to the objects and purpose'.[375] Indeed in her view the intention of the parties should be 'deduced from the object and the purpose of the agreement'.[376] Guillaume has said that while the terms of a treaty provision in their ordinary meaning form the basis for the inquiry of the International Court into the intention of the parties, the object and purpose of a treaty 'are equally strong expressions of the parties' intention and could sometimes express the parties' intent more clearly with respect to a specific provision'.[377] Reuter, one of the leading drafters of the VCLT, also put a premium on the nexus between the intentions of the parties and their treaty's object and purpose. He observed that, on the one hand, the purpose of treaty interpretation is 'to ascertain the intention of the parties by reference to the form, the final clauses and especially the object and purpose of the treaty'[378] and that, on the other hand, in addition to having been manifested, the intentions 'must concur to form the object and purpose of the agreement, both of which play so prominent a part in the whole law of treaties'.[379] According to Reuter the important role played by the object and purpose within the Vienna rules should not be seen as an exception to the principle of the autonomy of the will of the state.[380] Rather it is the objective reinforcement of that very principle. The object and the purpose of a treaty are the essential elements of the intention of the parties: it is to be assumed, therefore, that **(p.115)** the parties would not wish for that object and purpose, freely chosen by them as their common good, to be frustrated.[381]

In the literature it is nonetheless often argued that in the law of treaties the object and purpose of an instrument play a less important role than the wording. Aust has, for example, said about the object and purpose of a treaty that 'fortunately, the role it plays in interpreting treaties is less than the search for the ordinary meaning of the words in their context'; 'having regard to the object and purpose is more for the purpose of confirming an interpretation'.[382] This, in Aust's view, is clear from the jurisprudence of the International Court, as the judgments of the Court, even in its advisory opinions on the United Nations Charter,[383] according to Aust, 'do not suggest that in interpreting the Charter the Court has been minded to follow a doctrinaire, teleological approach'.[384]

The jurisprudence of the International Court has taken the approach according to which object and the purpose of a treaty are the essential elements of the intention of the parties. Thus in *Reservations to the Convention on Genocide*, where the International Court, after stressing that the objects of the Genocide Convention[385] must be given due consideration, held that the ideals inspiring the treaty must be regarded to 'provide, by virtue of the common will of the parties, the foundation and measure of all its provisions'.[386] In *Gabčíkovo–Nagymaros* the International Court took a similar approach, stating that, in accordance with Article 26 of the VCLT, 'every treaty in force is binding

upon the parties to it and must be performed by them in good faith'; this latter element, the Court continued:

implies that, in this case, it is the purpose of the Treaty, and the intentions of the parties in concluding it, which should prevail over its literal application. The principle of good faith obliges the Parties to apply it in a reasonable way in such a manner that its purpose can be realized.[387]

(p.116)

In *Oil Platforms* (Preliminary Objection) the International Court underlined the importance of 'the spirit and intent' of a treaty as set out in general terms in Article 1 of the treaty: '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'.[388] Article 1 of the treaty, the Court said, 'cannot be interpreted in isolation from the object and purpose of the Treaty in which it is inserted'.[389] The Court in *Questions relating to the Obligation to Prosecute or Extradite*, citing from the preamble of the Torture Convention,[390] underlined the importance of the object and purpose, considering that 'the obligation on a State to prosecute, provided for in Article 7, paragraph 1, of the Convention, is intended to allow the fulfilment of the Convention's object and purpose, which is "to make more effective the struggle against torture"'.[391] Andenas and Weatherall have convincingly argued that the Court could have relied on the Convention's purpose in making the prohibition against torture effective, and the torture prohibition's customary international law character as *jus cogens* and *erga omnes* in interpreting the obligation to extradite or prosecute under the Torture Convention as sufficient to provide Belgium with standing before the Court, on the basis of a general legal interest in the performance of the obligation.[392]

It is nonetheless true that, in *South West Africa*, the International Court took care not to engage in 'teleologic' interpretation (without, however, taking a stance in principle to this type of interpretation), and stated that:

It may be urged that the Court is entitled to engage in a process of 'filling in the gaps', in the application of a teleological principle of interpretation, according to which instruments must be given their maximum effect in order to ensure the achievement of their underlying purposes. The Court need not here enquire into the scope of a principle the exact bearing of which is highly controversial, for it is clear that it can have no application in circumstances in which the Court would have to go beyond what can reasonably be regarded as being a process of interpretation, and would have to engage in a process of rectification or revision.[393]

But in *LaGrand* the Court arrived at an interpretation[394] in which the object and purpose entirely overrode what might have seemed at first glance to be the meaning (at least the English version) of Article 41 of the Court's Statute.[395] This, as former President Guillaume has observed, was clearly a teleologic interpretation.[396] The **(p.117)** Court in

LaGrand made clear that the object and purpose of the Statute was to enable the Court to fulfil the functions provided for in the Statute, and in particular, the basic function of judicial settlement of international disputes by binding decisions in accordance with Article 59 of the Statute. The Court went on to say that:

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 Article 41 might not be binding would be contrary to the object and purpose of that Article.[397]

The Court thus showed the prominent importance which must be given to a treaty's object and purpose—to the detriment of that which might *prima facie* seem to follow from the treaty's wording.

The same is clear from the jurisprudence of the Permanent Court. In *Rights of Minorities in Upper Silesia (Minority Schools)* the Permanent Court relied on the object and purpose of the instrument to be interpreted, as it held that 'the Treaty would fail in its purpose if it were not to be considered as an established fact that persons who belonged *de facto* to such a minority must enjoy the protection which had been stipulated'.[398] The Tribunal in *Or de la Banque nationale d'Albanie* held that one may not rely on the text of a treaty instrument if that text 'n'est pas compatible avec l'objet et le but de ces engagements'.[399] Investment treaty arbitration tribunals, too, go far in relying upon the object and purpose in treaty interpretation; the jurisprudence on Article 52 of the ICSID Convention,[400] on annulment of awards, is a good example in this regard.[401] As the Tribunal held in *Hussein Nuaman Soufraki v United Arab Emirates*:

Article 52 of the ICSID Convention must be read in accordance with the principles of treaty interpretation forming part of general international law, which principles insist on neither restrictive nor extensive interpretation, but rather on interpretation in accordance with the object and purpose of the treaty.[402]

(p.118)

On this background, it can be concluded that, within the law of treaties, the language of treaty provisions is not subject to any particular presumption but will be read so that effect is given to the object and purpose of the treaty in its context.[403]

3.3.9 Evolutionary interpretation and object and purpose

The question for the present purposes is what this emphasis on the object and purpose of a treaty means for evolutionary interpretation. This is well brought out in the classic *Muscat Dhows*,[404] where the interpretation of the treaty term '*protégé*' in the Act of Brussels 1890[405] was at issue. Those who were defined as the '*protégé*' of France were exempt from searches aimed at discovering slave trade. In the event, an evolutionary

interpretation of the term would give that right to a large number of vessels; a contemporaneous interpretation would limit that number considerably. The Tribunal found that an evolutionary interpretation was not warranted. In order to reach this conclusion the Tribunal focused on the 'purpose of supressing slave trading', which it saw as one of the 'elevated intentions' of the Act of the Brussels Conference.[406] The evolutionary—and extensive—interpretation proposed by France, which would have run the risk of effectively accommodating slave trade, would hardly have been consonant with the object and purpose of the treaty. The terms were to be given the meaning

which corresponds the best both with the elevated intentions of the Conference and of the resulting Final Act and with principles of international law as expressed in treaties in effect during that period, in national legislation to the extent that it has received international recognition and in the practice of the Law of Nations.[407]

There is an obvious connection here with Huber's description of treaty interpretation as 'concentric encirclement', whereby the judge establishes the intention of the parties in conformity with the fundamental demands of the fullness of international law and justice.[408] But what the Tribunal held in *Muscat Dhows* on the interplay between the 'purpose' and 'intentions' in connection with evolutionary interpretation also found an echo in *Iron Rhine*, where the Tribunal said that: 'The object and purpose of a treaty, taken together with the intentions of the parties, are the prevailing elements for interpretation'.[409] The Tribunal in *Iron Rhine* went **(p.119)** on to say that in that case it was not a conceptual or generic term that was in issue; it was rather new technical developments relating to the operation and capacity of a railway: 'an evolutive interpretation, which would ensure an application of the treaty that would be effective in terms of its object and purpose, will be preferred'.[410] In other words, an evolutionary interpretation was chosen as that would ensure that the intention of the parties, as reflected by reference to the objects and purpose, was followed. This is the point Bernhardt made when he stressed how the object and purpose of a treaty plays a central role in treaty interpretation, and more specifically that if a treaty is to be effective in terms of its object and purpose then that may mean entry into a certain dynamism.[411] If it is the purpose of the treaty to create longer lasting and solid relations between the parties then it is hardly compatible with this purpose to eliminate new developments in the process of treaty interpretation.[412]

Nationality Decrees issued in Tunis and Morocco should also be seen in this light.[413] There the Permanent Court observed that the question whether a matter is solely within the jurisdiction of a state is essentially a relative question; it must depend upon 'the development of international relations'.[414] This interpretation of Article 15 of the Covenant of the League of Nations[415] must be understood on the background of the object and purpose of the Covenant of the League of Nations, which according to its preamble was 'to promote international co-operation and to achieve international peace and security'.[416] The same approach was taken to the object and purpose of the Hungarian–Czechoslovak Treaty[417] in *Gabčíkovo–Nagymaros* where the International Court extracted the object and purpose of the instrument from its Articles 15, 19, and 20

and held that for the treaty to be effective in terms of its object and purpose it must be interpreted as being 'not static', but rather 'open to adapt to emerging norms of international law'.[418] The parties had, in the view of the Court, committed themselves to a programme of progressive development by drawing up the object and purpose of the treaty in the language they had used in the treaty.[419] The same was the case with the interpretation which the International Court made in *Western Sahara*,[420] where in its interpretation of Resolution 3292 (XXIX)[421] the Court made an evolutionary interpretation of the **(p.120)** term 'legal ties' on the basis of 'the object and purpose of General Assembly resolution 3292 (XXIX)'.[422]

As was seen above, the object and purpose also set the limits of the evolutionary interpretation of an instrument. Thus, in *Whaling*,[423] where the International Court found that the functions which the the International Convention for the Regulation of Whaling[424] conferred on the International Whaling Commission (IWC) 'have made the Convention an evolving instrument',[425] the Court observed that 'amendments to the Schedule and recommendations by the IWC may put an emphasis on one or the other objective pursued by the Convention, but cannot alter its object and purpose'.[426]

3.3.10 Tensions between intention and evolution

It has in the literature of the law of treaties been argued that giving effect to the common will of the parties, on the one hand, and making an evolutionary interpretation, on the other, are two propositions that can be reconciled only with difficulty. This view has, for example, been cast in the following terms: 'the need to give effect to the intention of the parties is evidently a deterrent to the use of an evolutive interpretation'.[427] On this understanding a Tribunal's resort to evolutionary interpretation is seen as adopting an interpretation which is at variance with the intention of the parties. This proposition is, however, open to question. On the approach taken in this book, evolutionary interpretation is nothing if not tied to the intention of the parties; it must ultimately refer back to the consent of the parties themselves and to their common intention. As will be seen, this means the same for both what has been called contemporaneous and for evolutionary interpretation.

It is instructive to note that, in *Navigational Rights*, it was Nicaragua (arguing for a contemporaneous interpretation) that argued on the basis of the intentions of the parties, not Costa Rica (arguing for an evolutionary interpretation)—though in the event the Court concluded in favour of Costa Rica on the basis of the intention **(p.121)** of the parties. This goes some way in showing the difficulty that may be encountered in marrying the concepts of intent and evolution.[428]

Waldock addressed this point in a series of works on evolutionary interpretation, observing that the VCLT did not deal specifically with the effect of an evolution in treaty terms: 'The International Law Commission's commentary, however, which I myself wrote', he continued, 'explained that so much depends on...the intention of the parties in the particular treaty, that it would be difficult to lay down any general rules'.[429] Posing the question of how courts ought to approach the problem of evolutionary interpretation,

he added that:

The problem of interpretation caused by an evolution in the meaning generally attached to a concept embodied in a treaty provision is, of course, neither new nor confined to human rights....But the problem is a general one which may present itself whenever the original meaning of a concept forming the basis of a treaty provision is found to have evolved. If the International Law Commission's view of the matter is correct, as hardly seems open to doubt, the answer to the problem in any given case must be looked for in the intention of the parties to the particular treaty.[430]

Confronted with the question of how, according to the general rule of interpretation, a Tribunal ought to approach treaty terms which may or may not be deemed to be evolving, Yasseen made exactly the same point: 'That depends, to my mind, on what the parties really intended'.[431] This answer is question-begging, for as Waldock was quick to point out: 'that intention, however, may not always be easily discernible'.[432]

But the broader point remains. And that is why, in cases bearing upon evolutionary interpretation, the International Court and arbitral tribunals alike have proceeded as the Tribunal did in *La Bretagne*, where, in order to establish whether the treaty term 'fishing regulation' ought or ought not to be interpreted in an evolutionary fashion, the Tribunal stressed 'the primary necessity of interpreting an instrument in accordance with the intentions of the parties'.[433] 'This', the Tribunal continued, 'will be done by following the general rule of interpretation'.[434]

International jurisprudence has been consistent in taking this approach. Thus the Eritrea–Ethiopia Boundary Commission in *Border between Eritrea and Ethiopia* followed 'the general rule that a treaty is to be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose' because 'each of these elements guide **(p.122)** the interpreter in establishing what the Parties actually intended, or their common will'.[435] The Tribunal in the *Rhine Chlorides case* stated that the reason international jurisprudence has adhered to Article 31 was, simply, that 'all the elements of the general rule of interpretation provide the basis for establishing the common will and intention of the parties'.[436]

With the work of the ILC on treaty interpretation, led by Special Rapporteur Nolte, on 'Treaties over Time',[437] it is tempting to say that the issue of the intention of the parties has within the work of the ILC come full circle. The ILC in its work agreed, in Draft Conclusion 3, on the following wording:

Interpretation of Treaty Terms as Capable of Evolving over Time

Subsequent agreements and subsequent practice under article 31 and 32 may assist in determining whether or not the presumed intention of the parties upon the conclusion of the treaty was to give a term used a meaning which is capable of evolving over time.[438]

The ILC Commentary to the Draft Conclusion leaves little to be desired in terms of clarity when it comes to just what its approach to evolutionary interpretation and 'presumed intention' is. Any evolutionary interpretation of the meaning of a treaty term, the ILC states, must be justifiable as a result of the ordinary process of treaty interpretation.[439] And more specifically: 'The phrase "presumed intention" refers to the intention of the parties as determined through the application of the various means of interpretation which are recognized in articles 31 and 32'.[440] 'Presumed intention', the ILC concluded:

is thus not a separately identifiable original will, and the *travaux préparatoires* are not the primary basis for determining the presumed intention of the parties, but they are only, as article 32 indicates, a supplementary means of interpretation. And although interpretation must seek to identify the intention of the parties, this must be done by the interpreter on the basis of the means of interpretation which are available at the time of the act of interpretation.[441]

'Intention' is thus a construct to be derived from the articulation of the 'means of interpretation admissible'[442] in the process of interpretation—and not a separately identifiable factor.

In Crawford's view, instances of evolutionary interpretation of treaties as instances of international courts and tribunals electing 'to depart from the intentions of the parties at the time of conclusion of a treaty'.[443] In the same discussion, **(p.123)** however, he also stated that the issue of evolutionary interpretation 'is essentially one of the correct application of VCLT Article 31'.[444] Crawford's double helix (according to which, on the one hand, evolutionary interpretation involves a court making a departure from the intention of the parties and, on the other, evolutionary interpretation is the result of the correct application of Article 31) seems to contain within it an inherent instability. The reason for this is that this model is missing one element, that is, the fact that, properly understood, a correct application of Article 31, in a case bearing upon evolutionary interpretation as much as any other type of interpretation, leads to the intention of the parties.

The question is, to a large extent, one of emphasis. That approach is, however, squarely the approach preferred by the International Court. And the reason why the Court has chosen that approach, this chapter has argued, is that—as shown by the work of the ILC under both Special Rapporteur Waldock and Special Rapporteur Nolte—identifying the intention of the parties is nothing if not the approach that follows from Article 31 of the VCLT.

3.3.11 Evolutionary or contemporaneous interpretation?

According to Fitzmaurice, the principle of contemporaneity could be summed up as follows: 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.[445]

This principle found its main support in the judgment by the International Court in *Rights*

of US Nationals in Morocco.[446] In this case the treaty term in issue was 'disputes'. In the contemporaneous (and broader) interpretation of the term 'disputes' encompassed both civil and criminal disputes; this meant that both of these two types of dispute were, with respect to US nationals, exempted from the Moroccan legal system and instead under consular jurisdiction. In the evolutionary (and less broad) interpretation of the term 'disputes' would, following the present-day understanding of the term, encompass only civil disputes, so that Moroccan courts would have jurisdiction over criminal 'disputes' concerning US nationals.

Rights of US Nationals in Morocco has been criticized for being 'a Solomon's judgment', the implication being that the heavy US political and economic interests involved had made the International Court's job in the case a particularly difficult one.[447] In the same vein, Nolte has observed that, due to the context in which it was rendered, *Rights of US Nationals in Morocco* should not be accorded the same authority as more recent pronouncements.[448] **(p.124)**

On this background, Nolte has concluded that 'even if it were still appropriate to proceed from a presumption that a treaty should be given a contemporaneous interpretation, this is not a strong presumption'. It must be correct to say that there is no presumption in the law of treaties that treaty terms ought to be interpreted contemporaneously. But this is because the controlling element must be the intention of the parties, not because there is a presumption one way or the other. There can be no presumption one way or the other because here as elsewhere in the law of treaties the rule applies that any presumption or consideration which tend to transform the ascertainable intention of the parties into a factor of secondary importance are inimical to the true purpose of interpretation.[449]

It cannot be right therefore to say, as McNair did, that 'there is authority for the rule that when there is a doubt as to the sense in which the parties to a treaty used words, those words should receive the meaning which they bore at the time of the conclusion of the treaty; unless that intention is negatived by the use of terms indicating the contrary'.[450] There is no presumption one way or the other. Here as in other connections the intention of the parties must be controlling.

Two important international arbitrations in particular are given as examples of international tribunals opting not for an evolutionary interpretation but instead for a contemporaneous one.[451] These two arbitrations are *Atlantic Coast Fisheries*[452] and *Abu Dhabi*.[453] In the first case a Tribunal set up by the Permanent Court of Arbitration held the treaty terms used in a provision in the Treaty of London of 1818,[454] stipulating that US nationals were excluded from fishing in Canadian 'bays',

must be interpreted in a general sense as applying to every bay on the coast in question that might reasonably be supposed to have been considered as a bay by the negotiators of the Treaty under the general conditions then prevailing.[455]

The Tribunal then declined to interpret the term 'bays' by reference to legal concepts of

a six-mile, ten-mile, or twelve-mile closing limit, such as those developed had in the evolution of international law subsequent to 1818.

In *Abu Dhabi*,[456] the Tribunal was asked to interpret not a treaty but a contract for an oil concession entered into by the sheikh of Abu Dhabi with a foreign company. **(p.125)** The instrument, expressed as covering all the lands, islands, and sea-waters of the ruler, had been drawn up in 1938 and the Tribunal, of which Lord Asquith was the sole member, was not prepared to 'read back into the contract the implications of a doctrine not mooted till seven years later, and, if the view which I am about to express is sound, not even today admitted to the canon of international law'.[457]

3.3.12 Generic and specific terms

The Tribunals in *Atlantic Coast Fisheries*[458] and *Abu Dhabi*[459] automatically assumed that the terms used were intended to fix the scope of the parties' rights and obligations once and for all, and it was therefore in reliance on the intention of the parties that the Tribunals decided against interpreting the treaties evolutionarily. The provisions in issue were concerned with the distribution or grant of territorial rights in maritime areas. It was therefore only natural for the Tribunals to assume—and assume was what they did—that the parties in both cases had intended these provisions to define their respective rights at that time and for posterity, even if they might have used such terms as 'bays' or 'sea-waters' which in a different context might be understood as open-ended and liable to evolve with changing conditions. The same was the case in *La Bretagne*,[460] where the Tribunal accepted in principle that the French–Canadian treaty at issue[461] could contain terms the interpretation of which must evolve, not least because the treaty was an agreement concluded for an unlimited duration. In the view of the Tribunal the treaty 'used the term "fishery regulations" as a generic formula covering all the rules applicable to fishing activities, while the reference to the dimensions of the vessels appears to suggest that a particular purpose was thereby intended, namely the limitation of these vessels' fishing capacity'.[462] In other words, the intention restricted the extent to which the different generic terms were seen by the Tribunal to be able to carry the new meaning.

It seems that the approach of the Permanent Court was less restricted. In a statement of principle regarding generic terms, or 'provisions which are general in scope', the Permanent Court in *Convention concerning Employment of Women during the Night*, stated the following:

The mere fact that, at the time when the Convention...was concluded, certain facts or situations, which the terms of the Convention in their ordinary meaning are wide enough to cover, were not thought of, does not justify interpreting those of its provisions which are general in scope otherwise that in accordance with their terms.[463]

(p.126)

The same conclusion as that reached in principle by the Permanent Court has been reached with respect to the generic terms in which the European Convention on Human

Rights[464] is cast. Many of the provisions of the European Convention were drawn up in broad terms, which lend themselves to an evolving interpretation that can take account of social change.[465] The same has been the case in the law of the World Trade Organisation (WTO),[466] where the WTO Appellate Body has held that 'natural resources' in Article XX(g) and 'sound recording' and 'distribution' in China's GATS[467] Schedule are generic terms which must be interpreted evolutionarily.[468]

Waldock in this respect pointed out that the answer to the question of whether a contemporaneous or an evolutionary interpretation ought to be adopted must in any given case be looked for in the intention of the parties to the particular treaty:

The interpretation of a treaty must always have its source in, and be consistent with, the original intention of the parties at the time of its conclusion. Consequently, it is only when it may be understood from the terms of the treaty that the parties contemplated a possible evolution of the content of the treaty in response to subsequent developments that those developments become part of the legal 'framework' for its interpretation.[469]

It is when the treaty terms at issue may be said to have been 'intended to evolve in response to changes in legal and social concepts'[470] that an evolutionary interpretation is inappropriate. If this is not the case then, as *Atlantic Coast Fisheries*[471] and *Abu Dhabi*[472] show, a contemporaneous interpretation will, in principle, be the appropriate solution. This is what the International Court made clear, in *Navigational Rights*, when it said that:

It is true that the terms used in a treaty must be interpreted in light of what is determined to have been the parties' common intention, which is, by definition, contemporaneous with the treaty's conclusion. That may lead a court seised of a dispute, or the parties themselves, when they seek to determine the meaning of a treaty for purposes of good-faith compliance with it, to ascertain the meaning a term had when the treaty was drafted, since doing so can shed light on the parties' common intention.[473]

(p.127)

It seems that tribunals operate on the presumption that the intention of the parties was for a contemporaneous interpretation to be adopted if the parties used in the instrument a technical or a factual term, such as topographical denominations. This is clear from the approach taken in *Decision regarding delimitation of the border between Eritrea and Ethiopia*[474] where it had been argued that the Tribunal must apply the principle of contemporaneity in its interpretation of the treaty terms in issue:

By this the Commission understands that a treaty should be interpreted by reference to the circumstances prevailing when the treaty was concluded. This involves giving expressions (including names) used in the treaty the meaning that they would have possessed at that time. The Commission agrees with this approach and has borne it in mind in construing the Treaties.[475]

The same type of technical treaty term was in issue in *Land and Maritime Boundary*,[476] where the International Court seemed to distinguish the interpretation of the treaty term 'mouth' of a river from the interpretation it had conducted, of 'main channel' of a river, in *Kasikili/Sedudu*.[477] As the term to be interpreted was a technical one, 'the Court must seek to ascertain the intention of the parties at the time',[478] by which it clearly meant that it must give to the terms the meaning they were seen to have at the time.

If we are to judge from the cases available in the law reports of international tribunals, usually with this type of case the Tribunal is confronted, in one decision, either with a technical term, or a set of technical terms, or a more generic term, or a set of more generic terms. That is not, however, necessarily the case.

3.3.13 Generic and specific intentions of the parties

In *Western Sahara* both types of term were in issue in the same decision, as the case involved the interpretation both of technical and generic terms.[479] The International Court drew a distinction in its interpretation of a legal term of art on the one hand and a more generic term on the other.[480] The International Court had, in Resolution 3292 (XXIX), been asked two questions by the General Assembly of the United **(p.128)** Nations: 'Was Western Sahara (Río de Oro and Sakiet El Hamara) at the time of colonization by Spain a territory belonging to no one (*terra nullius*)?' and, 'What were the legal ties between this territory and the Kingdom of Morocco and the Mauritanian entity?'[481] As will be seen, the Court was not asked to make an interpretation of a treaty instrument but of legal terms contained in a Resolution of the General Assembly.

The legal term of art ('*terra nullius*') was given a contemporaneous interpretation; it must be 'interpreted by reference to the law in force at that period'.[482] The Court saw nothing in the use by the General Assembly of this legal term of art that pointed in the direction of an evolutionary interpretation. This was, according to the Court, different when it came to the more generic term ('legal ties'), a term with no very precise meaning, which was interpreted by reference not only to the circumstances of the time to which its application related but also in the light of the intentions underlying the request for the Court's opinion:

Question II asks the Court to state 'what were the legal ties between this territory'—that is, Western Sahara—'and the Kingdom of Morocco and the Mauritanian entity'. The scope of this question depends upon the meaning to be attached to the expression 'legal ties' in the context of the time of the colonization of the territory by Spain. That expression, however, unlike '*terra nullius*' in Question I, was not a term having in itself a very precise meaning. Accordingly, in the view of the Court, the meaning of the expression 'legal ties' in Question II has to be found rather in the object and purpose of General Assembly resolution 3292 (XXIX).[483]

The Court went on to say that about the interpretation of 'legal ties' that 'in framing its answer, the Court cannot be unmindful of the purpose for which its opinion is sought'.[484] As was seen above, the intention of the parties will be reflected by an instrument's object

and purpose, and can thus be inferred from the object and purpose.[485]

It was clear from the intention of the General Assembly that the International Court had been seized of the questions for the purpose of the decolonization of Western Sahara in conformity with Resolution 1514 (XV)[486] on the right to self-determination. This approach could be thought to be reminiscent of the one suggested by Jiménez de Aréchaga (incidentally a Judge on the Court in this case) during the ILC debates on the VCLT with respect to whether or not a term should be interpreted contemporaneously or evolutionarily: 'The intention of the parties should be controlling'.[487] The International Court in *Western Sahara*, in other words, exemplified how the objectivized intention of the parties—or in the context of a resolution from the General Assembly: the intention of the Assembly—is the deciding factor as to whether one adopts a contemporaneous or an evolutionary interpretation. **(p.129)**

It is possible to conclude, then, that when the parties have inserted into an instrument a technical or a factual term, such as topographical denominations, or in the narrower formulation of Special Rapporteur Nolte: 'rather specific terms in boundary treaties',[488] the presumption arises that this term ought to be given a contemporaneous interpretation. In Nolte's view, this is partly because in such cases 'changes in the meaning of a (general or specific) terminology normally do not affect the substance of the specific arrangement, which is designed to be as stable and divulged from contextual elements as possible'.[489]

The view is perhaps preferable, however, that this is rather a function of the intention of the parties: international tribunals will in such cases proceed on the assumption that the intention of the parties was for the treaty term in issue to be interpreted in a contemporaneous manner. But when the treaty term in issue is more generic, then international tribunals will proceed on the assumption that the intention was for the treaty term to be interpreted in an evolutionary manner. Thus, for example, McNair stated that 'expressions such as "suitable, appropriate, convenient", occurring in a treaty are not stereotyped as at the date of the treaty but must be understood in the light of the progress of events and changes in habits of life'.[490]

Two examples could be given here: first, the evolutionary interpretation given by the International Court to the terms of the Mandate System in *Namibia*,[491] and more generally the intentions behind the constitutive documents of the League of Nations[492] and the United Nations,[493] and, secondly, the approach taken in many cases by the European Court of Human Rights to the interpretation of the European Convention on Human Rights.[494] The evolutionary interpretations made in both of these types of case are best understood as being fully consonant with the common intention of the parties.

As was seen above, the International Court in *Namibia*[495] referred to 'the primary necessity of interpreting an instrument in accordance with the intentions of the parties'. It went on in the same paragraph to hold that, *because* of this primary necessity,

the Court is bound to take into account the fact that the concepts embodied in Article 22

of the Covenant—'the strenuous conditions of the modern world' and 'the well-being and development' of the peoples concerned—were not static, but were by definition evolutionary, as also, therefore, was the concept of the 'sacred trust'.[496]

(p.130)

It is wrong to see the reference to the primary necessity of interpreting the treaty in accordance with the intentions of the parties as the Court merely paying lip service to an old principle of interpretation. The ruling of the International Court in *Namibia* has, however, been criticized for applying retroactively a modern understanding of the Mandates System. It has been argued that the Court relied on an apparent act of benevolent hindsight, the point being that the Court in no way relied on the intentions of the parties but instead that which, in 1971, in the view of Court ought to have been the parties' intentions.[497]

This argument is open to criticism. It is based on the proposition that it was inconceivable for the statesmen, when at the Paris Conference in 1919 they drew up the provisions on the Mandate System,[498] to have had in mind the possibility of recognizing that states may have a general interest in the maintenance of an international regime adopted for the benefit of international society. Moreover, the problem is that this proposition does not sufficiently take into account the idealistic aspiration to which the end of the Great War had in fact given rise, and of which the following 1928 quotation from McNair is but one example: 'There was perhaps no part of the Covenant that called forth more derision from the cynical and the worldly-wise than the Mandates System'; 'the Mandates System represents the irruption of the idealist into one of the periodical world settlements which have in the past lain too much in the hands of so-called "practical men"'.[499]

As Judge Jessup later observed in *South West Africa*: 'No doubt some statesmen were cynical but great charters of human liberties were signed and ratified and became binding on States.'[500] It is, against this background, not so clear that the objectivized intention of the parties on which the International Court founded its evolutionary interpretation, in 1971, was the result of benevolent hindsight. Those intentions should be deemed to have contained, in 1919, some very benevolent aspirations, aspirations to which the International Court had to give full and fair effect in its interpretation. To adopt this interpretation was indeed 'not to set aside but to give effect to the original intention of the parties'.[501]

The same approach must be taken to the intention of the parties to the UN Charter.[502] Akande has observed that the UN Charter is among the type of treaty which 'must be regarded as living instruments and be interpreted in an evolutionary manner, permitting the organization to fulfil its purposes in changing circumstances'.[503] He gives instances of what he regards as such evolutionary **(p.131)** interpretations of the UN Charter. Perhaps the most salient example is *Reparation for Injuries*, in which the International Court referred to the practice of the United Nations and the fact that it had entered into treaties as confirming the legal personality of the organization.[504] It is plain that if one sees this interpretation in light of the intentions of the parties, it becomes clear that the

interpretation confirms these intentions and in no way runs counter to them. In fact the International Court in *Reparation for Injuries* explicitly referred to how its interpretation arose 'by necessary intendment out of the Charter'.[505] The same conclusion was drawn in *Effect of Awards of Compensation by made by the UN Administrative Tribunal*, where the International Court held that the power to establish a Tribunal to do justice as between the United Nations and the staff members 'arises by necessary intendment out of the Charter'.[506] This should not come as a surprise.

As the Tribunal in *RosInvest* (Jurisdiction) (Sir Franklin Berman, Lord Steyn, and Böckstiegel, the last of whom presided) put it, as regards constituent instruments of international organizations:

given the changing nature of the problems and circumstances international organizations have to confront, a degree of evolutionary interpretation is the only realistic approach to realizing the underlying purposes of the organization as laid down in its constituent instrument.[507]

The nature of circumstances of such instruments thus 'provide evidence that the Parties themselves *intended* or *understood* that an evolutionary interpretation was appropriate to the interpretation and application of what they had agreed upon'.[508] The inferences made by the International Court in *Reparation for Injuries*[509] and *Effect of Awards of Compensation made by the UN Administrative Tribunal*[510] were clearly based on similar types of reasoning; imputations were made on the basis of an objectivized establishment of 'intendment' or 'intention'.

This is not surprising. After all, 'it was', as Franck has put it, 'the intention of the founders at San Francisco to create a living institution, equipped with dynamic political, administrative, and juridical organs, competent to interpret their own powers under a flexible constituent instrument in response to new challenges'.[511] **(p.132)** Crawford has, in an analysis of *Reparations for Injuries*—where the International Court held that under international law an organization 'must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties'[512]—made the same point by stating that: 'the underlying idea is that an international organization is expected to evolve and adapt to changes on the international plane'.[513]

The point could be made that this is a Western view of what in fact the intentions—or in the register of the International Court in this line of cases: intendment—of the founders at San Francisco were.[514] It is indubitably true, as Hambro said, that one thread of continuity in the interpretation and application of the Charter,[515] certainly during the Cold War, was that:

members, when they rely heavily on the United Nations for the advancement of their national interests and the support of their national policies, tend to take a liberal view with regard to the powers of organs and the capacity of the United Nations to act in furtherance of its purposes. Thus, on the one hand, non-Communist members under the

leadership of the United States, during the first decade, took a liberal view of the power and responsibilities of the General Assembly to justify the use of that veto-free organ to support their policies and achieve their purposes in the 'cold war'. On the other hand, members, when they do not see the possibility of utilizing the United Nations to serve national interests (possibly because of their being in a minority position on important issues), tend to take a restrictive line in Charter interpretation.[516]

Perhaps the best reply to this type of criticism would be to say that (in the current period of international law, where the positions of the Cold War are if not reversed then at least significantly changed in this respect)[517] the broad view of the intentions of the parties at San Francisco which was so popular in arguments by Western countries before the International Court in the 1940s, 1950s, and 1960s are today no less true for the fact that some of those countries have ceased to hold them.

A similar point about the intention of parties and the European Convention on Human Rights[518] is made by Simpson, who says that if we are to believe the judges on the European Court of Human Rights (which he suggests we ought not to), then human rights violations are taking place in Europe on a daily basis, and 'this is only **(p.133)** partially the result of moving the goal posts by interpreting the Convention as a living instrument'. He continues by observing that:

Absolutely nobody thought that that was the situation back in 1950, and Lauterpacht was certainly no exception to the general mood of self-congratulatory optimism. He never imagined that the Strasbourg institutions would become as intrusive a force as they have subsequently become. One wonders what he would have made of Strasbourg today, with the Secretariat and the Court at risk of destruction in part by the living instrument they have developed, and by the huge extension of populations protected by the Convention, as well as by the use of the Convention by individuals who, back in the 1950s, would have simply accepted their lot?[519]

Though Simpson does not give any examples, it would surely not be wrong to impute to his words a criticism of rulings from the European Court such as *Tyrer v United Kingdom*[520] and *Airey v Ireland*[521] where the European Court has held that the Convention is 'a living instrument' to be 'interpreted in the light of present-day conditions'.[522] The view expressed here by Simpson on the intentions of the parties—according to which no one had thought that the European Convention was intended by the parties to have any influence on the law of the member states of the Council of Europe—is open to question for the following reasons.

It is, however, clear from the preamble that 'the aim of the Council of Europe is the achievement of greater unity between its members and that one of the methods by which this aim is to be pursued is the maintenance and further realisation of human rights and fundamental freedoms'.[523] The parties sought not just the achievement but also the further realization and the development of the rights at issue.

This was clear also to the judges on the European Court in the first years of its activity.

President McNair underlined already in 1961, as the European Court sat for the first time, the importance of the European state authorities collaborating 'fully and conscientiously in implementing the Convention and aiding the Commission and the Court in their delicate task'; it can thus not have been an impossible contingency to the European Court's first President (1959–65) that the Convention could become an intrusive force if the state authorities did not do so.[524]

Just as importantly, however, there exists proof from before 1950 that the European Convention was intended by the parties to have a very real effect indeed. **(p.134)** Lauterpacht, whose work was acknowledged as being a direct forerunner to what would become the European Convention,[525] said in 1949 that: 'Even in democratic countries, situations may arise in which the individual is in danger of being crushed under the impact of reason of State'. He continued by explicitly mentioning human rights problems—as they had come to light in famous trials before the domestic courts of the United Kingdom, France, and the United States—and concluded that:

even in countries in which the rule of law is an integral part of the national heritage and in which the Courts have been the faithful guardians of the rights of the individual, there is room for a procedure which will put the imprimatur of international law upon the principle that the State is not the final judge of human rights.[526]

The same point, that the Convention could indeed have serious effects on the law of Western European states, was made by Hartcourt Barrington—representative, together with Maxwell Fyfe, of the United Kingdom in the drafting of the European Convention. Hartcourt Barrington expressed what he called the British draftsmen's great debt to Lauterpacht, from whom they 'shamelessly borrow[ed] many ideas'. Hartcourt Barrington said that the Convention was 'intended to be enforceable, and therefore puts the rights in a very concise and clear form'.[527] This background goes some way in tempering Simpson's claim. As another President of the European Court would put it, the Convention was indeed, as both its preamble and drafting history show, 'intended to evolve in response to changes in legal and social concepts'.[528]

3.3.14 *Loizidou* and *Bankovic*

The point could be illustrated with the judgments of the Grand Chamber of the European Court in *Loizidou* (Preliminary Objections)[529] and *Bankovic*.[530] The decision in *Loizidou* (Preliminary Objections) bore on whether an invalid reservation to a treaty is severable. It had been the orthodox position of general international law that it was not,[531] though, as Higgins has pointed out, the exact scope of the orthodox position, as set out by the International Court in *Reservations to the Genocide Convention*, is debatable, which makes it possible to say that there is no bifurcation between human rights law and the orthodox position.[532] Turkey had agreed to the application of the European Convention[533] and the competence of the Court **(p.135)** in respect of 'matters coming within Article 1 of the Convention and performed within the boundary of the national territory of the Republic of Turkey', a reservation which was plainly intended to exclude the northern part of Cyprus from the jurisdiction of the European Court. The Grand

Chamber of the Court held that the 'invalid' Turkish reservation was severable, and that Turkey therefore must be taken to have accepted the competence of the Court without any reservation at all.[534]

Before it could turn to the question of severability, however, the Grand Chamber had to ascertain whether the reservations in issue were acceptable; it was in this connection that the Grand Chamber discussed the evolutionary interpretation of the Convention and the intentions of the states parties to it. The Grand Chamber noted that the Convention was a living instrument which must be interpreted in the light of present-day conditions, and that such an approach was not confined to the substantive provisions of the Convention but also applied to those provisions, such as Articles 25 and 46, which govern the operation of the Convention's enforcement machinery. The Grand Chamber then made the following point about the intentions of the parties and evolutionary interpretation: 'these provisions cannot be interpreted solely in accordance with the intentions of their authors as expressed more than forty years ago'.[535] This sounds like an outright repudiation of the argument made in this book. It should be added, however, that the Grand Chamber was not convinced that it would in fact be going against the grain of the intentions of the parties if it were to make, as in the event it would do, an interpretation of the provisions leading to a treatment of the objectionable reservation as severable. The Grand Chamber underlined that it would not be in line with the object and purpose of the Convention to say that the contracting parties may impose restrictions on their acceptance of the competence of the Commission and the Court under Articles 25 and 46. This is in keeping with the thread that runs through both of the examples above—it would be wrong to adopt too narrow a view of the intentions of the parties.[536] It is also in keeping with the broader point made in this chapter: it is the taking into account of all the means on interpretation to which the treaty interpreter is directed by Articles 31–33 of the VCLT, of which the object and purpose is an important element, that leads to the establishment of what was the intention of the parties properly so-called. In fact, therefore, the Grand Chamber in *Loizidou* (Preliminary Objections) based its evolutionary interpretation upon the objectivized intention of the parties as established on the basis of the approach of the VCLT —although the Grand Chamber did so *malgré elle*.

In *Bankovic* the Grand Chamber of the European Court later, in respect of the interpretation of Article 1 of the European Convention, distinguished the evolutionary interpretation it had made in *Loizidou* (Preliminary Objections).[537] **(p.136)** When the Court held in *Bankovic* that it was, in principle, out of the question to make an evolutionary interpretation of Article 1,[538] it observed that this was so because the scope of that provision 'is determinative of the very scope of the Contracting Parties' positive obligations and, as such, of the scope and reach of the entire Convention system of human rights' protection'.[539] This, according to the Court, set the interpretation of Article 1 apart both from the interpretation of the Convention's substantive provisions,[540] and the provisions of the Convention which regulate the competence of the Convention organs to examine a case, the latter of which had been at issue in *Loizidou* (Preliminary Objections).[541]

The argument is colourable that the scope and reach of the Convention were intended to be evolutionary. That is the approach the International Court and its predecessor have taken to the evolutionary interpretation in similar situations where the scope and reach of the provisions contained in an instrument have depended upon the interpretation of the terms contained in one particular provision. Thus in *Aegean Sea* the Court, called upon to interpret a state's instrument of accession to a treaty excluding from the Court's jurisdiction 'disputes relating to territorial status' of that state, where the meaning of 'territorial status' was contested, stated that:

once it is established that the expression 'the territorial status of Greece' was used in Greece's instrument of accession as a generic term denoting any matters comprised within the concept of territorial status under general international law, the presumption necessarily arises that its meaning was intended to follow the evolution of the law and to correspond with the meaning attached to the expression by the law in force at any given time. This presumption, in the view of the Court, is even more compelling when it is recalled that the 1928 Act was a convention for the pacific settlement of disputes designed to be of the most general kind and of continuing duration, for it hardly seems conceivable that in such a convention terms like 'domestic jurisdiction' and 'territorial status' were intended to have a fixed content regardless of the subsequent evolution of international law.[542]

These points seem to apply with no less force in respect specifically of the interpretation of Article 1 of the European Convention. Moreover, as mentioned above, the Preamble of the Convention itself clearly states that it is the European Court's task to secure not only 'the maintenance' of the human rights and fundamental freedoms; it also sets out the task of ensuring the 'further realisation of human rights and fundamental freedoms'. The French version of the Preamble speaks of **(p.137)** 'la sauvegarde et le développement des droits de l'homme et des libertés fondamentales'. This injunction must be taken seriously. As former President of the European Court of Human Rights, Jean Paul Costa, observes:

le Préambule de la Convention indique que le but du Conseil de l'Europe, et donc de la Cour, est non seulement la sauvegarde des droits et libertés, mais encore leur *développement*. Cela implique une conception évolutive et progressive du contenu des droits reconnus, et la Cour manquerait à une partie de ses devoirs si elle ne veillait qu'à la sauvegarde des droits en négligeant l'impératif de leur développement.[543]

Not to take the living instrument, or evolutionary, approach to Article 1 of the Convention would amount to a failure of taking into account the 'conception évolutive et progressive du contenu des droits reconnus' which, by the clear admission of the Preamble, is incumbent upon the Court.

But given that the Court in *Bankovic* also made the statement that the rights of the Convention could not be 'divided and tailored',[544] it is possible to have some sympathy for the conclusion the Court reached in *Bankovic* in respect of whether the living instrument approach could be taken to Article 1. Giving an evolutionary interpretation to

the gatekeeper provision of Article 1, the result of which would be the broadening of the scope and reach of an indivisible and untailorable Convention, could, given the way the scenario was presented by the Court, be seen to be a tall order.

In *Al-Skeini*,[545] however, the Grand Chamber, overturning *Bankovic* on this point at least, made clear that the rights and obligations in the Convention *can* in fact be 'divided and tailored'.[546] This largely takes the sting out of the point which the Grand Chamber made about the *territorial* reach and scope of the Convention in *Bankovic*, that it would take a restrictive approach to the possible expansion, *ratione loci*, of the 'scope and reach of the *entire* Convention system of human rights' protection'.[547] In fact, as will be seen in Chapter 5, the Grand Chamber has explicitly taken an evolutionary approach to the scope and reach of the Convention rights in *temporal* terms. There is no Convention article that regulates the scope *ratione temporis* in the way that Article 1 bears on the scope *ratione loci*. In developing its approach to the scope of the Convention *ratione temporis*, the Grand Chamber in *Šilih*[548] explicitly saw the obligations at issue as having 'evolved', and it did so in *Šilih*, and in later cases, on the basis of the idea that, in temporal terms like in territorial terms, the application of the Convention rights can be 'divided and tailored'.[549] **(p.138)**

Chapter 5 will show, however, that the evolutionary interpretation which the Grand Chamber made in *Šilih* was supererogatory, as a straightforward application of the age-old doctrine of jurisdiction *ratione temporis* in international law, as developed already by the Permanent Court of International Justice, would have led to the same result.[550]

In fact, the question of the 'living instrument' or evolutionary interpretation of Article 1 of the European Convention is moot for the same reasons as the question of an evolutionary approach to jurisdiction *ratione temporis* is moot. The European Court can, instead of seeing the correct interpretation of Article 1 as a question of evolutionary interpretation, simply apply the approach of general international law.

In considering the same issue as confronted the European Court in *Bankovic*, the International Court observed in the *Wall* opinion that, in light of its object and purpose, the International Covenant on Civil and Political Rights[551] was 'applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory'.[552] This was confirmed in *Congo v DRC*.[553] Subsequently the Court has even done away with the mention of exercise of jurisdiction, stating in *Russia v Georgia* (Provisional Measures) that Articles 2 and 5 of the International Convention on the Elimination of All Forms of Racial Discrimination[554] 'generally appear to apply, like other provisions of instruments of that nature, to the actions of a State party when it acts beyond its territory'.[555] As far as general international law is concerned, 'a State will', in the words of President Higgins, 'of course be responsible for the acts attributable to it, even when those occur outside of its own jurisdiction'.[556] **(p.139)**

3.3.15 Conclusion

It is possible on this basis to conclude that the evolutionary interpretations arrived at in *Namibia*[557] and in *Tyrer v United Kingdom*[558] and *Airey v Ireland*[559] as well as

numerous cases in the jurisprudence of the European Court are best understood on the background of the intention of the parties, that is, an intention which is established objectively on the basis of the means of interpretation legitimately available. As the Tribunal in *RosInvest* (Jurisdiction) put it, human rights treaties 'represent the very archetype of treaty instruments in which the Contracting Parties must have intended that the principles and concepts which they employed should be understood and applied in the light of developing social attitudes';[560] the common thread in human rights treaties 'is that their nature or circumstances provide evidence that the Parties themselves *intended* or *understood* that an evolutionary approach was appropriate to the interpretation and application of what they had agreed upon'.[561]

If the common intention of the parties is given a restricted reading—one which does not fully take into account what the parties intended to achieve when concluding the instrument—then one may easily end up wrongly criticizing interpretations made in respect of treaties, elements of which were meant from the outset to evolve. There are, however, times when the intentions of the parties were that the treaty terms should be interpreted not in an evolutionary manner but rather contemporaneously. In such cases, too, it is the common intention of the parties which is controlling.

3.4 Conclusion

The analysis above has borne out that evolutionary interpretation is inexorably linked to the objectivized intention of the parties. The giving of effect to the intention of the parties does *not* have to be a deterrent to the use of evolutionary interpretation; rather the two—the intention of the parties and the evolutionary interpretation of treaties—are cut from the same cloth. This is why one can say that Article 31 of the VCLT[562] has played a critical role in the development of an evolutionary approach to treaty interpretation.

In that sense evolutionary interpretation relates to the intention of the parties in the same way that contemporaneous interpretation does. When one looks at the interpretive results arrived at by the International Court in, for example, *Namibia* or *Navigational Rights*, and one takes into account the careful way in **(p.140)** which the Court in those cases relied on the will of the parties, then one sees that this insistence on the importance of the intention of the parties is not by definition conservative. That which could be thought to be conservative would be to take too narrow an approach to what in fact was the common intention of the parties and then proceed to rely on that narrow conception. As the analysis has brought out, the object of treaty interpretation is to give effect to the intention of the parties as fully and fairly as possible. The analysis has also shown that that will by necessity at times involve imputing an intention to be bound by an evolving interpretation of the terms of the treaty. Once the parties have chosen to clothe their intention in the form of treaty provisions, an international Tribunal seized of the interpretation of that treaty is bound and entitled to assume an effective common intention of the parties.

If evolutionary interpretation is seen as a function of the common intention of the parties, it is not only rendered explicable; it also comes to us not as an aberrant and freewheeling interpretive technique but as nothing else than a result of the traditional canons of treaty

interpretation. It is, to appropriate McNair's description of Huber's evolutionary interpretation in *Spanish Zone of Morocco Claims*,[563] a 'proper and commonsense' interpretive technique.[564]

Equally, however, these insights make it necessary to take the argument one step further. Not only is evolutionary interpretation not exceptional, as it too is a result of the interpretive process described in the general rule of interpretation. Not only will it, as was seen at the beginning of this chapter, more often than not be corroborated by the subsequent practice of the parties, as has been the case in the jurisprudence of the International Court and also in the European Court of Human Rights. There are times when evolutionary interpretation is really wholly supererogatory, times when there simply is no need for it as the result to which it would have led already follows from the plain meaning of the text read in good faith.

As has been seen in this chapter, interpretation of treaties drafted in generic terms indeed comes close to meaning that speaking of evolutionary interpretation may be of little use, as the mere wording comes so close to providing us with the answer. As seen above, this point was made already by the Permanent Court in *Employment of Women during the Night* when, in a statement of principle regarding 'provisions which are general in scope', it stated that:

The mere fact that, at the time when the Convention...was concluded, certain facts or situations, which the terms of the Convention in their ordinary meaning are wide enough to cover, were not thought of, does not justify interpreting those of its provisions which are general in scope otherwise that in accordance with their terms.[565]

The same point, which if taken seriously leaves very little scope or need for evolutionary interpretation, was made more recently by the Panel Report in *Certain* ***(p.141)*** *Information Technology Products*.[566] At issue in this case was the interpretation of so-called concession commitments in relation to technological progress and whether the treaty text, 'flat panel display devices', covered types of technology, in the event LCD screens, which did not exist when the text was drafted. The Panel 'applied the customary rules of interpretation of public international law, as codified in Article 31 of the Vienna Convention' and, in doing so, 'examined the ordinary meaning of the terms', and the Panel went on to note that the 'generic terms' had been used in the treaty, 'to cover a wide range of products and technologies'.[567] In light of its conclusion on the ordinary meaning of the terms, the Panel did 'not consider it necessary to resort to any form of evolutionary interpretation'.[568] In this way the Panel in *Certain Information Technology Products* arrived at the same result to which an evolutionary interpretation would have led in the event, by relying upon what it saw as the ordinary meaning of the terms.

In fact the same could be said about *Navigational Rights*, where Judge *ad hoc* Guillaume held that the result which the Court had reached by way of evolutionary interpretation could also be reached by way of ordinary interpretation of the wording. For he found that 'the drafters of the 1858 Treaty intended to cover the transport for profit of passengers as well as of goods when they referred to navigation for commercial

purposes'.[569] In other words, it was arguably not necessary to resort to any form of evolutionary interpretation here either.

In any event, these insights add to the point that there is nothing exceptional about evolutionary interpretation. Not only does evolutionary interpretation follow as naturally from the general rule of interpretation; it is, at times, nothing else than a different name for, as the Permanent Court put it in *Employment of Women during the Night*, interpreting treaty provisions 'in accordance with their terms'.[570]

Notes:

([1]) F Berman, 'International Treaties and British Statutes' (2005) 26 SLR 1, 3.

([2]) Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331; (1969) 8 ILM 679, Art 2(b), Art 11, Art 12, Art 13, Art 14, Art 15, Art 17, Art 18(b), Art 20(4)(c), Art 20(5), Art 23(2), Art 24(2), Art 46(1), Art 48(1), Art 49, Art 50, Art 51, Art 65(1), and Art 69(4). See S Rosenne, '"Consent" and Related Words in the Codified Law of Treaties' in *Mélanges offerts à Charles Rousseau: La comunauté international* (Pedone, 1974), 229; A Bolintineau, 'Expression of Consent to be Bound by a Treaty in the Light of the 1969 Vienna Convention' (1974) 68 AJIL 672; G Korontzis, 'Making the Treaty' in D Hollis (ed), *Oxford Guide to Treaties* (Oxford University Press, 2012), 196.

([3]) P Reuter, *La Convention de Vienne du droit des traités* (Armand Colin, 1971), 15–17.

([4]) *Free Zones of Upper Savoy and the District of Gex* (1932) PCIJ Series A/B No 46, 166; *Interpretation of the Statute of the Memel Territory* (1932) PCIJ Series A/B No 49, 313–14; *Award in the Arbitration regarding the Iron Rhine ('Ijzeren Rijn') (Belgium v Netherlands)* (2005) 27 RIAA 35, 64.

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

([6]) *Daimler Financial Services AG v Argentine Republic* (n 5) at [168].

([7]) ILC Ybk 1964/II, 58 at [21].

([8]) G Gaja, 'Trattati internazionali' (1999) 15 DDP 344, 355–6.

([9]) I Sinclair, *The Vienna Convention on the Law of Treaties* (2nd edn, Manchester University Press, 1984), 114–53; F Jacobs, 'Varities of Approach to Treaty Interpretation' (1969) 18 ICLQ 318; JM Sorel and V Boré Eveno, 'Article 31' in O Corten and P Klein (eds), *The Vienna Convention on the Law of Treaties: A Commentary* (Oxford University Press, 2011), 804–37; R Kolb, *Interprétation et création du droit international. Esquisse d'une herméneutique juridique moderne pour le droit international public* (Bruylant, 2006); S Sur, *L'interprétation en droit international public* (LGDJ, 1974), 194; C McLachlan, 'The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention' (2005) 54 ICLQ 279, 291; A Orakhelashvili, *The*

Interpretation of Acts and Rules in Public International Law (Oxford University Press, 2008), 285; I Brownlie, *Principles of International Law* (7th edn, Oxford University Press, 2008), 630–1.

([10]) *Interpretation of the Treaty of Lausanne, Article 3, paragraph 2* (1925) PCIJ Ser B, No 12, 18–19. Also: *Italy–United States Air Transport* (Arbitration) (1965) 45 ILR 393, 408. Further: P Reuter, *Introduction to the Law of Treaties* (J Mico and P Haggenmacher tr, Paul Kegan International, 1995), 24.

([11]) R Gardiner, *Treaty Interpretation* (paperback edn, Oxford University Press, 2011), 5.

([12]) Reuter, *Introduction to the Law of Treaties* (n 10), 96–7.

([13]) G Guillaume, 'Methods and Practice of Treaty Interpretation by the International Court of Justice' in G Sacerdoti, A Yanovich, and J Bohanes (eds), *The WTO at Ten: The Contribution of the Dispute Settlement System* (Cambridge University Press, 2006), 472–3.

([14]) *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* [1971] ICJ Rep 16, 35 at [53]. Also: *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria: Equatorial Guinea intervening)* (Judgment) [2002] ICJ Rep 303, 346 ('the Court must seek to ascertain the intention of the parties').

([15]) *Aegean Sea Continental Shelf* [1978] ICJ Rep 3, 32 at [77].

([16]) *Gabčíkovo–Nagymaros Project (Hungary/Slovakia)* (Judgment) [1997] ICJ Rep 7, 78–9 at [142].

([17]) *Dispute regarding Navigational and Related Rights (Costa Rica v Nicaragua)* (Judgment) [2009] ICJ Rep 213, 242 at [63].

([18]) *Pulp Mills on the River Uruguay (Argentina v Uruguay)* (Judgment) [2010] ICJ Rep 14, 83 at [204].

([19]) See, on these concepts, Ch 2.2.

([20]) V Gowland-Debbas, 'The Role of the International Court of Justice in the Development of the Contemporary Law of Treaties' in CJ Tams and J Sloan (eds), *The Development of International Law by the International Court of Justice* (Oxford University Press, 2013), 35–7. Also: *Young Loan Arbitration* (1980) 59 ILR 494, 531 at [18]–[19]; *Dispute concerning Filleting within the Gulf of St Lawrence ('La Bretagne') (Canada/France)* (1986) 82 ILR 591, 659–60; *Case Concerning the Delimitation of the Maritime Boundary between Guinea-Bissau and Senegal (Guinea-Bissau v Senegal)* (1989) 10 RIAA 119, 152 at [85]; *Iron Rhine (Belgium v Netherlands)* (n 4), 65 and 73. See ILC Draft Conclusions on Subsequent Agreements and Subsequent Practice in

Relation to the Interpretation of Treaties 2013, ILC Report 2013 UN Doc A/68/10, 26 at [7] ('In the *Iron Rhine* case the continued viability and effectiveness of a multi-dimensional crossborder railway arrangement was an important reason for the Tribunal to accept that even rather technical rules may have to be given an evolutive interpretation').

([21]) ILC Ybk 1966/II, 218–19. Also: ILC Ybk 1964/II, 58 at [21].

([22]) V Lowe, *International Law* (Oxford University Press, 2007), 74.

([23]) A Aust, *Modern Treaty Law and Practice* (3rd edn, Cambridge University Press, 2013), 222.

([24]) Lowe, *International Law* (n 22), 74. Also: Aust, *Modern Treaty Law and Practice* (n 23), 216–17.

([25]) AD McNair, *The Law of Treaties* (2nd edn, Oxford University Press, 1961), 392.

([26]) S Beckett, 'Worstward Ho' in *Nohow On* (Calder, 1992), 101.

([27]) *Dispute regarding Navigational and Related Rights (Costa Rica v Nicaragua)* (n 17), 242 at [63].

([28]) J Basdevant (ed), *Dictionnaire de la terminologie du droit international* (Sirey, 1960) 'intention'. Also: C Calvo, *Dictionnaire de droit international public et privé* (Pedone, 1885), 400.

([29]) J Salmon (ed), *Dictionnaire de droit international public* (Bruylant, 2001), 'intention'.

([30]) Dissenting Opinion of Judge Schwebel in *Maritime Delimitation and Territorial Questions* [1994] ICJ Rep 6, 27. Also: *EC—Computer Equipment*, Report of the Appeallate Body WT/DS62/AB/R; WT/DS67/AB/R; WT/DS68/AB/R [84]: 'The purpose of treaty interpretation under Article 31 of the Vienna Convention is to ascertain the *common* intentions of the parties. These *common* intentions cannot be ascertained on the basis of the subjective and unilaterally determined "expectations" of *one* of the parties to a treaty.'

([31]) Draft Report of the International Law Commission on the Work of Its Sixty-Fifth Session A/CN.4/L.819/Add.1, 18.

([32]) ILC YBK 1964/II, 58.

([33]) *Lands, Island and Maritime Frontier Dispute* (Judgment) [1992] ICJ 351, 585 at [378]. Also: *The Borchgrave Case* (Preliminary Objections) PCIJ (1937) Series A/B No 72, 163.

([34]) *Argentina/Chile Frontier Case (Palena)* (1966) 16 RIAA 109, 174; (1966) 38 ILR 10, 89; *Decision regarding delimitation of the border between Eritrea and Ethiopia* (2002) 25 RIAA 83, 110; (2002) 130 ILR 1, 34 at [3.4].

([35]) *Dispute regarding Navigational and Related Rights (Costa Rica v Nicaragua)* (n 17), 237.

([36]) *Argentina/Chile Frontier Case (Palena)* (n 34), 89. Also: M Sørensen, *Les sources du droit international: Étude sur la jurisprudence de la Cour permanente international de justice* (Einar Munksgaard, 1946), 214–15; JD Mortenson, '*The Travaux of Travaux*: Is the Vienna Convention Hostile to Drafting History?' (2013) 107 AJIL 780; G Nolte, 'Introductory Report of the Study Group on Treaties over Time' in G Nolte (ed), *Treaties and Subsequent Practice* (Oxford University Press, 2013).

([37]) *Interpretation of the Air Transport Services Agreement between the United States of America and France* (1963) 16 RIAA 5, 47; (1963) 38 ILR 182, 229. Also: *Lighthouses Case between France and Greece* (1934) PCIJ Series A/B No 62, 13 and 18; *Reservations to the Convention on Genocide* (Advisory Opinion) [1951] ICJ Rep 15, 23; *Case of Certain Norwegian Loans* (Judgment) [1957] ICJ Rep 9, 23 and 27; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)* (n 14), 35 at [53]; *Dispute regarding Navigational and Related Rights (Costa Rica v Nicaragua)* (n 12), 237 at [48]; *Argentina/Chile Frontier Case (Palena)* (n 27), 89; *Decision regarding delimitation of the border between Eritrea and Ethiopia* (n 34), 34 at [3.4]; *Tax regime governing pensions paid to retired UNESCO officials residing in France (France v UNESCO)* (2003) 25 RIAA 231, 248; *China—Audiovisual Entertainment Products*, Report of the Appeallate Body WT/DS363/AB/R at [405]; *US—Gambling* Report of the Appellate Body WT/DS363/AB/R at [84]; *EC—Computer Equipment*, Report of the Appeallate Body WT/DS62/AB/R; WT/DS67/AB/R; WT/DS68/AB/R at [84].

([38]) R Dworkin, *A Matter of Principle* (Harvard University Press, 1985), 48.

([39]) Dworkin, *A Matter of Principle* (n 38), 48–50.

([40]) Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 UNTS 222.

([41]) G Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (Oxford University Press, 2007), 70. Letsas goes on, however, to state that: 'any theory of interpretation for the ECHR (or any international treaty) must at some stage stand outside drafters' intentions and provide a normative justification based on values of political morality'. This idea captures, he says, 'the spirit of arts 31–32 VCLT. We cannot know whether (and the extent to which) drafters' intentions are relevant unless we settle first on the object and purpose of the treaty'. As will become clear, this study does not share that view of Arts 31–32 of the VCLT and more broadly of the role of the intention of the parties.

([42]) Declaration of Judge Higgins in *Kasikili/Sedudu Island (Botswana/Namibia)* (Judgment) [1999] ICJ Rep 1045, 1114. Also: R Higgins, 'Some Observations on the Inter-Temporal Rule in International Law' in *Theory of International Law at the Threshold of the 21st Century: Essays in Honour of Krzystof Skubiszewski* (Kluwer,

1996), 181. Further: H Waldock, United Nations Conference on the Law of Treaties: Official Records, First Session, Vienna, 1968: Summary Records 184 at [70].

([43]) Draft Report of the International Law Commission on the Work of Its Sixty-Fifth Session (n 31), 17–18.

([44]) Draft Report of the International Law Commission on the Work of Its Sixty-Fifth Session (n 31), 18.

([45]) ILC Ybk 1966/II, 218–19.

([46]) See W Churchill, *House of Commons Speech*, 11 November 1947 ('Democracy is the worst form of government, except for all those other forms that have been tried from time to time').

([47]) P Daillier, M Forteau, and A Pellet, *Droit international public* (8th edn, LGDJ, 2009), 283.

([48]) Daillier, Forteau, and Pellet, *Droit international public* (n 47), 283

([49]) H Waldock, 'The Effectiveness of the System Set up by the European Convention on Human Rights' (1980) 1 HRLJ 1, 3.

([50]) Waldock, 'The Effectiveness of the System Set up by the European Convention on Human Rights' (n 49), 1–4.

([51]) ILC Ybk 1966/II, 222.

([52]) J Christoffersen, *Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights* (Martinus Nijhoff, 2009), 54.

([53]) *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt* [1980] ICJ Rep 73, 95 at [47].

([54]) Charter of the United Nations, 26 June 1945, 892 UNTS 119.

([55]) Resolution 2625 (XXV), 24 October 1970.

([56]) Lowe, *International Law* (n 22), 116–18.

([57]) C Greenwood, 'State Contracts in International Law' (1982) 53 BYIL 27, 42.

([58]) Resolution 1803 (XVII), 14 December 1962.

([59]) R Kolb, *La bonne foi en droit international public: Contribution à l'étude des principes généraux de droit* (Presses Universitaires de France, 2000), 274–5.

([60]) *Loizidou v Turkey* (Preliminary Objections) (1995) 103 ILR 622, 644–9.

([61]) *North Atlantic Fisheries (Great Britain v United States)* (1910) 11 RIAA 167, 188. See also *Land and Maritime Boundary between Cameroon and Nigeria* (Preliminary Objections) (Judgment) [1998] ICJ Rep 275, 296 (which cites *North Atlantic Fisheries*); *Factory at Chorzow* (Merits) (Judgment No 13) (1928) PCIJ Series A No 17, 30; *Certain German Interests in Polish Upper Silesia* (Merits) (1926) PCIJ Series A No 7, 4, 30 (French version only); *Free Zones of Upper Savoy and the District of Gex, Order of 6 December* (1930) PCIJ Series A No 24, 12 and (1932) PCIJ Series A/B No 46, 167; *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter)* (Advisory Opinion) [1948] ICJ Rep 57, 63; *Rights of Nationals of the United States of America in Morocco* (Judgment) [1952] ICJ Rep 212; *Fisheries Jurisdiction (Federal Republic of Germany v Iceland)* (Jurisdiction of the Court) (Judgment) [1973] ICJ Rep 18. See also *Re Italian Special Capital Levy Duties* (1949) 18 ILR 406, 407; *Lighthouses Arbitration (Claim No 26)* (1956) 23 ILR 342, 345; *Alsing Trading Co v The Greek State* (1954) 23 ILR 633, 635; *Interpretation of Article 78(7) of the Peace Treaty with Italy 1947 (Franco–Ethiopian Railway Co claim)* (1956) 24 ILR 602, 626; *Pertusola claim* (1951) 18 ILR 414, 419.

([62]) *Nuclear Tests (Australia v France) (New Zealand v France)* ICJ Rep 1974 253, 267.

([63]) *Pulp Mills on the River Uruguay (Argentina v Uruguay)* (n 18), 14 at [145].

([64]) H Thirlway, 'The Law and Procedure of the International Court of Justice 1960–1989 Part III' (1991) 62 BYIL 1, 17; MK Yasseen 'L'interprétation des traités d'après la Convention de Vienne sur le droit des traités' (1976) 15 Hague *Recueil* 21.

([65]) Thirlway, 'Law and Procedure 1960–1989 III' (n 64), 17–18.

([66]) See ME Villiger, 'The Rules on Interpretation: Misgivings, Misunderstandings, Miscarriage? The "Crucible" Intended by the International Law Commission' in E Cannizzaro (ed), *The Law of Treaties Beyond the Vienna Convention* (Oxford University Press, 2011), 108–9.

([67]) McNair, *The Law of Treaties* (n 25), 465.

([68]) Reuter, *Introduction to the Law of Treaties* (n 10), 94.

([69]) E Zoller, *La bonne foi en droit international* (Pedone, 1977), 202.

([70]) Dissenting Opinion of Judge Schwebel in *Maritime Delimitation and Territorial Questions* [1994] ICJ Rep 6, 39.

([71]) *Auditing of Accounts between the Kingdom of the Netherlands and the French Republic (Netherlands/France) (Rhine Chlorides Arbitration)* (2004) 25 RIAA 267; (2004) 144 ILR 259, 292–3 at [63]. Also: RY Jennings, 'Treaties' in M Bedjaoudi (ed), *International Law: Achievements and Prospects* (Martinus Nijhoff, 1991), 146.

([72]) H Lauterpacht, 'De l'interprétation des traités' (1950) 43 Ann de l'Inst 366, 383. Also:

R Bernhardt, *Die Auslegung völkerrechtlicher Verträge—insbesondere in der Rechtsprechung internationaler Gerichte* (Heymann, 1963), 24.

([73]) H Lauterpacht, 'Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties' (1949) 26 BYIL 48, 56.

([74]) Aust, *Modern Treaty Law and Practice* (n 23), 160–1.

([75]) Lauterpacht, 'Restrictive Interpretation and the Principle of Effectiveness' (n 73), 56.

([76]) Bernhardt, *Auslegung völkerrechtlicher Verträge* (n 72), 24. (The agreement in legal doctrine of the importance in treaty interpretation of good faith 'steht die erstaunliche Tatsache gegenüber, daβ in der neueren Praxis, vor allem in der internationalen Gerichtspraxis, von Geboten der *bona fides* nur auβerordentlich selten die Rede ist'.)

([77]) Kolb, *La bonne foi* (n 59), 267.

([78]) Cf U Linderfalk, *On the Interpretation of Treaties: The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties* (Springer, 2007).

([79]) See generally O Corten, *L'utilisation du 'raisonnable' par le juge international* (Bruylant, 1997).

([80]) A Rivier, *Principes du droit des gens* (Rousseau, 1896) at [157].

([81]) *Barcelona Traction, Light and Power Co Ltd* (Judgment) [1970] ICJ Rep 3, 48 at [93]. Also: Dissenting Opinion of Judge Yusuf in *Whaling in the Antarctic (Australia v Japan: New Zealand Intervening)* (Judgment) 31 March 2014 at [15].

([82]) Joint Dissenting Opinion of Judges Lauterpacht, Wellington Koo, and Spender in *Aerial Incident of 27 July 1955 (Israel v Bulgaria)* (Preliminary Objections) [1959] ICJ Rep 127, 189. See eg Zoller, *La bonne foi* (n 69), 229; Kolb, *La bonne foi* (n 59), 271.

([83]) Zoller, *La bonne foi* (n 69), 203. See on the relationship between equity and good faith more generally, AV Lowe, 'The Role of Equity in International Law' (1989) 12 AYIL 54, 72–3; E Lauterpacht, *Aspects of the Administration of International Justice* (Grotius, 1991), 117–52.

([84]) Individual Opinion of Judge *ad hoc* Torres Bernárdez in *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)* [1992] ICJ Rep 351, 718–19.

([85]) Further: Sinclair, *Vienna Convention* (n 9), 120–1.

([86]) *Territorial Dispute between Libya and Chad* [1994] ICJ Rep 6, 21–2 at [41]. See Ch 3.3.7.

([87]) *Rhine Chlorides Arbitration (Netherlands/France)* (n 71), 292–3 at [63].

([88]) *Cayuga Indians (Great Britain) v United States* (1926) 6 RIAA 173, 179.

([89]) Lowe, *International Law* (n 22), 117.

([90]) *Diverted Cargoes Case (Greece v United Kingdom)* (1955) 12 RIAA 53, 70 ('le principe fondamental de la bonne foi qui régit, soit l'interprétation, soit l'exécution des conventions et incite à rechercher la commune intention des États contractants').

([91]) H Lauterpacht, *International Law—Collected Papers IV* (Cambridge University Press, 1978), 437–8.

([92]) Kolb, *La bonne foi* (n 59), 275.

([93]) See *Certain Expenses of the United Nations (Article 17, paragraph 2 of the Charter)* (Advisory Opinion) [1962] ICJ Rep 151, 159; *South West Africa* (Second Phase) (Judgment) [1966] ICJ Rep 6, 48; *Interpretation of Peace Treaties* (Second Phase) (Advisory Opinion) [1950] ICJ Rep 221, 229; *Rights of Nationals of the United States of America in Morocco (France v United States of America)* (n 61), 196.

([94]) *Boundary Dispute between Argentina and Chile Concerning the Delimitation of the Frontier Line between Boundary Post 62 and Mount Fitzroy* (1994) 22 RIAA 3, 25; (1994) 113 ILR 1, 45 at [75].

([95]) See *Lighthouses Case between France and Greece* (n 37), 13 and 18; *Interpretation of the Air Transport Services Agreement between the United States of America and France* (n 37), 229; *Decision regarding delimitation of the border between Eritrea and Ethiopia* (n 34), 34 at [3.4].

([96]) *The Indo–Pakistan Western Boundary (Rann of Kutch) Case (India v Pakistan)* (1976) 50 ILR 1, 104.

([97]) *Affaire relative à l'interprétation du traité de commerce conclu entre l'Italie et la Suisse le 13 juillet 1904 (Italie/Suisse)* (1911) 11 RIAA 257.

([98]) *Affaire relative à l'interprétation du traité de commerce conclu entre l'Italie et la Suisse le 13 juillet 1904* (n 97), 262. Also: *Affaire de l'indemnité russe (Russie/Turquie)* (1912) 11 RIAA 421, 446; *Pertosula Claim* (1951) 18 ILR 414, 419–23; *Anglo–Iranian Oil Co Case (Jurisdiction)* (Judgment) [1952] ICJ Rep 93, 107.

([99]) *Baer* (1959) 14 RIAA 402.

([100]) *Baer* (n 99), 405–6.

([101]) *Baer* (n 99), 406 (internal references and inverted commas omitted).

([102]) A Clapham, *Brierly's Law of Nations: An Introduction to the Role of International Law in International Relations* (7th edn, Oxford University Press, 2012), 354; Jennings, 'Treaties' (n 71), 145.

([103]) Zoller, *La bonne foi* (n 69), 235–6.

([104]) This was classically expounded by the Permanent Court in *Acquisition of Polish Nationality* PCIJ (1923) Series B No 7, 7, 20, to which the Tribunal in *Baer* also made reference, where the Permanent Court declined to follow the bad-faith interpretation suggested by Poland as to who was Polish for the purposes of Art 4(1) of the Treaty of 28 June 1919 between the Principal Allied and Associated Powers and Poland. The Court held that: 'The Court's task is clearly defined. Having before it a clause which leaves little to be desired in the nature of clearness, it is bound to apply this clause as it stands, without considering whether other provisions might with advantage have been added to or substituted for it....To impose an additional condition for the acquisition of Polish nationality, a condition not provided for in the Treaty of June 28th, 1919, would be equivalent not to interpreting the Treaty, but to reconstructing it.' See Ch 1.

([105]) Zoller, *La bonne foi* (n 69), 238.

([106]) *The Indo–Pakistan Western Boundary (Rann of Kutch) Case (India v Pakistan)* (n 96), 104.

([107]) GT di Lampedusa, *The Leopard* (*Archibald Colquhoun tr, Random House*, 1960), 26.

([108]) *Dispute regarding Navigational and Related Rights (Costa Rica v Nicaragua)* (n 17), 213 at [63].

([109]) *Dispute regarding Navigational and Related Rights (Costa Rica v Nicaragua)* (n 17), 213 at [64].

([110]) *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)* (n 14), 35.

([111]) Charter of the United Nations, 26 June 1945, 892 UNTS 119.

([112]) See Kolb, *La bonne foi* (n 59), 503–10.

([113]) *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)* (n 14), 35, 45–6.

([114]) Kolb, *La bonne foi* (n 59) 526–30.

([115]) Separate Opinion of Judge Lauterpacht in *South West Africa—Voting Procedure, Advisory Opinion* [1955] ICJ Rep 67, 105, 119–20; Separate Opinion of Judge Gros in *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)* (n 14), 35, 338–41.

([116]) See H Waldock, 'The Evolution of Human Rights Concepts and the Application of the European Convention on Human Rights' in *Mélanges offerts à Paul Reuter—Le droit international: unité et diversité* (Pedone, 1981), 535, 541.

([117]) Dissenting Opinion of Judge Fitzmaurice in *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)* (n 14), 35, 208–310.

([118]) See Ch 4.

([119]) See Nolte, *Treaties and Subsequent Practice* (n 36); J Arato, 'Treaty Interpretation and Constitutional Change: Informal Change in International Organizatons' (2013) 38 Yale JIL 289, 307–48; R Gardiner, 'The Vienna Convention Rules on Treaty Interpretation' in D Hollis (ed), *The Oxford Guide to Treaties* (Oxford University Press, 2012), 494–5.

([120]) *Dispute regarding Navigational and Related Rights (Costa Rica v Nicaragua)* (n 17), 213, 242–3.

([121]) *Dispute regarding Navigational and Related Rights (Costa Rica v Nicaragua)* (n 17), 213, 242.

([122]) Separate Opinion of Judge Skotnikov in *Dispute regarding Navigational and Related Rights (Costa Rica v Nicaragua)* (n 17), 213, 284–85.

([123]) Nolte, 'Introductory Report of the Study Group on Treaties over Time' (n 36), 184–8.

([124]) *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)* (n 14), 16, 30–1.

([125]) *Aegean Sea Continental Shelf* (n 15), 31.

([126]) *Mangouras v Spain* App No 12050/04 judgment [GC] 28 September 2010.

([127]) Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 UNTS 222.

([128]) Joint Dissenting Opinion of Judges Rozakis, Bratza, Bonello, Cabral Barretto, Davíd Thór Björgvinsson, Nicolau, and Bianku in *Mangouras v Spain* (n 126) at [1].

([129]) *Mangouras v Spain* (n 126) at [87].

([130]) *Mangouras v Spain* (n 126) at [86].

([131]) *Kasikili/Sedudu Island (Botswana/Namibia)* (n 42), 1094.

([132]) T Ginsburg, 'Bounded Discrection in International Judicial Lawmaking' (2005) 45 Va JIL 1, 41–2.

([133]) Also: *Nationality Decrees Issued in Tunis and Morocco* (1923) PCIJ Series B No 4, 7; *Gabčíkovo–Nagymaros Project (Hungary/Slovakia)* (n 16); *Pulp Mills on the River Uruguay (Argentina v Uruguay)* (n 18), 14.

([134]) *Tyrer v United-Kingdom* (1978) 58 ILR 339, 353.

([135]) *A, B and C v Ireland* App No 25579/05 judgment [GC] 16 December 2010 at [234].

([136]) Nolte, 'Second Report of the Study Group on Treaties over Time' (n 36), 254.

([137]) LR Helfner, 'Nonconsensual International Lawmaking' [2008] U Ill LR 71, 88.

([138]) *Affaire de l'indemnité russe (Russie/Turquie)* (1912) 11 RIAA 421, 433.

([139]) *Interpretation of Article 3(2) of the Treaty of Lausanne* (n 10), 24. Also: *Jurisdiction of the Courts of Danzig* (1928) PCIJ Series B No 15, 4, 18.

([140]) See G Distefano, 'La pratique subséquente des États parties à un traité' (1994) 40 AFDI 41.

([141]) See Gardiner, 'Vienna Convention Rules' (n 119); A Boyle, 'Reflections on the Treaty as a Law-Making Instrument' in A Orakhelashvili and S Williams (eds), *40 Years of the Vienna Convention on the Law of Treaties* (British Institute of International and Comparative Law, 2010), 21–8.

([142]) Clapham, *Brierly's Law of Nations* (n 102), 356.

([143]) *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)* (n 14), 16 at [53].

([144]) *Aegean Sea Continental Shelf* (n 15), 32 at [77].

([145]) *Gabčíkovo–Nagymaros Project (Hungary/Slovakia)* (n 16), 78–9 at [142].

([146]) *Pulp Mills on the River Uruguay (Argentina v Uruguay)* (n 18), 83 at [204].

([147]) *Whaling in the Antarctic (Australia v Japan: New Zealand Intervening)* (n 81).

([148]) International Convention for the Regulation of Whaling, 2 December 1946, 161 UNTS 72.

([149]) *Whaling in the Antarctic (Australia v Japan: New Zealand Intervening)* (n 81) at [44].

([150]) Convention for the Regulation of Whaling, 24 September 1931, 155 LNTS 349.

([151]) International Agreement for the Regulation of Whaling, 8 June 1937, 190 LNTS 79.

([152]) *Whaling in the Antarctic (Australia v Japan: New Zealand Intervening)* (n 81) at [45]. Further: Separate Opinion of Judge Greenwood at [5]; Separate Opinion of Judge Charlesworth *ad hoc* at [3]; Separate Opinion of Judge Cançado Trindade at [25]–[40].

([153]) *Whaling in the Antarctic (Australia v Japan: New Zealand Intervening)* (n 81) at [56].

([154]) Separate Opinion of Judge Lauterpacht in *South West Africa—Voting Procedure* (n 115), 106.

([155]) *Whaling in the Antarctic (Australia v Japan: New Zealand Intervening)* (n 81).

([156]) Separate Opinion of Judge Greenwood in *Whaling in the Antarctic (Australia v Japan: New Zealand Intervening)* (n 81) at [7].

([157]) See Ch 3.3.8.

([158]) Separate Opinion of Judge Greenwood in *Whaling in the Antarctic (Australia v Japan: New Zealand Intervening)* (n 81) at [5].

([159]) Further: Separate Opinion of Judge Charlesworth *ad hoc* in *Whaling in the Antarctic (Australia v Japan: New Zealand Intervening)* (n 81) at [3].

([160]) *Indus Waters Kishenganga Arbitration (Pakistan v India)* (Partial Award) (2013) 154 ILR 1, 173 at [452].

([161]) *Whaling in the Antarctic (Australia v Japan: New Zealand Intervening)* (n 81).

([162]) C Redgwell, 'Multilateral Environmental Treaty-Making' in V Gowland-Debbas (ed), *Multilateral Treaty-Making: The Current Status of Challenges to and Reforms Needed in the International Legislative Process* (Martinus Nijhoff, 2000), 107. Also: Separate Opinion of Judge Cançado Trindade in *Whaling in the Antarctic (Australia v Japan: New Zealand Intervening)* (n 81) at [29]–[30].

([163]) See *Territorial Dispute (Libya/Chad)* (n 86), 21–2; *Oil Platforms (Islamic Republic of Iran v United States of America)* (Preliminary Objection) (Judgment) [1996] ICJ Rep 803, 812; *Kasikili/Sedudu Island (Botswana/Namibia)* (n 42), 1059; *LaGrand (Germany v United States of America)* (Judgment) [2001] ICJ Rep 466, 501; *Pulau Ligitan/Sipadan* [2002] ICJ Rep 625, 645; *Avena and Other Mexican Nationals* [2004] ICJ Rep 12, 34; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136, 174; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* [2007] ICJ Rep 43, 109–10.

([164]) *Continental Shelf (Libya/Malta)* [1995] ICJ Rep 13, 23 ('Since the jurisdiction of the Court derives from the Special Agreement between the Parties, the definition of the task so conferred upon it is primarily a matter of ascertainment of the intention of the Parties by interpretation of the Special Agreement').

([165]) *Frontier Dispute (Burkina Faso/Mali)* [1986] ICJ Rep 554, 577 ('In the present case, the Chamber finds it to be clear from the wording of the Special Agreement—including its preamble—that the common intention of the Parties was that the Chamber should indicate the frontier line between their respective territories throughout the whole of the "disputed area", and that this area was for them the whole of the frontier not

yet delimited by joint agreement').

([166]) B Simma, 'Miscellaneous Thoughts on Subsequent Agreements and Practice' in G Nolte (ed), *Treaties and Subsequent Practice* (Oxford University Press, 2013), 48; P Palchetti, 'Interpreting "Generic Terms": Between Respect for the Parties' Original Intention and the Identification of the Ordinary Meaning' in Boschiero et al (eds), *International Courts and the Development of International Law: Essays in Honour of Tullio Treves* (Brill, 2013), 103–4; J Katz Cogan, 'The 2009 Judicial Activity of the International Court of Justice' (2010) 104 AJIL 605, 612–13; A Orakhelashvili, 'The Recent Practice on the Principles of Treaty Interpretation' in A Orakhelashvili and S Williams (eds), *40 Years of the Vienna Convention on Treaties* (British Institute of International and Comparative Law, 2010), 134–5.

([167]) *Iron Rhine (Belgium v Netherlands)* (n 4), 65 and 73–4. Also: *La Bretagne (Canada/France)* (n 20), 659–60; *Young Loan Arbitration* (n 20), 531 [18]–[19]; *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WB/DS58/AB/R, 12 October 1998 at [130]; *China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/AB/R, 21 December 2009 at [396]. Cf *European Communities and its Member States—Tariff Treatment of Certain Information Technology Products*, WT/DS375, 376 and 377/R, 16 August 2010 at [7.600]. More generally, the AB takes the view of treaty interpretation that: 'The purpose of treaty interpretation under Article 31...is to ascertain the common intentions of the parties': *EC—Computer Equipment*, Report of the Appellate Body WT/DS62/AB/R; WT/DS67/AB/R; WT/DS68/AB/R [84]; *US—Gambling*, Report of the Appellate Body WT/DS363/AB/R at [84].

([168]) Palchetti, 'Interpreting "Generic Terms"' (n 166), 103–4.

([169]) Palchetti, 'Interpreting "Generic Terms"' (n 166), 104.

([170]) Cf Mortenson, 'The *Travaux* of *Travaux*' (n 36).

([171]) H Lauterpacht, *The Development of International Law by the International Court* (Stevens & Sons, 1958), 134.

([172]) Dissenting Opinion of Judge Alvarez in *Reservations to the Convention on Genocide* (n 37), 53.

([173]) *Jurisdiction of the Courts of Danzig* (n 139), 17–18.

([174]) Lauterpacht, *The Development of International Law* (n 171), 174; Crawford, *International Law as an Open System: Selected Essays* (Cameron May, 2002), 27–8; Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (n 9), 293; K Parlett, *The Individual in the International Legal System: Continuity and Change in International Law* (Cambridge University Press, 2011), 16–26; R McCorquodale, 'The Individual and the International Legal System' in M Evans (ed), *International Law* (4th edn, Oxford University Press, 2014), 284.

([175]) Nolte, 'Introductory Report' (n 36), 176–7.

([176]) *Jurisdiction of the Courts of Danzig* (n 139), 17.

([177]) Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 UNTS 222. Also: *Effect of Reservations Opinion* (1982) 67 ILR 558, 567–8.

([178]) See eg *Sovereignty over Certain Frontier Land* [1959] ICJ Rep 209, 221.

([179]) Statute of the International Court of Justice, 26 June 1945, 892 UNTS 119.

([180]) *Golder v United Kingdom* (1975) 57 ILR 200.

([181]) *Demir and Baykara v Turkey* App No 34503/97 judgment [GC] 12 November 2008.

([182]) *Golder v United Kingdom* (n 180), 217 at [35] (internal references omitted); *Demir and Baykara v Turkey* (n 181), at [71]. Also: R Jennings and A Watts, Oppenheim's International Law (9th edn, Longman, 1992), 1275; J Arato, 'Constitutional Transformation in the ECtHR: Strasbourg's Expansive Recourse to External Rules of International Law' (2012) 37 Brooklyn JIL 349.

([183]) *References to the Notion of the 'General Principles of Law Recognized by Civilised Nations' Contained in the Travaux Préparatoires of the Convention*, 4 (emphasis added). Also: Christoffersen, *Fair Balance* (n 52), 54–5.

([184]) JP Costa, *La Cour européenne des droits de l'homme: Des juges pour la liberté* (Dalloz, 2013), 43.

([185]) Separate Opinion of Judge Fitzmaurice in *National Union of Belgian Police* (1980) 57 ILR 262, 293–4.

([186]) Crawford, *Brownlie's Principles of International Law* (8th edn, Oxford University Press, 2012), 367.

([187]) The principal items, with respect to treaty interpretation, are: ILC Ybk 1964/I–II; ILC Ybk 1966/I–II; ILC Final Report and Draft Articles, ILC Ybk 1966/II.

([188]) The principal items are (1950) 43 Ann de l'Inst; (1956) 46 Ann de l'Inst.

([189]) See ILC Ybk 1964/II, 53–4.

([190]) G Fitzmaurice, 'The Law and Procedure of the International Court of Justice 1951–54: Treaty Interpretation and Other Treaty Points' (1957) 33 BYIL 203, 204.

([191]) Orakhelashvili, 'Principles of Treaty Interpretation' (n 166), 118.

([192]) See Ch 3.3.3.

([193]) See ILC Ybk 1964/II, 53–4.

([194]) ILC Ybk 1966/II, 217.

([195]) ILC Ybk 1966/II, 217–18.

([196]) ILC Ybk 1964/II, 52. Cf 1966 ILC Ybk/II 220.

([197]) JL Brierly, *The Law of Nations: An Introduction to the International Law of Peace* (Oxford University Press, 1928), 168.

([198]) G Fitzmaurice, 'The Law and Procedure of the International Court of Justice: Treaty Interpretation and Certain other Treaty Points' (1951) 28 BYIL 1, 3.

([199]) H Lauterpacht, *Private Law Sources and Analogies of International Law: with Special Reference to International Arbitration* (Longman, 1927), 187; Lauterpacht, 'Restrictive Interpretation and the Principle of Effectiveness' (n 73), 73; Lauterpacht, *The Development of International Law* (n 171), 136.

([200]) ILC Ybk 1964/II, 52.

([201]) ILC Ybk 1964/I, 275.

([202]) Lauterpacht, 'De l'interprétation des traités' (n 72), 366–402.

([203]) ILC Ybk 1964/I, 276.

([204]) ILC Ybk 1964/I, 277.

([205]) ILC Ybk 1964/I, 278. He thus added that the Commission should not hesitate to mention the teleological aspects of treaties. Pessou, too, felt that the wording of the Special Rapporteur was too narrow. He proposed instead: 'In the light of the context and of the general rules of application, the provisions of a treaty shall be interpreted in good faith in conformity with the objects and purposes of the treaty and with the intentions of the parties at the time of the conclusion of the treaty.'

([206]) ILC Ybk 1964/I, 287.

([207]) ILC Ybk 1964/I, 279.

([208]) ILC Ybk 1964/I, 279.

([209]) ILC Ybk 1964/I, 280.

([210]) ILC Ybk 1964/I, 281.

([211]) ILC Ybk 1964/I, 281.

([212]) ILC Ybk 1964/I, 286.

([213]) ILC Ybk 1964/I, 36 (the 'fundamental rule of interpretation [is] that the intention of the parties must prevail').

([214]) ILC Ybk 1964/I, 34 ('the intention of the parties should be controlling').

([215]) ILC Ybk 1964/II, 189 ('Interpretation consisted in the attempt to determine what the parties intended'); ILC Ybk 1964/II, 205 (treaty interpretation aims 'to ascertain the will of the parties from what they had said').

([216]) Lauterpacht, *The Development of International Law* (n 171), 136.

([217]) Declaration of Judge Higgins in *Kasikili/Sedudu Island (Botswana/Namibia)* (n 42), 1114.

([218]) Higgins, 'Inter-Temporal Rule' (n 42), 181.

([219]) C de Visscher, *Problèmes d'interprétation judiciaire en droit international public* (Pedone, 1963), 50.

([220]) Waldock in fact pointed out that his proposed Art 70—which would become Art 31—'corresponds to article 1 of the Institute's resolution': ILC Ybk 1964/II, 56.

([221]) ILC Ybk 1964/II, 56. Cf ILC Ybk 1966/II, 220 where, no longer enjoying 'primacy', the text was described by the ILC as 'the starting point'.

([222]) ILC Ybk 1966/II, 218.

([223]) ILC Ybk 1966/II, 218–19.

([224]) Jennings and Watts, *Oppenheim's International Law* (n 182), 1271 (my emphasis).

([225]) J Crawford, 'Chance, Order, Change: The Course of International Law' (2013) 365 Hague *Recueil* 9, 300. Cf M Waibel, 'Uniformity versus Specialisation: A Uniform Regime of Treaty Interpretation?' in Tams, Tzanakopoulos, and Zimmermann (eds), *Research Handbook on the Law of Treaties* (Elgar, 2014).

([226]) Crawford, *Brownlie's Principles of International Law* (n 186), 379.

([227]) Yasseen, 'L'interprétation des traités' (n 64), 25 ('C'est au texte que de prime abord il est inévitable de recourir pour interpréter le traité. Ce texte est censé contenir l'intention commune des parties').

([228]) Yasseen, 'L'interprétation des traités' (n 64), 25 ('A quoi sert un texte, si, pour interpréter le traité, il faut chercher *ab initio* l'intention des parties? Prendre le texte comme point de départ, ce n'est donc pas minimiser l'importance de l'intention des parties, mais procéder à sa découverte, par l'examen de l'instrument par lequel elle s'est exprimée').

([229]) Reuter, *Introduction to the Law of Treaties* (n 10), 96–7. Also: Reuter, *La Convention de Vienne* (n 3), 17 ('L'interprétation [doit] se faire essentiellement par *la recherche de l'intention* des parties telle qu'elle apparaît dans ces éléments objectifs que constituent le texte, le contexte et l'attitude des parties'); P Reuter, *Droit international public* (5th edn, Presses universitaire de France, 1983), 145 ('Interpréter consiste à retrouver la volonté du ou des auteurs d'un acte juridique. Interpréter un accord instrumenté dans un texte consiste donc, en se soumettant d'abord au texte, à retrouver la commune volonté de ses auteurs'). Also: M Dawidowicz, 'The Effect of the Passage of Time on the Interpretation of Treaties: Some Reflections on *Costa Rica v Nicaragua*' (2011) 24 LJIL 201, 206–7.

([230]) F Capotorti, *Convenzione di Vienna sul diritto dei trattati* (CEDAM, 1969), 36 ('In definitiva si può ben dire che l'importanza sempre crescente degli accordi multilaterali, accentuando il valore "normativo" e non meramente "contrattuale" della disciplina pattizia, ha contribuito a determinare la prevalenza dei criteri oggettivi rispetto a quelli soggettivi di interpretazione. Bisogno d'altro canto avvertire che la stessa soluzione accolta dalla Convenzione di Vienna non manca di aprire qualche spiraglio alla ricerca dell'intenzione comune delle parti').

([231]) *Iron Rhine (Belgium v Netherlands)* (n 4), 63 at [47]; *Territorial Dispute (Libya/Chad)* (n 86), 21–2 at [41].

([232]) ILC Ybk 1966/II, 218–19 (my emphasis).

([233]) ILC Ybk 1964/II, 56 and ILC Ybk 1966/II, 220, citing (1950) 43 Ann de l'Inst 199 ('le texte signé est, sauf de rares exceptions, la seule et la plus récente expression de la volonté commune des parties').

([234]) E Beckett (1964) 43 Ann de l'Inst 435, 442. Also: G Fitzmaurice and FA Vallat, 'Sir (William) Eric Beckett, KCMG, QC (1896–1966): An Appreciation' (1968) 17 ICLQ 267, 307–8. It should be noted, however, that Lauterpacht had made of the wording the point of departure: 'La recherche de l'intention des parties étant le but principal de l'interprétation, il est légitime et désirable, dans l'intérêt de la bonne foi et de la stabilité des transactions international, de prendre le sens naturel des termes comme point de départ du processus d'interprétation': Lauterpacht, 'De l'interprétation des traités' (n 72), 433. The only real difference between Lauterpacht's approach and Waldock's therefore is the importance given to preparatory works.

([235]) Gaja, 'Trattati internazionali' (n 8), 355–6. Also: Capotorti, *Convenzione di Vienna sul diritto dei trattati* (n 230), 36; RE Fife, 'Les techniques interprétatives non juridictionnelles de la norme internationale' (2011) 115 RGDIP 367, 372; M Fitzmaurice, 'Interpretation of Human Rights Treaties' in D Shelton (ed), *Handbook in International Human Rights Law* (Oxford University Press, 2014), 745.

([236]) *Interpretation of the Air Transport Services Agreement between the United States of America and France* (n 37), 229. Also: *Lighthouses Case between France and Greece*

(n 37), 13 and 18; *Reservations to the Convention on Genocide* (n 37), 23; *Certain Norwegian Loans* (n 37), 23, 27; *Kasikili/Sedudu Island (Botswana/Namibia)* (n 42), 35 [53]; *Dispute regarding Navigational and Related Rights (Costa Rica v Nicaragua)* (n 17), 237 at [48]; *Argentina/Chile Frontier Case (Palena)* (n 36), 89; *Decision regarding delimitation of the border between Eritrea and Ethiopia* (n 34), 34 at [3.4]; *Tax regime governing pensions paid to retired UNESCO Officials residing in France (France v UNESCO)*, 248; *China—Audiovisual Entertainment Products*, Report of the Appellate Body WT/DS363/AB/R at [405]; *US—Gambling*, Report of the Appellate Body WT/DS363/AB/R at [84]; *EC—Computer Equipment*, Report of the Appellate Body WT/DS62/AB/R; WT/DS67/AB/R; WT/DS68/AB/R at [84]; *Aguas del Tunari v Bolivia* ICSID Case No ARB/02/03, 21 October 2005 at [91].

([237]) *Italy–United States Air Transport*, Arbitration (1965) 45 ILR 393, 409–10; Dissenting Opinion of Judges Anzilotti and Huber in *Case of the SS 'Wimbledon'* (1923) PCIJ Series A No 1, 15, 36. Also: Sørensen, *Les sources du droit international* (n 36), 214 ('Partant de la supposition que les mots d'une disposition conventionnelle n'ont de valeur qu'en tant qu'expressions des intentions que les parties entendaient réaliser par la convention, toute interprétation devrait poursuivre le seul but de constater ces intentions').

([238]) *Affaire de l'île de Timor (Pays-Bas c Portugal)* (1914) 11 RIAA 481, 497 (the reference here and below is to the English translation provided by the Permanent Court of Arbitration: *Boundaries of the Island of Timor (Netherlands v Portugal)* award of 25 June 1914). Also: R Kolb, 'Is there a Subject-Matter Ontology in Interpretation of International Legal Norms' in M Andenas and E Bjorge (eds), *A Farewell to Fragmentation: Reassertion and Convergence in International Law* (Cambridge University Press, 2015).

([239]) *Affaire de l'île de Timor (Pays-Bas c Portugal)* (n 238), 496–7.

([240]) *Affaire de l'île de Timor (Pays-Bas c Portugal)* (n 238), 496–7. Also: *Affaire de la Dette publique ottomane (Bulgarie, Irak, Palestine, Transjordanie, Grèce, Italie et Turquie)* (1925) 1 RIAA 529, 548; *Affaire relative à la concession des phares de l'Empire ottoman (Grèce v France)* (1956) 12 RIAA 155, 184; *Affaire Chevreau (France v Royaume-Uni)* (1931) 2 RIAA 1113; *Arbitral Award in the Matter of the Claim of Madame Chevreau against the United Kingdom* printed in (1933) 27 AJIL 153; *Sarropoulos* in (1927–28) *Annual Digest of Public International Law Cases* Case No 291; *Polyxene Plessa v the Turkish Government* in (1929) VIII *Recueil des décisions des tribunaux arbitraux mixtes* 224; *Ottoman Debt Arbitration* in (1925–26) *Annual Digest of Public International Law Cases* Case No 270; *Lederer v German State* in (1928) III *Recueil des décisions des tribunaux arbitraux mixtes* 762–9; *Diverted Cargoes Case (Greece v United Kingdom)* (n 90), 70. See Lauterpacht, *The Development of International Law by the International Court* (n 171), 56.

([241]) *Lighthouses Case between France and Greece* (n 37), 13 and 18. Also: *Territorial Jurisdiction of the International Commission of the River Oder* (1929) PCIJ Series A No

23, 5, 26; *Jurisdiction of the Courts of Danzig* (n 139), 17–18.

([242]) MO Hudson, *The Permanent Court of International Justice 1920–1942* (Macmillan, 1943), 640–4; Gardiner, *Treaty Interpretation* (n 11), 59–60.

([243]) Orakhelashvili, 'Principles of Treaty Interpretation' (n 166), 117.

([244]) Rivier, *Principes du droit des gens* (n 80) at [157].

([245]) Sørensen, *Les sources du droit international* (n 36), 214 ('Partant de la supposition que les mots les mots d'une disposition conventionnelle n'ont de valeur qu'en tant qu'expressions des intentions que les parties entendaient réaliser par la convention, toute interprétation devrait poursuivre le seul but de constater ces intentions.')

([246]) De Visscher, *Problèmes d'interprétation* (n 219), 18.

([247]) C de Visscher, *Théories et réalités en droit international public* (4th edn, Pedone, 1970), 414.

([248]) De Visscher, *Théories et réalités en droit international public* (n 247), 413.

([249]) De Visscher, *Problèmes d'interprétation* (n 219), 12.

([250]) *Jurisdiction of the Courts of Danzig* (n 139), 17–18.

([251]) S Schwebel, 'The Treatment of Human Rights and of Aliens in the International Court of Justice' in V Lowe and M Fitzmaurice, *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings* (Cambridge University Press, 1996), 327; S Schwebel, 'Human Rights in the World Court' (1991) 24 Vand JTL 945, 955–6; Lauterpacht, *The Development of International Law* (n 171), 174; Crawford, *International Law as an Open System* (n 174), 27–8.

([252]) De Visscher, *Théories et réalités* (n 247), 415; Schwebel, 'Human Rights in the World Court' (n 251), 955.

([253]) *Jurisdiction of the Courts of Danzig* (n 139), 17.

([254]) Lauterpacht, *The Development of International Law* (n 171), 175.

([255]) See E Beckett, 'Decisions of the Permanent Court of International Justice on Points of Law and Procedure of General Application' (1930) 11 BYIL 1, 4 ('Applying the general principle that international law only creates rights and duties as between states, the Court, in their advisory opinion relating to the *Danzig Railway Officials*, said the position was the same with regard to agreements between states'); E Beckett, 'Diplomatic Claims in Respect of Injuries to Companies' (1931) 17 GST 175, 176 ('the Permanent Court have decisively rejected this view, and adopted the position that States, and States alone, have rights under International Law'). See the criticism of Beckett's surprising, and repeated, descriptions of *Jurisdiction of the Courts of Danzig* in Lauterpacht, *The*

Development of International Law (n 171), 175.

([256]) McNair, *The Law of Treaties* (n 25), 366.

([257]) *Argentina/Chile Frontier Case (Palena)* (n 34), 89. See also M Shaw, *International Law* (6th edn, Cambridge University Press, 2008), 496.

([258]) McNair, *The Law of Treaties* (n 25), 185.

([259]) A Watts, 'The International Court and the Continuing Customary International Law of Treaties' in N Ando, E McWhinney, and R Wolfrum (eds), *Liber Amicorum Judge Shiregu Oda* (Kluwer, 2002), 251.

([260]) Lauterpacht, *Private Law Sources and Analogies* (n 199), 187.

([261]) M Huber (1952) 45 *Ann de l'Inst* 199; ILC Ybk 1964/II.

([262]) Brierly, *The Law of Nations* (n 197), 168. Also: Calvo, *Dictionnaire* (n 28), 400; A Rivier, *Principes du droit des gens* (n 80) at [157]; J Westlake, *International Law I* (Cambridge University Press, 1904), 282; Sørensen, *Les sources du droit international* (n 36), 214–15; Fitzmaurice, 'Treaty Interpretation and Certain other Treaty Points' (n 198), 3; Lauterpacht, *Private Law Sources and Analogies* (n 199), 187; Lauterpacht, *The Development of International Law* (n 171), 136; Huber (n 261), 200–1; de Visscher, *Problèmes d'interprétation* (n 219), 18; de Visscher, *Théories et réalités* (n 247), 414; McNair, *The Law of Treaties* (n 25), 366.

([263]) Brierly, *The Law of Nations* (n 197), 168–9. Also: ILC Ybk 1964/II, 53; Westlake, *International Law I* (n 262), 282; E Hambro, *The Case Law of the International Court: A Repertoire of the Judgments, Advisory Opinions and Orders of the International Court of Justice Including Dissenting and Separate Opinions IV–A 1959–1963* (AW Sijthoff, 1966) 133; Fitzmaurice, 'Treaty Interpretation and Certain other Treaty Points' (n 198), 3; Thirlway, 'Law and Procedure 1960–1989 Part III' (n 64), 19. See now, however, Clapham, *Brierly's Law of Nations* (n 102), 352–3.

([264]) Lauterpacht, 'De l'interprétation des traités' (n 72), 366.

([265]) Lauterpacht, 'De l'interprétation des traités' (n 72), 433.

([266]) Beckett (n 234), 434–4.

([267]) Beckett (n 234), 438–40. Also: Jiménez de Aréchaga at the First Session of the 26 March–24 May 1968 United Nations Conference on the Law of Treaties: A/CONF.39/C.1/SR.31 160. See Fitzmaurice and Vallat, 'Sir (William) Eric Beckett, KCMG, QC (1896–1966)' (n 234), 307.

([268]) The list is surprisingly long: the 'treaty' will on his admission 'include everything that was signed at the time even though this consists of a main document, called the treaty,

together with a whole lot of letters, protocols and even (probably) agreed minutes....In addition to everything which is published and registered, there may exist yet further specially initialled minutes which have been deliberately prepared for the purposes of its interpretation...and further, within the general mass of the *travaux préparatoires* there may be special reports of a Rapporteur with regard to which it may be demonstrated that it falls into a special category, being specially adapted as a guide for interpretation': Beckett (n 234), 442.

([269]) ILC Ybk 1966/II, 220.

([270]) Mortenson, 'The *Travaux* of *Travaux*' (n 36), 820–1.

([271]) See eg Sorel and Boré Eveno, 'Article 31' (n 9), 817.

([272]) ILC YBK 1964/II, 58.

([273]) ILC Ybk 1964/II, 220–1.

([274]) Sorel and Eveno, 'Article 31' (n 9), 804–37; Sinclair, *The Vienna Convention* (n 9), 114–53; Jacobs, 'Varieties of Approach to Treaty Interpretation' (n 9); Kolb, *Interprétation et création du droit international* (n 9); McLachlan, 'Systemic Integration' (n 9), 291; Orakhelashvili, *The Interpretation of Acts and Rules* (n 9), 285; Brownlie, *Principles of International Law* (n 9), 630–1.

([275]) Gardiner, *Treaty Interpretation* (n 11), 6–7.

([276]) H Waldock, United Nations Conference on the Law of Treaties: Official Records, First Session, Vienna, 1968: Summary Records 184 at [70].

([277]) Lauterpacht, 'De l'interprétation des traités' (n 72), 433.

([278]) Rivier, *Principes du droit des gens* (n 80) at [157].

([279]) TE Holland, *Studies in International Law and Diplomacy* (Clarendon Press, 1898), 152.

([280]) Lauterpacht, *Private Law Sources and Analogies* (n 199), 181–90.

([281]) *Diverted Cargoes Case (Greece v United Kingdom)* (n 90), 70.

([282]) *Affaire de l'île de Timor (Pays-Bas c Portugal)* (n 238), 497 (the reference here and above is to the English translation provided by the Permanent Court of Arbitration: *Boundaries of the Island of Timor (Netherlands v Portugal)* award of 25 June 1914).

([283]) *Petroleum Development (Trucial Coast) Ltd and the Sheikh of Abu Dhabi* (1952) 1 ICLQ 247, 251.

([284]) Crawford, *Brownlie's Principles of International Law* (n 186), 35.

([285]) See eg M Fabre-Magnan, *Droit des obligations: Contrat et engagement unilatéral* (2nd edn, Presses universitaires de France, 2010), 70 ('il sera jugé de mauvaise foi d'essayer de s'échapper de la lettre du contrat pour arguer de la volonté réelle des parties') and 502 (where the example of Shakespeare's *The Merchant of Venice* act IV, scene one is used as an example of how 'la lettre du contrat' is what is most important in the English approach to contract interpretation).

([286]) G McMeel, *The Construction of Contracts: Interpretation, Implication, and Rectification* (2nd edn, Oxford University Press, 2011), 28.

([287]) *Petroleum Development (Trucial Coast) Ltd and the Sheikh of Abu Dhabi* (n 283), 251.

([288]) See eg AB Keith, *Elements of the Law of Contracts* (Clarendon Press, 1931), 77–9.

([289]) Fabre-Magnan, *Droit des obligations* (n 285), 484.

([290]) UNIDROIT, Principles of International Commercial Contracts *1994*.

([291]) UNIDROIT, *Principles of International Commercial Contracts 2010* (UNIDROIT 2010), 137.

([292]) Cour de cassation, Com, 20 October 1998, no 96–10259.

([293]) See eg Art 1163: 'Quelque généreux que soient les termes dans lesquels une convention est conçue, elle ne comprend que les choses sur lesquelles il paraît que les parties se sont proposé de contracter' and Art 1164: 'Lorsque dans un contrat on a exprimé un cas pour l'explication de l'obligation, on n'est pas censé avoir voulu par là restreindre l'étendue que l'engagement reçoit de droit aux cas non exprimés'.

([294]) *Fisheries Jurisdiction (Spain v Canada) Jurisdiction of the Court* (Judgment) [1998] ICJ Rep 432, 455; *Dispute between Argentina and Chile concerning the Beagle Channel* (1977) 11 RIAA 53, 231; *Corfu Channel* [1949] ICJ Rep 4, 24; *Ambatielos case* (Jurisdiction) (Judgment) [1952] ICJ Rep 28, 45.

([295]) Cour de cassation, Civ, 30 January 1996, no 93–20330; Cour de cassation, Com, 14 October 2008, no 07–18955; Fabre-Magnan, *Droit des obligations* (n 285), 486–7.

([296]) PDV Marsh, *Comparative Contract Law* (Gower, 1994), 38–9.

([297]) G Alpa and V Zeno-Zencovich, *Italian Private Law* (Routledge-Cavendish, 2007), 180; G Alpa, G Fonsi, and G Resta, *L'interpretazione del contratto: orientamenti e techniche della giurisprudenza* (2nd edn, *Giuffrè Editore*, 2001), 10; G Alpa, *Nuove frontiere del diritto contrattuale* (Edizioni Seam, 1998), 7–30; G Alpa, *Casi dubbi in materia di diritto contrattuale* (Casa editrice dott Antonio Milani, 1998).

([298]) T Bingham, 'Foreword' in A Burrows and E Peel (eds), *Contract Terms* (Oxford

University Press 2007), v.

([299]) *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896.

([300]) *Investors Compensation Scheme Ltd v West Bromwich Building Society* (n 299), 912F–913G.

([301]) C Mitchell, 'Obligations in Commercial Contracts: A Matter of Law or Interpretation?' (2012) 65 CLP 1, 2.

([302]) See eg *Bank of Credit and Commerce International Sa (In Liquidation) v Ali (No 1)* [2001] UKHL 8, [2002] 1 AC 251; *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] 1 AC 1101 at [21]–[26] (Lord Hoffmann); *Pink Floyd Music Ltd v EMI Records Ltd* [2010] EWCA Civ 1429, [2011] 1 WLR 770 at [17] (Lord Neuberger MR).

([303]) *Rainy Sky SA and others v Kookmin Bank* [2011] UKSC 50, [2011] 1 WLR 2900 at [14].

([304]) *Co-operative Wholesale Society Ltd v National Westminster Bank plc* [1995] 1 EGLR 97, 98; *Glynn v Margetson & Co* [1893] AC 351, 359 (Lord Halsbury LC); *Homburg Houtimport BV v Agrosin Private Ltd: The Starsin* [2004] 1 AC 715 at [10] (Lord Bingham).

([305]) J Steyn, 'Contract Law: Fulfilling the Reasonable Expectations of Honest Men' (1997) 113 LQR 433, 441.

([306]) *Society of Lloyd's v Robinson* [1999] 1 All ER (Comm) 545, 551. See also *Gan Insurance Co Ltd v Tai Ping Insurance Co* [2001] EWCA Civ 1047, [2001] 2 All ER (Comm) 299 (Mance LJ); *Arbuthnott v Fagan* [1995] CLC 1396, 1400 (Bingham MR).

([307]) K Lewinson, *The Interpretation of Contracts* (5th edn, Sweet & Maxwell, 2011), 36.

([308]) C Mitchell, 'Obligations in Commercial Contracts: A Matter of Law or Interpretation?' (n 301), 2.

([309]) McNair, *The Law of Treaties* (n 25), 6.

([310]) *Azpetrol International Holdings BV, Azpetrol Group BV, Azpetrol Oil services Group BV v the Republic of Azerbaijan*, ICSID Case No ARB/06/15, 8 September 2009 at [61]. The arbitral Tribunal adds the proviso that this is with the possible exception of how, first, English law has traditionally precluded reference to the negotiating history of an agreement as an aid to interpretation (*Prenn v Simmonds* [1971] 1 WLR 1381, 1384–85), and, secondly, how English law does not normally admit reference to the subsequent conduct of the parties as an aid to the interpretation of a contract (*L Schuler AG v Wickman Machine Tools Sales Ltd* [1974] AC 235, 252). The Tribunal notes, however, 'that the view that the negotiating history and the subsequent practice of the parties are

not admissible as an aid to interpretation in English law has not gone unchallenged' ([65]).

([311]) Brierly, *The Law of Nations* (n 197), 168.

([312]) Clapham, *Brierly's Law of Nations* (n 102), 352; Gardiner, 'The Vienna Convention Rules' (n 119), 476.

([313]) Brierly, *The Law of Nations* (n 197), 168.

([314]) *Azpetrol International Holdings BV, Azpetrol Group BV, Azpetrol Oil Services Group BV v the Republic of Azerbaijan* (n 310), at [62].

([315]) *The Channel Tunnel Group Ltd and France-Manche SA v United Kingdom and France* 132 (2007) ILR 1, 34 at [92]. See Crawford, *Chance, Order, Change* (n 225), 209.

([316]) J Crawford, 'Treaty and Contract in Investment Arbitration' (2008) 24 Arb Int 351, 373–4.

([317]) Fitzmaurice, 'Treaty Interpretation and Certain other Treaty Points' (n 198), 3. Also: Huber (n 261), 199.

([318]) Westlake, *International Law I* (n 262), 293–4; Clapham, *Brierly's Law of Nations* (n 102), 349–51.

([319]) JL Halpérin, *Le Tribunal de cassation et les pouvoirs sous la Révolution (1790–1799)* (LGDJ, 1987); JL Halpérin, *L'impossible Code civil* (Presses Universitaires de France, 1992).

([320]) See eg Cour de cassation (1re chambre civile) 20 October 1982.

([321]) F Terré, *Introduction générale au droit* (9th edn, Dalloz, 2012), 472.

([322]) K Larenz and CW Canaris, *Methodenlehre des Rechswissenschaft* (Springer, 1992); S Vogenauer, *Die Auslegung von Gesetzen in England und auf dem Kontinent: Eine Vergleichende Untersuchung der Rechtsprechung und ihrer historischen Grundlagen I* (Mohr Siebeck, 2001).

([323]) BVerfGE 2, 280 (401); BVerfGE 3, 407 (422). Also: A Voßkuhle, 'Gibt es und wozu nutzt eine Lehre vom Verfassungswandel?' (2004) 43 *S* 450.

([324]) See WN Eskridge, *Dynamic Statutory Interpretation* (Harvard University Press, 1994); LM Balkin, *Living Originalism* (Harvard University Press, 2011); LW Levy, *Original Intent and the Framers' Constitution* (Macmillan, 1988); DA Strauss, *The Living Constitution* (Oxford University Press, 2010); see, however, A Scalia, 'Originalism: The Lesser Evil' (1989) 57 U Cinc LR 849; A Scalia, 'Common Law Courts in a Civil Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws' in A Gutmann (ed), *A Matter of Interpretation: Federal Courts and the Law* (Princeton University Press, 1997).

([325]) Convention on the Protection of Submarine Cables, 14 March 1884, TS 380.

([326]) *The Netherlands (PTT) and the Post Office (London) v Nedlloyd* (1977) 74 ILR 212.

([327]) *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641.

([328]) *New Zealand Maori Council v Attorney-General* (n 327), 655–6 and 663.

([329]) *Edwards v Attorney-General of Canada* [1930] AC 124.

([330]) *Nairn v University of St Andrews* [1909] 1 AC 1.

([331]) See eg B Hale, 'Common Law and the Convention: The Limits to Interpretation' [2011] EHRLR 534, 534–5.

([332]) Dispute regarding Navigational and Related Rights (Costa Rica v Nicaragua) (n 17).

([333]) *Also: Herron v Rathmines and Rathgar Improvement Commissioners* [1892] AC 498.

([334]) *Edwards v Attorney-General of Canada* (n 329), 135 (emphasis added).

([335]) *Edwards v Attorney-General of Canada* (n 329), 136.

([336]) Hale, 'Common Law and the Convention' (n 331). The approach is criticized by R Ekins, *The Nature of Legislative Intent* (Oxford University Press, 2012), Chs 7–9.

([337]) See JSC Reid, 'The Judge as Lawmaker' (1972) 12 JSPTL 22.

([338]) Hale, 'Common Law and the Convention' (n 331), 535–6.

([339]) See eg *Grant v Southwestern and County Properties Ltd* [1975] Ch 185; *Fitzpatrick v Sterling Housing Association Ltd* [2001] 1 AC 27; *R v Ireland* [1998] AC 147; *Goodes v East Sussex County Council* [2000] UKHL 34, [2000] 1 WLR 1356; *Birmingham City Council v Oakley* [2000] UKHL 59, [2000] 3 WLR 1936; *R v Bristol City Council, ex p Everett* [1999] EWCA Civ 869, [1999] 1 WLR 1170; *Royal College of Nursing of the United Kingdom v Department for Health and Social Security* [1981] AC 800; *McCarten Turkington Breen (A Firm) v Times Newspapers Ltd* [2001] 2 AC 277; *R v R (Rape: Marital Exemption)* [1992] 1 AC 599; *R v SK* [2011] 2 Cr App R 34.

([340]) *Yemshaw (Appellant) v London Borough of Hounslow (Respondent)* [2011] UKSC 3, [2011] 1 WLR 433.

([341]) *Yemshaw* (n 340), at [56].

([342]) H Thring, *Practical Legislation* (John Murray, 1902), 83. Also: R Cross J Bell, and G Engle, *Cross: Statutory Interpretation* (3rd edn, Butterworths, 1995), 51; J Bell, 'Interpreting Statutes over Time' in F Ost and M van Hoecke (eds), *Temps et droit: le droit a-t-il pour vocation de durer?* (Bruylant, 1998).

([343]) *R v Secretary of State for Health, ex p Quintavalle (on behalf of Pro-Life Alliance)* [2003] 2 AC 687.

([344]) *Quintavalle* (n 343) at [9].

([345]) F Bennion, *Bennion on Statutory Interpretation* (5th edn, LexisNexis, 2008), 288.

([346]) R Cross, J Bell, and G Engle, *Cross: Statutory Interpretation* (3rd edn, Butterworths, 1995), 51–2; Bennion, *Statutory Interpretation* (n 345), 288.

([347]) J Steyn, *Democracy through Law: Selected Speeches and Judgments* (Ashgate, 2004), 62–3.

([348]) D Akande, 'Can the ICC Prosecute for Use of Chemical Weapons in Syria?' (EJIL: Talk!, 23 August 2013) <http://www.ejiltalk.org/can-the-icc-prosecute-for-use-of-chemical-weapons-in-syria/>. Further: Akande, 'International Organizations' in MD Evans (ed), *International Law* (4th edn, Oxford University Press, 2014), 258–60.

([349]) Sorel and Eveno, 'Article 31' (n 9), 829.

([350]) Sorel and Eveno, 'Article 31' (n 9), 829.

([351]) *Territorial Dispute between Libya and Chad* (n 86), 21–2 at [41].

([352]) *Competence of the General Assembly for the Admission of a State to the UN* (Advisory Opinion) [1950] ICJ Rep 4, 8.

([353]) Crawford, *Brownlie's Principles of International Law* (n 186), 40.

([354]) See eg *Legality of the Use of Force (Serbia and Montenegro v Belgium)* (Preliminary Objections) (Judgment) [2004] ICJ Rep 279 at [100]; *Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* [2007] ICJ Rep 43, 109–10; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* case [1995] ICJ Rep 6, 18 at [33]; *Pulau Ligitan/Sipadan* [2002] ICJ Rep 625, 645; Appellate Body Report, *Japan—Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WTDS11/AB/R (4 October 1996) 11; *Rhine Chlorides Arbitration (Netherlands/France)* (n 71), 292–93 at [63]. Also: Shaw, *International Law* (n 273), 935–6; Akande, 'International Organizations' (n 348), 259; M Fitzmaurice, 'The Practical Working of the Law of Treaties' in MD Evans, *International Law* (4th edn, Oxford University Press, 2014), 179.

([355]) Crawford, *Brownlie's Principles of International Law* (n 186), 40.

([356]) E de Vattel, *Le droit des gens II* (1758), Ch XVII at [263].

([357]) Lauterpacht, *The Development of International Law* (n 171), 52.

([358]) *Territorial Dispute between Libya and Chad* (n 86), 21–2 at [41].

([359]) *Territorial Dispute between Libya and Chad* (n 86), 21–2 at [41] (my emphasis).

([360]) *Rhine Chlorides Arbitration (Netherlands/France)* (n 71), 292–3 at [63]. Also: P Daillier, M Forteau, and A Pellet, *Droit international public* (n 47), 284; MJ Cazala, 'Le résultat manifestement absurd ou déraissonable de l'interprétation dans l'affaire de l'apurement des comptes (Pays-Bas c. France)' (2004) 50 AFDI 624, 629–36.

([361]) *Legality of the Use of Force (Serbia and Montenegro v Belgium)* (Preliminary Objections) (Judgment) [2004] ICJ Rep 279, 318 at [100].

([362]) *Territorial Dispute between Libya and Chad* (n 86), 25 at [51]. Also: Dissenting Opinion of Judges Anzilotti and Huber in *Case of the SS 'Wimbledon'* (1923) PCIJ Series A No 1, 15, 36; M Sørensen, *Les sources du droit international* (n 36); Orakhelashvili, *The Interpretation of Acts and Rules* (n 9), 341–42 and 347.

([363]) *Territorial Dispute between Libya and Chad* (n 86), 25–6 at [52].

([364]) *Iron Rhine (Belgium v Netherlands)* (n 4), 65. Also: Fife, 'Les techiniques interprétatives ' (n 235), 372.

([365]) See *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* (Judgment) [2012] ICJ Rep 422, 451 at [74] and 454 at [86]; *Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia v Greece)* (Judgment) [2011] ICJ Rep 644, 675 at [97]; *Pulp Mills on the River Uruguay (Argentina v Uruguay)* (n 18), 14, 48 at [75], 66 at [143]; *Certain Questions of Mutual Asistance in Criminal Matters (Djibouti v France)* (Judgment) [2008] ICJ Rep 177, 218 at [109], 232 at [154]; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136, 179 at [109]; *LaGrand (Germany v United States of America)* (n 163), 501–3 at [99]–[104]; *Gabčíkovo–Nagymaros Project (Hungary/Slovakia)* (n 16), 78–9 at [142]; *Oil Platforms (Islamic Republic of Iran v United States of America)* (n 163), 820 at [52]; *South-West Africa Cases (Ethiopia and Liberia v South Africa)* (Preliminary Objections) [1962] ICJ Rep 319, 335–6; *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization* (Advisory Opinion) [1960] ICJ Rep 150, 170–1; *Case of Certain Norwegian Loans* (Judgment) [1957] ICJ Rep 9, 23 and 27; *Reservations to the Convention on Genocide* (n 37), 23. Also: *Affaire relative à l'or de la Banque nationale d'Albanie* (1953) 12 RIAA 12, 46; *Italy–United States Air Transport Arbitration* (1965) 45 ILR 393, 409–14; *Pope and Talbot v Canada* (2001) 122 ILR 293, 383–84 at [115]–[117]; *Cissé v International Bank for Reconstruction and Development* (2001) 133 ILR 117, 124 at [23]; *The Volga (Russian Federation v Australia)* (2002) 126 ILR 433, 456 at [77]; *The Hoshinmaru (Japan v Russia Federation)* (2007) 143 ILR 1, 22 at [80]; *Abyei Arbitation (Government of Sudan/Sudan People's Liberation Movement/Army)* (2009) 144 ILR 348, 561–5 at [583]–[596]; *Indus Waters Kishenganga Arbitration (Pakistan v India)* (Partial Award) (2013) 154 ILR 1, 156–9 at [410]–[418].

([366]) De Visscher, *Problèmes d'interprétation judiciaire en droit international public* (n

219), 62; Kolb, *Interprétation et création du droit international* (n 9), 532–3.

([367]) *Minority Schools in Albania* (1935) PCIJ Ser A/B, No 64, 14, 17.

([368]) *Sovereignty over Certain Frontier Land* [1959] ICJ Rep 209, 221; *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* (n 365), 449 at [68] and 460 at [115]. Also: *HICEE BV v The Slovak Republic* (Permanent Court of Arbitration) Case No 2009–11, 23 May 2011 at [116].

([369]) *Golder v United Kingdom* (n 180), 216 at [34].

([370]) ME Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhoff, 2009), 428.

([371]) J Combacau, *Le droit des traités* (Presses universitaires de France, 1991), 33. Also: Jennings, 'Treaties' (n 71), 145; I Buffard and K Zemanek, 'The "Object and Purpose" of a Treaty: An Enigma?' (1998) 3 ARIEL 311, 312–19; P Reuter, 'Solidarité et divisibilité des engagements conventionnels' in Y Dinstein (ed), *International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne* (Martinus Nijhoff, 1989), 627–8; Gaja, 'Trattati internazionali' (n 8), 356.

([372]) See below on 'generic terms'.

([373]) De Visscher, *Théories et réalités en droit international public* (n 247), 280.

([374]) De Visscher, *Théories et réalités en droit international public* (n 247), 415.

([375]) R Higgins, 'Inter-Temporal Rule in International Law' (n 42), 181. Also: Fife, 'Les techniques interprétatives' (n 235), 372.

([376]) R Higgins, 'Time and the Law' (1997) 46 ICLQ 501, 519.

([377]) Guillaume, 'Methods and Practice of Treaty' (n 13), 468–9.

([378]) Reuter, *Introduction to the Law of Treaties* (n 10), 24.

([379]) Reuter, *Introduction to the Law of Treaties* (n 10), 30.

([380]) See Ch 3.1.

([381]) Reuter, *La Convention de Vienne du droit des traités* (n 3), 17 ('la Convention retient comme un élément déterminant, ou au moins important, de solution des problèmes qu'elle considère, l'objet et le but du traité; ce n'est pas une dérogation au principe de l'autonomie de la volonté, mais bien au contraire sa consolidation objective: l'objet et le but du traité sont les éléments essentiels qui sont pris en considération par la volonté des parties, on doit donc toujours supposer que les parties se sont mutuellement refusé d'admettre toutes les libertés qui porteraient atteinte à ce but et à cet objet qu'elles ont librement choisi comme leur bien commun').

([382]) Aust, *Modern Treaty Law and Practice* (n 23), 209. Also: Akande, 'International Organizations' (n 348), 258–9.

([383]) Charter of the United Nations, 26 June 1945, 892 UNTS 119.

([384]) Aust, *Modern Treaty Law and Practice* (n 23), 343.

([385]) Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, 78 UNTS 277.

([386]) *Reservations to the Convention on Genocide* (n 37), 23. Also: *Ambatielos case* (Jurisdiction) (Judgment) [1952] ICJ Rep 28, 45; *Norwegian Loans* (n 37), 23 and 27; *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization* (Advisory Opinion) [1960] ICJ Rep 150, 170–1; *Case concerning US Diplomatic and Consular Staff in Tehran (USA v Iran)* [1980] ICJ Rep 3 at [54]; *Military and Paramilitary Activities in and against Nicaragua* [1986] ICJ Rep 14 at [273]; *Kasikili/Sedudu Island (Botswana/Namibia)* (n 42), 1072 at [43]; *Certain Questions of Mutual Asistance in Criminal Matters (Djibouti v France)* (Judgment) [2008] ICJ Rep 177, 218 at [109], 232 at [154].

([387]) *Gabčíkovo–Nagymaros Project (Hungary/Slovakia)* (n 16), 79 at [142].

([388]) *Oil Platforms (Islamic Republic of Iran v United States of America)* (Preliminary Objection) (n 163), 820 at [52]. Further: Orakhelashvili, *The Interpretation of Acts and Rules* (n 9), 349–50.

([389]) *Oil Platforms (Islamic Republic of Iran v United States of America)* (Preliminary Objection) (n 163), 813 at [27].

([390]) Convention Against Torture and Other Cruel, Inhuman or Degrading Treament or Punishment, 10 December 1984, 1465 UNTS 85.

([391]) *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* (n 365), 460 at [115].

([392]) M Andenas and T Weatherall, 'International Court of Justice: Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal), Judgment of 20 July 2012' (2013) 62 ICLQ 753, 769.

([393]) *South West Africa* (Second Phase) (n 93), 48 at [91].

([394]) *LaGrand (Germany v United States of America)* (n 163), 501–3 at [99]–[104].

([395]) Statute of the International Court of Justice, 26 June 1945, 892 UNTS 119.

([396]) Guillaume, 'Methods and Practice of Treaty Interpretation' (n 13), 469.

([397]) *LaGrand (Germany v United States of America)* (n 163), 503 [102].

([398]) *Rights of Minorities in Upper Silesia (Minority Schools)* (1928) PCIJ Ser A, No 15, 33.

([399]) *Affaire relative à l'or de la Banque nationale d'Albanie* (1953) 12 RIAA 12, 46. Also: C Rousseau, *Droit international public I* (Éditions Sirey, 1971), 282.

([400]) Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 18 March 1965, 575 UNTS 159.

([401]) See M Waibel, 'International Investment Law and Treaty Interpretation' in R Hofmann and CJ Tams, *International Investment Law and General International Law: From Clinical Isolation to systemic Integration?* (Nomos, 2011), 38–44; Waibel, 'Uniformity versus Specialisation' (n 225).

([402]) *Hussein Nuaman Soufraki v United Arab Emirates*, ICSID Case No ARB/02/7, Decision of the ad hoc Committee on the Application for Annulment of Mr Soufraki, 5 June 2007 at [21]–[22]. Also: *Klöckner Industrie-Anlagen GmbH and others v United Republic of Cameroon and Société Camerounaise des Engrais (Klöckner I)*, ICSID Case No ARB/81/2, Decision of the ad hoc Committee, 3 May 1985 at [3]; *Maritime International Nominees Establishment v Republic of Guinea*, ICSID Case No ARB/84/4, Decision on the Application by Guinea for Partial Annulment of the Arbitral Award dated 6 January 1988, 22 December 1989 at [4.05]; *Amco Asia Corporation and others v Republic of Indonesia* (*Amco II*), ICSID Case No ARB/81/1, Decision on the Applications by Indonesia and Amco Respectively for Annulment and Partial Annulment, 17 December 1992 at [1.17].

([403]) J Crawford, 'Sovereignty as a Legal Value' in J Crawford, M Koskenniemi, and S Ranganathan (eds), *The Cambridge Companion to International Law* (Cambridge University Press, 2011), 123.

([404]) *Affaire des boutres de Mascate (France c Grande-Bretagne)* (1905) 11 RIAA XI 83. Further: M Bressonnet, 'L'arbitrage franco-anglais dans l'affaire des boutres de Mascate' (1906) 13 RGDIP 145; J Allain, 'The Nineteenth Century Law of the Sea and the British Abolition of the Slave Trade' (2007) 78 BYIL 342; P Daillier, M Forteau, and A Pellet, *Droit international public* (n 47), 552–3.

([405]) Declaration of the General Act of the Brussels Conference, 2 July 1890, 173 CTS 188.

([406]) *Affaire des boutres de Mascate (France c Grande-Bretagne)* (n 404), 93–4.

([407]) *Affaire des boutres de Mascate (France c Grande-Bretagne)* (n 404), 94.

([408]) Huber (n 261), 200–1. Also: Gardiner, *Treaty Interpretation* (n 11) 141; *Aguas del Tunari v Bolivia*, ICSID Case No ARB/02/03, 21 October 2005 at [91].

([409]) *Iron Rhine (Belgium v Netherlands)* (n 4), 65.

([410]) *Iron Rhine (Belgium v Netherlands)* (n 4), 73.

([411]) R Bernhardt, 'Evolutive Treaty Interpretation—Especially of the European Convention on Human Rights' (1999) 42 GYIL 11, 16–17.

([412]) R Bernhardt, 'Evolutive Treaty Interpretation' (n 411), 16–17.

([413]) See Jennings and Watts, *Oppenheim's International Law* (n 182), 1281–2.

([414]) *Nationality Decrees Issued in Tunis and Morocco* (n 133), 24.

([415]) Covenant of the League of Nations, 28 June 1919, 225 CTS 195.

([416]) See W Schücking and H Wehberg, *Die Satzung des Völkerbundes I* (3rd edn, Verlag von Franz Vahlen, 1931), 56; WD Krause-Ablaß, *Intertemporales Völkerrecht* (Forschungsstelle für Völkerrecht und ausländisches Recht der Universität Hamburg, 1969), 124–5.

([417]) Treaty Concerning the Construction and Operation of the Gabčíkovo–Nagymaros System of Locks, 16 September 1977, 1978 UNTS 236.

([418]) *Gabčíkovo–Nagymaros Project (Hungary/Slovakia)* (n 16), 67–8.

([419]) McLachlan, 'Systemic Integration' (n 9), 317; M Paparinskis, *The International Minimum Standard and Fair and Equitable Treatment* (Oxford University Press, 2013), 123.

([420]) *Western Sahara* (Advisory Opinion) [1975] ICJ Rep 12, 38–40.

([421]) Resolution 3293 (XXIX), 13 December 1974.

([422]) *Western Sahara* (n 420), 40. See Jennings and Watts, *Oppenheim's International Law* (n 182), 1282.

([423]) Whaling in the Antarctic (Australia v Japan: New Zealand Intervening) (n 81). See Ch 3.3.1.

([424]) International Convention for the Regulation of Whaling, 2 December 1946, 161 UNTS 72.

([425]) *Whaling in the Antarctic (Australia v Japan: New Zealand Intervening)* (n 81) at [45]. Further: Separate Opinion of Judge Greenwood at [5]; Separate Opinion of Judge Charlesworth *ad hoc* at [3]; Separate Opinion of Judge Cançado Trindade at [25]–[40].

([426]) Whaling in the Antarctic (Australia v Japan: New Zealand Intervening) (n 81) at [56].

([427]) Palchetti, 'Interpreting "Generic Terms"' (n 166). Also: Bernhardt, 'Evolutive Treaty Interpretation' (n 411), 21; R Bernhardt, 'Thoughts on the Interpretation of Human

Rights Treaties' in F Matscher and H Petzold (eds), *Protecting Human Rights: The European Dimension. Studies in Honour of Gérard J Wiarda* (Carl Heymann, 1988), 65; C Brölmann, 'Limits of the treaty Paradigm' in M Craven and M Fitzmaurice (eds), *Interrogating the Treaty: Essays in the Contemporary Law of Treaties* (Wolf Legal Publishers, 2005), 28; C Brölmann, 'Specialized Rules of Treaty Interpretation: International Organizations' in D Hollis (ed), *Oxford Guide to Treaties* (Oxford University Press, 2012), 512; B Cali, 'Specialized Rules of Treaty Interpretation: Human Rights' in D Hollis (ed), *The Oxford Guide to Treaties* (Oxford University Press, 2012), 547; G Letsas, 'Strasbourg's Interpretive Ethic: Lessons for the International Lawyer' (2010) 21 EJIL 509, 527.

([428]) CR 2009/4, 49–50 (Pellet) ('le principe de base qui constitue la toile de fond de cette opération n'a rien de mystérieux et me paraît vraiment indiscutable; il est celui-là même qui inspire le droit des traités dans son ensemble: tout se rapporte à *l'intention des Parties*'). See Dawidowicz, 'Passage of Time' (n 229), 213.

([429]) Waldock, 'Effectiveness' (n 50), 3–4.

([430]) Waldock, 'Evolution of Human Rights Concepts' (n 116), 536.

([431]) Yasseen, 'L'interprétation des traités' (n 64) ('Cela dépend à notre avis de ce que les parties ont vraiment voulu').

([432]) Waldock, 'Evolution of Human Rights Concepts' (n 116), 536.

([433]) *La Bretagne (Canada/France)* (n 20), 624.

([434]) *La Bretagne (Canada/France)* (n 20), 659–60. Also: J Crawford, *State Responsibility: The General Part* (Cambridge University Press, 2013), 247.

([435]) *Decision regarding the Delimitation of the border between Eritrea and Ethiopia* (n 34), 34 at [3.4] (inverted commas deleted).

([436]) *Rhine Chlorides Arbitration (Netherlands/France)* (n 71), 293 at [62].

([437]) See Nolte, 'Introductory Report' (n 36).

([438]) Draft Report of the International Law Commission on the Work of Its Sixty-Fifth Session (n 31), 14.

([439]) Draft Report of the International Law Commission on the Work of Its Sixty-Fifth Session (n 31), 17.

([440]) Draft Report of the International Law Commission on the Work of Its Sixty-Fifth Session (n 31), 17–18.

([441]) Draft Report of the International Law Commission on the Work of Its Sixty-Fifth Session (n 31), 18.

([442]) ILC Ybk 1966/II, 218–19.

([443]) Crawford, *State Responsibility: The General Part* (n 434), 246.

([444]) Crawford, *State Responsibility: The General Part* (n 434), 247.

([445]) Fitzmaurice, 'Treaty Interpretation and other Treaty Points' (n 190), 212.

([446]) *Case concerning Rights of Nationals of the United States of America in Morocco,* (n 61). Also: *South West Africa* (Second Phase) (n 93), 23 at [16].

([447]) B Cheng, 'Rights of United States Nationals in the French Zone of Morocco' (1953) 2 ICLQ 354, 355–6, and 367.

([448]) Nolte, 'Introductory Report' (n 36), 186.

([449]) Lauterpacht, 'Restrictive Interpretation' (n 73), 73.

([450]) McNair, *The Law of Treaties* (n 25).

([451]) See eg McNair, *The Law of Treaties* (n 25), 467–8; R Higgins, 'Inter-Temporal Rule' (n 42), 179–80; ILC Ybk 1964/II, 9–10.

([452]) *The North Atlantic Coast Fisheries Case (United Kingdom v United States)* (1910) 11 RIAA 167.

([453]) *Arbitration between Petroleum Development (Trucial Coast) Ltd and the Sheikh of Abu Dhabi* (n 283). The question has been raised whether the instrument in issue was a treaty or not: Lalive, 'Contracts between a State or State Agency and a Foreign Company' (1964) 13 ICLQ 991; CF Amerasinghe, *Principles of the Institutional Law of International Organizations* (2nd edn, Cambridge University Press, 2005), 276. See, generally, VCLT Art 2(1)(a); Crawford, *Brownlie's Principles of Public International Law* (n 186), 369.

([454]) Treaty of London 20 October 1818, TS 112; 12 Bevans 57.

([455]) *The North Atlantic Coast Fisheries Case (United Kingdom v United States)* (n 452), 195.

([456]) *Arbitration between Petroleum Development (Trucial Coast) Ltd and the Sheikh of Abu Dhabi* (n 283).

([457]) *Arbitration between Petroleum Development (Trucial Coast) Ltd and the Sheikh of Abu Dhabi* (n 283), 253.

([458]) *The North Atlantic Coast Fisheries Case (United Kingdom v United States)* (n 452).

([459]) *Arbitration between Petroleum Development (Trucial Coast) Ltd and the Sheikh of*

Abu Dhabi (n 283).

([460]) *La Bretagne (Canada/France)* (n 20).

([461]) Agreement between Canada and France on their Mutual Fishing Relations, 27 March 1972, CTS 1979 No 37.

([462]) *La Bretagne (Canada/France)* (n 20), 619.

([463]) *Convention concerning Employment of Women during the Night* PCIJ (1932) Series A/B No 50, 377.

([464]) Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 UNTS 222.

([465]) RCA White and C Ovey, *Jacobs, White, and Ovey: The European Convention on Human Rights* (5th edn, Oxford University Press, 2010), xvii.

([466]) See Marrakesh Agreement Establishing the World Trade Organization, 15 April 1994, 1867 UNTS 187; (1994) 33 ILM 1153.

([467]) General Agreement on Trade in Services, 15 April 1994, 1869 UNTS 183, (1994) 33 ILM 1167.

([468]) *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WB/DS58/AB/R, 12 October 1998 at [130]; *China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/AB/R, 21 December 2009 at [396]. Cf *European Communities and its Member States—Tariff Treatment of Certain Information Technology Products* (n 173), at [7.600].

([469]) Waldock, 'The Evolution of Human Rights Concepts' (n 116), 541.

([470]) Waldock, 'The Evolution of Human Rights Concepts' (n 116), 547.

([471]) *The North Atlantic Coast Fisheries Case (United Kingdom v United States)* (n 452).

([472]) *Arbitration between Petroleum Development (Trucial Coast) Ltd and the Sheikh of Abu Dhabi* (n 283).

([473]) *Navigational and Related Rights (Costa Rica v Nicaragua)* (n 17), 213 at [63].

([474]) *Decision regarding the Delimitation of the border between Eritrea and Ethiopia* (n 34).

([475]) *Decision regarding the Delimitation of the border between Eritrea and Ethiopia* (n 34), 34 at [3.4]. Also: *Boundary Dispute between Argentina and Chile Concerning the Delimitation of the Frontier Line between Boundary Post 62 and Mount Fitzroy* (n 94), 76

at [157].

([476]) *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria: Equatorial Guinea intervening)* (n 14).

([477]) *Kasikili/Sedudu Island (Botswana/Namibia)* (n 42), 1060–72 at [20]–[41].

([478]) *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria: Equatorial Guinea intervening)* (n 14), 356 at [59].

([479]) *Western Sahara* (n 420). The question of intertemporality in this case comes to the fore in a particular form as the legal instrument to be interpreted was not in itself an old one; the question was whether the terms of the instrument, though the instrument was a new one, made reference to the law in force at an earlier time only or the law in force at the time of the adoption of the instrument as well.

([480]) See Jennings and Watts, *Oppenheim's International Law* (n 182), 1281–2.

([481]) Resolution 3293 (XXIX), 13 December 1974.

([482]) *Western Sahara* (n 420), 38–9.

([483]) *Western Sahara* (n 420), 40.

([484]) *Western Sahara* (n 420), 67–8.

([485]) Higgins, 'Inter-Temporal Rule' (n 42), 181.

([486]) Resolution 1514 (XV), 14 December 1960.

([487]) ILC Ybk 1964/I, 34.

([488]) Nolte, 'Introductory Report' (n 36), 186.

([489]) Nolte, 'Introductory Report' (n 36), 186.

([490]) McNair, *The Law of Treaties* (n 25), 467.

([491]) *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)* (n 14), 16.

([492]) Covenant of the League of Nations, 28 June 1919, 225 CTS 195.

([493]) Charter of the United Nations, 26 June 1945, 892 UNTS 119.

([494]) Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 UNTS 222. See, eg, *Tyrer v United-Kingdom* (n 134), 353; *Airey v Ireland* App No 6289/73, judgment 9 October 1979.

([495]) *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)* (n 14).

([496]) *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)* (n 14), 16, 35 at [53]. Cf *South West Africa* (Second Phase) (n 93), 23 at [16].

([497]) Dawidowicz, 'Passage of Time' (n 229), 214–15; H Thirlway, 'Law and Procedure 1960–1989 Part III' (n 64), 136–7.

([498]) Article 22, Covenant of the League of Nations, 28 June 1919, 225 CTS 195.

([499]) A McNair, 'Preface' in J Stoyanovsky, *The Mandate for Palestine: A Contribution to the Theory and Practice of International Mandates* (Hyperion Press, 1928).

([500]) Dissenting Opinion of Judge Jessup in *South West Africa* (Second Phase) (n 93), 373.

([501]) Waldock, 'The Evolution of Human Rights Concepts' (n 116), 541.

([502]) Charter of the United Nations, 26 June 1945, 892 UNTS 119.

([503]) Akande, 'International Organizations' (n 348), 259. Also: Arato, 'Treaty Interpretation and Constitutional Change' (n 119), 316–27; S Kadelbach, 'The Interpretation of the Charter' in B Simma et al (eds), *The Charter of the United Nations: A Commentary* (3rd edn, Oxford University Press, 2012), 86.

([504]) *Reparation for Injuries Suffered in the Service of the United Nations* (Advisory Opinion) [1949] ICJ Rep 174, 179.

([505]) *Reparation for Injuries Suffered in the Service of the United Nations* (n 504), 184.

([506]) *Effects of Awards of Compensation made by the UN Administrative Tribunal* (Advisory Opinion) [1954] ICJ Rep 47, 57. According to the Oxford English Dictionary 'intendment' means 'the sense in which the law understands or interprets something, such as the true intention of a piece of legislation'. See, however, the discussion in E Lauterpacht, 'The Development of the Law of International Organizations by the Decisions of International Tribunals' (1976) 152 Hauge *Recueil* 381, 424–25.

([507]) *RosInvestCo UK Ltd v Russian Federation* SCC Case No Arb V079/2005, Award on Jurisdiction at [39]–[40].

([508]) *RosInvestCo UK Ltd v Russian Federation*, (n 507) at [40].

([509]) *Reparation for Injuries Suffered in the Service of the United Nations* (n 504).

([510]) *Effects of Awards of Compensation made by the UN Administrative Tribunal* (n 506).

([511]) T Franck, *Recourse to Force: State Action against Threats and Armed Attacks* (Cambridge University Press, 2002), 30–1. Also: E Hambro, LM Goodrich, and AP Simons, Charter of the United Nations: Commentary and Documents (3rd edn, Columbia University Press, 1969), 12–16.

([512]) *Reparation for Injuries Suffered in the Service of the United Nations* (n 504), 182.

([513]) Crawford, *Brownlie's Principles of Public International Law* (n 186), 187.

([514]) Dissenting Opinion of Judge Krylov in *Reparation for Injuries Suffered in the Service of the United Nations* (n 504), 217–19; Dissenting Opinion of Judge Winiarski in *Effects of Awards of Compensation made by the UN Administrative Tribunal* (n 506), 64–6; Dissenting Opinion of Judge Winiarski in *Certain Expenses of the United Nations (Article 17, paragraph 2 of the Charter)* (Advisory Opinion) [1962] ICJ Rep 151, 230.

([515]) Charter of the United Nations, 26 June 1945, 892 UNTS 119.

([516]) Hambro, Goodrich, and Simons, *Charter of the United Nations* (n 511), 16.

([517]) See eg M Byers and G Nolte (eds), *United States Hegemony and the Foundations of International Law* (Cambridge University Press, 2003).

([518]) Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 UNTS 222.

([519]) AWB Simpson, 'Hersch Lauterpacht and the Genesis of the Age of Human Rights' (2004) 120 LQR 49, 78.

([520]) *Tyrer v United-Kingdom* (n 134), 353.

([521]) *Airey v Ireland* (n 494) at [26].

([522]) See J Christoffersen, 'The Impact of Human Rights Law on General International Law' in MT Kamminga and M Scheinin, *The Impact of Human Rights Law in General International Law* (Oxford University Press, 2009), 47–8.

([523]) Preamble, Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 UNTS 222.

([524]) A McNair, *The Rights of the European Citizen* (Directorate of Information of the Council of Europe, 1961), 9–10. Also: H Waldock, 'The European Convention for the Protection of Human Rights and Fundamental Freedoms' (1958) 34 BYIL 356; H Golsong, 'The European Convention on Human Rights before Domestic Courts' (1962) 38 BYIL 445.

([525]) H Lauterpacht, *An International Bill of the Rights of Man* (reissue, Oxford University Press, 2013).

([526]) H Lauterpacht, 'The Proposed European Court of Human Rights' (1949) 35 GST 25, 33–4. Also: P Sands, 'Introduction' in H Lauterpacht, *An International Bill of the Rights of Man* (n 525).

([527]) JH Barrington, 'The Proposed European Court of Human Rights' (1949) 35 GST 41.

([528]) Waldock, 'Evolution of Human Rights' (n 116), 547.

([529]) *Loizidou v Turkey* (Preliminary Objections) (1995) 103 ILR 622.

([530]) *Bankovic v Belgium* (2001) 123 ILR 94.

([531]) See *Reservations to the Convention on Genocide* (n 37); *Certain Norwegian Loans* (n 37); H Lauterpacht, 'Some Possible Solutions of the Problem of Reservations to Treaties' (1953) 39 GST 97.

([532]) R Higgins, 'The ICJ, the ECJ, and the Integrity of International Law' (2003) 52 ICLQ 1, 18.

([533]) Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 UNTS 222.

([534]) See the criticism by R Jennings, 'The Proliferation of Adjudicatory Bodies' [1995] ASIL Bulltetin no 92, 5–6.

([535]) *Loizidou v Turkey* (n 529), 645.

([536]) See *Acquisition of Polish Nationality* PCIJ (1923) Series B No 7, 20.

([537]) *Bankovic v Belgium* (n 530), 110–11 at [64]–[65].

([538]) Article 1 ECHR provides: 'The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.'

([539]) *Bankovic v Belgium* (n 530), 111 at [64]. Also: *Al-Skeini and Others v Secretary of State for Defence* [2007] UKHL 26, [2008] 1 AC 153, 199 at [69] (Lord Rodger), 214–15 at [128] (Lord Brown).

([540]) The Grand Chamber cited as instances thereof *Dudgeon v United Kingdom* 22 October 1981, Series A No 45; *X, Y, and Z v United Kingdom* 22 April 1997 Rep 1997 II; *V v United Kingdom* App No 24888/94 ECHR 1999 IX; *Matthews v United Kingdom* App No 24833/94 ECHR 1999 I.

([541]) *Loizidou v Turkey* (n 529). See *Bankovic v Belgium* (n 530), 110–11 at [64]–[65].

([542]) *Aegean Sea Continental Shelf* (n 15), 32 at [77]. Also: *Navigational and Related Rights (Costa Rica v Nicaragua)* (n 17), 242–44; *Nationality Decrees Issued in Tunis and Morocco* (n 133), 23–4.

([543]) Costa, *La Cour européenne des droits de l'homme* (n 184), 43.

([544]) *Bankovic v Belgium* (n 530), 114 at [75].

([545]) *Al-Skeini v United Kingdom* App No 55721/07 at [137].

([546]) Crawford, *Brownlie's Principles of Public International Law* (n 186), 653.

([547]) *Bankovic v Belgium* (n 530), 111 at [64] (my emphasis).

([548]) *Šilih v Slovenia* App No 71463/01, judgment [GC] of 9 April 2009 at [1]–[2].

([549]) This evolution has only been applied to certain (especially important) rights of the Convention: *Janowiec and Others v Russia* App Nos 55508/07 and 29520/09, judgment [GC] of 21 October 2013; *Lyubov Efimenko v Ukraine* App No 75726/01 25 November 2010; *Frandeş v Romania* App No 35802/05, judgment 17 May 2011 (where Art 2 was concerned); *Tuna v Turkey* App No 22339/03 judgment 19 January 2010; *Stanimirović v Serbia* App No 26088/06 18 October 2011; *PM v Bulgaria* App No 49669/07, judgment 24 January 2012; *Yatsenko v Ukraine* App No 75345/01, judgment 16 February 2012 (where Art 3 was concerned).

([550]) *Electricity Company of Sofia and Bulgaria (Belgium v Bulgaria)* (1939) PCIJ Rep Ser A/B No 77, 82; *Case concerning Right of Passage over Indian Territory* (Merits) (Judgment) [1960] ICJ Rep 6, 35. Also: A Koroma, 'Assertion of Jurisdiction by the International Court of Justice' in P Capps, M Evans, and S Konstadinidis (eds), *Asserting Jurisdiction: International and European Legal Persprectives* (Hart, 2003), 196; S Rosenne, *The Time Factor in the Jurisdiction of the International Court of Justice* (AW Sythoff, 1960); WD Krause-Ablaß, *Intertemporales Völkerrecht* (Forschungsstelle für Völkerrecht und ausländisches Recht der Universität Hamburg, 1969), 29–30; P Tavernier, *Recherches sur l'application dans le temps des actes et des règles en droit international public* (LGDJ, 1970), 215–20; R Higgins, *Themes and Theories: Selected Essays, Speeches, and Writings in International Law, vol II* (Oxford University Press, 2009), 875–80.

([551]) International Covenant on Civil and Policial Rights, 16 December 1966, 999 UNTS 171.

([552]) *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136, 180 at [111].

([553]) *Armed Activities on the Territory of the Congo (DRC v Uganda)* [2005] ICJ Rep 168, 243 at [216].

([554]) International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965, 660 UNTS 195.

([555]) *Application of the International Convention on the Elimination of all Forms of Racial*

Discrimination (Georgia v Russian Federation) (Provisional Measures) [2008] ICJ Rep 353, 386 at [109].

([556]) R Higgins, 'A Babel of Judicial Voices? Ruminations from the Bench' (2006) 55 ICLQ 791, 795. Also: B Simpson and L Moor, 'Ghosts of Colonialism in the European Convention on Human Rights' (2005) 76 BYIL 121, 123; T Meron, 'Extraterritoriality of Human Rights Treaties' (1995) 89 AJIL 80–1.

([557]) *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)* (n 14), 16.

([558]) *Tyrer v United Kingdom* (n 134) 58 ILR 339.

([559]) *Airey v Ireland* (n 494).

([560]) *RosInvestCo UK Ltd v Russian Federation* (n 507), at [39].

([561]) *RosInvestCo UK Ltd v Russian Federation* (n 507), at [39]–[40].

([562]) Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331, (1969) 8 ILM 679.

([563]) *British Claims in the Spanish Zone of Morocco* (1925) 2 RIAA 722, 725.

([564]) McNair, *The Law of Treaties* (n 25), 468.

([565]) *Convention concerning Employment of Women during the Night* (n 463), 377.

([566]) *European Communities and its Member States—Tariff Treatment of Certain Information Technology Products* (n 167).

([567]) *European Communities and its Member States—Tariff Treatment of Certain Information Technology Products* (n 167) at [7.597]–[7.599].

([568]) *European Communities and its Member States—Tariff Treatment of Certain Information Technology Products* (n 167) at [7.600]. Cf *China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/AB/R, 21 December 2009 at [47], [396].

([569]) Separate Opinion of Judge *ad hoc* Guillaume in *Dispute regarding Navigational and Related Rights (Costa Rica v Nicaragua)* (n 17), 290, 298.

([570]) *Convention concerning Employment of Women during the Night* (n 463), 377.