

A Contrario Interpretation in the Jurisprudence of the International Court of Justice

Abdulqawi A. Yusuf* & Daniel Peat**

In its recent judgments on preliminary objections in the cases of Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v Colombia) and the Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast (Nicaragua v Colombia), the International Court of Justice (“ICJ”) had to deal with arguments based on a contrario interpretation. This form of interpretation, according to which “the fact that a provision expressly provides for one category of situations is said to justify the inference that other comparable categories are excluded”, has been addressed several times in the jurisprudence of the Court and its predecessor, the Permanent Court of International Justice (“PCIJ”). Yet, despite assertions that the maxim of interpretation would “find a place in the logic of the nursery”, there remain fundamental questions about both its character and its operation. This article addresses two of those questions: how has a contrario interpretation been used in the practice of the PCIJ and ICJ, and how might we explain the importance attributed to it?

* Vice-President, International Court of Justice.

** Associate Legal Officer, International Court of Justice.

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I. Introduction

In its recent judgments on preliminary objections in the cases of *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v Colombia)*¹ (“*Alleged Violations*”) and the *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast (Nicaragua v Colombia)*² (“*Question of the Delimitation*”), the International Court of Justice (“ICJ”) had to deal with arguments based on *a contrario* interpretation. This form of interpretation, according to which “the fact that a provision expressly provides for one category of situations is said to justify the inference that other comparable categories are excluded”,³ has been addressed several times in the jurisprudence of the Court and its predecessor, the Permanent Court of International Justice (“PCIJ”). Yet, despite assertions that the maxim of interpretation would “find a place in the logic of the nursery”,⁴ there remain fundamental questions

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1. *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v Colombia)*, [2016] ICJ Rep 36 [*Alleged Violations*].
 2. *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast (Nicaragua v Colombia)*, Preliminary Objections, [2016] ICJ Rep 32 [*Question of the Delimitation*].
 3. *Alleged Violations*, *supra* note 1 at para 37.
 4. Lord McNair, *The Law of Treaties*, 1d (Oxford: Clarendon Press, 1961) at 399. Lord McNair uses the expression *expressio unius est exclusio alterius* – literally, “expression of the one is exclusion of the other”. He considers this to be synonymous with *a contrario* interpretation, with the latter terminology more frequently adopted in continental Europe, at 400.

about both its character and its operation. In this article, we intend to address two of those questions: how has *a contrario* interpretation been used in the practice of the PCIJ and ICJ, and how might we explain the importance attributed to it?

Whilst the academic literature on interpretation, in general, has grown exponentially since the conclusion of the *Vienna Convention*,⁵ *a contrario* interpretation remains both an understudied and elusive phenomenon.⁶ The principle does not clearly fit within the schema of the *Vienna Convention* nor is it applicable in every instance of interpretation. In an academic landscape dominated by the study of Articles 31 and 32 of the *Vienna Convention*, interpretative principles that are not expressly listed in those provisions fall through the cracks. The academic commentary and rare judicial decisions that address the principle demonstrate that there is disagreement over its most basic characteristics. Some authors contend that the principle has neither an autonomous role nor a fixed function, functioning as an *ex post facto* justification for interpretation made on other grounds,⁷ whilst other commentators contend that the maxim is nothing more than a “principle of common sense”.⁸

The relative scarcity of commentary on the principle leaves many

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5. *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) [*Vienna Convention*].
 6. One notable modern exception is Robert Kolb, *Interprétation et Création du Droit International* (Brussels: Bruylant, 2006) at 748-56.
 7. Charles de Visscher, *Problèmes d'interprétation judiciaire en droit international public* (Paris: Pedone, 1963) at 113. Cf. James W Garner & Valentine Jobst, “Codification of International Law: Part III – Law of Treaties” (1935) 29 *American Journal of International Law Supplement* 653 at 947 (“in all probability [the maxims of interpretation] developed as neat *ex post facto* descriptions or justifications of decisions arrived at by mental processes more complicated than the mere mechanical application of rules to a text”).
 8. See Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* (Princeton: Princeton University Press, 1997) at 26 (*a contrario* interpretation belonged to a category of canons of interpretation the application of which is “so commonsensical that, were the canons not couched in Latin, you would find it hard to believe anyone could criticize them”).

questions unanswered. However, the World Court has engaged with the principle both in response to arguments advanced by parties as well as by raising it *proprio motu*, shedding light on the character and operation of the principle and its relationship to the provisions of the *Vienna Convention*.⁹ The treatment of the principle by the Court is consonant with the general approach to interpretation adopted at the Vienna Conference, which finds its roots in a voluntarist approach to international law.¹⁰ Yet, its highly context-specific nature reminds us that interpretation is as much a matter of appreciation of circumstances and context on the part of the interpreter as it is a straight-forward application of codified rules. In this respect, *a contrario* interpretation is just another means of “arriving at the intention of the parties in an imperfectly expressed document”.¹¹

II. *A Contrario* Interpretation in the Jurisprudence of the World Court

One does not have to search far for the first inclusion of *a contrario* interpretation in the jurisprudence of the Court. In fact, the issue arose in the very first contentious case which came before the Court, the *Case of the S.S. Wimbledon*.¹² The *S.S. Wimbledon* was an English steamship that was chartered to a French company from 1919 to 1921. In March 1921, it loaded 4,200 tons of ammunition at Salonica (now called Thessaloniki) in Greece, bound for Danzig, Poland. After rounding the mainland of western Europe and travelling up the English Channel, the *S.S. Wimbledon* presented itself at the western entrance to the Kiel Canal,

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9. I submit that the Court’s judgment in *Territorial and Maritime Dispute (Nicaragua v Colombia)*, Application for Permission by Honduras to Intervene, [2011] ICJ Rep 420 at para 29, is to be distinguished as the Court is not interpreting a treaty, but refers to the judgment of the Court in *Land, Island and Maritime Frontier Dispute (El Salvador v Honduras)*, Application by Nicaragua for Permission to Intervene, [1990] ICJ Rep 92, which interprets certain provisions of the Statute.
 10. Cf. Kolb, *supra* note 6 at 749.
 11. *Commissioner of Taxes v Aktiebolaget Tetra Pak*, (1966) 45 ILR 427 (Appellate Division of High Court (Southern Rhodesia)) at 433, per Beadle CJ.
 12. (1923), PCIJ (Ser A) No 1 at 21 [*Wimbledon*].

a 61-mile canal situated in German territory and which joins the North Sea to the Baltic. It was refused entry on the basis that it was carrying ammunition bound for Poland. Germany had declared itself to be neutral in the on-going Russo-Polish war, and argued that its territory could not be used for transit that benefitted one of the belligerent states.

After fruitless negotiations with the German government, Britain, France, Italy, and Japan brought a case against Germany alleging that it was in breach of its obligations under the *Treaty of Versailles*,¹³ the peace treaty entered into by Germany and the Allied Powers at the end of the First World War. Specifically, the Applicants claimed that Germany had breached Article 380 of the *Treaty*, which provided that “The Kiel Canal and its approaches shall be maintained free and open to the vessels of commerce and of war of all nations at peace with Germany on terms of entire equality”.¹⁴ As the *S.S. Wimbledon* was both owned and operated by states that were at peace with Germany, the Applicants claimed that Article 380 clearly protected the right of free passage of the ship.

For its part, Germany claimed that the provisions of the *Treaty of Versailles* allowed it to restrict transit in pursuance of its neutrality. Its principal argument was that Article 381(2) of the *Treaty* permitted impediments to passage through the Kiel Canal “arising out of police, customs, sanitary, emigration or immigration regulations and those relating to the import or export of prohibited goods”.¹⁵ None of these permissible limitations, the Applicants argued, were relevant to the case at hand. This paragraph mirrors exactly the wording of Article 327(4) of the *Treaty* which governs transit to and from ports and transit through inland navigation routes. Germany argued that as the two provisions are identically worded, they must be interpreted in the same way.¹⁶ As neither provision expressly addressed transit in times of neutrality, Germany contended that they must be supplemented by reference to the

13. *Treaty of Peace with Germany (Treaty of Versailles)*, 28 June 1919, 225 CTS 188 (entered into force 10 January 1920).

14. *Ibid*, art 380.

15. *Ibid*, art 381.

16. *Case of S.S. Wimbledon*, “Counter-Memorial (Additional Volume)”, PCIJ (Series C) No 3, at 45-46.

“fundamental principles of international law”,¹⁷ one of which was that a state could prohibit transit through its internal waterways in protection of its neutral status. Germany contended that as this must be the case for Article 327(4) of the *Treaty*, it must also be the case for Article 381(2) of the *Treaty*, relating to the Kiel Canal.

The Court rejected Germany’s argument, stating that “the terms of article 380 are categorical and give rise to no doubt”.¹⁸ It noted that the drafters of the *Treaty* had intentionally created a “self-contained” separate section related to the Kiel Canal and that the rules in that section differed from those to which other internal navigable waterways were subjected, including Article 327(4). The Court was, therefore, of the view that “[t]he idea which underlies Article 380 and the following articles of the *Treaty* [which regulate the Kiel Canal] is not to be sought by drawing an analogy from these provisions but rather by arguing *a contrario*, a method of argument which excludes them”.¹⁹ Although its reasoning is somewhat sparse, the Court appears to be making the following point: the inclusion in the *Treaty* of a special section containing provisions related to the Kiel Canal means that the drafters of the *Treaty* must have intended those provisions, and not the provisions related to “standard” internal waterways, to govern transit through the Canal; put another way, the express inclusion of those provisions excluded the application of the general provisions on internal waterways to the Canal.

Two further points are worth noting with regard to the Court’s reasoning. First, it views the *a contrario* line of reasoning as intimately linked to the search for the intention of the parties. It is only because one can deduce that the drafters of the *Treaty* intended to create a specific section related to the Kiel Canal that *a contrario* interpretation has any weight. However, the Court could only discern that this was the intention of the drafters by referring to the text and context of the provisions and the structure of the whole treaty. Second, it is notable that the Court concludes that the terms of Article 380 are unambiguous and,

17. *Ibid* at 46.

18. *Wimbledon*, *supra* note 12 at 22.

19. *Ibid* at 24.

thus, protect the right of free transit before supporting this conclusion with an *a contrario* argument. Although it may be correct to say that the *a contrario* argument did not dictate the solution in this case, it does not seem accurate to state that it “only explained *ex post facto* the structure of the Court’s reasoning”.²⁰ The Court’s *a contrario* reasoning appears to do more than that, acting as confirmation of the intention of the parties that had already found expression in the text and context of the provisions of the treaty itself.

The second case that will be examined in this article is the advisory opinion of the Permanent Court in *Railway Traffic Between Lithuania and Poland*,²¹ handed down in 1931. In those proceedings, the Council of the League of Nations requested the Court to render an opinion regarding whether Lithuania was legally obliged to open a section of railway that had been out of use for at least ten years. Prior to its abandonment, the railway line was an important method of transporting goods between ports on the Baltic Sea, including to and from the Port of Memel, which lay in Lithuanian territory.

Of particular importance was whether the provisions of the *Memel Convention*²² obliged Lithuania to open the railway.²³ One of the arguments made in favour of opening the railway was based on Article 3 of Annex III of the *Memel Convention*, which made reference to another instrument, the *Statute of Barcelona*.²⁴ The latter obliged Lithuania to “facilitate free transit, by rail or waterway, on routes in use convenient for international transit”.²⁵ As the railway line was not “in use” the Court

20. de Visscher, *supra* note 7 at 113.

21. *Railway Traffic between Lithuania and Poland (Railway Sector Landwarów-Kaisiadorys)* (1931), Advisory Opinion, PCIJ (Ser A/B) No 42 [*Railway Traffic*].

22. *Convention and Transitory Provision concerning Memel*, 8 May 1924, 29 LNTS 87 (entered into force August 1925).

23. So called because it established the regime of the territory and Port of Memel, an area which was placed under French administration following the First World War.

24. *Convention on Freedom of Transit and Statute of Freedom of Transit*, 20 April 1921, 7 LNTS 11 (entered into force 31 October 1922).

25. *Railway Traffic*, *supra* note 21 at 120.

rejected the contention that this provision obliged Lithuania to open the railway. In support of this conclusion, the Court noted that Article 3, Annex III of the *Memel Convention* itself only obliged Lithuania to “permit and grant all facilities for the traffic *on the river* to or from or in the port of Memel”.²⁶ The fact that this provision only mentioned waterways, and not railways, confirmed, in the eyes of the Court, that Lithuania did not wish to abandon its right to restrict access to railways on its territory. In other words, the express inclusion of free transit of waterways justified the inference that railways were intentionally not covered by that provision.

In a similar vein to the *Wimbledon* case, the Permanent Court in *Railway Traffic* rooted the importance of a *contrario* interpretation in the intention of the parties to the *Memel Convention*. The Court considered that it could only have been an intentional act to include waterways but not railways in the free transit provisions of the *Memel Convention* and that this intention should therefore be given effect. Second, the Court – again, as in the *Wimbledon* case – used a *contrario* interpretation as a subsidiary means of interpretation. The Court’s *a contrario* line of reasoning is subsequent to, and confirmation of, its conclusion that:

[n]either the Memel Convention nor the Statute of Barcelona to which the former refers can be adduced to prove that the Lithuanian Government is under an obligation to restore the ... railway sector to use and to open it for international traffic.²⁷

We can see similar uses of a *contrario* reasoning in the judgments of the present Court. The first judgment of the ICJ to do so was the *Tehran Hostages* case²⁸ between the US and Iran. As is well-known, that case related to the storming of the US Embassy in Tehran by Iranian militants in late 1979 and the taking hostage of at least 48 persons having either diplomatic or consular status. After failed attempts to initiate bilateral negotiations to secure the release of the hostages, the Secretary-General of the UN sent a letter to the President of the Security Council requesting

26. *Ibid* at 121 (citing art 3 of Annex III of the *Memel Convention*).

27. *Ibid*.

28. *Case Concerning United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)*, [1980] ICJ Rep 3 [*Tehran Hostages*].

that the “Security Council be convened urgently in an effort to seek a peaceful solution of the problem”.²⁹ Whilst the Security Council was considering the situation in Tehran, the US submitted the dispute to the ICJ, basing the jurisdiction of the Court on the compromissory clauses of the *Vienna Conventions on Diplomatic Relations* (1961)³⁰ and *Consular Relations* (1963).³¹

As Iran did not submit written pleadings to the Court nor did it appear before the Court in oral proceedings,³² the Court was required to consider *proprio motu* any questions of jurisdiction or admissibility that might be relevant to the case. Of particular importance was the fact that the UN Security Council was “actively seized of the matter” and that the UN Secretary-General had been requested by the Security Council to use his good offices to search for a peaceful solution to the crisis. Article 12 of the *UN Charter* expressly prohibits the General Assembly from making recommendations with regard to a dispute whilst the Security Council is exercising its functions under the *Charter*. It could therefore be argued by analogy that the Court should exercise the same restraint in matters of which the Security Council was actively seized.

The Court rejected such an approach for two reasons. First, it observed that the Security Council had expressly taken note of the Court’s order of provisional measures in a resolution that it had adopted

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29. “Letter from the Secretary-General to the President of the Security Council” (25 November 1979) UN Doc S/13646.
30. *Vienna Convention on Diplomatic Relations*, 18 April 1961, 500 UNTS 95 (entered into force 24 April 1964).
31. *Vienna Convention on Consular Relations*, 24 April 1963, 596 UNTS 261 (entered into 19 March 1967).
32. *Tehran Hostages*, *supra* note 28. However, Iran did submit two letters to the Court in which it argued that the the Court should not exercise jurisdiction over the dispute as the situation of the hostages held in the US Embassy was part of an “overall problem” involving “more than 25 years of continual interference by the United States in the internal affairs of Iran”. *Ibid* at para 37.

on the matter.³³ In this context, the Court noted that “it does not seem to have occurred to any member of the Council that there was or could be anything irregular in the simultaneous exercise of their respective functions by the Court and the Security Council”.³⁴ Second, it reasoned *a contrario* that:

[w]hereas Article 12 of the Charter expressly forbids the General Assembly to make any recommendation with regard to a dispute or situation while the Security Council is exercising its functions in respect of that dispute or situation, no such restriction is placed on the functioning of the Court by any provision of either the Charter or Statute.³⁵

The reason for the implicit exclusion of the Court from this restriction was, in the view of the Court, clear:

[i]t is for the Court, the principal judicial organ of the United Nations, to resolve any legal questions that may be in issue between parties to a dispute; and the resolution of such legal questions by the Court may be an important, and sometimes decisive, factor in promoting the peaceful settlement of the dispute.³⁶

The case of *Frontier Dispute (Burkina Faso/Niger)*³⁷ provides another illustrative example of *a contrario* interpretation in the Court’s jurisprudence. The two parties in that case had brought a dispute before the Court on the basis of a special agreement, which asked the Court to determine the course of a certain sector of the parties’ land boundary. The parties agreed that the border should be delimited with reference to a 1927 French colonial-era document – referred to as the *arrêté* – that

33. *Case Concerning United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)*, Order of 15 December 1979, [1980] ICJ Rep 3.

34. *Tehran Hostages*, *supra* note 28 at para 40.

35. *Ibid.*

36. *Ibid.* This reasoning was cited with approval by the Court in subsequent case of *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, Jurisdiction and Admissibility Judgment, [1984] ICJ Rep 392, in response to the US argument that “the matter [in that case] was essentially one for the Security Council since it concerned a complaint by Nicaragua involving the use of force” at para 93.

37. *Frontier Dispute (Burkina Faso/Niger)*, [2013] ICJ Rep 44 [Niger].

described the boundary between the states when they were both French colonies.³⁸ In one particular section, the *arrêté* stated that the boundary lay between two points – the question before the Court was whether the boundary was necessarily a straight line between these points, or whether it took a less direct route.

The Court rejected the claim – advanced by Burkina Faso – that the boundary between the two points was necessarily a straight line for several reasons. First, it noted that the *arrêté* specified, in relation to two other sections, that the boundary between two points should take the form of a straight line but did not make a similar stipulation for the section under consideration.³⁹ If Burkina Faso’s argument that the boundary between two points is necessarily a straight line was correct, then these express stipulations would be superfluous. However, the Court noted that this was:

not necessarily enough to exclude the possibility that, in the section here under consideration, the inter-colonial boundary followed a straight line ... Nevertheless, the fact that the provisions specifying that certain sections consist of straight lines appear in the same document as those providing no precise details in respect of other sections, weakens Burkina Faso’s argument that the latter provisions, solely by virtue of that lack of detail, should necessarily be interpreted as drawing a straight line.⁴⁰

In order to conclusively reject Burkina Faso’s argument, it examined two further pieces of evidence. First, it studied the records of the French colonial administration, which – in its view – provided no support for the claim that the boundary in that section should be a straight line.⁴¹ Second, the Court highlighted the fact that a town that was administered by the colonial predecessor of Niger would be on the ‘wrong side’ of

38. The Court has frequently reiterated that boundaries inherited from colonization are inviolable by virtue of the principle *uti possedetis juris*; see for example, *Frontier Dispute (Burkina Faso/Republic of Mali)*, [1986] ICJ Rep 554 at para 20.

39. *Niger*, *supra* note 37. For example, in relation to one section of the boundary, the *arrêté* specified that the boundary, following “an east-south-east direction, continues in a straight line up to [an identified] point” at para 88.

40. *Ibid* at para 88.

41. *Ibid* at para 93.

the boundary if it were held to be a straight line, providing additional support for the conclusion that the *arrêté* should not be interpreted in such a manner.⁴²

A similar pattern can be discerned in the Court's most recent treatment of *a contrario* interpretation, which occurred in the judgments on preliminary objections in the *Alleged Violations* and the *Question of the Delimitation* cases. Whilst not joined, those cases had a significant degree of overlap with respect to the first preliminary objection raised by Colombia and thus the Court dealt with that objection identically in both cases.⁴³ In those cases, Nicaragua attempted to found the jurisdiction of the Court on Article XXXI of the *American Treaty on Pacific Settlement* of 1948,⁴⁴ more commonly referred to as the *Pact of Bogotá*. That provision provides that the ICJ has jurisdiction over all legal disputes "without the necessity of any special agreement so long as the present treaty is in force".⁴⁵ Whilst both Nicaragua and Colombia were initially states parties to the *Pact*, Colombia denounced the treaty on 27 November 2012. Article LVI regulates the effect of denunciation, providing that:

The present treaty shall remain in force indefinitely, but may be denounced upon one year's notice, at the end of which period it shall cease to be in force with respect to the State denouncing it, but shall continue in force for the remaining signatories ...

The denunciation shall have no effect with respect to pending procedures initiated prior to the transmission of the particular notification.⁴⁶

Nicaragua filed its applications in the two cases on 26 November 2013, one day before denunciation took effect. In both cases, one of Colombia's principal arguments against the jurisdiction of the Court was based on an *a contrario* interpretation of the second paragraph of Article LVI. According to this interpretation, as procedures that were initiated prior

42. *Ibid* at para 95.

43. For ease of reference, the paragraph numbers to which I refer are those in the *Alleged Violations* judgment on preliminary objections.

44. *American Treaty on Pacific Settlement (Pact of Bogotá)*, 30 April 1948, OASTS No 17 and 61 (entered into force 6 May 1949) [*Pact of Bogotá*].

45. *Ibid*, art XXXI.

46. *Ibid*, art LVI.

to the transmission of notification of denunciation are not affected by denunciation, those initiated after notification must therefore be affected by denunciation. Colombia claimed that this leads to the conclusion that parties to the *Pact* cannot bring cases against a state that has denounced the *Pact* in the one-year period after denunciation.

In response to this argument, the Court stated that an *a contrario* interpretation:

is only warranted when it is appropriate in light of the text of all the provisions concerned, their context and the object and purpose of the treaty. Moreover, even where an *a contrario* interpretation is justified, it is important to determine precisely what inference its application requires in any given case.⁴⁷

In the view of the Court, the ordinary meaning of Articles XXXI and LVI clearly demonstrated that the *Pact* continued to be in force for the denouncing state during the one-year period after notification; it ceased to be in force only after this period had expired. As the treaty was “in force” between the denouncing state and other states parties to the *Pact*, Article XXXI thus gave the Court jurisdiction over applications submitted to it during that period. It noted that this interpretation was not only supported by the text of the treaty, but also by the context of the provisions and the object and purpose of the *Pact*. In relation to context, the Court observed that if one were to adopt Colombia’s interpretation, none of the provisions related to dispute settlement procedures would still be in force over the one-year notification period; this would be, in the view of the Court, “difficult to reconcile with the express terms of the first paragraph of Article LVI”.⁴⁸ Moreover, the very purpose of the *Pact* is to facilitate dispute settlement, evidenced *inter alia* by the full title of the *Pact*, which would evidently be frustrated by precluding access to dispute settlement procedures during the one-year notice period.

III. The Operation of a *Contrario* Arguments

At the start of this article, two questions were raised: how has a *contrario* interpretation been used by the World Court, and how might we explain

47. *Alleged Violations*, *supra* note 1 at para 37.

48. *Ibid* at para 40.

its significance? The judgments and advisory opinions examined above shed some light on the answers to these questions, which are further elaborated below.

Perhaps the most noticeable element of the jurisprudence on a *contrario* interpretation is that the Court does not assimilate or subsume the principle within the framework of Articles 31 and 32 of the *Vienna Convention*. Indeed, the Court most explicitly recognised the autonomous nature of the principle in *Alleged Violations/Questions of Delimitation*, when it stated that a *contrario* interpretation in effect only operated as a result of (*i.e.* after) the application of the factors listed in Article 31(1). This might seem to be a minor point, but it is nevertheless notable, demonstrating that the Court has used or made reference to uncodified interpretative principles that lay outside the remit of those Articles 31 and 32. Whilst much of the academic literature inevitably elaborates how those provisions have been understood and applied by various courts and tribunals, the vast majority of it does not pay much attention to the operation and character of uncodified interpretative principles.

Moreover, it should be noted that the use of such principles is perfectly in keeping with the drafting history of the *Vienna Convention* provisions. It was the work of the International Law Commission (“ILC”) on the law of treaties that provided the blueprint for a convention to the Vienna Conference in 1968 and 1969, which ultimately adopted many of the proposed provisions without change.⁴⁹ Most pertinently, the Commission did not aim to be exhaustive when it outlined the factors that an interpreter should or could take account of in Articles 31 and 32; instead, the Special Rapporteur on the topic at that time, Sir Humphrey Waldock, noted that the Commission should “seek to isolate and to codify the comparatively few rules which appear to constitute

49. For greater detail on the history to Articles 31 and 32 on the *Vienna Convention*, see Richard K Gardiner, *Treaty Interpretation*, 2d (Oxford: Oxford University Press, 2015) ch 2.

the strictly legal basis of the interpretation of treaties”.⁵⁰ There were, he acknowledged, myriad other principles “whose appropriateness in any given case depends so much on the particular context and on a subjective appreciation of varying circumstances” that the Commission should not attempt to codify.⁵¹ *A contrario* interpretation clearly falls within this category of interpretative principles that has hitherto attracted scant attention.

The second notable aspect of the Court’s use of *a contrario* reasoning is that it is always used as an auxiliary method of interpretation by the Court – it is never in and of itself determinative of a particular interpretation. Instead, the Court uses *a contrario* reasoning in one of two ways: either it confirms an interpretation that is made on other grounds (such as ordinary meaning), or it is a factor that is taken into account alongside other considerations (such as context and or object and purpose) that advocate in favour of taking a certain approach.⁵² Whilst not determinative, the Court’s use of *a contrario* interpretation is to be distinguished from recourse to the subsidiary means of interpretation under Article 32 of the *Vienna Convention*. The latter – the preparatory work and circumstances of conclusion of a treaty – can only be used to confirm or correct an interpretation arrived at by application of the general rule of interpretation in Article 31. However, the jurisprudence above demonstrates that *a contrario* interpretation is used sometimes alongside the context or object and purpose of a treaty as an important factor in deducing the intention of the parties. It is, therefore, given a significantly more important role than the simple corrective or confirmatory function that the *travaux préparatoires* or circumstances of conclusion of a treaty

50. “Third Report on the Law of Treaties, by Sir Humphrey Waldock, Special Rapporteur” (UN Doc A/CN.4/167) in *Yearbook of the International Law Commission 1964*, vol 2 (New York: UN, 1965) at 54 (UNDOC. A/ CN.4/SER.A/1964/Add. 1).

51. *Ibid* at 54.

52. In the first group are the cases of the *Wimbledon*, *supra* note 12; *Alleged Violations*, *supra* note 1; *Question of Delimitation*, *supra* note 2; and the advisory opinion in *Railway Traffic*, *supra* note 21. In the second group of cases, one could count the judgments in the *Tehran Hostages*, *supra* note 28; and *Niger*, *supra* note 37 cases.

play under Article 32 of the *Vienna Convention*. The *Frontier Dispute (Burkina Faso/Niger)* judgment provides an illustrative example of this. It should be recalled that in that case, the Court commenced its analysis with a *contrario* interpretation that, although not determinative of the Court's approach, was the first of three factors that led the Court to reject Burkina Faso's argument. This shows that a *contrario* interpretation may sometimes be used not only as a distinct interpretative principle from those codified in the provisions of the *Vienna Convention*, but also in a way that does not clearly fit within the schema instituted by Articles 31 and 32.

This leads to a final point which is worth considering in this analysis – why does a *contrario* interpretation have any weight in the reasoning of the Court? The jurisprudence analysed above demonstrates that the Court has used a *contrario* interpretation as a manner of framing its reasoning regarding the intentions of the parties, or of confirming its conclusions.⁵³ This was most clearly expressed by the Court in the recent judgments on preliminary objections in *Alleged Violations/Questions of Delimitation*, in which the Court stated that recourse to an a *contrario* interpretation is only justified “when it is appropriate in light of the text of all the provisions concerned, their context and the object and purpose of the treaty”.⁵⁴ All these elements – the text, context, and object and purpose of a treaty – are drawn on by the Court in order to determine whether it was the *intention* of the parties to include explicitly some categories or provisions and exclude others.

One might contend that this is open to criticism insofar as the ILC explicitly rejected the idea that the goal of interpretation was to search for the intentions of the parties. The “intentionalist” approach, advocated

53. Indeed, tribunals have held that not every inclusion in a treaty text justifies the inference that other categories were intentionally excluded; some provisions are placed in treaties *ex abundanti cautela*. See *Alleged Violations*, *ibid* at para 43; see also, *Différend interprétation et application des dispositions de l'Article 78, par. 7, du Traité de Paix au territoire éthiopien — Décisions nos 176 et 201 rendues respectivement en date des 1er juillet 1954 et 16 mars 1956*, XIII RIAA 636 at 649.

54. *Alleged Violations*, *ibid* at para 37.

by Sir Hersch Lauterpacht amongst others,⁵⁵ carried little favour with the majority of members in the ILC, who were instead of the view that “the elucidation of the meaning of the text rather than an investigation *ab initio* of the supposed intentions of the parties constitutes the object of interpretation”.⁵⁶ Importantly, however, the Commission did not reject the notion that the purpose of interpretation was to give effect to the intention of the parties;⁵⁷ instead, it simply recognised that the interpreter should not be given free rein to consult any materials that they desired, such as the preparatory work of a treaty. The division between “textualists” and “intentionalists” in the Commission was, therefore, a division not regarding the importance of intention to interpretation but rather about the appropriate method to find the parties’ intention; the latter group considered that any useful material could be consulted whereas the former were of the view that the text of the treaty constituted the “authentic expression” of the parties’ intention.⁵⁸ As such, it is correct to say that the elements codified in Articles 31 and 32 are simply the means of interpretation admissible for ascertaining the intention of

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55. See in particular the report of Lauterpacht in his capacity as Special Rapporteur for the topic of treaty interpretation in the Institut de Droit International: Hersch Lauterpacht, “L’Interprétation des traités”, (1950) 43:1 *Annuaire de l’Institut de Droit International* 367.
56. “Reports of the International Law Commission on the second part of its seventeenth session and on its eighteenth session” (UN Doc A/6309/Rev 1) in *Yearbook of the International Law Commission 1966*, vol 2 (New York: UN, 1967) at 223 (UNDOC. A/CN4/SER.A/1964/Add. 1) [Reports].
57. Indeed, the first Special Rapporteur of the International Law Commission on the topic explicitly noted that the purpose of interpretation was “to give effect to the intention of the Parties as fully and fairly as possible”: James Leslie Brierly, *The Law of Nations: An Introduction to the International Law of Peace* (Oxford: Oxford University Press, 1928) at 168.
58. Reports, *supra* note 56 at 220.

the parties,⁵⁹ and that they provide the interpreter with the tools to determine whether the parties intended to include certain categories to the detriment of others.

IV. Conclusion

This brief study of *a contrario* interpretation has shed some light on its character and operation, demonstrating that it is used by the World Court as a subsidiary means of interpretation which functions alongside or in support of the provisions of the *Vienna Convention*. Whilst one hopes that this is useful in itself, the study also serves the broader purpose of demonstrating that there are still unanswered questions in the field of interpretation that could fruitfully be the subject of academic study. Despite the numerous books that have been published on the topic in the past decade, there remains space for academics and practitioners to further elucidate and debate how judicial institutions should interpret international law. This symposium, focussing on interpretation in international law, is therefore a welcome addition to the literature, and it is to be hoped that the following articles will engender lively debate in the international law community and beyond.

59. *Ibid* at 218-19. See also Eirik Bjorge, “The Vienna Rules, Evolutionary Interpretation, and the Intentions of the Parties” in Andrea Bianchi, Daniel Peat & Matthew Windsor, eds, *Interpretation in International Law* (Oxford: Oxford University Press, 2015) at 189.