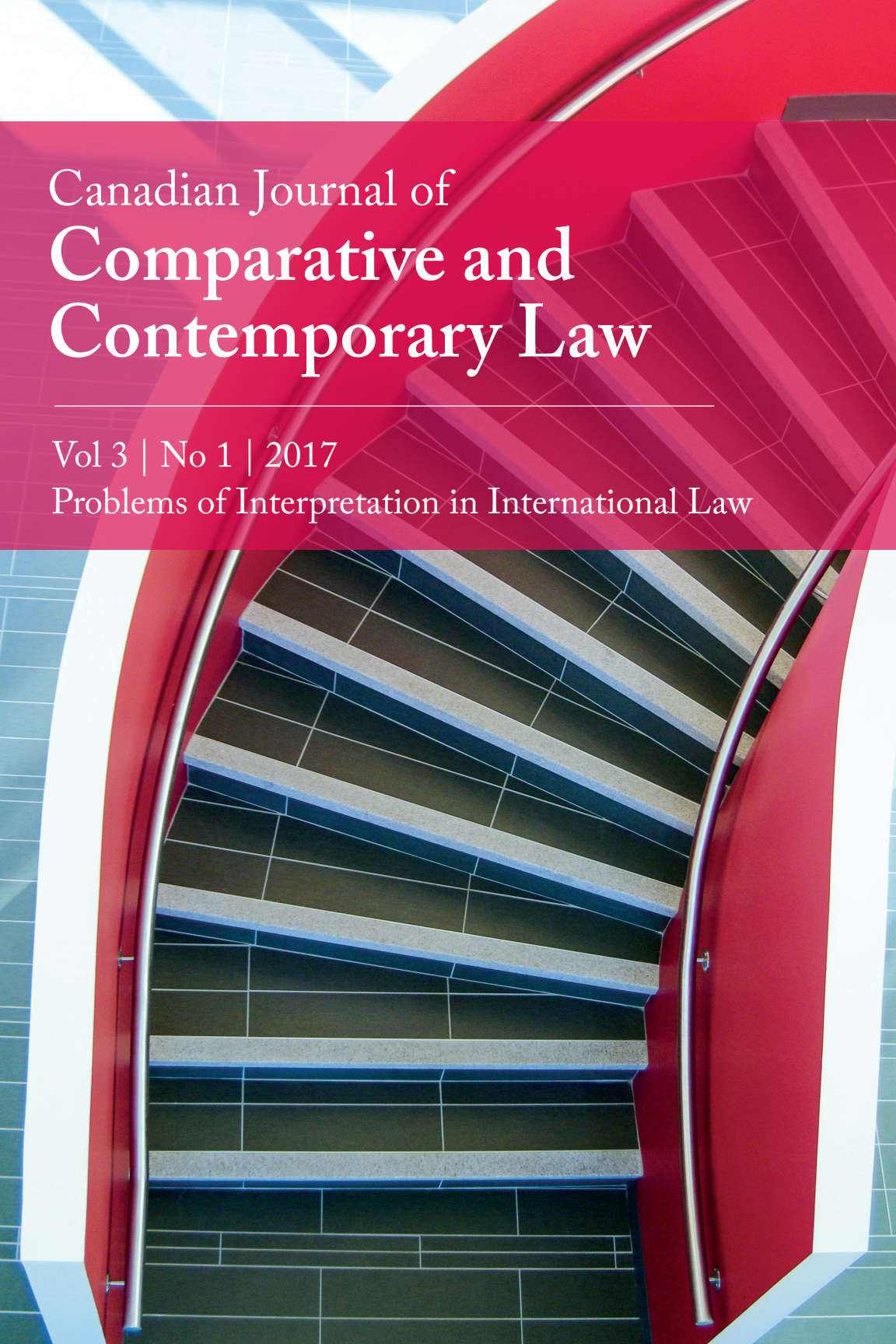

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The front cover depicts the main stairwell that leads to the atrium of Thompson Rivers University, Faculty of Law. The back cover depicts the distinct exterior of the Faculty of Law. The curved design of the roof was inspired by the natural beauty of the mountains visible from the building.

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Foreword

Aspects of International Law: From Interpretation to Law Making

Louis LeBel
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Once again, the *Canadian Journal of Comparative and Contemporary Law* has published a collection of essays on important and sensitive legal issues, this time in Public International Law. We owe this new collection to the initiative of Professors Lorne Neudorf, Chris Hunt, and Robert Diab and the Faculty of Law at Thompson Rivers University.

Its title is simply "Problems of Interpretation in International Law". This modest title understates the importance of this collection. It does not pretend, as a textbook might claim to do, to fully review the state of the law. Rather, it opens views on the actual life of International Law. It reviews a number of current difficult issues and looks ahead to the developing future of International Law. It shows that interpretation does not operate solely as a technique to elicit meaning from text. It means more than that as it moves beyond this stage to discuss how interpretation impacts on the creation of the law and on the sometimes tense relationship between International Law and domestic legal systems.

This collection looks at International Law from the perspective of legal interpretation. Such a topic is well known to lawyers, judges, and academics everywhere in Canadian law. Nevertheless, the nature of legal interpretation and of its core principles, even after *Rizzo*[1] and the rise of

1. *Rizzo & Rizzo Shoes Ltd, Re*, [1998] 1 SCR 27.

the modern principle of interpretation, remains an ongoing controversy.[2]

As we go through the contributions of the authors of these essays, the problems that interpretation raises in International Law seem close to those that must be addressed in Canadian law.

Some of the contributions focus on narrower issues which also come up in Canadian law. For example, Judge Abdulqawi Yusuf and Dr. Daniel Peat reflect on "*A Contrario* Interpretation in the Jurisprudence of the International Court of Justice". This method is often used and discussed to resolve legal interpretation problems, but the analysis of the authors leads them to a fundamental question on the nature of legislative interpretation. Beyond the words of a text, how purposive can any interpretation be? What is the goal of interpretation? We might ask whether it would possible to find a common purpose in the international community, as readers of statute pretend to discover an intention of Parliament or legislature according to the canons of statutory interpretation. In the discussion of this question, it might be bold to assume the existence of a community of interpretation sharing the same values and processes. It might look more like a hope than a fact, resting on a blind faith in the unicity of International Law.

The issue of whether there exists a truly International Law also comes up when other contributions focus on the interpretation of a key international instrument governing the interpretation, like the *Vienna Convention on the Law of Treaties* ("*Vienna Convention*"). Disagreements extend to the interpretation of principles of interpretation. The paper of Professor Juliette McIntyre raises this problem as it discusses the strikingly different approaches between the High Court of Australia and the Supreme Court of Canada. In their interpretation of the *Vienna Convention*, both high Courts embrace a stated goal, ensuring the uniformity of its interpretation given its critical importance in

2. For *e.g.* Stéphane Bernatchez, "De la vérité à l'intersubjectivité, et du texte au contexte vers une conception réflective de l'interprétation du droit" in Stéphane Beaulac & Mathieu Devinat, eds, *Interpretatio non cessat*: *Mélanges en l'honneur de Pierre-André Côté* (Cowansville: Éditions Yvon Blais, 2011) 79.

the development of International Law. Despite this shared purpose, the author asserts that one court, the Supreme Court of Canada, has shifted to a more teleological method while another, the High Court of Australia, remains wary of moving away from a more textualist approach. In the end, beyond the desire to foster the unity of International Law, the methods of interpretation of International Law, as they are applied in practice, remain distinct according to the holdings of two judicial bodies belonging to the same legal culture, the Common Law.

Other contributions seem to lead to an acknowledgment that International Law may take a regional colour. An interesting example is found in the article of Professor Lucas Lixinski, "The Consensus Method of Interpretation by the Inter-American Court of Human Rights". The author sets out the strengths and the drawbacks of the method as it is used by the Inter-American Court to reinforce the application of human rights. His analysis supports a view that the effectiveness of International Law principles and rules varies as they are applied in different parts of the world, either by regional judicial institutions or by national courts.

The same concern about the unicity of International Law underpins the paper of Dr. Daniel Peat on "Interpretation and Domestic Law: The Prosecution of Rape at the International Criminal Tribunal for the former Yugoslavia". The author considers the relationship between International Law and national laws when the latter are used to interpret International Law by giving substance to international instruments. This essay confirms a tension about the nature of International Law as to whether it constitutes an essentially autonomous system of law or necessarily incorporates elements of national legal systems.

In Canada, it is well established that International Law is given at least interpretive or comparative law value. The jurisprudence of the Supreme Court of Canada, since *National Corn Growers v Canada (Import Tribunal)*[3] accepts that consideration from International Law is appropriate in the interpretational Canadian laws. For example, it seeks to ensure consistency between Canadian laws and treaties on which they are based.

3. [1990] 2 SCR 1324.

But the influence of domestic law as a source of interpretation in International Law raises more concern among a number of International jurists, as Dr. Peat acknowledges. For example, a prominent scholar, Mr. Antonio Cassese, both in his judicial and academic work, asserts that the use of national laws may compromise the uniformity of International Law. Moreover, doubts arise about the possibility of relying on truly exhaustive reviews of the national legal systems of the world. But despite these reservations, according to the author, the practice of International Courts, like the International Criminal Tribunal for the former Yugoslavia ("ICTY"), appears to confirm the relevance of a review of domestic laws to give substance to the general provisions of international instruments like the *Rome Treaty* or the *Statute of the ICTY*.

The relationship between International Law and domestic laws stands at the center of other essays as some of the authors move beyond strict issues of interpretation; they focus on the nature of that relationship and on the scope of its impact on International Law and on national legal systems. In his comments on a sad chapter of the legal and political history of Canada, Mr. Gib van Ert reviews the attempts of British Colombia, a century ago, to exclude Chinese and Japanese immigrants. His contribution shows that, on one side, International Law, as found in treaties between the British Empire and Japan, contributed to the definition of the scope of provincial and federal powers in a former British colony like Canada. On the other side, it illustrates how national law may limit the effectiveness of validly concluded treaties. The treaties with Japan needed to be received into the domestic order of Canada to become effective. The treaties between the British Empire and Japan were undoubtedly law governing their relationship within the international order as independent political actors. But at the same time, within the Dominion of Canada, these treaties would not be binding law until they became part of the domestic law of the Dominion of Canada. A two-way relationship between the different legal orders is needed to create an effective or holistic legal system. It suggests that legal orders situated at different levels do not easily remain totally autonomous.

Two other contributions focus on the use of interpretation to identify sources of law or even to create law. This process of creation involves the

discovery of new materials or sources that finally contribute to defining and fleshing out the rules and principles of International Law and to moving it into new directions.

For example, Professor Marie-Claire Cordonier Segger explores in depth the nature of the interpretative process as such in her paper "Inspiration for Integration: Interpreting International Trade and Investment Accords for Sustainable Development". She focuses on the quest for relevant materials in order to bring into the interpretation of economic agreements concerns about problems of sustainable development. Interpretation becomes a process of acknowledgment of relevant sources to broaden the scope of the agreements. This requires the recognition of a variety of soft law and of consensus arising out of it. It is interpretation in the sense that it adds to the sources used in the interpretation process. This approach invites us to look beyond the text of agreements to the conduct or practice of international actors. It includes a range of emerging standards in the process, but leaves open the problem of the triggering points at which those developing concerns acquire a normative effect because they become part of international customs or find their way into the interpretation of a text.

The problem of the sources of interpretation in international agreements is raised by Professor Joshua Karton in another context in his paper "Choice of Law and Interpretive Authority in Investor-State Arbitration". First, the author acknowledges a growing backlash against investors' state arbitration. He then looks for a solution in a new approach to the interpretation of the instruments governing this form of arbitration. As the author points out, this arbitration process faces a problem of democratic legitimacy in many of the states that entered into such agreements. These concerns demonstrate the importance of the connections between domestic and International Law, in order to develop the interpretative principles of such agreements. According to the author, International Law, in such a context does not stand in isolation. Preserving the legitimacy of this particular form of arbitration requires that the process of interpretation give more respect to the law of the states that entered into these agreements to more clearly define rules of choice of law and interpretation governing their application. It

does suggest that the application of International Law in such a context may have to reflect the presence of communities that states represent and their values. The preservation of a link between these values and the interpretation of such agreements is required to reach a proper balance between private and public interests.

Finally, in the paper of Professor Rumiana Yotova, "Challenges in the Identification of the "General Principles of Law Recognized by Civilized Nations": The Approach of the International Court", the approach of the international laws considers a classic problem of interpretation. It discusses the view and the question of the International Court of Justice on the interpretation of article 38(1)(c) of the *Statute of the International Court of Justice* ("*Statute of the International Court*") which states that the general principles of law common to civilized nations are a source of law. It discusses how those principles can be recognized and accepted for the purpose of the application of this provision of the *Statute of the International Court*.

The essay of Professor Yotova raises concerns about the scope of the process of interpretation. The review of the jurisprudence of international courts of justice confirms tensions between different methods of interpretation in International Law. One would be based essentially on consideration of International Law itself and another would rely on a more comparative approach extending to national legal systems. These disagreements reflect conflicts between the strands of opinion about the scope of the interpretative process itself.

In the end, in the application of a provision like article 38(1)(c), the problem of interpretation concerns the development of the substance of legal rules through a process of identification of the sources of law themselves. As the author shows, this highly complex process goes beyond abstract word play. It seems to show that the life of the actors of the international community actually becomes a main source of law, even in the interpretation of critically important instruments like the *Statute of the International Court* or of the *Vienna Convention*.

Interpretation is not formally acknowledged as a source of law in such instruments, but it is recognized as a necessary and legitimate process, reflecting the life of the actors participating in the development

of the international community, as it seeks to determine the sources of law, their nature and their reach. The process of interpretation raises a basic question: how is law born and what is law? Is there a common International Law? How worldwide is International Law?

The problems raised in this collection of papers illustrate the richness and diversity of International Law. Their authors do not close the issues, but they open them to new chapters in their evolution.

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?*

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I. Introduction
II. *A Contrario* Interpretation in the Jurisprudence of the World Court
III. The Operation of *a Contrario* Arguments
IV. Conclusion

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

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

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,

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

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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* case[28] 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

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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

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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

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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/CN4/167) in *Yearbook of the International Law Commission 1964*, vol 2 (New York: UN, 1965) at 54 (UNDOC. A/CN4/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

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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] curried 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

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.

Same Pod, Different Peas: The *Vienna Convention on the Law of Treaties* in Australian and Canadian Courts

Juliette McIntyre*

What role do the rules of interpretation in Articles 31 and 32 of the Vienna Convention on the Law of Treaties ("VCLT") *have to play as potential agents of systemic integration and a coherent international legal system? Part of the answer lies in an examination of the practice of domestic courts which are increasingly called upon to undertake the task of interpreting treaties. This paper compares the practice of two superior courts – the Supreme Court of Canada and the High Court of Australia – in their approaches to the interpretation of international legal norms and their use of the interpretative principles in Articles 31 and 32. Despite the theoretical idea that the* VCLT *rules will, or should, encourage consistency of interpretation amongst varied interpreters, potential for divergences in interpretative technique (let alone outcome) remains. While both courts identify international law as a single system, and promote the role of Articles 31 and 32 as a means of ensuring uniformity of treaty application, historically the practise of the Supreme Court and High Court has been far from consistent, either internally or vis-à-vis each other. However, as the international law experience of these domestic courts grows, so too there appears to be an emerging consensus as to the preferred interpretative approach.*

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I. Introduction

The *Vienna Convention on the Law of Treaties*[1] ("*VCLT*") regulates for its parties[2] a broad range of issues: from fraud and invalidity, to amendment and the impact of treaties on third states.[3] But since its entry into force in 1980, it is in respect of the rules of treaty interpretation – Articles 31 and 32 – that the *VCLT* has achieved a remarkable and "near universal"[4] acceptance. Article 31, now habitually acknowledged as

1. *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) [*VCLT*].
2. Including, relevantly, Australia (accession 13 June 1974) and Canada (accession 14 October 1970).
3. *VCLT*, *supra* note 1 at arts 34, 39, 49; see also Eberhard P Deutsch, "Vienna Convention on the Law of Treaties" (1971-1972) 47 Notre Dame Lawyer 297.
4. Duncan B Hollis, "Interpretation and International Law" (2015) online: Social Science Research Network at 4 <ssrn.com/abstract=2656891>.

customary international law,[5] sets out the "general rule" of interpretation:

> 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
>
> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
>
> (a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
>
> (b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
>
> 3. There shall be taken into account, together with the context:
>
> (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
>
> (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
>
> (c) any relevant rules of international law applicable in the relations between the parties.
>
> 4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32 contains the rule in respect of supplementary means of interpretation:

> Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to

5. *Land, Island and Maritime Frontier Dispute (El Salvador v Honduras)*, [1992] ICJ Rep 351 at para 380; *Territorial Dispute (Libyan Arab Jamahiriya v Chad)*, [1994] ICJ Rep 6 at para 41; *Kasikili/Sedudu Island (Botswana v Namibia)*, [1999] ICJ Rep 1045 at 1059; *LaGrand (Germany v United States of America)*, [2001] ICJ Rep 466 at para 99; C*ase Concerning Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia v Malaysia)*, [2002] ICJ Rep 625 at para 37; *Case Concerning Avena and Other Mexican Nationals (Mexico v United States of America)*, [2004] ICJ Rep 12 at para 83; Jan Klabbers, "Virtuous Interpretation" in Malgosia Fitzmaurice, Olufemi Elias & Panos Merkouris, eds, *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years On* (Leiden: Brill, 2010) 17 (However, Klabbers disagrees that rules on interpretation can be of a customary nature as they are "simply of a different quality" being "methodological devices" rather than rules guiding behaviour at 30) [Klabbers, "Virtuous Interpretation"].

> determine the meaning when the interpretation according to article 31:
>
> (a) leaves the meaning ambiguous or obscure; or
> (b) leads to a result which is manifestly absurd or unreasonable.

International lawyers are intimately familiar with these terms of the *VCLT* regulating interpretation. But international courts are not the only bodies tasked with the application, and therefore interpretation, of international law;[6] many international norms are no longer concerned merely with the interactions between States, but "aim to regulate State conduct *within* the domestic jurisdiction".[7] As such, domestic courts have become, "at least implicitly", a key audience for the *VCLT*'s interpretive provisions,[8] as they are now regularly called upon to apply international legal norms. The subject considered in this paper is the use by domestic courts of the international law canons of interpretation.

The place of international law in domestic courts attracts significant scholarly interest, as does the theory of interpretation in international law. However, what remains relatively under-studied is the *practice* of domestic

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6. Jean d'Aspremont, "The Systemic Integration of International Law by Domestic Courts: Domestic Courts as Architects of the Consistency of the International Legal Order" in Ole Kristian Fauchald & André Nollkaemper, eds, *The Practice of International and National Courts and the De-Fragmentation of International Law* (Oxford: Hart Publishing, 2012) 141 at 141; Antonios Tzanakopoulos, "Judicial Dialogue as a Means of Interpretation" in Helmut Philipp Aust & Georg Nolte, eds, *The Interpretation of International Law By Domestic Courts: Uniformity, Diversity, Convergence* (New York: Oxford University Press, 2016) 72 ("Interpretation is crucial for the application of law – indeed the two can hardly be distinguished" at 72) [Aust & Notle, *Interpretation of International Law*].
7. Antonios Tzanakopoulos, "Domestic Courts in International Law: The International Judicial Function of National Courts" (2011) 34 Loyola of Los Angeles International & Comparative Law 133 at 138.
8. Michael Waibel, "Principles of Treaty Interpretation: Developed for and Applied by National Courts?" in Helmut Philipp Aust & Georg Nolte, eds, *The Interpretation of International Law By Domestic Courts: Uniformity, Diversity, Convergence* (New York: Oxford University Press, 2016) 10 at 13 [Waibel, "Principles of Treaty Interpretation"].

courts;[9] the quirks (or qualms) that can arise in the final judgment when issues of international law have been argued. This paper will consider and compare the practice of two superior courts – the Supreme Court of Canada and the High Court of Australia – in their approaches to the interpretation of international legal norms and their use of the interpretative principles in Articles 31 and 32 of the *VCLT*. It undertakes to provide an illustrative snapshot of some themes, points of interest, and points of divergence which have emerged in the jurisprudence of both States, rather than a comprehensive doctrinal analysis.

Given the limited scope of this paper, there are a number of important issues which cannot be considered. First, the potential influence of international law in the interpretation of each States' Constitution is a matter for domestic jurisprudence and constitutional law theorists. Second, anterior questions regarding the proper role of international law in domestic law are not addressed. For present purposes, it is sufficient that as a matter of fact international treaty norms are adopted into domestic law by the various mechanisms set out in Section III below. Third and finally, it is worth emphasizing that the focus of this paper is on the *art* of interpretation,[10] and not on the outcome of any particular *act* of interpretation. That is, no claims are made as to the accuracy or otherwise of the Courts' conclusions on any of the substantive issues of law raised in the case law discussed below.

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9. But see Helmut Philipp Aust, Alejandro Rodiles & Peter Staubach, "Unity or Uniformity? Domestic Courts and Treaty Interpretation" (2014) 27 Leiden Journal of International Law 75 (in which the authors review the courts of the European Union, Mexico and the United States) [Aust et al, "Unity or Uniformity?"]. See also, for an earlier review of domestic practise Christoph H Schreuer, "The Interpretation of Treaties by Domestic Courts" (1971) 45 British Year Book of International Law 255. See also generally, Aust & Nolte, *Interpretation of International Law*, *supra* note 6; Waibel, "Principles of Treaty Interpretation", *ibid* at 20.
10. *Report of the International Law Commission*, UNGAOR, 16th Sess, Supp No 9, UN Doc A/CN.4/173 (1964) at 200; Richard Gardiner, *Treaty Interpretation* (Oxford: Oxford University Press, 2008) ("Those who would practise the art need to understand the rules" at 5).

A. Why Canada and Australia?

Canada and Australia should be considered members of the same epistemic community,[11] as they share some remarkable similarities in their legal cultures, particularly *vis-à-vis* the relationship of domestic law to international law. These similarities make a comparative study particularly insightful, as differences of approach which may become apparent cannot be dismissed on the grounds of mere cultural relativism. Both are federal States,[12] sharing a similar political history as former British colonies.[13] Both confer distinct roles on the executive and Parliament in respect of treaties and may be described as traditionally dualist.[14] The historical antecedent of both States' approach to international law is set out clearly in *Attorney General for Canada v Attorney General for Ontario (Labour Conventions)*, a decision of the Privy Council binding in Canada and influential in Australia, in which Lord Atkin stated:

> It will be essential to keep in mind the distinction between (1) the formation, and (2) the performance, of the obligations constituted by a treaty, using that word as comprising any agreement between two or more sovereign States. Within the British Empire there is a well-established rule that the making of a treaty

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11. Michael Waibel, "Interpretive Communities in International Law" in Andrea Bianchi, Daniel Peat & Matthew Windsor, eds, *Interpretation in International Law* (Oxford: Oxford University Press, 2015) 148 at 153 [Waibel, "Interpretive Communities"].
12. *Commonwealth of Australia Constitution* Act 1900 (Imp), s 9; *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1895, Appendix II, No 5; *Canada Act 1982* (UK), 1982, c 11; *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.
13. In the case of the geographical area now comprising the province of Quebec, post-1763: George R, Proclamation, 7 October 1763 (3 Geo III), reprinted in RSC 1985, App II, No 1.
14. Canada and Australia take dramatically different approaches to the reception of customary international law, however that is not relevant for present purposes, but see *Nulyarimma v Thompson*, [1999] FCA 1192 [*Nulyarimma*]; *R v Hape*, 2007 SCC 26, at paras 36-9 [*Hape*]. Although as noted in James Crawford, *Chance, Order, Change: The Course of International Law* (Leiden: Brill, 2014), classifying a State's constitutional design as either monist or dualist is "not so much an exercise in absolutes as a matter of degree" at 164) [Crawford, *Chance*].

> is an executive act, while the performance of its obligations, if they entail alteration of the existing domestic law, requires legislative action.[15]

Finally, Canada and Australia are both parties to the *VCLT*.[16] As such, both are members of the same "interpretative community", and their superior courts' jurisprudence has an important role to play in contributing to understanding the function, utility, and importance of the *VCLT* in domestic courts.[17]

B. Structure of this Paper

Section II begins with the underlying question of the role of the *VCLT* as a tool of greater systemic integration in international law; this is the question to which the review of court practice will seek to provide an answer. Section III investigates the perception held by the Supreme Court of Canada and the High Court of Australia that international law is a single system of law, observing that both courts recognise the importance of uniform treaty interpretation, and the role that the *VCLT* rules have to play in promoting that outcome. Section IV turns to assess the attitudes of each court with respect to the application of international legal norms. It will be seen that the High Court has generally exhibited "hesitation towards treating international law as a legitimate and useful source of legal ideas, reasoning and principles"[18] while the Supreme Court, by contrast, has demonstrated a "muddled enthusiasm for international law".[19] The analysis concludes in Section V by considering how the respective attitudes of the courts as set out in Sections III and IV have influenced their approaches to interpretative methodology under the *VCLT*. While sharply divergent for some time, in the most recent case

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15. [1937] AC 326 at 34748.
16. *Supra* note 2.
17. On interpretative communities generally, see Waibel, "Interpretive Communities", *supra* note 11.
18. Michael Kirby, "The Growing Impact of International Law on the Common Law" (2012) 33 Adelaide Law Review 7 at 22.
19. Karen Knop, "Here and There: International Law in Domestic Courts" (2000) 32 New York University Journal of International Law and Politics 501 at 515.

law the courts appear to be converging in their approach, as will be seen in Section VI. Finally, Section VII sets out some tentative conclusions that may be drawn from the review regarding the role of domestic courts, and the international rule of law.[20]

II. International Law as a Legal System: The Role of the *VCLT* in Promoting Systemic Integration

That international law "is a legal system"[21] is a controversial opening gambit. But despite ever growing concerns regarding the fragmentation of international law, there is strong evidence of international law being a single system. In 1923 James Brown Scott, Director of the International Law Division of the Carnegie Endowment for International Peace, wrote that "[a] system of law to be applied between nations exists".[22] In 2012, Judge Greenwood averred in *Diallo (Compensation)* that international law is "not a series of fragmented specialist and self-contained bodies of law [but] a single, unified system",[23] and Pauwelyn has observed that while "in their treaty relations states can 'contract out' of one, more or, in theory, all rules of international law (other than those of *jus cogens*), … they cannot contract out of the system of international law".[24] Indeed the mere existence of norms with the status of *jus cogens* suggests the

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20. Aust et al, "Unity or Uniformity?", *supra* note 9 at 111.
21. *Report of the International Law Commission*, UNGAOR, 58th Sess, Supp No 10, UN Doc A/61/10 (2006) at 407-08. See also Martti Koskenniemi, "The Fate of Public International Law: Between Technique and Politics" (2007) 70 Modern Law Review 1.
22. James Brown Scott, "Annual Report of the Director of the Division of International Law " in *Carnegie Endowment for International Peace Yearbook* (Washington: The Endowment, 1923) 235 at 237.
23. *Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)*, Declaration of Judge Greenwood, [2102] ICJ Rep 391 at para 8.
24. Joost Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (New York: Cambridge University Press, 2003) at 37. See also Crawford, *Chance*, *supra* note 14 at 138, 145.

existence of a Raz-ian "intricate web … of interconnected laws",[25] or at least that international law is more than simply a series of disjointed parallel norms.

However, the question with which we are particularly interested is not the status of international law as a legal system as a matter of jurisprudence *per se*, but the role of the rules of interpretation in *VCLT* Articles 31 and 32 as a potential agent of systemic integration and a coherent international legal system.

The idea behind systemic integration goes something like this: international law is a legal system, made up of a large body of primary rules in the form of treaty and customary law, which are in turn "moderated" by common (secondary) rules of interpretation.[26] The very use of those secondary rules of interpretation can contribute to harmonization[27] and enhance legal certainty,[28] by amongst other things, promoting stability by making a court's decisions more predictable, and resolving conflicts between different primary norms.[29]

The *VCLT* is a treaty about treaties; a regime of secondary rules.[30] As neatly expressed by McLachlan: "[t]he rules of interpretation are themselves one of the means by which the system as a whole gives form and meaning to individual rules".[31] But behind this lies the question of "how this legal system shall be understood", as asked by Aust et al:

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25. Joseph Raz, *The Authority of Law* (Oxford: Clarendon Press, 1979) at 78-79.
26. Crawford, *Chance*, *supra* note 14 at 140 citing Raz, *ibid* at 183.
27. Chester Brown, *The Common Law of International Adjudication* (New York: Oxford University Press, 2010) at 12.
28. Panos Merkouris, "Introduction: Interpretation is a Science, Is an Art, Is a Science" in Malgosia Fitzmaurice, Olufemi Elias & Panos Merkouris, eds, *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years On* (Leiden: Brill, 2010) 1 at 10.
29. Aust et al, "Unity or Uniformity?", *supra* note 9 at 79. See generally Campbell McLachlan, "The Principle of Systemic Integration and Article 31(3)(C) of the Vienna Convention" (2005) 54 International Comparative Law Quarterly 279 at 280.
30. See Herbert Lionel Adolphus Hart, *The Concept of Law*, 3d (Oxford: Clarendon Press, 2012) at 76.
31. McLachlan, *supra* note 29 at 282.

> [I]s it premised on an all-encompassing uniformity of interpretation, *i.e.* the goal that all relevant actors are supposed to interpret international obligations in exactly the same way? Or is it sufficient that the international legal system is held together by some common rules which ensure systemic unity at a general level, but allow for deviation and pluralism in specific situations?[32]

Naturally, scholars differ. Waibel argues that there is a "crucial normative aspiration"[33] underlying Articles 31 and 32, which is the uniform interpretation and, as a corollary, application of treaties, wherein the interpretative principles act as a "glue"[34] to bring together the diverse range of potential treaty interpreters – including State governments and institutions, and both international and domestic courts. While by no means a guarantee of absolutely consistent interpretation, Articles 31 and 32 have, he argues, an important role in "setting outer limits to what counts as acceptable interpretation in international law".[35]

Roberts on the other hand has taken the position that the primary obligation on interpreters should be to interpret a treaty in the "best manner possible", consistently with the principle of good faith, rather than "consistently with other interpreters".[36] And Klabbers, for whom "treaty interpretation is a non-normative, methodological device",[37] opines that the use of interpretative devices as a tool of systemic integration is an overly "optimistic vision", given that the use of the same interpretative devices presents a mere "simulacrum of unity", and wide varieties of interpretation will still be present across the dividing lines of fragmented international law, such as human rights, trade, humanitarian law, and so on.[38]

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32. Aust et al, "Unity or Uniformity?", *supra* note 9 at 79.
33. Waibel, "Principles of Treaty Interpretation", *supra* note 8 at 10.
34. *Ibid* at 18.
35. *Ibid* at 12.
36. Anthea Roberts, "Comparative International Law? The Role of National Courts in Creating and Enforcing International Law" (2011) 60 International Comparative Law Quarterly 57 at 84.
37. Hollis, *supra* note 4 at 8, citing Jan Klabbers, "The Invisible College" (3 March 2009), Opinio Juris On-Line Symposium: Richard Gardiner's Treaty Interpretation, online: <opiniojuris.org/2009/03/03/the-invisible-college/>.
38. Klabbers, "Virtuous Interpretation" *supra* note 5 at 33.

Indeed Roberts' point that "even when States agree on a treaty text, they may have adopted vague or ambiguous wording precisely to permit conflicting interpretations to be maintained" must be conceded as a political reality.[39] But from a position of pure theory, the more convincing argument is Waibel's: that there is a presumption underlying the *VCLT* about the desirability of uniform treaty interpretation, and that through their mere application the use of consistent secondary rules can and will contribute to the furtherance of systemic integration. Like baking a cake by following a recipe, applying the same interpretative methodology should yield a very similar result, while nevertheless leaving room for necessary or desirable adjustments to suit the political will or milieu of the interpreter; the substitution of raspberries for strawberries, if you will.

In more conventional terms, legal texts must of necessity have some concrete and discrete meaning, and as potently argued by Scobbie, cannot be "free radicals that bear the meaning anyone chooses to put upon them".[40] Ultimately it is a matter of pragmatism – the terms utilised in a treaty must "have an identifiable meaning, or range of acceptable meanings, because the practice of law is an instrumental activity aimed at practical outcomes in the 'real' world".[41] Bahdi argues that "the claim that meaning resides in the text" would mean that there cannot be divergent interpretations of treaties across domestic jurisdictions.[42] He suggests that "[i]f meaning resides in the text, then a single proper interpretation of a treaty must emerge. If two national court judges interpret the same treaty differently, then one is right while the other is wrong".[43]

But this goes too far. It is not that pluralism is entirely prohibited; rather that at the end of the day a law must mean *something*, it cannot

39. Roberts, *supra* note 36 at 85, citing Phillip Allott, "The Concept of International Law" (1999) 10 European Journal of International Law 31 at 43.
40. Ian Scobbie, "Provenance and Meaning" in M Evans, *International Law*, 4d (New York: Oxford University Press, 2014) 64 at 65.
41. *Ibid* at 66.
42. Reem Bahdi, "Truth and Method in the Domestic Application of International Law" (2002) 15 Canadian Journal of Law and Jurisprudence 255 at 259.
43. *Ibid*.

mean everything. When a dispute comes before the court, the court cannot say "it means both X and Y". The court must decide between competing interpretations, and it must do so with some modicum of consistency.[44] And whether two identical primary norms are given the same interpretation will depend "in part on the question of whether they are governed by the same secondary rules".[45]

The use of the same secondary norms will not guarantee *absolute* uniformity of interpretation, but will at least contribute a "normative pull towards convergence".[46] Thus, while not a "panacea for fragmentation",[47] the application of the rules of interpretation in Articles 31 and 32 *should* contribute to the coherence of international law as a single system by providing interpreters with what McLachlan calls the "master key".[48] The question that remains, then, is whether they *do*.

III. Aims of Interpretation: The Recognised Importance of Uniformity

Judge Simma of the International Court of Justice has argued that the growing volume and importance of domestic jurisprudence concerning international legal issues brings with it an "increasing responsibility on the part of [domestic] courts to maintain the law's coherence and integrity".[49] While international law's character as a single legal system continues to be a matter of debate for international lawyers, D'Aspremont posits that domestic judges "tend to construe the international legal order as a

44. On the role of authority and continuity as the determinants of the character of legal interpretation, see Joseph Raz, *Between Authority and Interpretation* (New York: Oxford University Press, 2009) at 223-40.
45. André Nollkaemper, "The Power of Secondary Rules of International Law to Connect the International and National Legal Orders" (2009) Amsterdam Center for International Law Working Paper at 4, online: <papers.ssrn.com/sol3/papers.cfm?abstract_id=1515771> .
46. *Ibid* at 7.
47. Bruno Simma, "Universality of International Law from the Perspective of a Practitioner" (2009) 20 European Journal of International Law 265 at 277.
48. McLachlan, *supra* note 29 at 318-19.
49. Simma, *supra* note 47 at 290.

consistent and systemic order".[50] D'Aspremont continues:

> This leaning of domestic judges to interpret international law in a systemic manner and to give it some consistency deserves some attention in that it undoubtedly mirrors the use of the principle of systemic integration of international law which is enshrined in the Vienna Convention on the Law of Treaties and relied upon by international judges.[51]

The practice of the High Court and the Supreme Court bears out both D'Aspremont's supposition and Judge Simma's exhortation. As noted above, both Canada and Australia subscribe to a dualist theory of international law with respect to treaty obligations: treaties binding on the State are not binding within it, without transformation into domestic law. This means that an international treaty must be directly incorporated into domestic law by an implementing statute, either in whole[52] or in part.[53]

The dualist theory also gives rise to a separate but related question regarding the potential influence of unincorporated treaty law on the interpretation of domestic statutes. There exists a common law principle that Parliament should be taken as intending to legislate in conformity and not in conflict with "the comity of nations and the established rules of international law",[54] which permits a court reference to international

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50. D'Aspremont, *supra* note 6 at 147.
51. *Ibid*.
52. For example, the *Convention for the Unification of Certain Rules for International Carriage by Air*, 28 May 1999, 2242 UNTS 309 (entered into force 4 November 2003) is part of Canadian federal law by virtue of the *Carriage by Air Act*, RSC 1985, c C-26, s 2, Schedule VI; and part of Australian federal law by virtue of the *Civil Aviation (Carriers' Liability) Act 1959* (Cth), s 9B.
53. For example, the *Convention Relating to the Status of Refugees*, 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954) [*Refugees Convention*] which is given partial effect by the *Migration Act* 1958 (Cth) in Australia, and the *Immigration and Refugee Protection Act*, SC 2001, c 27 in Canada.
54. *Daniels v White*, [1968] SCR 517 at 541; *Schreiber v Canada (Attorney-General)*, [2002] 3 SCR 269 at para 50. The same principle applies in Australia, see *Zachariassen v Commonwealth*, [1917] 24 CLR 166 at 181; *Polites v Commonwealth*, [1945] HCA 3, 70 CLR 60 at 68-69, 77, 80-81.

materials for the purposes of interpretation. In this category there is a subtle difference between the approach taken in Australian and Canadian courts. In the former, an ambiguity must be present in the domestic law before reference may be made to international law,[55] while in the latter there need not be such an ambiguity, and international law may be considered to determine whether an ambiguity exists in the first place.[56]

In each of these scenarios listed above, Nollkaemper acknowledges two possibilities. Either the domesticated international law becomes "part of a different normative universe" to be governed by different (presumably, national) secondary norms. Or, alternatively, "secondary rules of international law remain applicable to the interpretation, modification and termination of corresponding rules at national level".[57] The High Court and the Supreme Court have adopted the second approach, accepting almost without question both the necessity of ensuring the consistent interpretation of international treaties, and the authority of the interpretative rules in *VCLT* Articles 31 and 32. As expressed by Chief Justice McLachlin in the recent *Febles* case, "[i]nterpretation of an international treaty that has been directly incorporated into Canadian law is governed by Articles 31 and 32 of the Vienna Convention on the Law of Treaties".[58] While strictly speaking, as State organs[59] the Supreme Court and the High Court are required to conform to binding international norms as a failure to do so may impose international responsibility on

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55. *Chu Kheng Lim v Minister for Immigration Local Government & Ethnic Affairs*, [1992] 176 CLR 1 at 38.
56. *National Corn Growers Association v Canada (Import Tribunal)*, [1990] 2 SCR 1324 at 1372-73; *Canada (Attorney General) v Ward*, [1993] 2 SCR 689 [*Ward*] and *Pushpanathan v Canada (Minister of Citizenship and Immigration)*, [1998] 1 SCR 982 [*Pushpanathan*].
57. Nollkaemper, *supra* note 45 at 7.
58. *Febles v Canada (Citizenship and Immigration)*, [2014] 3 SCR 431 at para 11 [*Febles*].
59. "Draft Articles on Responsibility of States for Internationally Wrongful Acts" (UN Doc A/CN.4/L.608/Add.1 and Corr.1 and Add.2-10) in *Yearbook of the International Law Commission 2001*, vol 2, part 1 (New York: UN, 2006) at 243 (UNDOC. A/56/10) ["Draft Articles on Responsibility of States for Internationally Wrongful Acts"].

the State,[60] in practice a domestic courts' non-compliance with the *VCLT* would be unlikely to result in any sanction at the international level. From the perspective of the domestic legal system, neither Canada nor Australia has implemented the *VCLT* as a part of its domestic law. The *content* of *VCLT* Article 31 is, as noted above, generally recognised as customary international law, and would therefore be automatically incorporated as part of the common law of Canada,[61] and would also likely be considered to have been adopted into the common law of Australia.[62] However, it appears that both the Supreme Court and the High Court have simply given effect to the *VCLT* without considering in any great depth its domestic status.[63] It is given effect, as expressed by the High Court, "as a matter of law and out of comity to ensure that the interpretation of international treaties by Australian courts will, so far as possible, conform to the approach which will be taken by the courts of other countries in relation to the same treaty".[64]

The first Australian case to address the use of the *VCLT* provisions

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60. Eyal Benvenisti, "Judicial Misgivings Regarding the Application of International Law: An Analysis of Attitudes of National Courts" (1993) 4 European Journal of International Law 159 at 160. See also generally James Crawford, *The International Law Commission's Articles on State Responsibility* (Cambridge: Cambridge University Press, 2002) and "Draft Articles on Responsibility of States for Internationally Wrongful Acts", *ibid*.
61. See *Hape*, *supra* note 14.
62. See *Nulyarimma*, *supra* note 14.
63. On the tendency of domestic courts to not address the legal status of the *VCLT*, see Nollkaemper, *supra* note 45 at 22. See also *Thiel v Federal Commissioner of Taxation*, [1990] 171 CLR 338 (where McHugh J did observe briefly that the rules of the *VCLT* should be applied as custom, but this is as far as any analysis appears to have gone, "because the interpretation provisions of the Vienna Convention reflect the customary rules for the interpretation of treaties, it is proper to have regard to the terms of the Convention in interpreting the Agreement, even though Switzerland is not a party to that Convention" at para 12).
64. *De L v Director-General Department of Community Services (NSW)*, [1996] 187 CLR 640 [*De L v Director*].

was *Koowarta v Bjelke-Petersen*.[65] The case was primarily addressed to the constitutional validity of the federal *Racial Discrimination Act*, and whether section 51 (xxix) of the Australian Constitution conferred upon Parliament a general competence to legislate for the performance of treaty obligations. As a member of a majority answering the question broadly in the affirmative, Justice Brennan, as he then was, observed that since the statute had been enacted to give effect to Australia's obligations under the *International Convention on the Elimination of All Forms of Racial Discrimination* ("*ICERD*"):[66]

> [T]o attribute a different meaning to the statute from the meaning which international law attributes to the treaty might be to invalidate the statute in part or in whole, and such a construction of the statute should be avoided. The method of construction of such a statute is therefore the method applicable to the construction of the corresponding words in the treaty.[67]

The perceived fundamental importance of consistent interpretation is self-evident in this passage. The English House of Lords had long recognised the necessity of adopting an interpretative approach that would lead to uniformity of interpretation both as between an international treaty and the domestic legislation implementing or giving effect to that treaty, and

65. [1982] 153 CLR 168 [*Koowarta*].
66. *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969).
67. *Koowarta*, *supra* note 65 at 265.

as between various national jurisdictions.[68] Brennan J in *Koowarta* adopts the same ideological position.

However, it is apparent that the courts do not subscribe to what Frishman and Benvenisti have pejoratively called the "convergence thesis";[69] there is no perception that the Supreme and High Courts form part of a "hierarchical structure which puts international tribunals – primarily the International Court of Justice (ICJ) at its apex".[70] Rather, uniformity of treaty interpretation is promoted because it is simply the most logical approach to adopt. That the "rules of a given legal order, even when applied by the judiciary of another legal order, should be interpreted according to the principles of interpretation of the legal order

68. *Stag Line Ltd v Foscolo Mango & Co Ltd*, [1932] AC 328 (HL) per Lord Macmillan: ("It is important to remember that the Act of 1924 was the outcome of an International Conference and that the rules in the Schedule have an international currency. As these rules must come under the consideration of foreign Courts it is desirable in the interests of uniformity that their interpretation should not be rigidly controlled by domestic precedents of antecedent date, but rather that the language of the rules should be construed on broad principles of general acceptation" at 350), adopted and applied in *James Buchanan & Co Ltd v Babco Forwarding & Shipping (UK) Ltd*, [1978] AC 141 (HL) per Lord Wilberforce: ("I think that the correct approach is to interpret the English text, which after all is likely to be used by many others than British businessmen, in a normal manner, appropriate for the interpretation of an international convention, unconstrained by technical rules of English law, or by English legal precedent, but on broad principles of general acceptation" at 152). This principle was in turn accepted in *Shipping Corporation of India Ltd v Gamlen Chemical Co A/Asia Pty Ltd* [1980] 147 CLR 142. See also *Quazi v Quazi*, [1980] AC 744 (HL) per Lord Diplock, Viscount Dilhorne, Lord Fraser of Tullybelton and Lord Scarman.

69. Olga Frishman & Eyal Benvenisti, "National Courts and Interpretative Approaches to International Law: The Case against Convergence" (2014) Global Trust Working Paper 8/2014 at 3.

70. *Ibid*.

in which they originate"[71] is not, to domestic courts, a controversial proposition.[72] It is the same essential rule that is applied in any domestic conflicts of laws situation.

The High Court's 1997 decision in *Applicant A v Minister for Immigration and Ethnic Affairs*[73] serves as useful evidence. *Applicant A* concerned an application for refugee status by a Chinese couple who claimed that they faced persecution in the form of forced sterilisation under China's "One Child Policy". To succeed, the couple had to demonstrate that they fell within the definition of the term 'refugee' as set out in of section 4(1) of the *Migration Act*. That section provided that the term 'refugee' was to have the same meaning as it has in Article 1 of the *Refugees Convention*.[74] The High Court, by majority,[75] held that the couple did not satisfy the definition of refugee on the ground that they did not constitute a "particular social group". However, the Court held *per curiam* that a domestic statute which incorporates the text from an international treaty should be interpreted in accordance with the meaning in the treaty, and that the international rules of interpretation

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71. D'Aspremont, *supra* note 6 at 152. See also *Brazilian Loans Case (France v United States)* (1929), PCIJ (Ser A) No 21 ("Once the Court has arrived at the conclusion that it is necessary to apply the municipal law of a particular country, there seems no doubt that it must seek to apply it as it would be applied in that country. It would not be applying the municipal law of a country if it were to apply it in a manner different from that in which that law would be applied in the country in which it is in force" at para 72).
72. Even the notoriously anti-internationalist Justice Antonin Scalia once opined in Antonin Scalia, "Keynote Address: Foreign Legal Authority in the Federal Courts" (2004) 98 American Society of International Law Proceedings 305 (that "[w]hen federal courts interpret a treaty to which the United States is a party, they should give considerable respect to the interpretation of the same treaty by the courts of other signatories" because "[o]therwise the whole object of the treaty, which is to establish a single, agreed-upon regime governing the actions of all the signatories, will be frustrated" at 305).
73. [1997] 190 CLR 225 [*Applicant A*].
74. *Refugees Convention, supra* note 53.
75. Dawson, McHugh and Gummow JJ; Brennan CJ and Kirby J dissenting.

applicable to the treaty will govern the interpretation of those domestic statutory provisions. Brennan, now Chief Justice, again emphasised the importance of ensuring uniformity of interpretation, stating:

> If a statute transposes the text of a treaty or a provision of a treaty into the statute so as to enact it as part of domestic law, the prima facie legislative intention is that the transposed text should bear the same meaning in the domestic statute as it bears in the treaty. To give it that meaning, the rules applicable to the interpretation of treaties must be applied to the transposed text and the rules generally applicable to the interpretation of domestic statutes give way.[76]

The importance of uniform interpretation is likewise evident in the extensive comparative references made by members of the High Court to the dissenting judgment of Justice La Forest in *Chan v Canada*,[77] a 1995 judgment which addressed the identical issue of whether or not fear of being forcibly sterilized for a violation of China's One Child Policy constituted a wellfounded fear of persecution for reasons of membership in a particular social group.[78]

In Canada, the importance of uniform treaty interpretation is less explicit, but nevertheless can be perceived in the Supreme Court's jurisprudence. One of the Courts' leading cases on treaty interpretation is *Pushpanathan*,[79] which concerned an application for refugee status under the *Convention Relating to the Status of Refugees*, as implemented by

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76. *Applicant A*, *supra* note 73 at 231 per Brennan CJ; see also per Dawson J: ("Deciding that question involves the construction of a domestic statute which incorporates a definition found in an international treaty. Such a provision, whether it is a definition or otherwise, should ordinarily be construed in accordance with the meaning to be attributed to the treaty provision in international law. By transposing the provision of the treaty, the legislature discloses the *prima facie* intention that it have the same meaning in the statute as it does in the treaty. Absent a contrary intention, and there is none in this case, such a statutory provision is to be construed according to the method applicable to the construction of the corresponding words in the treaty" at 239-40).
77. *Chan v Canada (Minister of Employment and Immigration)*, [1995] 3 SCR 593.
78. As well as with La Forest J's judgment in *Ward*, *supra* note 56.
79. *Pushpanathan, supra* note 56.

the *Immigration Act*.[80] The applicant had been imprisoned for conspiracy to traffic in heroin, and subsequent to his release on parole, issued with a conditional deportation order under sections 27(1)(d) and 32.1(2) of the *Immigration Act*. Deportation required a determination that the applicant was not a refugee, by virtue of the exclusion clause in Article 1F(c) of the *Refugees Convention*, which provides that protection under the *Convention* is not available to a person who "has been guilty of acts contrary to the purposes and principles of the United Nations". Justices L'Heureux Dubé, Gonthier, McLachlin and Bastarache held that since the purpose of the incorporation of Article 1F(c) into the *Immigration Act* was to implement the underlying *Convention*, an interpretation consistent with Canada's obligations under the *Convention* must be adopted. Bastarache J, delivering the judgment of the majority, stated simply that:

> Since the purpose of the Act incorporating Article 1F(c) is to implement the underlying Convention, the Court must adopt an interpretation consistent with Canada's obligations under the Convention. The wording of the Convention and the rules of treaty interpretation will therefore be applied to determine the meaning of Article 1F(c) in domestic law.[81]

The emphasis placed on the importance of uniformity is evident throughout later Australian case law, as for example in *Povey v Qantas Airways Limited*,[82] where the majority stated "[i]mportantly, international treaties should be interpreted uniformly by contracting states"[83] and in *Great China Metal Industries Co Ltd v Malaysian International Shipping Corporation Berhad.*[84]

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80. RSC 1985, c I2.
81. *Pushpanathan*, *supra* note 56 at para 52.
82. [2005] 216 ALR 427 [*Povey*].
83. *Ibid* at para 25 per Gleeson CJ, Gummow, Hayne and Heydon JJ; at para 60 per McHugh J. See also *Shipping Corporation of India Ltd v Gamlen Chemical Co A/Asia Pty Ltd*, *supra* note 68 at 159 per Mason and Wilson JJ; *Great China Metal Industries Co Ltd v Malaysian International Shipping Corporation Berhad*, [1998] HCA 65, 196 CLR 161 at 186 per McHugh J, 213 per Kirby J [*Great China Metal*]; *Siemens Ltd v Schenker International (Australia) Pty Ltd*, [2004] 216 CLR 418 at 466-467 per Kirby J.
84. [1998] 196 CLR 161.

Great China Metal concerned the application of the *Hague Rules*,[85] as incorporated into Australian federal law by the *Sea-Carriage of Goods Act*. Although it was not ultimately determinative of the appeal, much of the argument before the High Court concerned the meaning and effect of Article IV r 2(c) of the *Hague Rules* that: "[n]either the carrier nor the ship shall be responsible for loss or damage arising or resulting from … (c) perils, dangers and accidents of the sea or other navigable waters".[86] The goods being carried by the *MV Bunga Seroja* had been damaged in heavy weather during the vessel's passage across the Great Australian Bight. Justices Gaudron, Gummow and Hayne in their joint judgment stated that: "[b]ecause the Hague Rules are intended to apply widely in international trade, it is self-evidently desirable to strive for uniform construction of them".[87]

Interestingly, however, the joint judgment, along with those of Justices McHugh and Kirby, observed that despite the recognised importance of uniformity, there had been a divergence of interpretation with respect to the phrase "perils of the sea". This variance was examined in great detail by McHugh J, who said:

> The Schedule to the Sea-Carriage of Goods Act 1924 enacts the Hague Rules as domestic law. *Prima facie*, the Parliament intended that the transposed text should bear the same meaning in the domestic statute as it bears in the treaty. The guiding principles of treaty interpretation are found in the Vienna Convention on the Law of Treaties. … Primacy must be given, however, to the natural meaning of the words in their context, as I recently pointed out in *Applicant A v Minister for Immigration and Ethnic Affairs*.
>
> International treaties should be interpreted uniformly by the contracting States, especially in the case of treaties such as the Hague Rules whose aim is to harmonise and unify the law in cases where differing rules previously applied in the contracting States. So far, however, uniformity of interpretation has not

85. *International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading and Protocol of Signature*, 25 August 1924, *International Convention for the Unification of Certain Rules of Law relating to Bills of Lading*, 25 August 1924, 120 LNTS 155 (entered into force 2 June 1931) [*Hague Rules*].

86. *Ibid*, art 4.

87. *Great China Metal*, *supra* note 83 at para 38 per McHugh J, at para 137 per Kirby J.

> been a feature of the Hague Rules. In particular, courts in the United States and Canada on one hand and in France, Germany, England and Australia on the other have diverged in their approach to what causes of damage can be described as perils of the sea for the purpose of the Hague Rules.[88]

Likewise Kirby J, in his separate reasons, noted that "the Court should strive, so far as possible, to adopt for Australian cases an interpretation which conforms to any uniform understanding of the *Rules* found in the decisions of the courts of other trading countries".[89] His Honour continued, stating:

> It would be deplorable if the hard won advantages of international uniformity, secured by the Rules, were undone by serious disagreements between different national courts. What is at stake is not merely theoretical symmetry in judicial interpretation. There is also the practical matter that insurance covers most losses occurring in the international carriage of goods by sea. … Disparity of outcomes and uncertainty about the Rules produce costly litigation without positive contribution to the reduction of overall losses to cargo. This said, the achievement of a uniform construction of an international standard is often elusive.[90]

As *Great China Metal* demonstrates, "the normative pull of principles of treaty interpretation may be strongest in case of treaties that seek to establish a uniform regime"[91] such as the *Hague Rules*. Aust et al note that with respect to international agreements of "a rather technical content", the treaty's main purpose is to ensure uniformity of rules and behaviour among the parties. The authors note that "[t]o reach this goal, it does not suffice to adopt a single authoritative text – uniform application of the agreed rules is required".[92] This consideration is evident in the reasons of McLachlin CJC in *Thibodeau v Air Canada*,[93] where Her Honour observed that:

> In light of the *Montreal Convention*'s objective of achieving international uniformity, we should pay close attention to the international jurisprudence and be especially reluctant to depart from any strong international consensus

88. *Ibid* at paras 70-71.
89. *Ibid* at para 137 per Kirby J.
90. *Ibid*.
91. Nollkaemper, *supra* note 45 at 28.
92. Aust et al, "Unity or Uniformity?", *supra* note 9 at 81.
93. 2014 SCC 67. For the facts of the case, see Section V *below*.

> that has developed in relation to its interpretation.[94]

However, as also demonstrated by *Great China Metal*, the mere aspiration of uniformity does not guarantee the result. Indeed, many are sceptical, or suspicious, of the possibility of truly uniform interpretation. Munday argues that a truly "uniform" application of treaty rules is unlikely as "different countries almost inevitably come to put different interpretations upon the same enacted words"[95] – the situation that arose in respect of the *Hague Rules* in *Great China Metal*. Roberts suggests that even when domestic courts do attempt to impartially apply international law, identity between the two cannot be guaranteed. The domestic courts instead "often create hybrid international/national norms"[96] – the situation is perceived to be one of legal asymptote, where the international norm and the domestic norm can be incredibly similar but will never absolutely coincide. In the words of Karen Knop, "domestic interpretation of international law is not simply a conveyor belt that delivers international law to the people" but is instead "a process of translation from international to national".[97]

Thus, while the application and the interpretation of international law by domestic courts is "not at all synonymous with greater homogenisation and uniformisation of international law",[98] the High Court and the Supreme Court – whether as an article of faith or triumph of hope over experience – evidently both believe in its possibility, and strive for it.

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94. *Ibid* at para 50.
95. Roderick Munday, "The Uniform Interpretation of International Conventions" (1978) 27 International and Comparative Law Quarterly 450 at 450.
96. Roberts, *supra* note 36 at 73. See also Nollkaemper, *supra* note 45 at 2-3.
97. Knop, *supra* note 19 at 505-06. See also René Provost, "Judging in Splendid Isolation" (2008) 56 American Journal Comparative Law 125 at 126, 167-68; and Bahdi, *supra* note 42.
98. D'Aspremont, *supra* note 6 at 146.

IV. Attitudes to International Law: Hostility and Hesitant Embrace[99]

While the High Court and the Supreme Court both recognise the importance of uniform treaty *application* (and corollary interpretation), the courts have demonstrated a marked difference in their *attitudes* towards the utilisation of international law. That is, despite promising, albeit sporadic, reference to and reliance upon the *VCLT* in early Australian case law, the High Court's more recent jurisprudence has evidenced a decided hostility to the application of international law principles of interpretation,[100] and members of the Court have attempted to engage the use of various "avoidance doctrines"[101] to stifle the role of international rules of interpretation. The Supreme Court by contrast has embraced international law's interpretative role in domestic law.

Evidence of this divergence is demonstrated most clearly in respect of the provisions of *VCLT* Article 31(3), which mandates – the operative word is 'shall' – that treaty interpreters take into account the following: (a) any subsequent agreement between the parties regarding the interpretation of the treaty; (b) any subsequent practice in the application of the treaty; and/or (c) any relevant rules of international law applicable in the relations between the parties.

Sub-paragraphs (a) and (b) of Article 31(3) concern either subsequent agreement, or subsequent practice, as between the parties to an international treaty. The parties are "masters of their treaty"[102] and treaty interpreters must take account of demonstrated agreements

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99. Jutta Brunée & Stephen J Toope, "A Hesitant Embrace: The Application of International Law by Canadian Courts" (2003) 40 Canadian Yearbook of International Law 3.
100. Save and except for the very recent *Macoun v Commissioner of Taxation*, [2015] HCA 44 addressed in Section V *below*.
101. Eyal Benvenisti, "Judicial Misgivings Regarding the Application of International Law: An Analysis of Attitudes of National Courts" (1993) 4 European Journal of International Law 159 at 161.
102. Oliver Dörr, "General rule of interpretation" in Oliver Dörr & Kirsten Schmalenbach, eds, *Vienna Convention on the Law of Treaties – A Commentary* (London: Springer, 2012) 521 at 554.

between them as to the authentic interpretation of the treaty concerned. Sub-paragraph (c) of Article 31(3) is broader, and embodies the systemic approach to treaty interpretation. As expressed by Dörr: "whatever their subject matter, treaties are a creation of the international legal system and their operation is based upon that fact".[103]

The Supreme Court has applied Article 31(3) as it is intended to be used. In *Yugraneft Corp v Rexx Management Corp*,[104] the Court was required to consider the limitation period applicable to the recognition and enforcement of a foreign arbitral award in the province of Alberta. Rothstein J, for the Court, held that the *Convention*[105] left the matter of limitation periods to be determined according to the procedural law of the jurisdiction where recognition and enforcement was being sought – in this case, resulting in a limitation period of two years.[106] In reaching this conclusion, Rothstein J, in addition to the standard recitation that, as a treaty, the *Convention* had 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",[107] went on to state that:

> The second reason why art. III should be viewed as permitting the application of local limitation periods is that this reflects the practice of the Contracting States. In interpreting a treaty, courts must take into account "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation" (*Vienna Convention on the Law of Treaties*, art. 31(3)). A recent study indicates that at least 53 Contracting States, including both common law and civil law States, subject (or would be likely to subject, should the issue arise) the recognition and enforcement of foreign arbitral awards to some kind of time.[108]

The approach adopted in *Yugraneft* is proper as both a matter of law and logic. In the first part, while recourse to *travaux préparatoires* under Article 32 is clearly permitted only as a supplementary means of interpretation,

103. *Ibid* at 560.
104. *Yugraneft Corp v Rexx Management Corp*, [2010] SCC 19 [*Yugraneft*].
105. *Convention on the Recognition and Enforcement of Foreign Arbitral Award*, 10 June 1958, 330 UNTS 38 (entered into force 7 June 1959).
106. *Limitations Act*, RSA 2000, c L-12, s 3.
107. *Yugraneft*, *supra* note 104 at para 19.
108. *Ibid* at para 21.

Article 31 does not designate any hierarchy as between its listed interpretative methods; rather the techniques were meant to constitute a "crucible" into which "all the various elements, as they were present in any given case, would be thrown".[109] This includes the mandatory reference to sub-paragraph 3, insofar as it is necessary or informative.

As a matter of logic, to do otherwise than consider the possibility of the subsequent modification of the primary rule at the international level, and give effect to that rule, would "disconnect the link between the international and the national domain that the legislature sought to establish".[110] The result is a logical inconsistency: the domestic court is faced with a domesticated international norm, the transposed text of a treaty in a statute. The "*prima facie* legislative intention is thus that the transposed text should bear the same meaning in the domestic statute as it bears in the treaty",[111] and that meaning is determined by reference to international rules of interpretation. But if the domestic court fails to take account of subsequent agreement or practice of the parties, then it is neither applying the international rules of interpretation nor ensuring that the transposed text bears the same meaning on the domestic and international planes.

However, this is precisely what the High Court has purported to do in a series of very recent cases. And it matters not merely because it evidences a disappointing parochialism, but because the jurisprudence of the Court has a role to play in the development of international law. As explained by Tzanakopoulos:

> Courts are organs of the State, and in that sense they partake in the development of international law through their engagement in practice, which constitutes State practice, and their expression of *opinio juris*. When a domestic court interprets and applies (or does not apply) a rule of international law in a particular situation, it adds to the body of practice and *opinio juris* with respect

109. *Yearbook of the International Law Commission 1966*, vol 2, (UNDOC. A/CN.4/SER.A/1966/Add. 1) at 219-20, para 8; Gardiner, *supra* note 10 at 9.

110. Nollkaemper, *supra* note 45 at 21.

111. *A v Minister for Immigration & Ethnic Affairs*, [1997] 190 CLR 225 at 231.

> to the existence, content, and interpretation of that rule.[112]

The rationale (or "excuse"[113]) behind the High Court's resistance to Article 31(3) appears to be based in particular notions regarding the separation of powers doctrine.[114] The best example arises in the case of *Maloney v The Queen*,[115] which concerned whether alcohol management laws implemented on Palm Island, of which the residents are "overwhelmingly Aboriginal",[116] breached section 8 of the *Racial Discrimination Act,*[117] which gives effect to the *ICERD*, or whether the prohibitions with respect to alcohol purchase and possession could be considered "special measures".[118] All members of the Court acknowledged the necessity of referring to the *Convention* in interpreting the Act.[119] However, the majority took a highly restrictive approach to the interpretation of the *ICERD*, limiting the application of the interpretative rules of the *VCLT*, in particular with respect to Article 31(3) and Article 32.

While Chief Justice French acknowledged in *Maloney* that the relevant provisions of the *Racial Discrimination Act* are to be construed "according to the meaning in the *ICERD* and therefore according to the rules of construction applicable to the *ICERD* by Art 31(1) of the [*VCLT*]",[120] His Honour commented that:

> Difficulties can follow from the incorporation into a domestic law of criteria designed for an international instrument when those criteria have to be applied to the determination of rights and liabilities in a matter arising under that law in a municipal court. … The application in a court of criteria derived

112. Tzanakopoulos, *supra* note 6 at 18.
113. Benvenisti, *supra* note 101 at 175.
114. *Ibid* at 177.
115. *Maloney v The Queen*, [2013] 252 CLR 168 [*Maloney*].
116. *Ibid* at para 51.
117. *Racial Discrimination Act 1975* (Cth), s 8.
118. *Maloney*, *supra* note 115 at para 51.
119. However, three Justices – Hayne, Crennan, and Kiefel JJ – did so on the basis that the legislation should be interpreted in accordance with *domestic* rules of statutory interpretation. The *ICERD* was accordingly still relevant, but only as a result of the application of s 15AB(2)(d) of the *Acts Interpretation Act 1901* (Cth), which permits consideration of "any treaty or other international agreement that is referred to in the Act".
120. *Maloney*, *supra* note 115 at para 14.

> from an international instrument may require consideration by the court of whether it is constitutionally competent to apply the criteria and, if so, to what extent. Obligations imposed by international instruments on States do not necessarily take account of the division of functions between their branches of government. The difficulty is compounded when the interpretation of the international instrument is said to have been subject to change by reference to practices occurring since the enactment of legislative provisions implementing it into domestic law. Such practices may, by operation of Art 31(3) of the Vienna Convention, be taken into account in interpretation of the treaty or convention for the purposes of international law. They may lead to its informal modification. However, they cannot be invoked, in this country, so as to authorise a court to alter the meaning of a domestic law implementing a provision of a treaty or convention. [121]

This is an extraordinary proposition: that the rules of construction in *VCLT* Article 31(1) are applicable, but those in Article 31(3) are not. It is a proposition that is entirely at odds with French CJ's earlier statement that the Act must be construed according to the meaning in the *ICERD*. French CJ's only explanation is a perfunctory reference to the "judicial function"[122] which one may infer bears some relationship to the separation

121. *Ibid* at para 15.
122. *Ibid* at para 22.

of powers doctrine and the idea that judges are mere enforcers of law.[123]

In addition to French CJ's explicit rejection of the role of Article 31(3), the majority demonstrated "significant caution"[124] if not outright antagonism, to the utilisation of extrinsic materials in the interpretation of the relevant provisions of the *ICERD*. The Court was referred in particular to the output of the Committee on the Elimination of Racial Discrimination, which may be considered evidence of subsequent practice under Article 31(3)(b). However the High Court held that to make use of such materials would be to adopt "'interpretations' which rewrite the [treaty] text";[125] or, to "elevate non-binding extraneous materials over the

123. *Ibid* at 185. This is a controversy beyond the scope of this paper, but briefly, judicial law-making is essentially retrospective in effect, and is tightly constrained by the judicial decision-making method. Sir Robert Jennings, "The Judicial Function and the Rule of Law" in Dott Milan, ed, *International Law at the Time of its Codification: Essay in Honour of Roberto Ago* (Milan: Giuffre, 1988) 139 at 145 (notes that where a court creates law "in the sense of developing, adapting, modifying, filling gaps, interpreting, or even branching out in a new direction" that decision must "be seen to emanate reasonably and logically from existing and previously ascertainable law" at 145). But although constrained, judges do still make law in a meaningful sense; see also Aharon Barak, *The Judge in a Democracy* (Princeton: Princeton University Press, 2006) ("the meaning of the law before and after a judicial decision is not the same. Before the ruling, there were, in the hard cases, several possible solutions. After the ruling, the law is what the ruling says it is. The meaning of the law has changed. New law has been created" at xv). For a comprehensive analysis of the nature of the judicial function, see Joe McIntyre, *The Nature of the Judicial Function* (PhD Thesis, University of Cambridge, 2013) [unpublished].

124. Patrick Wall, "Case Note: The High Court of Australia's Approach to the Interpretation of International Law and its use of International Legal Materials in *Maloney v The Queen* [2013] HCA 28" (2014) 15 Melbourne Journal of International Law 1 at 6.

125. *Maloney*, *supra* note 115 at para 23.

language of the text".[126]

The clearest, and perhaps the most astonishing, examples of the High Court's rejection of Article 31(3) arose in the context of two extradition cases: *Minister for Home Affairs of the Commonwealth v Zentai*[127] and *Commonwealth Minister for Justice v Adamas*.[128]

In *Zentai*, Hungary sought extradition of the respondent for war crimes (the murder of a Jewish man) committed in Budapest in November 1944. Article 2.5(a) of the *Treaty on Extradition between Australia and the Republic of Hungary* required that extradition could only be made for an offence that was an offence in the requesting state at the time the acts constituting the offence were committed. The offence of 'war crime' did not exist in Hungarian law until 1945, and as such, the High Court was required to consider whether it was sufficient that the alleged conduct constituted *an* offence under Hungarian law at the time (namely, murder).

The Minister had received a departmental submission prior to acceding to the request for extradition that "the 'conduct-based' interpretation of Art 2.5(a) of the *Treaty* 'appears consistent with the view taken by the Hungarian Government'",[129] and that "the Ministry of Justice in Hungary had indicated that it believed the request was not precluded by Art 2.5(a) given that 'it can be established that the action [allegedly] committed by Zentai was an offence even at the time of its commission'".[130] The Minister also relied on the mere fact of the request for extradition to infer Hungary's concurrence that the requirements

126. *Ibid* at para 134. The antecedent of the enmity evident in *Maloney* may be seen in the High Court's 2006 judgments in *Minister for Immigration and Multicultural and Indigenous Affairs v QAAH of 2004*, [2006] 231 CLR 1 [*Minister v QAAH*]; see also *NBGM v Minister for Immigration and Multicultural Affairs*, [2006] 231 CLR 52 [*NBGM*]. However, for reasons of space, these decisions are not considered here.

127. *Minister for Home Affairs of the Commonwealth v Zentai*, [2012] 246 CLR 213 [*Zentai*].

128. *Commonwealth Minister for Justice v Adamas*, [2013] 253 CLR 43 [*Adamas*].

129. *Zentai*, *supra* note 127 at para 35.

130. *Ibid.*

of Article 2.5(a) had been met. As such, before the High Court it was argued that there was a demonstrated subsequent agreement as between Australia and Hungary (pursuant to *VCLT* Article 31(3)) that it was sufficient that the alleged conduct amounted to murder. French CJ rejected this submission, stating:

> For the purposes of Australian domestic law … the Treaty is to be interpreted in the light of its text, context and purpose as at the time that [the domestic law] was made and by reference to such extrinsic material as was in existence at that time. Any later agreement which had the effect of varying the terms of the Treaty would not affect the application of the Act. [131]

As in *Maloney*, French CJ rejects outright the role of Article 31(3) in interpretation, despite placing reliance on Article 31(1). His Honour takes a decidedly static view of both domestic and international law, asserting that even in the context of a purely bilateral treaty, the subsequent practice of the State parties has no bearing on the interpretation of the domestic statute – notwithstanding that the very reason for the existence of the domestic statute is to give effect to the underlying treaty. The joint judgment of Justices Gummow, Crennan, Kiefel and Bell in *Zentai* goes even further – discarding entirely the role of the *VCLT* in the interpretation of Article 2.5(a):

> The meaning of the limitation set out in Art 2.5(a) is to be ascertained by the application of ordinary principles of statutory interpretation. The limitation is not susceptible of altered meaning reflecting some understanding reached by the Ministry of Justice of Hungary and the Executive branch of the Australian Government.[132]

This is in direct opposition to the precedent established in *Applicant A*, to the effect that "the rules applicable to the interpretation of treaties must be applied to the transposed text and the rules generally applicable

131. *Ibid* at para 36.
132. *Ibid* at para 65.

to the interpretation of domestic statutes give way".[133] This reversion to the application of domestic rules of interpretation is also out of step with the practise of the Supreme Court, where "one can readily infer" from *Pushpanathan* and other leading jurisprudence that "*VCLT* treaty interpretation rules take precedence over domestic interpretive practices".[134]

In *Adamas*, the individual in question had been sentenced *in absentia* to life imprisonment for corruption and fraud offences. Indonesian law permitted the conviction of Mr. Adamas in his absence, and the trial procedures accorded with Indonesian law. The question for the High Court was whether the surrender of Mr. Adamas would be "unjust, oppressive or incompatible with humanitarian considerations".[135] Although a unanimous Court ultimately agreed with the Minister that extradition was permissible, in the course of their reasons their Honours reiterated the position adopted by French CJ in *Zentai*, to the effect that:

> Section 11 of the Act gives force to the Treaty only to the extent of the text set out in the Schedule to the Regulations. Article 9(2)(b) of the Treaty as given force by s 11 of the Act, for that reason, could not be affected by any subsequent agreement or practice of Australia and the Republic of Indonesia.[136]

Yet despite rejecting the possibility of applying *VCLT* Article 31(3), the

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133. *Applicant A*, *supra* note 73 at 231; see also per Dawson J: ("Deciding that question involves the construction of a domestic statute which incorporates a definition found in an international treaty. Such a provision, whether it is a definition or otherwise, should ordinarily be construed in accordance with the meaning to be attributed to the treaty provision in international law. By transposing the provision of the treaty, the legislature discloses the *prima facie* intention that it have the same meaning in the statute as it does in the treaty. Absent a contrary intention, and there is none in this case, such a statutory provision is to be construed according to the method applicable to the construction of the corresponding words in the treaty" at 239-40).
134. Gib van Ert, "Canada" in David Sloss, ed, *The Role of Domestic Courts in Treaty Enforcement: A Comparative Study* (New York: Cambridge University Press, 2009) 166 at 182; see also generally, Tzanakopoulos, *supra* note 7.
135. *Adamas*, *supra* note 128 at para 37.
136. *Ibid* at para 31.

Court went on to make use of Article 31(1), stating: "Article 9(2)(b) … is nevertheless to be interpreted for what it is: a provision of a treaty".[137] Such an approach is, to say the least, internally inconsistent.

As such, while decidedly antagonistic to the perceived interference of international law in domestic interpretation, the High Court does accept that when it is faced with interpreting a treaty, its text is to be interpreted in good faith, in accordance with the ordinary meaning to be given to its terms in their context and in the light of the treaty's object and purpose. This leads to the third and final 'theme' that emerges in the comparison between the Supreme Court and the High Court.

V. Interpretative Methodologies: Textualism vs. Teleology and *Travaux Préparatoires*

A further point of departure between the Supreme Court and the High Court is evident in their respective *approaches* to interpretative methodology, despite both purporting to apply the same rules as contained in *VCLT* Articles 31 and 32. The Supreme Court has demonstrated a marked preference for a purposive and subjective approach, even resorting to the use of *travaux préparatoires* "possibly more so than the *VCLT* itself envisions".[138] By contrast, the High Court has emphasized the primacy of the text, and has generally attempted to limit the use of extrinsic material as much as possible.[139]

One of the earliest Australian examples arises in the significant constitutional law decision known as the *Tasmanian Dams* case.[140] The Tasmanian government had enacted legislation[141] to support the construction of a hydro-electric dam on the Franklin–Gordon River. Following significant protests, the Commonwealth government passed

137. *Ibid* at para 32.

138. van Ert, *supra* note 134 at 181-82.

139. Save and except for Kirby J, who during his tenure consistently advocated for a more purposive approach and greater utilisation of extrinsic materials. See *Povey*, *supra* note 82; *De L v Director*, *supra* note 64; *Minister v QAAH*, *supra* note 126; *NBGM*, *supra* note 126.

140. *Commonwealth v Tasmania*, [1983] 158 CLR 1 [*Tasmanian Dams*].

141. *Gordon River Hydro-Electric Power Development Act 1982* (Tas).

the *World Heritage Properties Conservation Act 1983*[142] and made a declaration under it that listed the river as part of the Tasmanian Wilderness World Heritage Area, and thus protected pursuant to the *World Heritage Convention*.[143] The question before the Court was whether section 51(xxix) of the Australian Constitution, which empowers the federal Parliament to "make laws for the peace, order, and good government of the Commonwealth with respect to … external affairs"[144] permitted the enactment of legislation in relation to international agreements to which Australia was a party. By a slim majority of four judges to three, the High Court held that Parliament could enact domestic legislation to give effect to Australia's treaty obligations.

The Court was only required to interpret the *World Heritage Convention* insofar as the question arose whether Australia, as a party to the *Convention*, was obliged to take steps to ensure the protection, conservation and presentation of the cultural and natural heritage situated on Australian territory. All of the judges in substance applied a

142. *World Heritage Properties Conservation Act 1983* (Cth).

143. *Convention Concerning the Protection of the World Cultural and Natural Heritage*, 16 November 1972, 1037 UNTS 151 (entered into force 17 December 1975).

144. *Commonwealth of Australia Constitution Act* (Cth), s 51.

dominantly textual approach to the interpretation of the *Convention*.[145]

However, only three of the judges – two majority, one minority – made any reference to the interpretative rules of the *VCLT* in doing so. Murphy J stated simply that "[t]he Convention should be interpreted giving primacy to the ordinary meaning of its terms in their context and in the light of its object and purpose".[146] Brennan J made his rejection of the use of extrinsic materials more explicit:

> We were invited to refer to *travaux preparatoires* of the Convention in order to perceive the attenuation of obligatory language from the first draft of the Convention to its final text. In my view that invitation should be rejected. It accords with the Vienna Convention and with the consistent practice of the International Court of Justice and, earlier, of the Permanent Court of International Justice, generally to decline reference to *travaux preparatoires*, for "there is no occasion to resort to preparatory work if the text of a convention is sufficiently clear in itself".[147]

Chief Justice Gibbs was more inclined towards the utilisation of *travaux préparatoires*, but only in the limited circumstances permitted by Article 32, stating that the *travaux préparatoires* may be utilised either to resolve

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145. Mason J undertook a textual analysis but did not refer to the provisions of the *VCLT* see *Tasmania Dams*, *supra* note 140 at 132-136. Wilson J referred in broad terms to the 'objective' of the *Convention* and made brief reference to the 1972 Stockholm Declaration on the Human Environment (at 188) but also undertook a textual analysis at 189-196. Deane J acknowledged that "[i]nternational agreements are commonly 'not expressed with the precision of formal domestic documents as in English law' … [t]hat absence of precision does not … mean any absence of international obligation" but undertook only a brief survey of the terms of the *Convention* and applied no particular interpretative methodology at 261. Likewise, Dawson J mentioned that "the Court was referred by the Commonwealth to a number of international instruments commencing in 1900 and to the *travaux preparatoires*" but appeared to make no real use of those materials in the act of interpretation, rather referring to them in order to ascertain that "the Convention represents the highest point in the international expression of concern for the preservation of the cultural and natural heritage of nations generally, then it is necessary to go to the provisions of the Convention to determine the degree of concern" at 308.

146. *Tasmania Dams*, *ibid* at 61.

147. *Ibid* at 35.

an ambiguity in the text, or "to confirm the meaning which appears from the treaty itself".[148] Having reviewed preliminary drafts of the *World Heritage Convention* and a recommendation issued by UNESCO at the time of the adoption of the *Convention*, Gibbs CJ observed that "[o]n the whole, the *travaux preparatoires* confirm the meaning which the words of the relevant articles of the Convention themselves reveal".[149]

The High Court's judgment in *Applicant A* also discloses the preference for approaching treaty interpretation as a matter of semantics. McHugh J considered directly whether or not the textual approach "should be afforded interpretative precedence",[150] finding that previous Australian case law had not made clear whether Article 31 "*requires* or merely *allows* recourse to the context, object, and purpose of a treaty in interpreting one of its terms".[151]

Having been persuaded by the reasoning of Zekia J in *Golder v United Kingdom*,[152] to the effect that a textual analysis should be considered the primary source of interpretation, His Honour stated that "[p]rimacy is to be given to the written text of the Convention but the context, object and purpose of the treaty must also be considered".[153] McHugh J also justified his approach by reference to scholarly opinion that "courts should focus their attention on the 'four corners of the actual text' in discerning the meaning of that text".[154] McHugh J, together with Brennan CJ, described this approach to treaty interpretation as being "ordered, but holistic".[155] Likewise, Gummow J in the same case, placed emphasis on the necessity of the textual approach, as proposed by McHugh J:

> Regard primarily is to be had to the ordinary meaning of the terms used therein, albeit in their context and in the light of the object and purpose of the Convention. Recourse may also be had to the preparatory work for the

148. *Ibid* at 77.
149. *Ibid* at 88.
150. *Applicant A*, *supra* note 73 at 253.
151. *Ibid* at 254.
152. *Golder v United Kingdom*, [1975] 1 EHRR 524.
153. *Applicant A*, *supra* note 73 at 254.
154. *Ibid* at 255, referring to Joseph Gabriel Starke & Ivan Anthony Shearer, *Starke's International Law*, 11d (Oxford: Butterworths, 1994) at 435-436.
155. *Ibid* at 231.

> treaty and the circumstances of its conclusion, whether to confirm the meaning derived by the above means or to determine a meaning so as to avoid obscurity, ambiguity or manifestly absurd or unreasonable results. However, as McHugh J demonstrates by the analysis of the subject in his reasons for judgment, with which I agree, it is important to appreciate the primacy to be given to the text of the treaty.[156]

Later cases placed a gloss on McHugh's judgment, making more explicit the necessity of giving primacy to the text of the treaty.[157] As explained by the Court in its unanimous judgment in *Morrison v Peacock*: "[t]he need to give the text primacy in interpretation results from the tendency of multilateral treaties to be the product of compromises by the parties to such treaties".[158]

The approach taken by the High Court is not without support in international legal scholarship. Crawford, in the latest edition of *Brownlie's Principles of Public International Law*, suggests that "only the textual approach is recognized in the *VCLT*: Article 31 emphasizes the intention of the parties as expressed in the text, as the best guide to their common intention".[159] Early jurisprudence of the International Court likewise supported such an approach, as was stated in the 1950 *Advisory Opinion Competence of Assembly Regarding Admission to the United Nations*: "[i]f the relevant words in their natural and ordinary meaning make sense in their context, that is an end of the matter".[160] In later cases, the International Court has emphasised that interpretation must be based "above all upon the text of the treaty".[161]

The emphasis placed on the text of the treaty by the High Court may

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156. *Ibid* at 277.
157. *Great China Metal*, *supra* note 83; *Western Australia v Ward*, [2002] 213 CLR 1; *Minister for Immigration and Multicultural Affairs v Respondents S152-2003*, [2004] 222 CLR 1.
158. *Morrison v Peacock*, [2002] 210 CLR 274 at 279.
159. James Crawford, *Brownlie's Principles of Public International Law*, 8d (Oxford: Oxford University Press, 2012) at 379.
160. *Competence of Assembly Regarding Admission to the United Nations*, Advisory Opinion, [1950] ICJ Rep 4 at 8.
161. *Territorial Dispute (Libya v Chad)*, [1994] ICJ Rep 6 at para 4; *Legality of the Use of Force (Serbia and Montenegro v Belgium) Preliminary Objections*, [2004] ICJ Rep 279 at para 100.

be contrasted with the approach adopted by the Supreme Court, where a much greater emphasis has been placed on ascertaining the purpose of the international instrument by reference to extrinsic materials. For example, in *Thomson v Thomson*, La Forest J observed that:

> It would be odd if in construing an international treaty to which the legislature has attempted to give effect, the treaty were not interpreted in the manner in which the state parties to the treaty must have intended. Not surprisingly, then, the parties made frequent references to this supplementary means of interpreting the Convention, and I shall also do so. I note that this Court has recently taken this approach to the interpretation of an international treaty in *Ward v Canada (Minister of Employment & Immigration)*.[162]

In *Pushpanathan*, Barastache J suggested that the "starting point of the interpretative exercise is, first, to define the purpose of the [Refugees] Convention as a whole"[163] and only then to consider the purpose of particular articles within the *Convention* – in that case, Article 1F(c) prohibiting the recognition as a refugee of any person who has been guilty of acts contrary to the purposes and principles of the United Nations. Barastache J emphasised that the "overarching and clear human rights object and purpose is the background against which interpretation of individual provisions must take place".[164]

Having thus noted the "human rights character"[165] of the *Convention*, the interpretation of Article 1F(c) undertaken by Barastache J was strongly influenced by the *travaux préparatoires*, in particular the debates in respect of that provision in the Social Committee of the UN Economic and Social Council during the treaty's negotiation, UN resolutions, and

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162. *Thomson v Thomson*, 3 SCR 551 at para 42. See also *Connaught Laboratories Ltd v British Airways* (2002), 61 OR (3d) 204 (ONSC) per Molloy J (where the same idea has also been neatly expressed: the "objective of having uniform regulations limiting the liability of carriers would be seriously weakened if the courts of every country interpreted the Convention without any regard to how it was being interpreted and applied elsewhere. This potential problem supports an approach favouring consistency of interpretation among nations, rather than one in which each country applies its own domestic principles" at para 46).
163. *Pushpanathan*, *supra* note 56 at para 56.
164. *Ibid* at para 57.
165. *Ibid*.

jurisprudence of the International Court of Justice. Indeed, His Honour was particularly critical of the court below for "according virtually no weight to the indications provided in the *travaux préparatoires*".[166] Rather, Barastache J considered "[t]he purpose and context of the Convention as a whole, as well as the purpose of the individual provision in question as suggested by the *travaux préparatoires*, provide helpful interpretative guidelines".[167]

His Honour concluded that the purpose of Article 1F(c) was "to exclude those individuals responsible for serious, sustained or systemic violations of fundamental human rights which amount to persecution in a non-war setting"[168] or for acts "explicitly recognized as contrary to the purposes and principles of the United Nations".[169] Having found that the drug trafficking offences for which the applicant had been imprisoned did not come "close to the core, or even [form] a part of the corpus of fundamental human rights",[170] Barastache J held that the applicant's appeal should be successful, as conspiring to traffic in a narcotic was not a violation of Article 1F(c). van Ert has suggested that the approach adopted by the Supreme Court in *Pushpanathan* is "arguably too quick to turn to the *travaux*, which, it must be remembered, are described in Article 32 as 'supplementary means of interpretation'".[171] However, the approach to interpretation adopted therein continues to be influential,[172] and has never been explicitly rejected.

166. *Ibid* at para 55.
167. *Ibid*.
168. *Ibid* at para 64.
169. *Ibid* at para 65.
170. *Ibid* at para 72.
171. van Ert, *supra* note 134 at 179.
172. See for example, the approach adopted in *Ezokola v Canada (Citizenship and Immigration)*, 2013 SCC 40 per Lebel, Fish JJ; *Peracomo Inc v TELUS Communications Co*, 2014 SCC 29 per Cromwell J; see also the dissenting opinions of Abella J in *Febles*, *supra* note 58; *Thibodeau v Air Canada*, 2014 SCC 67 [*Thibodeau*].

VI. The Future of Interpretation: From Divergence to Convergence?

As can be seen from the points of departure between Australian and Canadian practice, end-users of the *VCLT*'s interpretative rules are granted "substantial leeway for idiosyncratic approaches" to treaty interpretation.[173] However, despite early inclinations towards different emphases in interpretative methodology, and despite the noted hostility of the High Court as compared to the more enthusiastic application of international law by the Supreme Court, it appears that the recent jurisprudence of both courts with respect to interpretation under the *VCLT* is showing signs of convergence.

Beginning with two cases handed down by the Supreme Court within days of each other, *Febles v Canada* and *Thibodeau v Air Canada*,[174] the majority of Justices appear to have moved towards adopting a more textual approach to treaty interpretation.

The first case,[175] like *Pushpanathan*, concerned the interpretation of Article 1F of the *Refugees Convention*; however in *Febles* the question was not whether an applicant for refugee status could be excluded on the grounds of Article 1F(c) for having committed acts contrary to the purposes and principles of the United Nations, but rather concerned sub-paragraph 1F(b) – exclusion for reason of having committed a "serious non-political crime".[176]

Chief Justice McLachlin, writing for the majority, took a much more structured approach than Barastache J in *Pushpanathan*, wherein Bastarche J eschewed immediate reference to the purposes of the *Convention* and demonstrated overreliance on the *travaux préparatoires*. Rather, McLachlin CJC made clear that "the point of departure for interpreting

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173. Michael Waibel, "Demystifying the Art of Interpretation" (2011) 22 European Journal of International Law 571 at 573.
174. *Febles, supra* note 58 and *Thibodeau, supra* note 172.
175. Although actually the second, chronologically.
176. *Febles*, *supra* note 58 at para 134; as incorporated in Canada by s. 98 of the *Immigration and Refugee Protection Act*, SC 2001, c 27.

a provision of a treaty is the plain meaning of the text".[177] Following ascertainment of the ordinary meaning of the terms used, the "second interpretive consideration is the context"[178] of Article 1F as a whole – being in the nature of an exclusion provision. Thirdly, McLachlin CJC looked to the object and purpose of the *Refugees Convention* and Article 1F(b) in particular, ultimately concluding that the exclusion "is central to the balance the *Refugee Convention* strikes between helping victims of oppression by allowing them to start new lives in other countries and protecting the interests of receiving countries".[179] In reaching this conclusion, McLachlin CJC emphasised that:

> While exclusion clauses should not be enlarged in a manner inconsistent with the Refugee Convention's broad humanitarian aims, neither should overly narrow interpretations be adopted which ignore the contracting states' need to control who enters their territory. Nor do a treaty's broad purposes alter the fact that the purpose of an exclusion clause is to exclude. In short, broad purposes do not invite interpretations of exclusion clauses unsupported by the text.[180]

Together with this greater emphasis on the text, what is most fascinating in McLachlin CJC's judgment is her explicit rejection of any reliance on the *travaux préparatoires*. Her reasoning merits extended quotation:

> As discussed, Article 31(1) of the Vienna Convention provides for interpretation of treaty provisions in accordance with the ordinary meaning of the terms in their context and in light of the treaty's object and purpose. Article 32 only allows for recourse to 'supplementary means of interpretation' — including the Travaux préparatoires — in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31 leaves the meaning ambiguous or obscure; or leads to a result which is manifestly absurd or unreasonable.
>
> These conditions for use of the Travaux préparatoires are not present in this case. With great respect to Justice Abella's contrary view, the meaning of Article 1F(b) is clear, and admits of no ambiguity, obscurity or absurd or unreasonable

177. *Febles*, *ibid* at para 16.
178. *Ibid* at para 19.
179. *Ibid* at para 35.
180. *Ibid* at para 30.

> result. Therefore, the Travaux préparatoires should not be considered.[181]

In this respect in particular, McLachlin CJC's judgment echoes that of Brennan J in the much earlier *Tasmanian Dams* case, that "there is no occasion to resort to preparatory work if the text of a convention is sufficiently clear in itself".[182] McLachlin CJC's structured approach, beginning with the text of the treaty and working through the other elements of Article 31(1), is likewise akin to the "ordered, but holistic" approach advocated by the High Court in *Applicant A*.

In the second case, *Thibodeau*, Air Canada had failed to provide services in French on some international flights as it was obliged to do under the *Official Languages Act*.[183] The majority held, however, that the uniform and exclusive scheme of damages liability for international air carriers established under the *Montreal Convention* did not permit an award of damages despite there having been a breach of language rights. Cromwell J, writing for the majority, adopted the same structure in his judgment as McLachlin CJC employed in *Febles*: placing the text of the treaty first in the interpretative approach, followed by object and purpose, and finally considering international jurisprudence.[184]

In both *Febles* and *Thibodeau*, Justice Abella dissented – joined by Cromwell J in the former and Wagner J in the latter – advocating for a continuation of the purposive approach to treaty interpretation. In *Febles*, Abella J argued that "the human rights approach to interpretation mandated by the Vienna Convention' required a 'less draconian' interpretation of Article 1F(b) than that adopted by the majority".[185] In particular, Abella J placed emphasis on the 'good faith' and 'object and purpose' aspects of the interpretative rules in Article 31(1), diminishing

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181. *Ibid* at paras 38-39. McLachlin CJC undertook a brief consideration of the *travaux* in any event, finding that they supported the conclusion already reached on the textual analysis: at paras 40-42.
182. *Tasmania Dams*, *supra* note 140.
183. RSC 1985, c 31 (4th Supp).
184. *Thibodeau*, *supra* note 172 at paras 36-57.
185. *Febles*, *supra* note 58 at para 74 per Abella J (Abella and Cromwell JJ in dissent).

the reference to the 'ordinary meaning' requirement,[186] and made extensive reference to the judgment of Barastache J in *Pushpanathan*. But most relevantly, she was critical of the majority for rejecting any role for the *travaux préparatoires* in the interpretation of Article 1F(b).[187] Likewise in *Thibodeau*, Abella J observed that:

> The process of treaty interpretation is a process of discernment. The literal meaning of the words is rarely reliably able to yield a clear and unequivocal answer. The intention of state parties must therefore be discerned by using a good faith approach not only to the words at issue, but also to the context, history, object and purpose of the treaty as a whole.[188]

Down under, the High Court's most recent effort at grappling with the *VCLT* appears to have overcome much of the latent hostility to the utilisation of extrinsic materials in treaty interpretation. *Macoun v Commissioner of Taxation*[189] concerned income tax; particularly, whether the pension of Mr. Macoun, who had worked as a sanitary engineer for the International Bank for Reconstruction and Development, was subject to taxation. Regulations promulgated under the *International Organisations (Privileges and Immunities) Act*[190] and *Specialized Agencies (Privileges and Immunities) Regulations*[191] granted immunity from taxation to salaries and emoluments received from an international organisation. The Act and Regulations give domestic effect to Australia's obligations under the *Agencies Convention*.[192] In a unanimous decision, the High Court held that nothing in the *Agencies Convention* required Australia to refrain from taxing Mr Macoun's pension.[193] It is instructive to set out the Court's reasoning in some detail:

> On the ordinary meaning of the words, the Agencies Convention does not prohibit States distinguishing between officers and former officers and

186. *Ibid* at para 89.
187. *Ibid* at para 107.
188. *Thibodeau*, *supra* note 172 at para 140 per Abella J in dissent.
189. [2015] HCA 44 [*Macoun*].
190. 1963 (Cth), s 6(1)(d)(i).
191. 1986 (Cth), reg 8(1).
192. *Convention on the Privileges and Immunities of the Specialized Agencies*, 21 November 1947, [1988] ATS 41 (entered into force 2 December 1948).
193. *Macoun*, *supra* note 189 at para 82.

> does *not* prohibit a State taxing a pension received by a former officer of a specialized agency. That construction is consistent with both State practice and the preparatory works. Although these materials were not debated before the AAT or the Full Court, they assist in the interpretation of the Agencies Convention.
>
> The starting point in understanding the context of the text, object and purpose of the Agencies Convention is the UN Convention. … the UN Convention was drafted on the basis that the phrase "salaries and emoluments" did not extend to retirement or death benefits.
>
> Next, the preparatory works in relation to the Agencies Convention must be considered. Its terms have been addressed earlier. A Sub-Committee of the Sixth Committee reported in 1947. It recorded that the Sub-Committee agreed that the immunity from suit in Section 19(a) would continue after the officials had ceased to be officials. …
>
> As seen earlier, the officials of the UN were not to get an exemption from taxation on their pensions. In each preparatory work, the taxation exemption was not extended to pensions.
>
> Next, the State practice of parties to the Agencies Convention in dealing with exemption from taxation for periodic pensions must be considered. … For present purposes, it is sufficient to record, as is the fact, that there is still no generally accepted State practice with regard to the exemption of retirement pensions from taxation.[194]

Whether through deliberate intention or careless language it is not clear, but the High Court's judgment shifts from resisting the use of *travaux préparatoires* and the application of Article 31(3), to suggesting that they "must be considered", albeit following the initial textual analysis.[195] Wall suggests that the different attitude of the Court may be explained by the retirement of certain judges from the bench who had previously taken highly restrictive approaches to treaty interpretation,[196] as well as the fact that the treaty and *travaux préparatoires* at issue in *Macoun* were more prosaic than in the cases dealing with treaty instruments related to

194. *Ibid* at paras 74-82 [emphasis in original].
195. *Ibid* at paras 78, 80.
196. Patrick Wall, "A Marked Improvement: The High Court of Australia's Approach to Treaty Interpretation in *Macoun v Commissioner of Taxation* [2015] HCA 44" (2016) 17 Melbourne Journal of International Law 1 at 17.

fundamental human rights.[197]

Whatever the reason, it is apparent that the most recent jurisprudence of the Supreme Court and High Court is beginning to converge on a more orthodox approach to treaty interpretation: a more archetypal adoption of the rules in Article 31 and 32 of the *VCLT*.

VII. Conclusions

The review undertaken above has demonstrated that the practise of the Supreme Court and High Court with respect to the application of the *VCLT* Articles 31 and 32 is far from consistent, either internally or *vis-à-vis* each other. Despite the theoretical idea that the *VCLT* rules will, or should, encourage consistency of interpretation amongst varied interpreters, there in fact remains, even within the purported bounds of the *VCLT*, the potential for divergences in interpretative technique (let alone outcome). While both courts identify international law as a single system, and promote the role of the *VCLT* interpretative rules as a means of ensuring uniformity of treaty application, the methods adopted by each court under the "crucible"[198] laid down in Article 31 have been, until quite recently, distinctly different. The High Court has limited the role for international law as a tool of interpretation, emphasising an austere textual approach to treaty interpretation and restricting the use of extrinsic materials. The Supreme Court, by contrast, has embraced the use of extrinsic materials as it seeks to ascertain the party's intentions and take its preferred purposive approach to treaty interpretation.

Thus, having lauded their potential as agents of systemic integration, when examined more closely it becomes apparent that *VCLT* Articles 31 and 32 are in fact an excellent (albeit, perhaps ironic) example of Allott's "disagreement reduced to writing".[199] Dörr prefers the phrase "pragmatic compromise".[200] The High Court has described the interpretative rules

197. *Ibid* at 15-17.

198. *Yearbook*, *supra* note 109 at 219-20, para 8.

199. Philip Allott, "The Concept of International Law" (1999) 10 European Journal of International Law 31 at 43.

200. Dörr & Kirsten Schmalenbach, eds, *Vienna Convention on the Law of Treaties* (London: Springer-Verlag, 2012) at 522.

as "somewhat amorphous".[201] Whatever the description, the fact is that the 'general rule' contained in Article 31 is itself open to interpretation, which as Waibel observes is "an illustration of the feedback loop that arises in interpretation".[202] Ultimately, the Supreme Court and the High Court, while sharing a common goal – uniform treaty application – have been required to interpret the scope, purpose and role of Articles 31 and 32, and have done so with different results.

For this reason, it cannot be said that the jurisprudence of either the Supreme or High Court is necessarily exemplifies the 'correct' application of *VCLT* Articles 31 and 32. There are ebbs and flows; some judgments are better reasoned than others. However, overall, as the international law experience of these domestic courts grows, there does appear to be some emerging consensus as to the preferred interpretative approach. At least in the courts of Canada and Australia, the dream of systemic integration may yet be alive.

201. *Riley v Commonwealth*, [1985] 159 CLR 1 at para 4 per Deane J.
202. Waibel, *supra* note 8 at 4-5.

The Consensus Method of Interpretation by the Inter-American Court of Human Rights

Lucas Lixinski*

This article examines treaty interpretation based on consensus, or the idea that legal or political practice that is not directly related to a treaty can be used in interpreting it, or at least in granting more discretion to States Parties. The practice of the Inter-American Court of Human Rights, contrasted with the well-settled practice of the European Court of Human Rights, reveals that consensus interpretation plays an important role in entrenching the legitimacy of international human rights courts. The Inter-American Court's practice seems to rely on consensus when it supports a progressive, teleological interpretation of human rights. The article argues that this selective engagement eliminates the legitimacy-building possibilities of the consensus method of interpretation, but that the Inter-American Court, in seeking legitimacy not from States Parties, but other stakeholders, does not seem particularly concerned with legitimacy costs (even if it probably should).

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I. Introduction
II. Consensus via International Law
III. Consensus via Comparative Law
IV. Consensus via Domestic Politics
V. Consensus and Legitimacy
VI. Conclusion

I. Introduction

International human rights tribunals, in interpreting the treaties that delegate competence to them in cases brought by individuals, often resort to a number of tools. These tools are frequently described in the *Vienna Convention on the Law of Treaties*[1] ["*Vienna Convention*"]. Most notably among these is interpretation based on the object and purpose of the human rights treaty. But teleological interpretation of the text using intrinsic tools does not always yield the answers the human rights body needs, particularly in new areas of social activity. In these situations, human rights bodies, particularly the European Court of Human Rights ("ECtHR"), have referred to "consensus" as a method of interpretation.

Consensus interpretation mediates tensions between different types of interpretation, even if it has fallen under the shadows of the margin of appreciation attributed to States.[2] There are five key categories of consensus interpretation in the ECtHR jurisprudence: (1) consensus among States Parties of the Council of Europe; (2) international consensus identified by international treaties; (3) internal consensus within a State; (4) expert consensus; and (5) consensus among ECtHR judges.[3] *Tyrer v United Kingdom*[4] is the case that started the use of consensus as a means for

1. 23 May 1969, 1155 UNTS 331 art 18 (entered into force 27 January 1980) [*Vienna Convention*].
2. Kanstantsin Dzehtsiarou, "European Consensus: a way of reasoning" (2009) University College Dublin Law, Working Paper No 11/2009.
3. *Ibid*.
4. (1978), ECHR (Ser A) 24, 2 EHRR 1.

evolutive interpretation.[5] In this case, corporal punishment of a minor was seen as no longer acceptable by the majority of States Parties to the *European Convention for the Protection of Human Rights and Fundamental Freedoms*[6] ("*ECHR*"). This triggered an evolution of the standard for Article 3 of the *ECHR* on cruel and degrading punishment.

The idea of regional consensus as a treaty interpretation tool has been explored in the European context as a means to articulate the ECtHR's balancing of subsidiarity and the expansionist tendencies of interpreting an ever-evolving instrument.[7] But the evolutive interpretation of the *ECHR* through consensus is one that almost seeks States Parties' "pre-approval" of the standard, before the ECtHR intervenes. The role of European consensus, as far as the ECtHR is concerned, also seems to be the maintenance of a certain degree of unity in the region, as well as finding common denominators in domestic human rights practice. In doing so, consensus interpretation enhances the legitimacy of the ECtHR.[8]

The functions of consensus interpretation are: (1) to enhance the legitimacy of a regional human rights court; (2) to persuade States Parties of said legitimacy, and make judgment thereby more acceptable; (3) to avoid arbitrary decision-making; (4) to determine the scope of subsidiarity; and (5) to help the court in dealing with new matters of interpretation of the treaty, or otherwise controversial or important

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5. Kanstantsin Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights* (Cambridge: Cambridge University Press, 2015) at 139 [Dzehtsiarou, *European Consensus*].
6. 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953).
7. See Dzehtsiarou, *European Consensus*, *supra* note 5 ("European consensus operates on the edge of the margin of appreciation and evolutive interpretation; both of these are necessary to maintain the stability of the Strasbourg system, with the former preventing the ECtHR from going too far in developing human rights standards and the latter ensuring that the ECHR does not turn into a meaningless instrument preserving views from 60 years ago when the Convention was drafted, signed and ratified by the original Contracting Parties" at 129).
8. *Ibid* at 1.

issues.[9]

Dzehtsiarou, in his monograph treatment of the topic, suggested that "European consensus should remain within European borders", and it may not be suitable for transplantation to other regional human rights contexts.[10] This piece takes on this challenge, and examines the idea of regional consensus in the Inter-American Court of Human Rights ("IACtHR"). The Americas would seem like an ideal context for the use of consensus, since the majority of countries subject to the IACtHR's jurisdiction share a linguistic and legal tradition, in contrast to the wider diversity found in Europe. This may even suggest that the use of consensus would be a given in the IACtHR's practice, and the search for it is almost a moot exercise, at least from an epistemological perspective.[11]

In spite of regional similarities, though, there is relatively sparse practice by the Inter-American Court in dealing with consensus methods of interpretation. More often than not, the IACtHR uses consensus as only one tool in its arsenal, relying on other methods of interpretation in the same case. This mixed record can be at least partly explained by the IACtHR being progressive in other, sometimes more, legitimacy-costing ways. In fact, it seems that the IACtHR cherry picks interpretation methods that serve an aspiration to foster the protection of human rights, which coincides with the expansion of the IACtHR's mandate. I argue that the IACtHR should take consensus interpretation more seriously as an interpretive tool in its case law, at least inasmuch as implementation of this method would require it being more deferential to states and subsidiarity as an initial step of its reasoning process. This choice is likely to translate into deeper entrenchment of the *American Convention on Human Rights "Pact of San Jose, Costa Rica"*[12] ("*ACHR*").

What follows discusses the uses of consensus interpretation methods by the IACtHR according to the different types of consensus, using Dzehtsiarou's three first categories, outlined above (consensus using international law; consensus using comparative law, and; consensus

9. *Ibid* at 184.
10. *Ibid* at 128.
11. I am thankful to Rosalind Dixon for this insight.
12. 22 November 1969, 1144 UNTS 123 (entered into force 18 July 1978).

using domestic politics), as these are the categories the IACtHR has engaged with the most. Underlying this discussion is the question of the connection between consensus interpretation and legitimacy of the IACtHR. Throughout these sections, the doctrinal schema developed with respect to the ECtHR will serve to frame the discussion, which will then highlight the specific experience of the IACtHR.

II. Consensus via International Law

The use of international law as a means to build consensus is perhaps the most common way in which the IACtHR engages with this method. This is related to the notion, discussed below, that the IACtHR seems to seek consensus from yardsticks external to the States Parties to the *ACHR* that have accepted its jurisdiction. Before getting to that, though, it is important to say a few words about the IACtHR's general approach to treaty interpretation.

A significant feature in the IACtHR's approach to treaty interpretation is the evolutionary interpretation of treaties, but packaged in way that promotes the object and purpose of the *ACHR*, rather than changes in society. The IACtHR has frequently asserted that the *American Convention* and other instruments should be given a *pro homine* interpretation, that is, that they should be interpreted in the way that is most protective of human rights. This declared "bias" of the Court is another means of advancing interpretation in accordance with the purpose of the treaty; by choosing the *pro homine* way, the IACtHR dismisses the interpretation of its instrument according to the ordinary meaning of its words (the primary rule of interpretation) or any other traditional canons of interpretation, instead directly serving the teleology of the instrument.[13] This approach seems to be somewhat at odds with

13. *Ricardo Canese v Paraguay* (2004), Inter-Am Ct HR (Ser C) No 111, at para 181; *Herrera-Ulloa v Costa Rica* (2004), Inter-Am Ct HR (Ser C) No 107, at para 184; *Baena-Ricardo et al v Panama* (2001), Inter-Am Ct HR (Ser C) No 72. For a broader discussion of treaty interpretation by the IACtHR, see Lucas Lixinski, "Treaty Interpretation by the Inter-American Court of Human Rights: Expansionism at the Service of the Unity of International Law" (2010) 21 European Journal of International Law 585.

the ECtHR's approach.[14] While the ECtHR's approach to evolutionary interpretation aims at updating the instrument, the IACtHR's approach makes it so that there is an incidental effect of a much more fundamental and declared bias. It is thus less conducive to finding consensus as a baseline, or even to addressing consensus among Member States. It puts the IACtHR in a position largely out of sync with Member States, which seems to reflect other postures, discussed below.

The IACtHR also engages with the need to interpret the *ACHR* in light of changing circumstances. In *Mapiripán Massacre v Columbia*,[15] when analyzing the issue of attribution to the State of responsibility for human rights violations perpetrated by non-State actors, the Court stepped away from general rules of international law. By doing so, the Court affirmed the independence of human rights from the general international legal system, based precisely on the special character of human rights obligations due to the purposes of human rights treaties and obligations.[16] The IACtHR then affirmed that human rights treaties must be interpreted in accordance with current circumstances, as opposed to an understanding based on an "original meaning". In saying that, the IACtHR used not only Article 29 of the *ACHR* (which is specifically on interpretation rules), but also the rules of the *Vienna Convention*.[17] Further, in an Advisory Opinion, the IACtHR also reinforced the point that human rights considerations permeate other areas of international law. That is, when human rights interests are concerned, legal obligations should be interpreted in a dynamic manner so as to cover new situations

14. Mark Toufayan, "Human Rights Treaty Interpretation: A Postmodern Account of Its Claim to "Speciality"" (2005) NYU Center for Human Rights and Global Justice Working Paper No 210 (arguing that there is no preferred method of interpretation in the European System). In a contrary sense, see Theodor Meron, "International Law in the Age of Human Rights: General Course on Public International Law" (2003) 301 Collected Courses of the Hague Academy of International Law 9 at 192-93.
15. (2005), Inter-Am Ct HR (Ser C) No 134.
16. *Ibid* at paras 104-108.
17. *Ibid* at para 106.

on the basis of pre-existing rights.[18] Therefore, in trying to articulate connections to broader areas of international law, the IACtHR will use the *ACHR* as a means to inject adaptability to changing circumstances into the law external to the Inter-American System. However, it seems more reluctant to invoke changing circumstances with respect to the *ACHR* itself, instead focusing on the *pro homine* method.

Consensus is often based on reliance on other international treaties.[19] This reliance helps clarify the scope of the treaty the human rights court is in charge of overseeing, and it also helps signal towards regional public opinion with respect to an issue. It is used by the IACtHR often in isolation, but increasingly also in conjunction with the domestic law of States Parties. For instance, in *Kawas-Fernández v Honduras*,[20] the IACtHR used a combination of non-Inter-American treaties, domestic law of States Parties, and even an Inter-American treaty to establish competence over environmental matters.[21]

The IACtHR often uses other treaties and what it calls the "*corpus juris* of international human rights law".[22] Those are in addition to the Inter-American treaties beyond the *ACHR* that give specific competence to the IACtHR for its application.[23] But, as I have discussed elsewhere,[24] the IACtHR tends to use only treaties to which the State in question is a party, aligning with the requirements of the *Vienna Convention*, Article 31.3.c.

The IACtHR has systematically invoked treaties outside of the Inter-American System as a means to expand its jurisdiction, using Article 29 of the *ACHR* as a catapult for expanding its mandate. There is some variation in the ways in which this will happen. In more politically

18. Antônio Augusto Cançado Trindade, "International Law for Humankind: Towards a New *Jus Gentium* (II)" (2005) 317 Collected Courses of the Hague Academy of International Law 9 at 62.
19. Dzehtsiarou, *European Consensus*, *supra* note 5 at 46-47.
20. (2009*)*, Inter-Am Ct HR (Ser C) No 196.
21. *Ibid* at para 148.
22. Jo M Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights*, 2d (Cambridge: Cambridge University Press, 2013) at 13.
23. *Ibid* at 122-25.
24. Lixinski, *supra* note 13.

delicate contexts such as economic, social and cultural rights, and indigenous rights, municipal law (or internalized international treaties) seems to play a larger role in interpreting the *ACHR*. In other areas, such as international humanitarian law, the Court has more easily referred to other international treaties as interpretive aids. However, it has also shown some reluctance in invoking international criminal law, using it only as part of the "factual matrix" of the case, rather than directly affecting the interpretation of provisions of the *ACHR*.[25]

The case of *Yean and Bosico Children v Dominican Republic*[26] ("*Yean and Bosico*"), involving the denial of nationality to two women of Haitian descent born in the Dominican Republic, is particularly relevant to thinking about the boundaries of this use of external treaties. In it, the court considered the status of a treaty to which the Dominican Republic was not a party and whether it could influence the judgment.[27]

In *Yean and Bosico*, the IACtHR engaged with a treaty which the State had signed, but not ratified. The treaty in question is the *Convention on the Reduction of Statelessness*,[28] which was signed by the Dominican Republic on December 5, 1961 and had been in force since December 13, 1975.[29] The treaty had by then only been ratified by 26 States, certainly not a particularly representative share of the international community sufficient to prove a consensus. Nevertheless, and without mentioning the principle of good faith with respect to treaties that have not entered into force for a State,[30] the IACtHR added the treaty to the list of norms that needed to be contextually considered in deciding the scope of obligations under the *ACHR*. In a Separate Opinion in that case, Judge Cançado Trindade went even further: he examined the *Convention on the Reduction of Statelessness*, alongside the *Convention Relating to the*

25. *Ibid*.
26. (2005), Inter-Am Ct HR (Ser C) No 130 [*Yean and Bosico*].
27. *Ibid* at 143.
28. 30 August 1961, 989 UNTS 175 (entered into force 13 December 1975).
29. *Yean and Bosico*, *supra* note 26 at 143.
30. *Vienna Convention*, *supra* note 1, art 18.

Status of Stateless Persons,[31] and the *European Convention on Nationality*,[32] to make a claim for a general principle of international law to prevent statelessness.[33]

In engaging in this type of consensus, though, there is a chance that the status of the consensus-building tools may get blurred. It is one thing to use international treaties to which the State in question is a party, a long-recognized method of interpretation contained in the *Vienna Convention.*[34] But to use international treaties to which the State is not a party, or other sources, to make an argument for the existence of applicable general principles of international law, as Judge Cançado Trindade did in *Yean and Bosico*, is a different type of effort. It requires the human rights court to find validity in a norm, the existence of which still needs to be proven, and then apply it to the State Party. Sometimes this application can be done by merging custom and consensus: that is, by claiming there is a regional consensus, one can claim there is in fact a norm of (regional) customary international law that applies to the parties. Consensus can thus become a custom-making tool as well.[35]

Even if consensus interpretation is in many ways analogous to regional customary international law, the ECtHR does not treat consensus interpretation as custom. Instead the ECTHR simply treats it as as practice under the treaty,[36] which is also a recognized means of treaty

31. 28 September 1954, 360 UNTS 117 (entered into force 6 June 1960).
32. 6 November 1997, Eur TS 166 (entered into force 1 March 2000).
33. See *Yean and Bosico*, *supra* note 26 at paras 8-9 for the separate opinion of Judge AA Cançado Trindade.
34. *Vienna Convention*, *supra* note 1, art 31(3)(c). For a discussion on the application of this provision by the ECtHR, see Vassilis Tzevelekos, "The Use of Article 31(3)(c) of the VCLT in the Case-law of the ECtHR: an Effective Anti-Fragmentation Tool or a Selective Loophole for the Reinforcement of the Teleology of Human Rights? Between Evolution and Systemic Integration" (2010) 31 Michigan Journal of International Law 621.
35. Vassilis Tzevelekos & Kanstantsin Dzehtsiarou, "International Custom Making and the ECtHR's European Consensus Method of Interpretation" (2016) 16 European Yearbook of Human Rights 313 at 343 [Tzevelekos & Dzehtsiarou].
36. *Ibid* at 316.

interpretation under the *Vienna Convention*.[37] Even if consensus could be used as a means to identify regional custom, it is deployed by the ECtHR for a different purpose. But admittedly, from an international legal perspective, the analogy between custom and consensus interpretation helps lend some legitimacy to consensus interpretation more broadly by making the method more familiar.[38]

The IACtHR could use consensus to identify regional custom in the Americas, but it has refrained from doing so thus far. Identifying regional custom would require making a claim for regionalism and specialization in the field of human rights protection that the IACtHR has not often done itself, rather opting to selectively rely on ECtHR case law (as well as the findings of UN Treaty Bodies) to develop their own jurisprudence. It would seem that relying on regional custom could in theory enhance the legitimacy of the Inter-American system, at least inasmuch as it would clearly ground the IACtHR in the Americas. It would certainly come a long way in addressing concerns, expressed by States like Venezuela, about the IACtHR allegedly behaving as a "colonial power", incapable of taking local circumstances into account.[39] But at the same time, it may put the broader legitimacy of international human rights law at risk, and which seems to be a more important concern for the IACtHR. The important question here is, "legitimacy for whom?" As far as the ECtHR is concerned, it would seem that legitimacy before States Parties is the key concern. Conversely, for the IACtHR, even though it appears to be more criticized by domestic governments than the ECtHR, legitimacy before the world seems to be key.

One must bear in mind that, even if regional custom were identified as such by the IACtHR, it is unclear whether the court could use it as custom or if it would still need to package it as practice under the treaty. Given the IACtHR's fairly restricted mandate, which allows it to directly apply only certain Inter-American human rights treaties, it seems no practical benefit would arise for the IACtHR to use consensus to apply

37. *Vienna Convention*, *supra* note 1, art 31(3)(b).
38. Tzevelekos & Dzehtsiarou, *supra* note 35 at 342.
39. Pasqualucci, *supra* note 22 at 303.

custom. However, pre-existing custom can be, and has been, used to challenge domestic law of States Parties as *Yean and Bosico* demonstrates.

In its use of international treaties as a means of identifying consensus, the IACtHR has adopted a somewhat expansionist angle. It does not see itself as declaring violations of those treaties, in fact, it has explicitly declared that as falling outside its competence. It does, however, use international treaties as means to expand on the meaning of provisions of the *ACHR*, and to ultimately build a more harmonized international legal order. This practice has an overall positive impact on the legitimacy of the IACtHR, but it assumes (or at least unintendedly reinforces) a fairly strict separation between the domestic and the international, which can be detrimental to the legitimacy of the Court. I will come back to this issue below. Before then, it is necessary to examine how the counterpart of international law, being domestic law of States not parties to a case, has been used.

III. Consensus via Comparative Law

The use of comparative law (that is, the domestic law of a number of countries) is the principal form of consensus interpretation in the ECtHR. However, while the IACtHR has used comparative law, it has not done so to the same extent. The strict separation between domestic and international that the IACtHR adopts prevents more reliance on domestic law, even if it would have positive legitimacy impacts on the IACtHR.

There are two variations on the use of comparative law as a tool to measure consensus: one, used more often, is to rely only on the domestic law of the States subject to the human rights tribunal's jurisdiction; the other is to look more broadly at domestic law across the world, regardless of whether they are parties to the relevant human rights treaty. While the latter practice can have a positive impact on developing general principles of law as a source of international law, it seems to be less important for the purposes of identifying consensus relevant to the interpretation of one specific treaty. As discussed in the previous section, the relationship between consensus interpretation and non-treaty sources of international law is only an incidental effect and not an objective. That said, the

IACtHR has referred to both types of comparative law use.

Consensus interpretation based on domestic law (as a proxy to domestic attitudes) is often used with respect to morally sensitive issues, such as the ECtHR's case law on LGBTI rights.[40] The same can be said with respect to the IACtHR. *Atala Riffo and Daughters v Chile*[41] ("*Atala Riffo*") is the first case of the IACtHR dealing with LGBTI rights. The case revolves around the rights of Karen Atala Riffo and her daughters in the context of custody and administrative proceedings. An important dimension of the case has to do with disciplinary proceedings against Ms. Atala, and the implications of the IACtHR judgment for judicial design in Chile.[42] For present purposes, I will focus on the custody proceedings, and the fact that Ms. Atala is a lesbian in a committed relationship with children from a previous (heterosexual) union. I will focus on the custody proceedings, resulting in the loss of custody of her three daughters, and the case's focus on the alleged international responsibility of the State for discriminatory treatment and arbitrary interference in the private and family life suffered by Ms. Atala due to her sexual orientation in this matter.[43]

The IACtHR asserted its role as a subsidiary jurisdiction, holding that it would not re-scrutinize the findings of domestic jurisdictions on the facts or evidence. It restricted its mandate to compliance with international human rights norms.[44] Subsidiarity also meant the IACtHR would not make a finding with respect to custody.[45]

In determining whether the IACtHR could include sexual orientation among the grounds upon which discrimination is prohibited, the IACtHR said that:

> [t]he Court has established, as has the European Human Rights Court, that

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40. Dzehtsiarou, *European Consensus*, *supra* note 5 at 34.
41. (2012), Inter-Am Ct HR (Ser C) No 239 [*Atala Riffo*].
42. David Kosar & Lucas Lixinski, "Domestic Judicial Design by Regional Human Rights Courts" (2015) 109 American Journal of International Law 713 [Kosar].
43. *Atala Riffo*, *supra* note 41 at para 3.
44. *Ibid* at para 65.
45. *Ibid* at para 66.

> human rights treaties are living instruments, whose interpretation must go hand in hand with evolving times and current living conditions[.] This evolving interpretation is consistent with the general rules of interpretation set forth in Article 29 of the American Convention, as well as those established in the Vienna Convention on the Law of Treaties.[46]

But the IACtHR immediately followed that with the *pro homine* principle, in saying that:

> [i]n this regard, when interpreting the words "any other social condition" of Article 1(1) of the Convention, it is always necessary to choose the alternative that is most favorable to the protection of the rights enshrined in said treaty, based on the principle of the rule most favorable to the human being[.][47]

Therefore, in this case, evolutionary and teleological interpretations seem to come hand in hand. With respect to Latin American consensus, the IACtHR said:

> [w]ith regard to the State's argument that, on the date on which the Supreme Court issued its ruling there was a lack of consensus regarding sexual orientation as a prohibited category for discrimination, the Court points out that the alleged lack of consensus in some countries regarding full respect for the rights of sexual minorities cannot be considered a valid argument to deny or restrict their human rights or to perpetuate and reproduce the historical and structural discrimination that these minorities have suffered. The fact that this is a controversial issue in some sectors and countries, and that it is not necessarily a matter of consensus, cannot lead this Court to abstain from issuing a decision, since in doing so it must refer solely and exclusively to the stipulations of the international obligations arising from a sovereign decision by the States to adhere to the American Convention.[48]

In the same way the separation of domestic and international was used to promote subsidiarity and deference to domestic law early in the judgment, that separation is used here to promote the authority of the international court (IACtHR).

Consensus interpretation was also invoked by a partially dissenting judge in *Atala Riffo*. Judge Alberto Pérez Pérez used constitutional provisions of thirteen Latin American countries to suggest that consensus had not emerged as to whether a same-sex couple and the children of one of them could be considered a "family". He clearly tied the evolutionary

46. *Ibid* at para 83.
47. *Ibid* at para 84.
48. *Ibid* at para 92.

interpretation of the *ACHR* to the need for a consensus to be established, asserting that, while consensus could be found to support the idea that discrimination based on sexual orientation violates human rights, the same could not be said about same-sex couples constituting families in Latin America.[49] It is somewhat telling that the IACtHR seems to have ignored what, by all effects, is an orthodox application of the consensus method. It has done so in favor of a more progressive interpretation of the *ACHR* with respect to Article 17 (family protection), and still used a version of consensus interpretation with respect to the grounds for discrimination (Article 1(1)). A selective approach to consensus interpretation seems to have been adopted by the IACtHR, meaning that only a consensus interpretation that supports a more progressive view of human rights will ultimately be deployed by the IACtHR.

Consensus was even more central in *Artavia Murillo et al ("In Vitro Fertilization") v Costa Rica*.[50] In this case, the IACtHR considered a prohibition of the practice of *in vitro* fertilization ("IVF") in Costa Rica in the aftermath of a ruling of the Constitutional Chamber of the Costa Rican Supreme Court of Justice ("Constitutional Chamber"). The IACtHR considered whether the prohibition amounted to an arbitrary interference in the right to private life and the right to found a family, the right to equality, and the disproportionate impact of the ban on women and women's rights.[51] The IACtHR used evolutionary interpretation (and consensus as a key component of it) particularly bearing in mind that IVF is a procedure that did not exist when the *ACHR* was drafted, and used it in respect to two issues: "(i) the pertinent developments in international and comparative law concerning the specific legal status of the embryo, and (ii) the regulations and practice of comparative law in relation to IVF".[52]

With respect to the latter, the IACtHR said that:

> [t]he Court considers that, even though there are few specific legal regulations

49. *Ibid* at paras 19-23 for the partially dissenting opinion of Judge Alberto Pérez Pérez.
50. (2012), Inter-Am Ct HR (Ser C) No 257.
51. *Ibid* at para 2.
52. *Ibid* at para 246.

> on IVF, most of the States of the region allow IVF to be practiced within their territory. This means that, in the context of the practice of most States Parties to the Convention, it has been interpreted that the Convention allows IVF to be performed. The Court considers that this practice by the States is related to the way in which they interpret the scope of Article 4 of the Convention, because none of the said States has considered that the protection of the embryo should be so great that it does not permit assisted reproduction techniques and, in particular, IVF. Thus, this generalized practice is associated with the principle of gradual and incremental – rather than absolute – protection of prenatal life and with the conclusion that the embryo cannot be understand as a person.[53]

In making this assessment, the IACtHR also relied on rules of the *Vienna Convention*, particularly in articulating "generalized practice" as meaning subsequent practice under the *ACHR*. The Court used consensus to rule out the argument that the prohibition of IVF could be justified to protect the right to life of the embryo.[54] The IACtHR concluded that an embryo is not entitled to the right to life until it is implanted in the uterus, when it becomes a fetus.[55] The IACtHR used multiple methods of interpretation, among them, consensus, and decided that they all led to a similar conclusion on the matter.

Reliance on comparative law can be useful in examinations of proportionality, which is an important element in tension with the "Margin of Appreciation" doctrine (at least inasmuch as they both act as defenses for the state). Resorting to the law of multiple states helps legitimize choices as it testifies to the success of a particular model.[56]

This practice is somewhat limited, in that it undertakes a fairly superficial reading of the law of the other countries involved, particularly in the absence of IACtHR cases dealing with the same set of laws in the other jurisdictions (which is more often than not the case when invoking the consensus method of interpretation). In doing so, an important factor to consider is that the analysis fails to take into account the domestic context of the many consulted jurisdictions where legislation itself does not adequately measure support around an existing law; it is

53. *Ibid* at para 256.
54. *Ibid*.
55. *Ibid* at para 264.
56. Rosalind Dixon, "Proportionality & Comparative Constitutional Practice" 5 (manuscript on file, cited with permission).

simply a proxy for it.[57] The situation is perhaps sharper when speaking of repeals of legislation, rather than positive creation of statutes. But it still applies, at least to the extent that the presence of legislation itself is at best an imperfect way to measure consensus, since it fails to take into account domestic politics.[58] Part of this is just a shortcoming of broad comparison in which contextualism falls by the wayside instead focusing on functional equivalents across jurisdictions.

In addition, the mechanism of seeking consensus through looking at the domestic law of States Parties has been pursued by the IACtHR in its advisory competence. According to the drafters of the *ACHR*, the advisory competence of the IACtHR was intended to be wide. They particularly envisioned the possibility of States Parties asking for Advisory Opinions on the compatibility of their domestic laws with the *ACHR*,[59] a type of Advisory Opinion that the IACtHR has rendered on a number of occasions.[60] In a way, these opinions have paved the way for the IACtHR to consider comparative domestic law as an avenue of interpretation.

It was only in a recent Advisory Opinion that the IACtHR tackled the matter of consensus interpretation. In the Advisory Opinion on

57. *Ibid* at 4.
58. *Ibid* at 5.
59. Pasqualucci, *supra* note 22 at 39.
60. *Proposed Amendments of the Naturalization Provisions of the Constitution of Costa Rica* (1984), Advisory Opinion OC-4/84, Inter-Am Ct HR (Ser A) No 4; *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts 13 & 29 of the American Convention on Human Rights)* (1985), Advisory Opinion OC-5/85, Inter-Am Ct HR (Ser A) No 5; *The Word "Laws" in Article 30 of the American Convention on Human Rights* (1986), Advisory Opinion OC-6/86, Inter-Am Ct HR (Ser A) No 6; *Enforceability of the Right to Reply or Correction (Arts 14(1), 1(1) & 2 of the American Convention on Human Rights)* (1986), Advisory Opinion OC-7/85, Inter-Am Ct HR (Ser A) No 7; *Compatibility of Draft Legislation with Article 8(2)(h) of the American Convention on Human Rights* (1991), Advisory Opinion OC-12/91, Inter-Am Ct HR (Ser A) No 12; *International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention (Arts 1 & 2 of the American Convention on Human Rights)* (1994), Advisory Opinion OC-14/94 (Ser A) No 14.

whether corporations are holders of human rights under the *ACHR*,[61] the IACtHR noted that consensus could be a means to verify whether corporations are entitled to human rights. Even though it ultimately concluded that extending human rights to corporations fell outside the text of the *ACHR*, it engaged with the idea that evolutionary interpretation gives particular relevance to comparative law.[62]

The IACtHR recognized that all States Parties to the *ACHR* which have accepted the jurisdiction of the court directly granted human rights to legal entities. However, there were some differences among States Parties with respect to which rights were granted to legal entities and which legal entities were entitled to human rights.[63] The IACtHR noted that, despite their domestic law positions, a number of these countries held that ultimately the *ACHR* did not support conferring human rights to legal entities. Specifically, the IACtHR said that differences in approach among States Parties, and the fact that the domestic law was not seen as being pursuant to implementing the *ACHR*, made it so that consensus was not a determining factor in the interpretation of the *ACHR* in this respect.[64]

At the time of writing this article, a request for an Advisory Opinion of the IACtHR is open and may help shed some light on the consensus method in the Inter-American System. This Advisory Opinion is being requested by Costa Rica, in which the State asks about the extent of *ACHR* obligations with respect to implementing name changes for transgender persons, as well as property rights flowing from same-sex relationships.[65]

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61. *Entitlement of Legal Entities to Hold Rights Under the Inter-American Human Rights System (Interpretation and Scope of Article 1(2), in relation to Articles 1(2), 8, 11(2), 13, 16, 21, 24, 25, 29, 30, 44, 46 and 62(3) of the American Convention on Human Rights, as well as of Article 8(1)(A) and (B) of the Protocol of San Salvador*) (2016), Advisory Opinion OC-22/16, Inter-Am Ct HR (Ser A) No 22.
62. *Ibid* at para 63.
63. *Ibid* at para 64.
64. *Ibid* at paras 66-67.
65. Solicitud de Opinión Consultiva presentada por el Estado de Costa Rica, online: Corte Interamericana de Derechos Humanos <www.corteidh.or.cr/cf/jurisprudencia2/observaciones_oc.cfm?nId_oc=1671>.

This opinion, being about issues involving changing social mores and minority groups, could be an important opportunity for the IACtHR to engage again in the consensus method, especially in light of its findings in *Atala Riffo*.

Therefore, the IACtHR's use of domestic law seems to be more restricted to issues not squarely within the *ACHR*. International treaties, on the other hand, are often used in these contexts, and also more generally to support the IACtHR's reasoning. These choices speak to the limited reliance by the IACtHR on the domestic law of States, which is indicative of its troubled relationship with the principle of subsidiarity, discussed further below.

Before getting to that, there is another possibility within the realm of consensus interpretation which has been discussed in some particularly volatile cases in the IACtHR jurisprudence. These have to do with whether a State can rely on relatively clear expressions of domestic democratic will as a means to interpret its international human rights obligations. To those situations I move next.

IV. Consensus via Domestic Politics

Assuming consensus is related to treaty interpretation, the lack of consensus can work for States, since it creates a presumption in favor of the solution adopted by the State on a given matter, and deferring to said position.[66] After all, once the State has deviated from consensus, it can justify the domestic posture by stating that consensus does not quite cover the State's interference with human rights, or, even if it does, that the State has a particularly strong justification to pursue alternative behavior.[67]

In the ECtHR context, European Consensus is meant to create a rebuttable presumption that the ECtHR will follow the majority of States Parties. That presumption can be rebutted in the presence

66. Dzehtsiarou, *European Consensus*, *supra* note 5 at 29.

67. Kanstantsin Dzehtsiarou, "European Consensus and the Evolutive Interpretation of the European Convention on Human Rights" (2011) 12 German Law Journal 1730 at 1733 [Dzehtsiarou, "Evolutive Interpretation"].

of "particularities of the historical and political development of a respondent State or moral sensitivity on the matter at issue".[68] Rebutting the presumption on these grounds, however, imposes a high burden on the State, significantly raising the stakes of a case, or at least further underlining high stakes.

Consensus can thus be used in international human rights adjudication as reliance on internal consensus, that is, the political views within certain states, as opposed to across a region. Of tools to gauge internal consensus, referenda have been used by the ECtHR on certain occasions, in part because of their clarity and "objectivity" on a specific matter. Naturally, these tools are not always available, but when they are (as in cases involving abortion rights in Ireland), they offer powerful subsidies to rebut the presumption in favor of regional consensus on a topic.[69] In the IACtHR practice, the Court has consistently rejected the possibility of relying on internal democratic consensus. Results have been mixed in the aftermath of cases, leading to attacks on the legitimacy of the IACtHR and its judgments *vis-à-vis* States Parties.

One instance in which domestic debate and controversy ran counter to the IACtHR's position was *Gomes Lund et al ("Guerrilha do Araguaia") v Brazil*,[70] having to do with amnesty laws enacted in Brazil in the aftermath of the country's military dictatorship (which lasted from 1964 to 1985). Between 1972 and 1975, a rural guerrilla group, Guerrilha do Araguaia, was persecuted by the military dictatorship, and was ultimately decimated by the armed forces. In 1979, an amnesty law was enacted in Brazil which covered acts between 1961 and 1979, and extended to government officials and non-governmental opposition forces. Reparations were granted to surviving relatives of the guerrilla's

68. Dzehtsiarou, *European Consensus*, *supra* note 5 at 3.
69. *Ibid* at 52-54.
70. (2010), Inter-Am Ct HR (Ser C) No 219 [*Gomes*].

members in the 1990s.[71]

A case was brought to the Inter-American Commission by relatives of members of the Guerrilha do Araguaia, and made its way to the Inter-American Court of Human Rights. Months before the hearing at the IACtHR, the Brazilian Federal Supreme Court ruled in favor of the constitutionality of the amnesty law. The Brazilian government made an argument based on internal consensus, and relied on the finding of the law's constitutionality. Specifically, it presented an objection to the IACtHR's jurisdiction in the case. The Brazilian government argued that, if the IACtHR were to hear the merits of the case, it would in fact, act as a court of fourth instance, and review the judgment of the Brazilian Federal Supreme Court. To that, the IACtHR responded saying its role was not to scrutinize internal legality, but rather compatibility with an international human rights treaty.[72] In particular, it stated that:

> [o]n numerous occasions, the Court has held that ascertaining whether the State violated its international obligations by means of its actions before its judicial organs, can lead to this Court examining the particular domestic procedures, eventually including the decisions of the higher courts, so as to establish the compatibility with the American Convention. In the present case, the Inter-American Court is not called to carry out an analysis of the Amnesty Law in relation with the National Constitution of a State, an analysis of domestic law which is not of its jurisdiction, and which is an issue of the Non-compliance Action No. 153 …, but rather it must assess a conventional control, namely to assess the alleged non-compatibility of said law with Brazil's international obligations pursuant to the American Convention. As a consequence, the arguments in regard to the objections are matters related directly with the merits of the controversy, which can be examined by the Court under [the] American Convention, without contravening the rule of the "fourth instance." As such, the Court dismisses this preliminary objection.[73]

In support of the idea that the judgments of higher domestic courts can

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71. Yolanda Gamarra, "National Responses in Latin America to International Events Propelling the Justice Cascade: The *Gelman* Case" in José María Beneyto & David Kennedy, eds, *New Approaches to International Law: The European and the American Experiences* (The Hague: TMC Asser Press, 2012) 75 at 86.
72. *Ibid* at 87.
73. *Gomes*, *supra* note 70 at para 49.

be scrutinized, the IACtHR cited a number of previous cases.[74] It also used a number of domestic judgments,[75] as well as the findings of regional and international bodies (including the African and European Systems, the United Nations Security Council, UN Treaty Bodies, the UN High Commissioner for Human Rights and several UN Rapporteurs, as well as International Criminal Tribunals) to make the case for an existing international consensus against amnesties.[76] The Court concluded by saying:

> [t]his Court has previously ruled on the matter and has not found legal basis to part from its constant jurisprudence that, moreover, coincides with that which is unanimously established in international law and the precedent of the organs of the universal and regional systems of protection of human rights. In this sense, regarding the present case, the Court reiterates that amnesty provisions, the statute of limitation provisions, and the establishment of exclusions of responsibility that are intended to prevent the investigation and punishment of those responsible for serious violations to human rights such as torture, summary, extrajudicial, or arbitrary executions, and enforced disappearance are not admissible, all of which are prohibited for contravening irrevocable rights recognized by International Law of Human Rights.[77]

In this judgment, the IACtHR used international consensus as a means to disregard strong internal consensus, as in *Gelman v Uruguay*[78] ("*Gelman*"). Further, consensus became a tool to maintain findings of the IACtHR in comparable cases and not deviate from them. International consensus served the purpose of maintaining the internal legitimacy of the IACtHR, by making its judgments more consistent among comparable cases.

With respect to the Brazilian Federal Supreme Court's judgment in particular, the IACtHR concluded that Brazil owed an obligation

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74. *"Street Children" (Villagrán-Morales et al) v Guatemala* (1999), Inter-Am Ct HR (Ser C) No 63, at para 222; *Escher et al v Brazil* (2009) Inter-Am Ct HR (Ser C) No 200, at para 44; *Dacosta Cadogan v Barbados* (2009), Inter-Am Ct HR (Ser C) No 204, at para 24.
75. *Gomes*, *supra* note 70 at paras 163-69.
76. *Ibid* at paras 150-62.
77. *Ibid* at para 171, citing *Barrios Altos v Perú* (2001), Inter-Am Ct HR (Ser C) No 75, at para 41; *La Cantuta v Peru* (2006), Inter-Am Ct HR (Ser C) No 162, at para 152; *"Las Dos Erres" Massacre v Guatemala* (2009), Inter-Am Ct HR (Ser C) No 211, at para 129.
78. (2011), Inter-Am Ct HR (Ser C) No 221 [*Gelman*].

to undertake control of conventionality and thus follow the *ACHR*, as interpreted by the IACtHR, in considering the constitutionality of domestic law. The IACtHR said that "[t]he conventional obligations of States Parties bind all the powers and organs of the State, those of which must guarantee compliance with conventional obligations and its effects (*effet utile*) in the design of its domestic law".[79]

After the IACtHR declared amnesties, and specifically the Brazilian Supreme Federal Court's upholding of amnesties, as a breach of international human rights obligations, the response of the Brazilian government has been, to date, to ignore the IACtHR judgment so as not to upset internal consensus. Partial compliance with the judgment is underway, but unlike Uruguay which eventually did away with the amnesty law, Brazil remains convinced of the importance of the amnesty law for internal stability. Thus, in this case, the reliance on international consensus, and not allowing for internal consensus to challenge it, has meant a direct attack on the legitimacy of the IACtHR and an accusation of overreach of its mandate.

In *Gelman*, the IACtHR examined the issue of going against the expressed will of the Uruguayan people. In 1986, Uruguay passed what is known as an "Expiry Law", which essentially shut the door on prosecutions for crimes perpetrated during the country's military dictatorship.[80] Two plebiscites attempting to change the law failed in 1989 and 2009, and the IACtHR in *Gelman* was then faced with whether these referenda

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79. *Gomes*, *supra* note 70 at para 177, citing *International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention (Arts. 1 and 2 of the American Convention on Human Rights)* (1994) Advisory Opinion OC-14/94 (Ser A) No 14, at para 35; *Miguel Castro-Castro Prison v Perú* (2006), Inter-Am Ct HR (Ser C) No 160, at para 394; *Zambrano Vélez et al v Ecuador* (2007), Inter-Am Ct HR (Ser C) No 166, at para 104; *Castillo-Petruzzi et al v Peru* (1999), Inter-Am Ct HR (Ser C) No 59 (considering clause 3); *De la Cruz Flores v Perú* (2010), Order of the Int-Am Ct HR (considering clause 5).

80. For commentary on this law, see generally, Daniel Soltman, "Applauding Uruguay 's Quest for Justice: Dictatorship, Amnesty, and Repeal of Uruguay Law No. 15.848." (2013) 12 Washington University Global Studies Law Review 829.

could justify the existence of the amnesty law.[81] In Uruguay, support for amnesties in the context of the dictatorship goes back to at least the late 1970s, when Uruguayans in exile demanded amnesty, for instance, for a military officer who fled to Europe because he refused to participate in torture in Uruguay. In fact, an amnesty law, commonly known as the "National Pacification Law", was eventually passed, granting amnesties to people on both sides of the conflict in Uruguay. This law had several loopholes which allowed prosecutions for certain crimes, however the military refused to accept these loopholes, and refused to cooperate with civilian courts. As a result, the Expiry Law was passed, preventing prosecutions for the majority of conduct before March 1, 1985.[82]

Shortly after the passage of the law, human rights groups mobilized and collected enough signatures for a national referendum for the abolition of the Expiry Law. This referendum, which took place in 1989, resulted in 56.7% of the population voting in favor of the Expiry Law, and 43.3% voting for its repeal. There has been a fair amount of speculation as to whether fear of retaliation from the military played a role in this outcome, but no conclusive evidence has been found to support the idea.[83]

The second referendum, in 2009, came when international legal opinion from academics and activists had clearly crystalized to say that amnesties were incompatible with international law. Uruguay's Supreme Court had similarly found the application of certain parts of the Expiry Law to be incompatible with the Constitution in the context of a specific criminal case (however, did not rule directly on the constitutionality in the abstract). Even still, the President of Uruguay was considering prosecuting former Heads of State in Uruguay under the dictatorship.

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81. For an in-depth discussion of this history, see Karen Engle, "Self-Critique, (Anti) Politics and Criminalization: Reflections on the History and Trajectory of the Human Rights Movement" in José Maria Beneyto & David Kennedy, eds, *New Approaches to International Law: The European and the American Experiences* (The Hague: TMC Asser Press, 2012) 41 at 61-68.
82. *Ibid* at 62-63.
83. *Ibid* at 64.

Regardless, the referendum failed to repeal the law again.[84]

To whether the referenda could be validly used to oppose the IACtHR's very strong anti-amnesty stance, the Court stated:

> [t]he fact that the Expiry Law of the State has been approved in a democratic regime and yet ratified or supported by the public, on two occasions, namely, through the exercise of direct democracy, does not automatically or by itself grant legitimacy under International Law. The participation of the public in relation with the law, using methods of direct exercise of democracy, – referendum (paragraph 2 of Article 79 of the Constitution of Uruguay) – in 1989 and "plebiscite (letter A of Article 331 of the Constitution of Uruguay) regarding a referendum that declared as null Articles 1 and 4 of the Law – therefore, October 25, 2009, should be considered, as an act attributable to the State that give rise to its international responsibility.
>
> The bare existence of a democratic regime does not guarantee, *per se*, the permanent respect of International Law, including International Law of Human Rights, and which has also been considered by the Inter-American Democratic Charter. … the protection of human rights constitutes a impassable limit to the rule of the majority, that is, to the forum of the "possible to be decided" by the majorities in the democratic instance, those who should also prioritize "control of conformity with the Convention" … which is a function and task of any public authority and not only the Judicial Branch. … *Other domestic courts have also referred to the limits of democracy in relation to the protection of fundamental rights*.[85]

The IACtHR then went on to consider the domestic jurisprudence not only of States Parties to the *ACHR* (like Costa Rica and Colombia), but also of non-parties such as the United States. The IACtHR even considered countries outside the Americas such as Slovenia, South Africa, and Switzerland. In casting such a wide net, one could say the IACtHR relied on a version of "international consensus" in other countries' domestic legal systems, and of domestic courts relying on international consensus via international instruments, to overrule internal consensus.

The exercise in *Gelman* of looking at other domestic jurisdictions seems to align with what the ECtHR once did when it referred to "international trends", that is, the domestic law of States outside the jurisdictional scope of the court, as a means to identify consensus building

84. *Ibid* at 65-66.

85. *Gelman*, *supra* note 78 at paras 238-39 [emphasis added].

worldwide.[86] This tool is too much of an interpretive stretch and does little to enhance the legitimacy of a regional body before States Parties. But, it can enhance the body's legitimacy before stakeholders outside the jurisdictional scope of the court, which seems to be a desirable outcome for the IACtHR.

Coupled with the conventionality control doctrine, *Gelman* shows a limited understanding and use of subsidiarity as a governing principle of international law.[87] This is in marked contrast with the embrace of subsidiarity in *Atala Riffo*. In fact, the IACtHR in *Gelman* insisted on a separation between domestic circumstances and international law, circumscribing its role as assessing compatibility with international legal obligations, regardless of domestic consensus. In *Atala Riffo*, the same argument of separation was made to isolate certain aspects of the domestic proceedings, such as the merits of the custody hearing. In *Gelman*, though, the IACtHR went as far as suggesting that the referenda, which had been organized by the State, were in fact acts of State for which Uruguay was internationally responsible.[88] So, while the separation between domestic and international meant subsidiarity and legitimacy in *Atala Riffo*, it meant disregarding domestic consensus and mandate creep in *Gelman*.

In the aftermath of the IACtHR judgment in *Gelman*, the President of Uruguay signed a law repealing the Expiry Law, just a few days before the statutes of limitations created additional obstacles for prosecution. The new law also made certain conduct before March 1, 1985 criminal under international law, to which statutory limitations did not apply, thus chastising the country's Supreme Court which had, in May 2011, classified enforced disappearances as an ordinary crime.[89] Therefore, the reliance on international consensus helped override internal consensus not only as far as the IACtHR was concerned, but it also helped

86. Dzehtsiarou, *European Consensus*, *supra* note 5 at 65.
87. Jorge Contesse, "Contestation and Deference in the Inter-American Human Rights System" (2016) 79 Law and Contemporary Problems 123 at 135.
88. Gamarra, *supra* note 71 at 90.
89. Engle, *supra* note 81 at 66.

domestically, where arguments about international consensus became vital in overturning the law.

Importantly, though, one must be mindful of what reliance on internal consensus ultimately means for the legitimacy of an international court. To be sure, it may mean more ready acceptance of a Court's judgment domestically if it takes into account strong domestic support, but at the same time it can have negative ripple effects across a region, especially if the regional court is seen to be creating exceptions in its own case law. On the other hand, as Mahoney has argued, "[w]here societal values are still the subject of debate and controversy at national level, they should not easily be converted by the Court into protected Convention values allowing for only one approach".[90]

These multiple threads of consensus interpretation all relate to the legitimacy of the IACtHR. Some of them can be used to enhance the legitimacy of the IACtHR *vis-à-vis* States Parties, whereas others seem to have the opposite effect, and actually align themselves more closely with the idea that, because human rights law is quintessentially a counter-majoritarian type of discourse, it should not worry about democratic will (which in fact can be oppressive of minorities). Underlying the uses of consensus interpretation are questions about the (de)legitimizing effects of treaty interpretation by the IACtHR. But a number of questions need to be answered in order to understand how legitimacy plays a role in the IACtHR's context. The next section addresses these issues.

V. Consensus and Legitimacy

In the European context, consensus interpretation is fundamentally a response to legitimacy challenges raised. These are challenges raised against attempts by the ECtHR when it engages in evolutionary interpretation, or the idea of treating the *ECHR* as a living instrument that must be adapted to everyday circumstances.[91] Because evolutionary interpretation

90. Paul Mahoney, "Marvellous Richness of Diversity of Invidious Cultural Relativism?" (1998) 17 Human Rights Law Journal 1 at 3, cited in Dzehtsiarou, *European Consensus*, *supra* note 5 at 54.

91. Dzehtsiarou, "Evolutive Interpretation", *supra* note 67 at 1730.

is also a common feature of the IACtHR's jurisprudence (as discussed above), staking consensus interpretation against evolution, and the legitimacy concerns that come with it, seems to be a good starting point.

The adjudication of international human rights law by regional courts is for the most part considered to be subsidiary to States' own efforts in internalizing these norms and following them. Therefore, at the crux of the debate between evolutionary interpretation and consensus is the respect that regional human rights courts owe to the principle of subsidiarity, and therefore respect to States' rights to implement their own international human rights obligations. It is only when subsidiarity fails that consensus comes into operation, as a means to bring the human rights court to a point that simultaneously respects its own subsidiary role by paying respect to States' discretion as a first step of its reasoning, but at the same time advancing human rights protection (using other States' discretionary application of human rights norms to impose responsibility on a non-complying State).

The breadth of subsidiarity granted to a State (in the ECtHR's terminology, the State's Margin of Appreciation) depends on: (1) the nature of the right protected; (2) its importance; (3) the interference by the State on the enjoyment of said right; (4) the object of interference; and (5) regional consensus around the issue.[92] Evolutionary interpretation is a counterpoint to subsidiarity that can undermine the legitimacy of a human rights court, at least in that it may require a human rights court to undermine its own judgments, thus reducing the predictability of outcomes. Consensus, or more specifically the change in consensus, can work as a shield to help a court justify a change of position.[93] The IACtHR uses consensus to reinforce its own case law, as discussed above.

As Jorge Contesse has argued, the IACtHR "embraces a maximalist model of adjudication", one that makes little to no room for State discretion, or subsidiarity more generally.[94] In fact, former IACtHR Judge and President, Cançado Trindade, has been a strong opponent of

92. Dzehtsiarou, *European Consensus*, *supra* note 5 at 135.
93. *Ibid* at 139.
94. Contesse, *supra* note 87 at 124.

the IACtHR officially adopting the doctrine of margin of appreciation.[95] Part of the reason for Trindade's opposition rests in a distrust of domestic judicial and other legal structures, particularly the lack of strong judiciaries, a problem that the IACtHR has consistently tackled in its own jurisprudence. As I have co-argued elsewhere, when the IACtHR engages with domestic judiciaries, it does so with the intent of strengthening domestic institutions; but, in doing so, the IACtHR also strengthens itself.[96] It is thus unclear whether the building up of domestic legal structures could ever reach a stage in which subsidiary could be trusted by cynics to perform the role of restricting the scope of application of the IACtHR. The consequence is that the maximalist approach of the IACtHR still reigns, and with it, evolutionary interpretation.

Attacks on the legitimacy of the IACtHR and its perceived "intrusiveness" seem incapable of mounting a credible challenge to its expansive mandate. This attitude makes it nearly impossible for the IACtHR to seriously engage with consensus interpretation as a means to restrict its own mandate. After all, excessive deference to States Parties, the first step triggering the use of consensus interpretation, is missing .[97] But the fact that consensus method can lend additional legitimacy to the IACtHR creates an incentive for the method to be deployed in other, creative ways.

Consensus interpretation is one way of representing the tipping point necessary for evolutionary interpretation of a human rights treaty. It also helps draw a clearer line in the balancing of subsidiarity and evolution.[98] However, consensus interpretation does not necessarily run counter to evolution, it merely slows down the pace of evolution by restricting some

95. *Ibid* at 133-34.
96. Kosar and Lixinski, *supra* note 42 at 747.
97. But see Nino Tsereteli, "Emerging doctrine of deference of the Inter-American Court of Human Rights?" (2016) 20 International Journal of Human Rights 1097 (arguing for the emergence of a doctrine of deference in the IACtHR practice, at least in regard to cases that do not involve state violence or vulnerable groups).
98. Dzehtsiarou, *European Consensus*, *supra* note 5 at 5.

of it.[99]

States in the European context still use their original consent as a means to challenge the ECtHR.[100] Similarly, in the Americas, a range of States have criticized the IACtHR's action for straying too far from the original consensus of States Parties. As a result, there have been proposals for "strengthening process[es]" with respect to the Inter-American System within the parent organization, which would undermine the Inter-American Commission's powers.[101] It may even undermine attempts at pitting one organ of the Inter-American System against another, such as the request for an Advisory Opinion in which Venezuela asked the Inter-American Court to explain whether it had the power to "control the legality" of acts of the Commission. If the Court said yes, it would risk alienating the Commission; if the Court said no, it would come across as ineffectual towards States Parties.[102] Regardless, the IACtHR is usually dismissive of original consent, and instead relies on the protection of human rights (the *pro homine* approach) as the key goal of its interpretive activity.

A related argument is that the opposite of consensus is pluralism, which can also be seen as a desirable goal.[103] Pluralism can be not only ethnic pluralism, but also recognition of the diversity of legal solutions, and, with it, the authority of individual States to rule their own affairs. But in the ethnic context, consensus interpretation also has its potential problematic effects, as Benvenisti argues.[104] After all, it can prevent courts from fulfilling their roles as independent guardians of an international

99. Dzehtsiarou, "Evolutive Interpretation", *supra* note 67 at 1736.
100. Dzehtsiarou, *European Consensus*, *supra* note 5 at 152.
101. Contesse, *supra* note 87 at 144.
102. I/A Court H.R., Control of due process in the exercise of the powers of the Inter-American Commission on Human Rights (Articles 41 and 44 to 51 of the American Convention on Human Rights). Advisory Opinion OC-19/05 of November 28, 2005. Series A No.19.
103. Tzevelekos & Dzehtsiarou, *supra* note 35 at 325.
104. Eyal Benvenisti, "Margin of Appreciation, Consensus, and Universal Standards" (1999) 31 Journal of International Law and Politics 843 at 853, cited in Dzehtsiarou, *European Consensus*, *supra* note 5 at 127.

human rights treaty.[105] This is a reason why it has been rejected by the IACtHR in *Atala Riffo*,[106] as discussed above. The counter-majoritarian argument also played a role in *Gelman*, discussed above. The IACtHR in *Gelman* stated that international human rights law is a limit on majoritarian rule, and as such should be implemented by States in spite of existing domestic consensus.[107] Thus, it seems that the counter-majoritarian argument can be used to reject consensus interpretation across the board by a court, like the IACtHR, staunchly in favor of human rights and the protection of less favored social groups.

Relatedly, there is naturally a risk that too much emphasis on consensus as a tool for interpretation will promote a "lowest common denominator" approach to human rights protection, which is the opposite of what a human rights court's mandate should be. Judges at the ECtHR seem to be aware of this risk.[108] This is precisely a risk that the IACtHR seems to wish to avoid when it sets a higher bar to human rights protection through mechanisms like *pro homine* interpretation and conventionality control.

As a result, the IACtHR avoids the limiting potentials of consensus interpretation. It will rely on them in order to assert legitimacy of its already existing jurisprudence, but not when consensus challenges said jurisprudence. In doing so, the IACtHR seems to imply that it draws legitimacy not from the States Parties, but from external stakeholders, and an abstract idea of human rights and human dignity. Thus, consensus will be used more readily if it is in line with an expansion of the IACtHR's mandate.

VI. Conclusion

It seems that the IACtHR searches for consensus across a number of areas, many of which match strategies adopted by the ECtHR. But, in doing so, the IACtHR does not use consensus as closely tied to subsidiarity; rather,

105. Dzehtsiarou, "Evolutive Interpretation", *supra* note 67 at 1735.
106. Dzehtsiarou, *European Consensus*, *supra* note 5 at 127-28.
107. Gamarra, *supra* note 71 at 90-91.
108. Dzehtsiarou, *European Consensus*, *supra* note 5 at 202.

it seems to reject subsidiarity, and use the separation between domestic and international not as a means to promote subsidiarity, but rather as a means to distance itself from domestic concerns that may have impact on its judgments. It is only broader domestic consensus that will be relied upon, and, even then, more often than not in support of more expansionist interpretations of the *ACHR*. In this sense, consensus interpretation in the IACtHR jurisprudence appears to be not a mechanism of legitimacy *vis-à-vis* States Parties, but one of mandate creep.

In other words, the activity of the IACtHR on consensus interpretation does not seem to be particularly connected to the subsidiarity of human rights. It is rather undertaken, in conjunction with other interpretive techniques, to advance a greater mandate for the IACtHR, one that seeks legitimacy not from the States Parties, but rather from external sources. The *corpus juris* of international human rights may be a legitimating source, and it is something the IACtHR sees itself as contributing to first and foremost. Thus, while in the ECtHR context, consensus interpretation is a tool to enhance legitimacy *vis-à-vis* States Parties, this is only partly true in the IACtHR context. In fact, it seems that legitimacy gains are only seen as unintended consequences of the use of consensus interpretation, and not their objective. The IACtHR's primary commitment is still to the defense of human rights in the region, in spite of States Parties.

This attitude of the IACtHR can have deep impacts on its legitimacy *vis-à-vis* States Parties. Even if this legitimacy is not a primary concern for the IACtHR, it ultimately affects its ability to promote the change it seeks to implement across the Americas. The IACtHR should thus consider the possibilities of consensus interpretation more seriously, at least inasmuch as it can create pathways for entrenchment of the *ACHR*, as interpreted by the IACtHR.

Interpretation and Domestic Law: The Prosecution of Rape at the International Criminal Tribunal for the former Yugoslavia

Daniel Peat*

In the late spring of 1992, the Secretary-General of the UN delivered a report to the Security Council that captured the attention of the international community. Yugoslavia – from which Croatia and Slovenia had declared independence less than a year before – had fallen into a pitched civil war fuelled by bitter ethnic tensions between Serb, Croat, and Muslim communities. Nestled in the centre of the former unified state, the nascent republic of Bosnia-Herzegovina became the scene of atrocities not seen since the Second World War. The gravity of such acts led to the creation of the International Criminal Tribunal for the former Yugoslavia ("ICTY"), which was intended to facilitate the restoration of peace and stability by providing a forum in which those guilty of grave breaches of international humanitarian law could be brought to justice. However, faced with a vague statute and little precedent to draw upon, the judges of the ICTY were left with little choice but to innovate in order to adjudicate upon such crimes. One of the ways that they bridged the gap between vague rules and concrete application was by using domestic law to interpret international crimes and rules of procedure and evidence. Yet despite the frequency with which the Tribunal adopted this technique, it remains "the most varied and unexplained" use of any interpretive aid by the Tribunal. This article aims to address some of those unanswered questions.

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I. Introduction

In the late spring of 1992, the Secretary-General of the UN delivered a report to the Security Council that captured the attention of the international community. Yugoslavia – from which Croatia and Slovenia had declared independence less than a year before – had fallen into a pitched civil war fuelled by bitter ethnic tensions between Serb, Croat, and Muslim communities. Nestled in the centre of the former unified state, the nascent republic of Bosnia-Herzegovina became the scene of atrocities not seen since the Second World War.[1] The Serbs of Bosnia-Herzegovina, the Secretary-General reported, were making a "concerted effort … to create 'ethnically pure' regions" in the Republic,[2] employing tactics that "were as brutal as they were effective".[3] Reports on the situation documented the grim scene: the killing or displacement of 2.1

1. At the time of the reference on independence, the Bosnian population consisted of 43% Slavic Muslims, 31% Serbs and 17% Croats: Virginia Morris & Michael P Scharf, *An Insider's Guide to the International Criminal Tribunal for The Former Yugoslavia* (Ardsley, NY: Transnational Publishers, 1995) vol 1 at 19.
2. *Further Report of the Secretary-General pursuant to Security Council Resolution 749 (1992)*, UNSCOR, 1992, UN Doc S/23900 at para 5.
3. Morris & Scharf, *supra* note 1 at 22.

million Bosnians by the summer of 1993,[4] the systematic rape of women and girls, and the operation of 715 detention centres in which rape, torture, and execution was commonplace.[5]

The gravity of such acts led to the creation of the International Criminal Tribunal for the former Yugoslavia ("ICTY" or the "Tribunal"),[6] which came into existence on 25 May 1993.[7] It was hoped that the Tribunal would facilitate the restoration of peace and stability in the area, providing a forum in which those guilty of grave breaches of international humanitarian law could be brought to justice.[8] As the first international criminal tribunal to be established since the Nuremberg and Tokyo international military tribunals in the wake of the Second

4. *Ibid*.
5. *Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)*, UNSCOR, 1994, UN Doc S/1994/674 at paras 216-53 [*Final Report pursuant to Res 780*].
6. See Theodor Meron, "Rape as a Crime under International Humanitarian Law" (1993) 87 American Journal of International Law 424.
7. *Resolution 827 (1993)*, SC Res 827, UNSCOR, 48th Sess, UN Doc S/Res/827 (1993) [*Resolution 827*]. On the appropriateness of establishing the *ad hoc* tribunals by Security Council resolution, as opposed to convention or resolution of the UN General Assembly, see Morris & Scharf, *supra* note 1 at 40-48; Mahmoud Cherif Bassiouni, *The Law of the International Criminal Tribunal for the Former Yugoslavia* (Ardsley, NY: Transnational Publishers, 1996) at 220; *Report of the Secretary-General pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, UNSCOR, 1993, UN Doc S/25704 at paras 19-29 [*Report pursuant to SC Res 808*]; Mia Swart, *Judges and Lawmaking at the International Criminal Tribunals for the former Yugoslavia and Rwanda* (PhD Thesis, University of Leiden, 2006) [unpublished] at 43-49.
8. *Resolution 808 (1993)*, SC Res 808, UNSCOR, 1993, UN Doc S/RES/808; *Resolution 827*, *ibid*.

World War,[9] the ICTY was faced with a statute that contained "not much more than the skeletons of crimes" within its jurisdiction,[10] as well as procedural rules that had scant precedent to draw on.[11] By establishing an international tribunal "on the basis of a laconic statute, a brief preparatory report and a few pages of debates, the Security Council left the judges with little choice but to innovate".[12]

In an attempt to bridge the gap between vague rules and concrete application, the Tribunal had frequent recourse to domestic law in the interpretation of its *Statute* and *Rules of Procedure and Evidence* ("*RPE*").[13] This article examines one such use – the Tribunal's use of domestic law to interpret the crime of rape in the cases of *Furundžija* and *Kunarac* – demonstrating the indelible effect that this reasoning has had on the jurisprudence of the *ad hoc* tribunals and on international criminal law more generally.

This article is divided into three Parts following the Introduction.

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9. The International Military Tribunal at Nuremberg was established in August 1945 by virtue of a conventional agreement, *Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis (The London Agreement)*, 8 August 1945, 82 UNTS 279 (entered into force 8 August 1945). The International Military Tribunal for the Far East, on the other hand, was established by military order in January 1946: *Special Proclamation by the Supreme Commander for the Allied Powers at Tokyo*, 19 January 1946, 4 Bevans 20.
10. Guénaël Mettraux, *International Crimes and the Ad Hoc Tribunals* (Oxford: Oxford University Press, 2005) at 5.
11. *Prosecutor v Dusko Tadic*, IT-94-1, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses (10 August 1995) at para 20.
12. William A Schabas, "Interpreting the Statutes of the Ad Hoc Tribunals" in Lal Chand Vohrah et al, eds, *Man's Inhumanity to Man: Essays on International Law in Honour of Antonio Cassese* (The Hague: Kluwer Law International, 2003) 847 at 848.
13. "Letter Dated 13 April 1993 from the Permanent Representative of Canada to the United Nations Addressed to the Secretary-General" UNSCOR, UN Doc S/25594 (1993) at para 11. Interestingly, in the process of the drafting of the Report of the Secretary-General on the ICTY, Canada suggested explicitly that reference could be made to appropriate national law, if necessary, for interpretive purposes.

In Part II, the historical and legal background of the ICTY is described. Part III details the use of domestic law by the trial and appeals chambers of the ICTY to interpret the crime of rape in the cases of *Furundžija* and *Kunarac,* highlighting the importance of these judgments to contemporary international criminal law. Part IV asks whether the main principled argument against the Tribunal's judgments – based on the principle of legality – has any purchase, before questioning the validity of methodological critiques that have been levelled at the Tribunal. It concludes by suggesting that domestic law was used as the interpretative aid of last resort, which allowed the Tribunal to adjudicate upon crimes within its subject-matter jurisdiction in the absence of all other relevant material.

The jurisprudence of the ICTY provides a rich repository of instances in which domestic law has been invoked to interpret international crimes or rules of procedure.[14] Yet despite the frequency with which the Tribunal adopted this technique, it remains "the most varied and unexplained" use of any interpretive aid by the Tribunal.[15] This article aims to address some of those unanswered questions.

II. A Brief History of the ICTY

In the wake of the Secretary-General's Report regarding the situation in the former Yugoslavia, the Security Council formed a Commission of Experts tasked with investigating potential grave breaches of

14. *Prosecutor v Dusko Tadic*, *supra* note 11 at paras 38-42, 47-48, 60-71; *Prosecutor v Kupreskic*, IT-95-16-A, Appeals Chamber Judgment (23 October 2001) at paras 34-41 (when reliance on visual identification of the perpetrator is unsafe (art 21)); *Prosecutor v Limaj et al*, IT-03-66-T, Trial Chamber Judgment (30 November 2005) at para 17 (when reliance on visual identification of the perpetrator is unsafe (art 21)); *Prosecutor v Naletilic*, IT-98-34-A, Appeals Chamber Judgment (3 May 2006) at n 465 (the extent to which defendants have a right to confront witnesses under art 21(4)(e)); *Prosecutor v Strugar*, IT-01-42-A, Appeals Chamber Judgment (17 July 2008) at paras 52-54 (on the requirement to be fit to stand trial "implicit in Articles 20 and 21 of the Statute").

15. Lena Grover, *Interpreting Crimes in the Rome Statute of the International Criminal Court* (Cambridge: Cambridge University Press, 2014) at 65.

international humanitarian law.[16] The Commission documented and collated information relevant to the purported breaches which ultimately totalled over 65,000 pages.[17] The Interim Report of the Commission also noted the possibility of establishing an international tribunal, adding to an increasing number of voices that had made similar recommendations in late 1992 and early 1993.[18] On the same day that the Commission's Interim Report was released, the Conference on Security and Co-operation in Europe circulated a report examining the possibility of establishing an international tribunal at a meeting of the UN Human Rights Commission in Geneva,[19] with France and Italy making their own

16. *Resolution 780 (1992)*, SC Res 780, UNSCOR, 1992, UN Doc S/RES/780. The Commission of Experts was formed, *inter alia*, on the recommendation of the newly appointed Special Rapporteur for the Human Rights Commission: *Report on the situation of human rights in the territory of the former Yugoslavia submitted by Mr. Tadeusz Mazowiecki, Special Rapporteur of the Commission on Human Rights, pursuant to paragraph 14 of the Commission Resolution 1992/S-1/1*, UNSCOR, 1992, Annex, UN Doc S/24516 at para 70.
17. *Final Report pursuant to Res 780*, *supra* note 5 at para 20.
18. *Interim Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)*, UNSCOR, 1993, Annex I, UN Doc S/25274 at para 74. "The Commission was led to discuss the idea of the establishment of an ad hoc international tribunal … The Commission observes that such a decision would be consistent with the direction of its work"; See also *Report on the situation of human rights in the territory of the former Yugoslavia prepared by Mr. Tadeusz Mazowiecki, Special Rapporteur of the Commission on Human Rights, pursuant to paragraph 15 of the Commission Resolution 1992/S-1/1 and Economic and Social Council decision 1992/305* annexed to *The situation of human rights in the territory of the former Yugoslavia – Note by the Secretary-General*, UNSCOR, 1992, UN Doc A/47/666 at para 140; *Report of the Secretary-General on the Activities of the International Conference on the former Yugoslavia*, UNSCOR, 1993, UN Doc S/25221 at para 9.
19. Morris & Scharf, vol 2, *supra* note 1 at 211-310.

proposals for an international tribunal shortly thereafter.[20]

As the impetus for the creation of an international tribunal amongst UN member states and civil society mounted, the Security Council passed Resolution 808 on 22 February 1993, which provided that "an international tribunal shall be established for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia", as well as formally requesting the Secretary-General of the UN to submit a report on "all aspects of this matter, including specific proposals [regarding the Tribunal]". Taking into account suggestions from member states, the Report of the Secretary-General proposed a statute for an *ad hoc* tribunal in May 1993, which was unanimously approved by the Security Council in Resolution 827 (1993).[21] The ICTY was created as a subsidiary body of the Security Council under the authority vested in the Security Council by Chapter VII of the *UN Charter*.[22]

Of particular importance is paragraph 29 of the Report of the Secretary-General, which stated that:

> [i]t should be pointed out that, in assigning to the International Tribunal the task of prosecuting persons responsible for serious violations of international

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20. "Letter Dated 10 February 1993 from the Permanent Representative of France to the United Nations Addressed to the Secretary-General" UNSCOR, UN Doc S/25266 (1993); "Letter Dated 18 February 1993 from the Permanent Representative of Italy to the United Nations Addressed to the Secretary-General" UNSCOR, UN Doc S/25300 (1993). In the following four months, a further 13 proposals for an international tribunal were circulated by states, international organizations and non-governmental organizations; for a full list including reproductions of the proposals, see Morris & Scharf, vol 2, *ibid* at 209-480.

21. *Report pursuant to SC Res 808*, *supra* note 7; *Resolution 827*, *supra* note 7.

22. *Report Pursuant to SC Res 808*, *ibid* at para 28 [emphasis added]. By determining that this situation [the conflict in the former Yugoslavia] continues to *constitute a threat to international peace and security*, the Security Council framed the situation so that it came within its primary responsibility under art 24(1) of the *Charter of the United Nations*, 26 June 1945, Can TS 1945 No 7 (entered into force 24 October 1945) and enabled measures to be taken under Chapter VII; *Resolution 827*, *ibid*.

> humanitarian law, the Security Council would not be creating or purporting to "legislate" that law. Rather, the International Tribunal would have the task of applying existing international humanitarian law.[23]

The applicable law of the Tribunal was hence that which was "beyond any doubt part of customary law".[24] Such an approach was necessary, in the view of the Report, to accord with the principle of *nullum crimen sine lege*[25] – also referred to by some commentators as the "principle of legality" – whereby actions cannot be criminalised unless a clear and specific criminal prohibition existed at the time of the alleged violation.[26] The Report recommended that the Tribunal have subject-matter jurisdiction over grave breaches of the *Geneva Conventions* of 1949 which constituted "the core of customary international law applicable in international armed conflicts";[27] violations of the law or customs of war, as reflected in the 1907 *Hague Convention (IV)* and annexed regulations;[28] genocide, as codified in the 1948 *Genocide Convention*;[29] and crimes against humanity, encompassing murder, torture, and rape.[30] Jurisdiction over these matters was enshrined in Articles 2 to 5 of the *Statute of the International Criminal Tribunal of the former Yugoslavia* ("*Statute of the ICTY*"). In the *Statute*

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23. *Report pursuant to SC Res 808*, *ibid*. See also *Prosecutor v Hadžihasanović*, IT-01-47-AR72, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility (16 July 2003) at para 55. Matters of personal, territorial, temporal and concurrent jurisdiction are not pertinent for the subject matter of this article, and will not be outlined here. For more information, see Morris & Scharf, *supra* note 1 at 89-136.
24. *Report pursuant to SC Res 808*, *ibid* at para 34.
25. *Ibid*. The limitation of the law applicable by the Tribunal to customary law was "so that the problem of adherence of some but not all States to specific conventions does not arise"; the Secretary-General did, however, consider that "some of the major conventional humanitarian law has become part of customary international law" at paras 33-35.
26. See Antonio Cassese et al, *Cassese's International Criminal Law*, 3d (Oxford: Oxford University Press, 2013) at 22 *et seq*.
27. *Report pursuant to SC Res 808, supra* note 7 at para 37.
28. *Ibid* at paras 41-44.
29. *Ibid* at paras 45-46.
30. *Ibid* at paras 47-49.

of the ICTY, domestic law is only mentioned explicitly in relation to sentencing and is only applicable insofar as it constitutes "general practice regarding prison sentences in the courts of the former Yugoslavia".[31]

Aside from contextualising the cases that will be examined in the following pages, this brief detour into the history of the ICTY demonstrates one important point. The subject-matter jurisdiction of the ICTY was based on what the Secretary-General considered to be extant and partially codified rules of customary international law.[32] These rules may have been, and ultimately proved to be, insufficiently defined for application. However, that does not detract from the fact that the normative authority of the legal rules had been recognised,[33] obviating the need to establish the legal proposition as a formally valid rule of international law prior to its application. This supports the view (which is

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31. *Updated Statute of the International Criminal Tribunal for the former Yugoslavia*, (September 2009), art 24(1) [*Statute of the ICTY*]. *Cf.* the proposals by the Conference on Security and Co-operation in Europe, Amnesty International, and Slovenia, which all permitted – to a greater or lesser extent – application of domestic law; Morris & Scharf, *supra* note 1 at 369-70. A similar demarche led to the creation of the International Criminal Tribunal for Rwanda eighteen months later, the *Statute* of which is largely based on the *Statute of the ICTY* with only minor modifications; *Report of the Secretary-General Pursuant to Paragraph 5 of Security Council Resolution 955 (1994)*, UNSCOR, 1995, UN Doc S/1995/134 at para 9; Virginia Morris & Michael P Scharf, *The International Criminal Tribunal for Rwanda* (Ardsley, NY: Transnational Publishers, 1998) vol 1 at n 466; William A Schabas, *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone* (Cambridge: Cambridge University Press, 2006) at 30.

32. In the case of art 3 of the *Statute of the ICTY*, *ibid*, "Violations of the laws or customs of war", the *Statute* enumerates a non-exhaustive list of prohibited acts, leaving the door open for the ICTY to ascertain novel custom. A similar non-exhaustive list is included in the *Statute of the International Criminal Tribunal for Rwanda,* UNSCOR 49th Sess, UN Doc S/Res/955 (1994) art 4.

33. See UNSCOR, 1993, 3217th Mtg, UN Doc S/PV.3217 [provisional], statement by the representatives of the United Kingdom, New Zealand and Brazil to the Security Council, reiterating that the ICTY is limited to applying extant legal norms [UNSCOR 3217th Mtg].

also borne out by case law) that when the Tribunal defined or substantiated the legal concepts examined below – whether an international crime or a procedural rule – it was *interpreting* the rule, as opposed to enquiring as to its validity. These are two qualitatively different processes. Domestic laws may form the basis of the validity of legal propositions if the laws either demonstrate the *opinio juris* of that state in the case of customary law,[34] or if the laws manifest a general principle of law.[35] In the cases examined, however, domestic law played neither of these roles. Instead, it is drawn on in a stage of reasoning when the question of legal validity has already been settled.

III. Interpreting Rape

A. The Historic Evolution of the Crime of Rape

One of the most controversial uses of domestic law by the ICTY is the interpretation of the crime of rape under Article 3 of the *Statute of the ICTY*. The earliest legal prohibitions of rape in times of war can be traced back to the fourteenth and fifteenth century war ordinances of Richard II (1385) and Henry V (1419),[36] although its modern form is normally traced to the US *Lieber Code* of 1863, which provided that "all rape, wounding, maiming, or killing of such inhabitants are prohibited

34. See *Jurisdictional Immunities of the State (Germany v Italy: Greece Intervening)*, [2012] ICJ Rep 99 at paras 70-78; the International Court of Justice examined domestic laws to assess whether a customary rule of immunity for state officials' tortious acts in other states existed.
35. *Procès-Verbaux of the Proceedings of the Committee of Jurists, June 16th - July 24th 1920 with Annexes at* 335; *The Corfu Channel Case (Albania v UK)*, [1949] ICJ Rep 4 at 18.
36. These ordinances are reprinted in Travers Twiss, *The Black Book of the Admiralty* (Cambridge: Cambridge University Press, 1871) vol 1 at 468; it was also mentioned in Alberico Gentili, *De Iure Belli Libri Tres*, translated by John C Rolfe (Oxford: Clarendon Press, 1933) at section 421: "[T]o violate the honour of women will always be held to be unjust". See generally, Theodor Meron, *Henry's Wars and Shakespeare's Laws: Perspectives on the Law of War in the Later Middle Ages* (Oxford: Clarendon Press, 1994) ch 6 and 8.

under the penalty of death …".[37] After the Second World War, rape was successfully prosecuted at the Tokyo War Crimes Tribunal[38] and was included as a crime against humanity in *Council Control Law No 10*, which regulated the Occupying Powers' individual war crimes courts operating in Germany.[39] Despite numerous conventional provisions prohibiting rape in times of war – notably, Article 27 of the fourth *Geneva Convention* of 1949, and Articles 76(1) and 4(2)(e) of *Additional Protocols I and II* of 1977, respectively[40] – doubts persisted in the latter half of the twentieth century as to whether rape constituted a "grave breach" of the *Geneva Conventions* capable of giving rise to individual criminal responsibility.[41]

However, by the time of the Yugoslav conflict, any hesitation to

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37. *Instructions for the Government of Armies of the United States in the Field*, USC art 44 (Government Printing Office 1898) online: <avalon.law.yale.edu/19th_century/lieber.asp#sec2>.
38. Meron, *supra* note 6 at 426.
39. *Council Control Law No 10*, (1946), art 2(1)(c). Rape was not, however, included in the subject-matter jurisdiction of the Nuremberg Tribunal: *Procès des Grands Criminels de Guerre Devant Le Tribunal Militaire International Tome 1: Documents Officiels* (Secretariat of the International Military Tribunal, 1947).
40. *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)*, 12 August 1949, 75 UNTS 287 art 27 (entered into force 21 October 1950) [*Geneva Convention*]; *Protocol Additional to the Geneva Convention of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 12 December 1977, 1125 UNTS 3 art 76(1) (entered into force 7 December 1978) [*Geneva Convention Protocol I*]; *Protocol Additional to the Geneva Convention of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, 8 June 1977, 1125 UNTS 609 art 4(2)(e) (entered into force 7 December 1978).
41. *Geneva Convention*, *ibid*, art 147; *Geneva Convention Protocol I*, *ibid*, arts 11, 85. Rape was not explicitly included in the "grave breaches" provisions of the *Conventions*; Niamh Hayes, "Creating a Definition of Rape in International Law: The Contribution of the International Criminal Tribunals" in Shane Darcy & Joseph Powderly, eds, *Judicial Creativity at the International Criminal Tribunals* (Oxford: Oxford University Press, 2010) 129 at 130.

recognize rape as a war crime or a grave breach of the *Geneva Conventions* had started to dissipate.[42] In late 1992, the International Committee of the Red Cross stated that rape constituted a grave breach under the fourth *Geneva Convention*, a sentiment that was echoed shortly after by the United States, which considered that "the legal basis for prosecuting troops for rape is well established under the *Geneva Conventions* and customary international law".[43] In early 1993, during negotiations regarding the formation of the ICTY, the widespread and systematic nature of rape and sexual assault in the former Yugoslavia became apparent.[44] The concern of the international community was reflected in the proposals for the statute of the Tribunal that were advanced: proposals from the United States and France both classified rape as a grave breach of the *Geneva Conventions*, whereas the proposals of Italy, the Netherlands, the Organization of the Islamic Conference and the Secretary-General re-affirmed rape as a crime against humanity.[45] At the suggestion of the Secretary-General,[46] rape was explicitly included in the list of crimes against humanity over which the ICTY has jurisdiction.[47] As a reflection of the fact that these crimes can also be committed in non-international armed conflicts, the *Statute of the International Criminal Tribunal for Rwanda* explicitly classifies rape as a crime against humanity, as well as recognising that rape may constitute a

42. Meron, *supra* note 6 at 426; see further Grace Harbour, "International Concern Regarding Conflict-related Sexual Violence in the Lead-up to the ICTY's Establishment" in Serge Brammertz & Michelle Jarvis, eds, *Prosecuting Conflict-Related Sexual Violence at the ICTY* (Oxford: Oxford University Press, 2016) 19.
43. Cited in Meron, *ibid* at n 22.
44. UNSCOR 3217th Mtg, *supra* note 33: "We must ensure that the voices of the groups most victimized are heard by the Tribunal. I refer particularly to the detention and systematic rape of women and girls, often followed by cold-blooded murder" – statement of the Permanent Representative of the United States of America.
45. Morris & Scharf, *supra* note 1 at 379-83. The report of the Commission of Experts, as well as proposals by the National Alliance for Women's Organizations, Amnesty International, and the Lawyers Committee for Human Rights also considered rape as a crime against humanity.
46. *Report pursuant to SC Res 808*, *supra* note 7 at para 48.
47. *Statute of the ICTY*, *supra* note 31, art 5(g).

serious violation of Common Article 3 and the Additional Protocol I of the *Geneva Conventions*.

B. Interpretation of Rape within the ICTR/ICTY

Whilst the prohibition on rape had been indubitably recognised as a rule of international criminal law, the question of which acts constituted rape had neither been defined in conventional nor customary law, nor in judicial practice. The first judgment to address the issue was *Akayesu,*[48] delivered by the Trial Chamber of the ICTR in September 1998.

Akayesu was *bourgemestre* of a commune in Rwanda, charged with "the performance of executive functions and maintenance of public order within his commune".[49] In 1994, hundreds of Tutsi civilians sought refuge in the *bureau communal* of Akayesu's commune, only to be subjected to beatings, sexual assault, rape and murder at the hands of local militia and the police.[50] The Prosecutor of the ICTR charged Akayesu *inter alia* with rape as a crime against humanity, and as a violation of Common Article 3 and the Second Additional Protocol of the *Geneva Conventions*.[51] The Trial Chamber acknowledged that:

> there is no commonly accepted definition of [rape] in international law. While rape has been defined in certain national jurisdictions as non-consensual intercourse, variations on the act of rape may include acts which involve the insertion of objects and/or the use of bodily orifices not considered to be intrinsically sexual.[52]

Moving away from the more traditional approaches to defining rape commonly found in domestic law, which specify *actus reus* and *mens*

48. *Prosecutor v Jean-Paul Akayesu*, ICTR-96-4-T, Trial Chamber Judgment, (2 September 1998) (*International Criminal Tribunal for Rwanda*) [*Akayesu*].
49. *Ibid* at para 4.
50. *Ibid* at para 12A.
51. Navanethem Pillay, "Equal Justice for Women: A Personal Journey" (2008) 50 Arizona Law Review 657 at 665-66. The charge of rape was included on an amended indictment which was modified following questioning from the Bench brought to light evidence of rape and sexual assault.
52. *Akayesu*, *supra* note 48 at para 596.

rea requirements,[53] the Trial Chamber opted for a broad conception of rape that defined the crime as "a physical invasion of a sexual nature, committed on a person under circumstances which are coercive".[54] This definition has been widely praised for shifting the focus to "the overwhelming [coercive] circumstances which are knowingly exploited by the perpetrator, rather than [restricting] the context and criminality of the act to the internal acquiescence of the victim".[55] The conceptual definition enunciated in *Akayesu* was followed two months later in the *Celebici* case,[56] the first case involving rape to be heard by the ICTY. In addition to being the first ICTY chamber to adopt the *Akayesu* definition of rape, the *Celebici* case broke new ground in other respects. Of particular note is the Trial Chamber's determination that rape in situations of armed conflict may constitute torture, a position that was followed by chambers in subsequent cases.[57]

Just one month after the *Celebici* judgment, the ICTY was again

53. See *Sexual Offences Act 2003* (UK) c 42. For example, s 1 defining rape as follows:

    1. A person (A) commits an offence if:
        (a) he intentionally penetrates the vagina, anus or mouth of another person (B) with his penis,
        (b) B does not consent to the penetration, and
        (c) A does not reasonably believe that B consents.

54. *Akayesu*, *supra* note 48 para 598.

55. Hayes, *supra* note 41 at 134; See also Pillay, *supra* note 51 at 666-67. Pillay, herself one of the judges in the Trial Chamber in *Akayesu,* stated that, "I must say that the testimony of one of the witnesses motivated me to reexamine traditional definitions of rape. Witness 'JJ' was being asked by the prosecutor, in respect of each of the multiple rapes she endured, whether there was penetration: 'I am sorry to keep on asking you each time – did your attacker penetrate you with his penis'? Her answer was: 'That was not the only thing they did to me; they were young boys and I am a mother and yet they did this to me. It's the things they said to me that I cannot forget'". See also Phillip Weiner, "The Evolving Jurisprudence of the Crime of Rape in International Criminal Law" (2013) 54 Boston College Law Review 1207 at 1210.

56. *Prosecutor v Delalic ("Celebici case")*, IT-96-21-T, Trial Chamber Judgment (16 November 1998) at para 478.

57. *Ibid* at para 496.

required to interpret the crime of rape in the case of *Furundžija*.[58] The reasoning of the Trial Chamber in *Furundžija* is one of the clearest examples of recourse to domestic law that exists in international case law. In that case, the defendant was leader of the Jokers, a special unit within the armed forces of the Croatian Community of Herzeg-Bosna, who raped and tortured a female Bosnian Muslim civilian.[59] The Trial Chamber dismissed the *Akayesu* definition for want of specificity,[60] and, stating that "no definition of rape can be found in international law",[61] reasoned that:

> [to] arrive at an accurate definition of rape based on the criminal law principle of specificity (Bestimmtheitgrundsatz, also referred to by the maxim "nullum crimen sine lege stricta"), it is necessary to look for principles of criminal law common to the major legal systems of the world. These principles may be derived, with all due caution, from national laws.[62]

This reliance was subject to two caveats: first, that reference should not be made solely to jurisdictions belonging to one "legal family", such as common or civil law; and second, that account must be taken of the "specificity of international criminal proceedings when utilising national law notions".[63] The Chamber surveyed the definition of rape in 18 legal systems,[64] noting that "most legal systems in the common and civil law worlds consider rape to be the forcible sexual penetration of the human body by the penis or the forcible insertion of any other object into either

58. *Prosecutor v Furundžija*, IT-95-17/1-T, Trial Chamber Judgment (10 December 1998) [*Furundžija* Trial Chamber].
59. *Ibid* at paras 121-130.
60. *Ibid* at para 177.
61. *Ibid* at para 175.
62. *Ibid* at para 177.
63. *Ibid* at para 178.
64. *Ibid* at nn 207-14. The comparative survey examined Chile, China, Germany, Japan, the Socialist Federal Republic of Yugoslavia, Zambia, Austria, France, Italy, Argentina, Pakistan, India, South Africa, Uganda, New South Wales, the Netherlands, England and Wales, and Bosnia and Herzegovina.

the vagina or the anus".[65] Although the Tribunal did not find a universal definition of rape in criminal systems throughout the world – indeed, it explicitly acknowledged significant divergence between jurisdictions regarding whether forced oral sex constituted rape – it recognised that rape attached "to a growing category of sexual offences, provided of course they meet certain requirements, chiefly that of forced penetration".[66] Drawing from this conclusion, the Chamber defined rape as:

> (i) the sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) of the mouth of the victim by the penis of the perpetrator; (ii) by coercion or force or threat of force against the victim or a third person.[67]

Both the first sentence of the *actus reus* (that rape covers vaginal and anal penetration with a penis or any other object) and the second limb of the test (the requirement of coercion or threat or use of force) are drawn from the Chamber's examination of the laws of rape in domestic jurisdictions. Whilst the *Furundžija* definition of the crime of rape was affirmed on appeal,[68] the ICTR subsequently re-affirmed the *Akayesu* definition, which in its view "clearly encompasse[d] all the conduct described in the definition of rape set forth in *Furundžija*".[69] In light of the continued divergence between the "conceptual" *Akayesu* and the more "mechanistic" *Furundžija* definitions of rape, the issue was raised again in the case of

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65. *Ibid* at paras 181, 183. Domestic laws did not, however, agree as to whether forced oral penetration constituted rape. The Chamber adopted a teleological approach with regard to this point, stating that the *raison d'être* of international humanitarian law is to protect dignity, and forced oral penetration constituted "a most humiliating and degrading attack upon human dignity". As such, it was to be included within the definition of rape.
66. *Ibid* at para 179.
67. *Ibid* at para 185.
68. *Prosecutor v Furundžija,* IT-95-17/1-A, Appeals Chamber Judgment (21 July 2000) at paras 211-12.
69. *Prosecutor v Musema*, ICTR-96-13-T, Judgment and Sentence at para 227 (27 January 2000) (International Criminal Tribunal for Rwanda, Trial Chamber). As Hayes notes, this adherence to the *Akayesu* definition was unsurprising "given that the Trial Chamber contained the same three judges as in *Akayesu*"; Hayes, *supra* note 41 at 140.

Kunarac[70] before the ICTY.

In that case, the three accused – members of the Bosnian Serb military accused of participating in the Foča "Rape Camps"[71] – were charged with rape as a crime against humanity and as a breach of the laws or customs of war. The Trial Chamber acknowledged that the *Furundžija* definition provided the *actus reus* element of the crime of rape in international law but that "in the circumstances of the present case the Trial Chamber considers that it is necessary to clarify its understanding of the element in paragraph (ii) of the *Furundžija* definition".[72] The Chamber continued:

> [i]n stating that the relevant act of sexual penetration will constitute rape only if accompanied by coercion or force or threat of force against the victim or a third person, the Furundzija definition does not refer to other factors which would render an act of sexual penetration non-consensual or non-voluntary on the part of the victim, which … is in the opinion of this Trial Chamber the accurate scope of this aspect of the definition in international law.[73]

As in *Furundžija*, the Trial Chamber turned to explain why reference to domestic laws could aid the interpretation of the crime of rape:

> the value of these sources is that they may disclose "general concepts and legal institutions" which, if common to a broad spectrum of national legal systems, disclose an international approach to a legal question which may be considered as an appropriate indicator of the international law on the subject.[74]

The Chamber considered that the "common denominator" of rape, as

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70. *Prosecutor v Kunarac*, IT-96-23-T & IT-96-23/1-T, Trial Chamber Judgement (22 February 2001) [*Kunarac* Trial Chamber].
71. For more information on the Foča "Rape Camps", see Matteo Fiori, "The Foča 'Rape Camps': A Dark Page Read Through the ICTY's Jurisprudence" (2007) 2 Hague Justice Journal 9.
72. *Kunarac* Trial Chamber, *supra* note 70 at para 438.
73. *Ibid* [footnotes omitted].
74. *Ibid* at para 439.

found in the domestic laws of 38 jurisdictions,[75] was wider than the requirement of force, threat of force or coercion proposed by the Trial Chamber in *Furundžija*. In the opinion of the Trial Chamber, the true common denominator of the surveyed jurisdictions was that "serious violations of sexual *autonomy* are to be penalised".[76] Thus, whilst accepting the *actus reus* limb of the *Furundžija* definition, the Trial Chamber considered that the "coercion or force or threat of force" requirement should be expanded to criminalise the specified sexual acts "where such sexual penetration occurs without the consent of the victim. Consent for this purpose must be consent given voluntarily as a result of the victim's free will, assessed in the context of the surrounding circumstances".[77]

On appeal, the ICTY Appeals Chamber elaborated on whether true consent was ever possible when the victim was a detainee in an armed conflict. It examined domestic laws that criminalise sexual acts between prisoners and inmates as crimes of strict liability, or which carry a presumption of non-consent.[78] The Chamber interpreted rape in international criminal law in accordance with these laws, recognizing the possibility that there could be circumstances that "were so coercive as to negate any possibility of consent".[79]

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75. *Ibid* at paras 443-45, 447-52, 453-56. The comparative study surveyed the laws of Bosnia and Herzegovina, Germany, South Korea, China, Norway, Austria, Spain, Brazil, United States (New York, Maryland, Massachusetts, California), Switzerland, Portugal, France, Italy, Denmark, Sweden, Finland, Estonia, Japan, Argentina, Costa Rica, Uruguay, Philippines, England and Wales, Canada, New Zealand, Australia (New South Wales, Victoria, ACT, Western Australia, South Australia), India, Bangladesh, South Africa, Zambia and Belgium.
76. *Ibid* at para 457.
77. *Ibid* at para 460.
78. *Prosecutor v Kunarac*, IT-96-23 & IT-96-23/1-A, Appeals Chamber Judgment (12 June 2002) at para 131 citing laws from Germany and the United States (California, New Jersey, the District of Columbia).
79. *Ibid* at para 132.

C. The Legacy of the ICTY Approach

The interpretation of the crime of rape in *Kunarac* has become "the most widely used definition in the ICTY, ICTR and Special Court for Sierra Leone",[80] and the antecedent upon which it is based, *Furundžija*, forms the basis for the definition of rape in the Elements of Crimes of the International Criminal Court ("ICC").[81] At the time of the Trial Chamber judgment in *Furundžija*, it was clear that a conventional definition of

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80. Valerie Oosterveld, "The Influence of Domestic Legal Traditions on The Gender Jurisprudence of International Criminal Tribunals" (2013) 2 Cambridge Journal of International and Comparative Law 825 at 831; Maria Eriksson, *Defining Rape: Emerging Obligations for States under International Law?* (Leiden: Martinus Nijhoff Publishers, 2011) at 407, 424; see *Prosecutor v Kvocka*, IT-98-30/1-T, Judgment (2 November 2001) at paras 177-79 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber); *Prosecutor v Semanza*, ICTR-97-20-T, Judgement (15 May 2003) at paras 344-46 (International Criminal Tribunal for Rwanda, Trial Chamber); *Prosecutor v Kajelijeli*, ICTR-98-44A-T, Judgment and Sentence (1 December 2003) at paras 910-15 (International Criminal Tribunal for Rwanda, Trial Chamber); *Prosecutor v Kamuhanda*, ICTR-95-54A-T, Judgment and Sentence (22 January 2004) at paras 705-709 (International Criminal Tribunal for Rwanda, Trial Chamber); *Prosecutor v Taylor,* SCSL-03-01-T, Judgment (18 May 2012) at para 415 (Special Court for Sierra Leone, Trial Chamber). *Cf. Prosecutor v Niyitegeka*, ICTR-96-14-T, Judgment and Sentence (16 May 2003) at para 456 (International Criminal Tribunal for Rwanda, Trial Chamber); The ICTR Trial Chamber in *Muhimana* effectively held the *Kunarac* definition to be an elaboration of the *Akayesu* definition; *Prosecutor v Muhimana*, ICTR-95-1B-T, Judgment and Sentence (28 April 2005) at paras 550-51 (International Criminal Tribunal for Rwanda, Trial Chamber); (Subsequently, the ICTR Appeals Chamber in *Gacumbitsi* followed the *Kunarac* definition), *Prosecutor v Gacumbitsi*, ICTR-2001-64-A, Judgment (7 July 2006) at paras 151-52 (International Criminal Tribunal for Rwanda, Appeals Chamber).

81. Weiner, *supra* note 55 at 1217. See *Rome Statute of the International Criminal Court*, 17 July 1998, 2187 UNTS 90 art 7(1)(g) (entered into force 1 July 2002) [*Rome Statute*]; *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court*, ICC, 1st Sess, ICC Doc ASP/1/3 (2002).

rape in international criminal law was unlikely to come to fruition. The case was decided just a few months after conclusion of the *Rome Statute of the International Criminal Court* ("*Rome Statute*"), which failed to define the crime due to the fundamentally different philosophical, legal, and cultural approaches of the delegates to sexual offences, and to rape in particular.[82]

However, where the delegates to the Rome conference failed, the Preparatory Committee for the ICC Elements of Crime succeeded, elaborating a definition of rape that was confirmed by the first Assembly of States Parties in 2002.[83] This definition drew upon the jurisprudence of the ICTY and ICTR, giving most weight to the definition expounded by the Trial Chamber in *Furundžija*. This was thought to be "particularly persuasive because its definition of rape was based on a survey of municipal rape law and thus came with the authority of timeliness and neutrality".[84] Indeed, as Kristen Boon notes, the influence of the *Furundžija* definition is demonstrated by the fact that the proposal for the definition of rape put forward by Costa Rica, Hungary, and Switzerland mirrored word-

82. *Rome Statute*, *ibid*; William A Schabas, *An Introduction to the International Criminal Court,* 4d (Cambridge: Cambridge University Press, 2011) at 117. Note that a definition of rape was originally considered in the 1996 Preparatory Committee for the *Rome Statute*, which defined rape as "causing a person to engage in or submit to a sexual act by force or threat of force": Mahmoud Cherif Bassiouni, *The Legislative History of the International Criminal Court: An Article-by-Article Evolution of the Statute from 1994-1998* (Netherlands: Transnational Publishers, 2005) vol 2 at 53. See also, Kristen Boon, "Rape and Forced Pregnancy under the ICC Statute: Human Dignity, Autonomy, and Consent" (2001) 32 Columbia Human Rights Law Review 625 at 644.

83. Pursuant to art 9 of the *Rome Statute*, *ibid*, the Elements of Crimes is a document that assists the Court in the interpretation and application of arts 6, 7, and 8 of the *Statute*. The document must be passed by a two-thirds majority of States Parties.

84. Boon, *supra* note 82 at 646.

for-word the definition laid down by the Trial Chamber.[85] Refusal by the ICTY to elaborate a definition of the crime of rape would have put the Preparatory Commission of the Elements of Crime back to the position of paralysis in which the states parties to the *Rome Statute* found themselves. In March 2016, the ICC delivered its first conviction for rape as a war crime and a crime against humanity in the *Bemba* case,[86] sentencing the defendant to 18 years of imprisonment. In its verdict, the Trial Chamber adopted the gender-neutral definition of rape contained in the Elements of Crimes, citing the Trial Chamber judgment in *Furundžija* as authority for the proposition that forced oral sex may also constitute rape. The judgments of the tribunals, and in particular that of the *Furundžija* Trial Chamber, have enabled international criminal law to move past the social, cultural and moral divides that stymied a conventional definition of rape.

Yet despite the influence of the ICTY's jurisprudence, there remain questions regarding some elements of the definition of rape, in particular regarding the role of consent. Formally, the absence of consent is not a requirement in the definition of rape in the Elements of Crimes, a fact that was recognised by the *Bemba* Trial Chamber, which noted that "the victim's lack of consent is not a legal element of the crime of rape under the Statute".[87] However, echoing the *Kunarac* Appeal Chamber judgment, the Trial Chamber also held that when the perpetrator took advantage of

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85. Preparatory Commission for the International Criminal Court, Working Group on Elements of Crimes, 2nd Sess, *Proposal Submitted by Costa Rica, Hungary and Switzerland on Certain Provisions of Article 8 para 2(b) of the Rome Statute of the International Criminal Court: (viii), (x), (xiii), (xiv), (xv), (xvi), (xxi), (xxii), (xxvi)*, PCNICC/1999/WGEC/DP.8 (1999); Boon, *ibid* at n 95.

86. *The Prosecutor v Jean-Pierre Bemba Gombo,* ICC-01/05-01/08, Judgment pursuant to Article 74 of the Statute (21 March 2016) (International Criminal Court, Trial Chamber) [*Bemba*]. The Court did address the question of rape in the *Katanga* case, in which the defendant was acquitted of sexual violence charges; *The Prosecutor v Germain Katanga,* ICC-01/04-01/07-3436, Judgment pursuant to Article 74 of the Statute (7 March 2014) (International Criminal Court, Trial Chamber).

87. *Bemba*, *ibid* at para 105.

a "coercive environment" to commit rape the prosecution does not need to prove the victim's lack of consent.[88] These two positions give rise to some conceptual problems: whilst formally not part of the definition of rape, the importance placed on the existence of coercive circumstances is based on the fact that there could be, in the words of the *Kunarac* Appeals Chamber, "circumstances that were so coercive as to negate any possibility of consent".[89] In other words, coercive circumstances are only important insofar as they allow chambers to induce the absence of consent from circumstantial evidence. It seems therefore that despite protestations to the contrary, the absence of consent remains the *sine qua non* of the crime of rape – the relevant question is how that absence of consent may be evidenced.

IV. Evaluating the Tribunal's Use of Domestic Law

Despite their considerable legacy, arguments have still been levelled at the reasoning of the ICTY in *Furundžija* and *Kunarac* and against the use of domestic law in particular. This Part examines the main principled argument, based on the principle of legality, that could be brought against the use of domestic law,[90] and methodological critiques that have been levelled at the reasoning of the Tribunal, before moving to explicate the Tribunal's approach.

88. *Ibid* at para 106. See also rule 70, *Rules of Procedure and Evidence*, Assembly of States Parties to the Rome Statute of the International Criminal Court, lst Sess, New York, 3-10 September 2002, ICC-ASP/1/3.

89. *Prosecutor v Kunarac*, IT-96-23& IT-96-23/1-A, Judgment (12 June 2002) at para 132 (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber).

90. See *e.g.* Jessica Corsi, *Legal Fictions: Creating the Crimes of Rape and Sexual Violence under International Law* (PhD Dissertation, University of Cambridge, Faculty of Law, 2016) [unpublished].

A. An Affront to the Principle of Legality?

Although the principle of legality has various iterations,[91] here it is understood to mean "no crime without law", or *nullum crimen sine lege.*[92] This was arguably breached in two ways in the abovementioned jurisprudence: first, in *Furundžija*, the Trial Chamber included forced oral sex in the definition of rape; and, second, in *Kunarac*, the Appeal Chamber expanded the requirement of "coercion or threat or use of force" to the absence of consent "assessed in the context of the surrounding circumstances". These two interpretations criminalised conduct that would not have fallen within the definition of the crime of rape under the penal law of Bosnia and Herzegovina in force at the time, which covered only forcible sexual intercourse and required force or threat of force to the victim or someone "close to her". [93] The argument could hence be made that the ICTY in effect retroactively criminalised conduct, breaching *nullum crimen sine lege*. In both cases, however, the argument has fatal flaws.

In *Furundžija*, it was clearly not the case that the use of domestic law constituted a breach the principle of legality. As noted above, the expansive interpretation which bought oral sex under the definition of rape did *not* result from the survey of domestic law; in fact, the Trial Chamber explicitly noted that "a major discrepancy may, however, be discerned in the criminalization of forced oral penetration" in domestic systems.[94] Instead, the Chamber brought oral sex within the definition

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91. For other variants of the principle of legality, see Kenneth S Gallant, *The Principle of Legality in International and Comparative Law* (Cambridge: Cambridge University Press, 2009) at 11-14.
92. Theodor Meron, "Remarks on the Principle of Legality in International Criminal Law" (2009) 103 Proceedings of the Annual Meeting (American Society of International Law) 107 at 107.
93. *Furundžija* Trial Chamber, *supra* note 58, n 214 (The Penal Code of Bosnia and Herzegovina (1988) Chapter XI states that "[w]hoever coerces a female person with whom he is not married to, into sexual intercourse by force of threat to endanger her life or body or that of someone close to her will be sentenced to between one to ten years in prison").
94. *Ibid* at para 182.

of the crime of rape using a purely teleological methodology. It reasoned that forced oral sex constitutes "a most humiliating and degrading attack on human dignity"; that the very purpose of international humanitarian and human rights law was to protect human dignity; and, *therefore*, "it is consonant with this principle that such an extremely serious sexual outrage as forced oral penetration should be classified as rape".[95] Whilst this expansive interpretation might be critiqued, such criticism cannot be placed at the foot of the Trial Chamber's use of domestic law.[96]

The argument has slightly more purchase with regards to the reasoning of Trial Chamber in *Kunarac*. Recall that the Chamber used domestic law to reason that absence of voluntary consent, and not just coercion or the threat or use of force, constituted the second limb of the definition of rape.[97] This departed from both the *Furundžija* definition of rape and the crime under the penal law of Bosnia and Herzegovina in force at the time. This question was pertinent because one victim, "DB", had initiated sexual intercourse with Kunarac without coercion or the threat or use of force on his part.[98] However, evidence was presented that another soldier, "Gaga", had threatened the victim with death if she did not have intercourse with Kunarac. The defendant himself had therefore not used or threatened to use force or coerced the victim to have sexual intercourse with him, and his actions thus fell outside the *Furundžija* definition of rape.

However, to argue that this use of domestic law breached the principle of legality is erroneous. Neither was a strict principle of legality recognised as a rule of international law in the pertinent period, nor was the application of such a principle acknowledged in the practice of the

95. *Ibid* at para 183.

96. *Ibid* at para 184. The Trial Chamber went on to pre-empt the criticism that its teleological reasoning breached the principle of legality by arguing that the acts would in any case have been considered as sexual assault under the domestic law of Bosnia and Herzegovina. As long as the defendant was sentenced on this basis, the Chamber was of the opinion that the categorization of the act was unimportant.

97. *Kunarac* Trial Chamber, s*upra* note 70 at para 460.

98. See especially *ibid* at paras 219, 647.

ad hoc tribunals. From Nuremberg up until the inclusion of a strong principle of legality in the *Rome Statute*,[99] the principle has been treated "as a flexible principle of justice that can yield to competing imperatives … the condemnation of brutal acts, ensuring victim accountability, victim satisfaction and rehabilitation, the preservation of world order, and deterrence".[100] As international criminal law has developed, what has been considered as protected by the principle of legality has evolved. This is best captured by characterising the change as a move from legality in law ascertainment in the *Statute of the ICTY* to legality in content determination in the *Rome Statute*.[101] The former encompasses non-retroactivity in the creation of crimes, as evidenced by the limitation of the subject-matter jurisdiction of the ICTY to "rules of international humanitarian law which are *beyond any doubt* part of customary law".[102] The latter, on the other hand, reflects the stricter principle that crimes must be interpreted strictly, not by analogy, and in favour of the defendant.[103] The principle of legality at the time of the *ad hoc* tribunals

99. *Rome Statute*, *supra* note 81, arts 11, 22, 23, 24.

100. Beth Van Schaack, "The Principle of Legality & International Criminal Law" (2009) 103:1 Proceedings of the Annual Meeting (American Society of International Law) 101 at 102; See also, Antonio Cassese, *International Criminal Law* (New York: Oxford University Press, 2003) at 72. *Cf.* Theodor Meron, *War Crimes Law Comes of Age: Essays* (New York: Oxford University Press, 1999) at 244.

101. Larisa van den Herik, "Interpretation in International Law: The Object, the Players, the Rules and the Strategies" in János György Drienyovszki & Martin Clark, eds, *Event Report: Temple Garden Seminar Series in International Adjudication* (London: British Institute of International and Comparative Law, 2015), online: <www.biicl.org/documents/715_report_tgc_interpretation_in_international_law_140515.pdf>. Van den Herik draws the law ascertainment/content determination distinction from Jean d'Aspremont, "The Multidimensional Process of Interpretation: Content-Determination and Law-Ascertainment Distinguished" in Andrea Bianchi, Daniel Peat & Mathew Windsor, eds, *Interpretation in International Law* (New York: Oxford University Press, 2015) 111.

102. *Report of the Secretary-General pursuant to Paragraph 2 of Security Council Resolution 808*, UNSC, 48th Sess, UN Doc S/25704 (1993) at para 34 [emphasis added].

103. *Rome Statute*, *supra* note 81, art 22(2).

was clearly understood in the former sense.[104] This was reflected in the practice of the tribunals, which took "a relatively relaxed approach, much in the spirit of their predecessors at Nuremberg".[105]

To sum, the principle of legality has been viewed as a malleable principle that has changed shape with the development of the legal regime. As noted above, "much like the beginning of criminal law jurisprudence in common law jurisdictions, legality was originally conceived of as a flexible concept to allow for critical legal developments, even if they occurred retroactively".[106] Whilst one might claim that a strict conception of the principle has reached the status of custom in contemporary international criminal law,[107] to claim that was the case for the *ad hoc* tribunals is a different – and quite unsustainable – proposition.[108]

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104. See *e.g. Prosecutor v Hadzihasanovic*, IT-01-47-AR72, Decision on Interlocutory Appeal Challenging Jurisdiction with respect to Command Responsibility (16 July 2003) at para 34 (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber), (recognizing that the accused must have understood "that the conduct is criminal in the sense generally understood, without reference to any specific provision"); *Prosecutor v Delalic and others*, IT-96-21-T, Judgment (16 November 1998) at para 403 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber). See also *Prosecutor v Karemera and others*, ICTR-98-44-T, Decision on the Preliminary Motions by the Defense of Joseph Nzirorera, Édouard Karemera Andr**é** Rwamakuba and Mathieu Ngirumpatse Challenging Jurisdiction in Relation to Joint Criminal Enterprise (11 May 2004) at para 43 (International Criminal Tribunal for Rwanda, Trial Chamber). See also, Meron, 'Remarks', *supra* note 92 at 108.
105. Schabas, *supra* note 31 at 63.
106. Grover, *supra* note 15 at 188. See also, Van Schaack, *supra* note 100 at 102; Gallant, *supra* note 91 at 405.
107. Gallant, *ibid* at 352-404.
108. For an interesting view on legality, tracing the differences in conceptions of the principle back to the division between international lawyers and criminal lawyers, see Dov Jacobs, "International Criminal Law" in Jörg Kammerhofer & Jean d'Aspremont, eds, *International Legal Positivism in a Post-Modern World* (New York: Cambridge University Press, 2014) 451 at 471-73.

Strict adherence to the principle of legality has not, then, been mandated as a rule of international law, nor did it feature in the practice of the *ad hoc* tribunals. One could nevertheless maintain that the Tribunal should have narrowly interpreted the crimes within their subject-matter jurisdiction. However, to do so would be an avowedly normative argument. Such an argument would be based on the idea that the value of a strict interpretation of the principle of legality is in itself sufficiently important to override countervailing considerations of substantive justice, condemnation, and deterrence, amongst others. It would have to counter the claim that "by subordinating the principle of [*nullum crimen sine lege*] to a vision of substantive justice, tribunals have determined that the former injustice is less problematic than the other".[109]

What values does the principle of legality uphold that might override these considerations? On the domestic plane, four purposes of the principle have been identified: the protection of human rights of the would-be accused, increased legitimacy of the criminal system, respect for the separation of powers between the legislature and judiciary, and effective pursuance of the purposes of criminalisation.[110] However, none of these purposes inherently outweigh the countervailing considerations: breaching the human rights of the accused is not inherently worse than letting a breach of the victim's human rights go unpunished, nor is it clear that the legitimacy of the international criminal system would be augmented by adherence to the principle of legality instead of advancing the battle against impunity. The separation of powers argument posits that it is for the legislature as the democratically elected lawmaker to determine criminal conduct in a society, not the judiciary. However, on the international plane, the concept of the separation of powers is notably different to that within domestic law. Indeed, it could even be argued that the Security Council in effect delegated the task of defining certain

109. Beth Van Schaack, "*Crimen Sine Lege*: Judicial Lawmaking at the Intersection of Law and Morals" (2008) 97 Georgetown Law Journal 119 at 140. See also Grover, *supra* note 15 at 152-54. See also *Furundžija* Trial Chamber, *supra* note 58, para 184.

110. Gallant, *supra* note 91 at 20-30. See also Grover, *ibid* at 137-51.

crimes to the ICTY by including those crimes within its subject-matter jurisdiction.[111] With regard to the final justification of the principle of legality, the purposes of criminalising conduct are myriad, including considerations of accountability, restorative justice, and reconciliation. Each of these purposes, it might be argued, could be fulfilled not by adherence to a strict principle of legality, but rather by judicial flexibility that permitted the extension of crimes to acts that were known to be wrong (*malum in se*)[112] or to which the accused was put on notice regarding potential future criminalisation.[113]

To conclude, the argument that the use of domestic law breached the principle of legality holds no weight with regard to the classification of oral sex as rape by the Trial Chamber in *Furundžija*. In relation to the extension of the crime by the Trial Chamber in *Kunarac,* one cannot make the argument that the use of domestic law violated the principle of legality insofar as it existed as a rule of international law, nor was the reasoning of the Chamber incongruent with the general approach to legality taken by the *ad hoc* tribunals. To critique the use of domestic law would have to be based on an argument of moral values, not law, the strength of which is unclear at best.

B. Methodological Critiques

Another strand of criticism that has been levelled at the Tribunal is based on purported methodological flaws in the reasoning of chambers. These critiques can be gathered in two broad categories: those that criticize with the breadth and depth of the Tribunal's comparative survey and those that take issue with using domestic law on the international plane more generally.

The first group of critics argues that the Tribunal should have surveyed the law of more countries and taken account of contextual

111. For a similar argument, see Tom Ginsburg, "International Judicial Lawmaking" (2005) University of Illinois College of Law Working Paper No LE05-006 at 13-14.

112. Gallant, *supra* note 91 at 41.

113. Van Schaack, *supra* note 109 at 167.

differences that might affect the operation of the law in practice. Jaye Ellis, for example, argues that the *Furundžija* Trial Chamber "took a far too narrow approach, paying no attention to questions of culture, legal or otherwise", as well as criticizing the Tribunal for not conducting a sufficiently extensive comparative survey.[114] However, others, such as Fabian Raimondo, have defended the reasoning of the Tribunal, claiming that "[t]he choice of legal systems it made was appropriate for demonstrating the universality of the general principle of law thus found, as they were representative of the different legal families and regions of the world".[115]

In my view, this methodological critique holds little weight, although not for the reasons Raimondo claims. The argument presupposes a certain vision of the appropriate method transposed from the scholarly realm, in which it is the job of comparative law to present a representative, comprehensive, contextualised survey of the legal approaches taken in different systems. This presupposes too much. Methodological concerns have a place in an examination of the judicial use of extra-systemic law, but these concerns must be tailored to the justification for recourse to that law advanced (or presupposed) by the court. Ellis' critique, for example, is based on the assumption that the Tribunal attempted to induce a general principle of law from its comparative surveys, which would be applicable by virtue of Article 31(3)(c) of the *Vienna Convention on the Law of Treaties*[116] ("*VCLT*"). However, none of the chambers noted above

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114. Jaye Ellis, "General Principles and Comparative Law" (2011) 22 European Journal of International Law 949 at 968; *Cf.* Basil Markesinis, "National Self-Sufficiency or Intellectual Arrogance? The Current Attitude of American Courts Towards Foreign Law" (2006) 65 Cambridge Law Journal 301 at 306 (arguing that "it is thus one of the primary functions of the comparatist to warn national lawyers against the danger of thinking that they can understand foreign law simply because they have mastered a foreign language. The exegesis of foreign law is an art that has to be learned …").
115. Fabián O Raimondo, *General Principles of Law in the Decisions of International Criminal Courts and Tribunals* (Leiden: Martinus Nijhoff Publishers, 2008) at 114.
116. 23 May 1969, UN Doc A/Conf 39/27.

justified their recourse to comparative law on the basis that it allowed them to induce general principles of law. The closest one gets to such an assertion is by the Trial Chamber in *Furundžija,* however neither did it mention "general principles of law" specifically nor did it note the relevance of such principles under Article 31(3)(c).[117] To hold the Tribunal to the methodological yardstick of a general principle of law is therefore wrong.

The second strand of criticism is based on the purported impropriety of transposing domestic law concepts to the international level. International lawyers will be familiar with Lord McNair's admonition that domestic law concepts cannot be transposed "lock, stock and barrel" to the international sphere,[118] but instead must be tailored to the peculiarities of international law. Within the ICTY, this argument has been most forcefully put in some of the opinions and judgments of the Tribunal itself.[119] For example, in the *Erdemović* case, Judge Cassese, in a discussion entitled "The Notion of a Guilty Plea (or: The Extent to which an International Criminal Court can rely upon National Law for the Interpretation of International Provisions)", argued that domestic law could only be drawn upon if the international instrument expressly stated that such recourse was permissible, or if reference to domestic laws was necessarily implied by the "very nature and content of the concept" (such as determination of nationality for the purposes of diplomatic protection).[120] His main contention was that *prima facie* similar concepts in international criminal law were hardly ever identical to those in domestic criminal law: international criminal law had a different focus

117. *Furundžija,* Trial Chamber *supra* note 58 at para 177.

118. *International Status of South-West Africa*, Advisory Opinion, [1950] ICJ Rep 28 at 148 (separate opinion of Lord McNair).

119. See also, Frédéric Mégret, "Beyond 'Fairness': Understanding the Determinants of International Criminal Procedure" (2009) 14 UCLA Journal of International Law and Foreign Affairs 37. *Cf. ibid.*

120. *Prosecutor v Erdemović*, IT-96-22-A, Separate and Dissenting Opinion of Judge Cassese (7 October 1997) at para 3 (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber) [*Erdemović* – Judge Cassese].

and applicability, was a fusion of civil and common law systems, and faced challenges and issues specific to a supra-national criminal tribunal.[121] Those that used domestic laws to interpret the provisions of the *Statute of the ICTY* or *RPE* too readily, he argued, were not cognizant of these potential incongruities.[122] Similarly, in *Blaškić*, the Appeals Chamber – presided by Cassese – reprimanded the Trial Chamber for the use of "domestic analogy":

> [t]he Appeals Chamber wishes to emphasise at the outset that the Prosecutor's reasoning, adopted by the Trial Chamber in its Subpoena Decision, is clearly based on what could be called "the domestic analogy" … The setting is totally different in the international community … the transposition onto the international community of legal institutions, constructs or approaches prevailing in national law may be a source of great confusion and misapprehension. In addition to causing opposition among States, it could end up blurring the distinctive features of international courts.[123]

There is, however, reason to think that the distinction between domestic and international law is to some extent overstated. This is aptly demonstrated by the abovementioned *Erdemović* case in which the majority, having surveyed the domestic law of Canada, the United States, Malaysia, and England and Wales, concluded that a valid guilty plea must meet three criteria: it must be voluntary, informed, and unequivocal.[124] These domestic laws were relevant because the concept of a guilty plea had been imported into international criminal procedure from common law systems and as a result:

> we may have regard to national common law authorities for guidance as to

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121. *Ibid* at paras 3-5.

122. For a defence of this view, see Harmen van der Wilt, "Commentary" in André Klip & Göran Sluiter, eds, *Annotated Leading Cases of International Criminal Tribunals* (Oxford: Hart Publishing, 1999) vol 1 654.

123. *Prosecutor v Blaškić*, IT-95-14, Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1996 (29 October 1997) at para 40 (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber) [*Blaškić* Appeals Chamber].

124. *Prosecutor v Erdemović*, IT-96-22-A, Joint Separate Opinion of Judge McDonald and Judge Vohrah (7 October 1997) at paras 6-8 (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber) [*Erdemović* – Judges McDonald and Vohrah].

> the true meaning of the guilty plea and as to the safeguards for its acceptance. The expressions "enter a plea" and "enter a plea of guilty or not guilty", appearing in the Statute and the Rules which form the infrastructure for our international criminal trials *imply necessarily*, in our view, a reference to the national jurisdictions from which the notion of the guilty plea was derived.[125]

Instead of recourse to domestic law, Cassese was of the view that interpretation must be based on the object and purpose that provision served within the context of international criminal law.[126] However, having reflected on the object and purpose of the guilty plea, he was of the view that the same three criteria identified by the majority in *Erdemović* were applicable "by virtue of a contemplation of the unique object and purpose of an international criminal court and the constraints to which such a court is subject [namely, to respect the rights of the accused under Article 21 of the Statute], rather than by reference to national criminal courts and their case law".[127] In this case, at least, the specificity of the international criminal justice system did not call for a different solution than that adopted by domestic systems. The claim of "exceptionalism" of the ICTY therefore seems overstated.

In relation to rape, one could argue that the definition of the crime in domestic law embodies the values of a particular circumscribed society that cannot simply be transposed to international law. Indeed, the difficulties that states parties to the *Rome Statute* encountered when trying to settle upon a statutory definition of rape certainly gives weight this idea. However, this does not suggest that, as a matter of principle, domestic laws cannot be used to inform the Tribunal's definition of the crime of rape, but rather that domestic law should be drawn on by the Court when it accords with the values that underpin international criminal law. Indeed, such a limitation was acknowledged by Judges McDonald and Vohrah in *Erdemović.* In their view:

> [i]n the event that international authority is entirely lacking or is insufficient, recourse may then be had to national law to assist in the interpretation of terms and concepts used in the Statute and the Rules. We would stress again

125. *Ibid* at para 6 [emphasis added].
126. *Erdemović* – Judge Cassese, *supra* note 120 at para 8; *Blaškić* Appeals Chamber*, supra* note 123 at para 47.
127. *Erdemović* – Judge Cassese, *ibid* at para 10.

> that no credence may be given to such national law authorities if they do not comport with the spirit, object and purpose of the Statute and the Rules … In our observation, there is no stricture in international law which prevents us from making reference to national law for guidance as to the true meaning of concepts and terms used in the Statute and the Rules.[128]

The judgments of the Trial and Appeals Chambers in *Furundžija* and *Kunarac* could certainly have made the link between the values underpinning the definition of rape in domestic jurisdictions and international criminal law more explicit. If they did so, it would be significantly harder to argue that it was inappropriate to draw on domestic law concepts to inform their understanding of international criminal law.

The methodology of the ICTY may certainly be criticized for its incompleteness, brevity, or acontextuality, and justifiably so.[129] As a nascent tribunal that was initially underfunded and understaffed, the inability of the bench to carry out exhaustive comparative research is unsurprising.[130] More extensive, representative, and thorough comparative surveys of domestic law would have been ideal. However, in my view, this does not necessarily undermine the Tribunal's reasoning. Instead, the methodological flaws must be balanced against the values that the use of domestic law furthered and the significant legacy that the judgments in the *Furundžija* and *Kunarac* cases left.

C. Understanding the Tribunal's Reasoning

How then are we to judge the ICTY's use of domestic law? The Tribunal's use of domestic law should be seen as a way to reconcile competing values that were at tension in the early days of its operation. On the one hand, there was the clear desire amongst members of the international community to punish those that had committed war crimes in the former Yugoslavia. On the other hand, there was recognition that this should be

128. *Erdemović* – Judges McDonald and Vohrah, *supra* note 124 at para 5.

129. See Ellis, *supra* note 114 at 968.

130. In a private conversation, the person charged with carrying out comparative research for the case of *Erdemović* stated that the 18 jurisdictions surveyed was the totality of the domestic criminal law books in the ICTY library at the time.

achieved via legal, not political, means. Several statements made before the UN Security Council in the debates leading up to the creation of the ICTY give voice perfectly to these competing values. In the lead up to the adoption of Security Council Resolution 808 (1993), for example, the Spanish representative to the Security Council stated that:

> the establishment of an international criminal tribunal … fulfils its dual objective of meting out justice and discouraging such grave violations in the future, we believe that this undertaking is so important and so sensitive that it is necessary to ensure the maximum respect for legal rigour in its functioning.[131]

The desire for "legal rigour", in the words of the Spanish Representative, was, however, quite impossible considering the nascent state of international criminal law in 1993. As noted in Part I, above, not only was the *Statute of the ICTY* laconic, but it also had little to draw on in terms of precedent from its predecessors, notably the international military tribunals in Nuremberg and Tokyo. Once these competing values are acknowledged, the use of domestic law is comprehensible. Faced with an insufficiently defined rule, but still required to mete out justice as a court of law, the ICTY used the only external material that was available to it which was relevant to the provisions being interpreted: domestic law. This allowed the judges to ground their reasoning in an external source, demonstrating that the interpretation was not a simple transposition of their own moral values.[132] Domestic laws were used as a tool of last resort that allowed the tribunal to thread a *via media* between indeterminacy and the radical subjectivity that loomed without recourse

131. UNSC, 48th year, 3175th Mtg, UN Doc S/PV.3175 (1993) [provisional], reprinted in Morris & Scharf, *supra* note 1 at 173. See also the statements of the representative of the United States, the United Kingdom and New Zealand. See also the statements by the representatives of Japan, Morocco, New Zealand, and Russia in the debates leading up to the adoption of Resolution 827 (1993), UNSCOR 3217th Mtg, *supra* note 33 at 179.

132. *Cf.* Van Schaak, *supra* note 109 at 167 (arguing that the ICTY considered domestic law as "sufficiently robust to provide notice to the defendant of a novel construction of ICL").

to external material.[133]

V. Conclusion

The use of domestic law in interpretation is a phenomenon that has until now been largely ignored. This article has shown that the use of domestic law as an interpretive aid has had an indelible impact on the jurisprudence of the ICTY and on contemporary international criminal law more generally. Without drawing on domestic law, the Tribunal would have been left struggling to fill the laconic statute that was drawn up by the UN Secretary-General in 1993. It provided the only means by which the Tribunal could apply the crimes within its subject-matter jurisdiction given the absence of relevant international case law or analogous international definitions. Whilst one might have qualms with the methodology adopted by the Tribunal, its approach is at the very least comprehensible.

The Tribunal's use of domestic law raises numerous questions of interest for scholars of international law, including broader questions regarding interpretation that have not been addressed in this article. In particular, the fact that recourse to domestic law does not fit within the framework of the *VCLT* provisions on interpretation makes us reconsider the centrality of those provisions to how we think about and evaluate interpretation in international law. I have addressed these issues elsewhere;[134] suffice to say, however, that the use of domestic law demonstrates that interpretation is still full of theoretical and practical problems that will continue to tax the mind of scholars and practitioners of international law alike.

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133. This is supported by the justification given for the use of domestic law by the majority of the Appeals Chamber in *Erdemović* – Judges McDonald and Vohrah, *supra* note 124 at para 3.

134. Daniel Peat, *Legitimate Interpretation: Comparative Reasoning in International Courts and Tribunals* (PhD Thesis, University of Cambridge, 2015) [Monograph forthcoming].

A Suitable Population: British Columbia's *Japanese Treaty Act* Litigation, 1920-1923

Gib van Ert*

In the early 1920s, the courts of British Columbia, the Supreme Court of Canada and the Judicial Committee of the Privy Council considered a series of constitutional challenges to a British Columbia law requiring the provincial government to discriminate against Japanese and Chinese persons in the making of government contracts. The attack on this racially-motivated law was founded on the 1911 Treaty of Commerce and Navigation *between the United Kingdom and Japan, under which Canada was bound to respect the right of the Japanese Empire's subjects "equally with native [British] subjects, to carry on their commerce and manufacture, and to trade in all kinds of merchandise of lawful commerce". Some of British Columbia and Canada's best-known advocates argued these cases. The decisions they produced addressed important and still relevant questions about the relationship between international and domestic law, the Crown's treaty power and Canadian federalism. These cases are remarkable early instances of Canada's international obligations being invoked by litigants to challenge domestic law.*

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I. "Asiatic" Discrimination and the 1894 treaty
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For nearly four years, from November 1920 to October 1923, the courts of British Columbia, the Supreme Court of Canada and the Judicial Committee of the Privy Council considered a series of constitutional challenges to a BC law requiring the provincial government to discriminate against Japanese and Chinese persons in the making of government contracts. The challenge was founded in large part on promises of non-discrimination set out in a treaty between the British and Japanese empires. Some of British Columbia and Canada's best-known advocates argued these cases. They raised important and still relevant questions about the relationship between international and domestic law, the Crown's treaty power and Canadian federalism. They are also a grim reminder of the history of anti-Asian discrimination in British Columbia.

I. "Asiatic" Discrimination and the 1894 treaty

On 16 July 1894 the Earl of Kimberley, for Great Britain, and Viscount Aoki, for Japan, signed a treaty of commerce and navigation in London ("1894 treaty").[1] Five weeks later, the parties exchanged ratifications in Tokyo. With the conclusion of this agreement, the era of unequal treaties between Britain and Japan came to a close. Unlike the notoriously one-sided Ansei treaties between Western and Asian powers earlier in the century, the 1894 agreement was authentically reciprocal. In the following two years, the United States and other Western nations also

1. *Anglo-Japanese Treaty of Commerce and Navigation*, 16 July 1894, UKTS No 23 (entered into force 17 July 1899) [*Anglo-Japanese Treaty*].

concluded reciprocal treaties with Japan.[2] In 1902, Britain and Japan entered into a formal alliance.[3]

Britain's recognition of Japan as an equal in international relations was in marked contrast to growing efforts to exclude and discriminate against Japanese nationals and other "Asiatic" immigrants by legislation in British colonies. At the Colonial Conference of June, 1897, the Secretary of State for the Colonies, Joseph Chamberlain, addressed the issue in a remarkable speech to the prime ministers of Canada, Newfoundland, New Zealand, the several Australian colonies, the Cape Colony and Natal.[4] "I wish to direct your attention to certain legislation which is in process of consideration, or which has been passed by some of the Colonies, in regard to the immigration of aliens, and particularly of Asiatics",[5] Chamberlain began:

> I have seen these Bills, and they differ in some respects one from the other, but there is no one of them, except perhaps the Bill which comes to us from Natal, to which we can look with satisfaction. I wish to say that Her Majesty's Government thoroughly appreciate the object and the needs of the Colonies in dealing with this matter. We quite sympathise with the determination of the white inhabitants of these Colonies which are in comparatively close proximity to millions and hundreds of millions of Asiatics that there shall not be an influx of people alien in civilization, alien in religion, alien in customs, whose influx, moreover, would most seriously interfere with the legitimate rights of the existing labour population. An immigration of that kind must, I quite understand, in the interest of the Colonies, be prevented at all hazards, and we shall not offer any opposition to the proposals intended with that object …[6]

From here, Chamberlain's comments took a different turn:

> … but we ask you also to bear in mind the traditions of the Empire, which

2. See generally Michael Auslin, *Negotiating with Imperialism: The Unequal Treaties and the Culture of Japanese Diplomacy* (Cambridge, MA: Harvard University Press, 2004).
3. *Agreement Between the United Kingdom and Japan Relative to China and Korea*, 30 January 1902, UKTS No 3 (entered into force 30 January 1902).
4. Proceedings of a Conference between the Secretary of State for the Colonies and the Premiers of the Self-Governing Colonies, at the Colonial Office, London, June and July 1897, PP (1897) (ch 8596), LIX at 13-14.
5. *Ibid.*
6. *Ibid.*

> makes no distinction in favour of, or against race or colour; and to exclude, by reason of their colour, or by reason of their race, all Her Majesty's Indian subjects, or even all Asiatics, would be an act so offensive to those peoples that it would be most painful, I am quite certain, to Her Majesty to have to sanction it. Consider what has been brought to your notice during your visit to this country. The United Kingdom owns as its brightest and greatest dependency that enormous Empire of India, with 300,000,000 of subjects, who are as loyal to the Crown as you are yourselves, and among them there are hundreds of thousands of men who are every whit as civilized as we are ourselves, who are, if that is anything, better born in the sense that they have older traditions and older families, who are men of wealth, men of cultivation, men of distinguished valour, men who have brought whole armies and placed them at the service of the Queen, and have in times of great difficulty and trouble, such for instance as on the occasion of the Indian Mutiny, saved the empire by their loyalty. I say, you, who have seen all this, cannot be willing to put upon those men a slight which I think is absolutely unnecessary for your purpose, and which would be calculated to provoke ill-feeling, discontent, irritation and would be most unpalatable to the feelings not only of Her Majesty the Queen, but of all her people.[7]

This note, with its plea for tolerance and even respect of differences of race and colour, immediately soured with Chamberlain's next words:

> [w]hat I venture to think you have to deal with is the character of the immigration. It is not because a man is of a different colour from ourselves that he is necessarily an undesirable immigrant, but it is because he is dirty, or he is immoral, or he is a pauper, or he has some other objection which can be defined in an Act of Parliament, and by which the exclusion can be managed with regard to all those whom you really desire to exclude. Well, gentlemen, this is a matter I am sure for friendly consideration between us.[8]

Chamberlain concluded his remarks by praising legislation recently brought in Natal, whereby exclusion of Asiatics was effected not by overt racial discrimination but by the administration of a language test that new immigrants could not hope to pass. This disguised form of discrimination was, Chamberlain explained, "absolutely satisfactory" to Natal and would "avoid hurting the feelings of any of Her Majesty's subjects".[9]

Overtly discriminatory legislation risked more than hurt feelings, however. Article I of the 1894 treaty between Britain and Japan granted

7. *Ibid.*
8. *Ibid.*
9. *Ibid.*

each state's subjects "full liberty to enter, travel and reside in any part of the dominions and possessions of the other Contracting Party".[10] Colonial measures to exclude or discriminate against Japanese immigrants were therefore potentially contrary to international law. The breach was only potential because Article XIX provided that the treaty's stipulations were not applicable to the Dominion of Canada and other specified British possessions unless Britain so notified Japan within two years of ratification.[11] The reason for delaying the operation of the 1894 treaty in self-governing British possessions was that the imperial authorities could not live up to promises of freedom of movement to Japanese subjects without first ensuring the colonies would enact conforming measures in

10. *Anglo-Japanese Treaty*, *supra* note 1, art I.
11. *Ibid*, art XIX.

their jurisdictions.[12, 13]

Opposition to Japanese immigration, particularly into British Columbia, was a serious obstacle to Canadian adherence to the 1894 treaty.[14] By order in council of 6 August 1895, Canada's federal government demanded "a stipulation with respect to Japanese immigration" before

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12. The 1894 Treaty's delayed operation in Canada and other British territories is remarkable. Today we tend to assume that Great Britain wholly controlled Canadian foreign affairs until the Statute of Westminster 1931 (UK) 22 Geo V c 4, reprinted in RSC 1985 App II No 27. The truth is subtler. While Whitehall had the necessary legal authority as a matter of international law to bind Canada and its other possessions unilaterally, it lacked (in self-governing territories) the internal legislative power to perform the international obligations without colonial cooperation. The constitutional requirement that treaties be implemented in domestic law to take direct legal effect (see generally Gib van Ert, *Using International Law in Canadian Courts*, 2d (Toronto: Irwin Law, 2008) at 234-55) had the practical consequence of giving colonial jurisdictions a role, however limited, in the conduct of imperial foreign relations. Percy E Corbett and Herbert A Smith, *Canada and World Politics: A Study of the Constitutional and International Relations of the British Empire* (Toronto: Macmillan, 1928) at 57 note that one of the earliest British treaties to provide for non-application to British possessions until their desire to accede was established was the *Convention for the Protection of Submarine Telegraph Cables 1884*, 14 March 1884, 75 UKFS 356, and that the Canadian delegate at the Paris conference that gave rise to this treaty, Sir Charles Tupper (discussed below) claimed in his memoirs to have taken a stand contrary to that of the British representative on a point, with a consequent change in the draft agreement. Corbett and Smith also relate that the practice of exempting British dominions from the operation of imperial treaties until they indicated their desire to adhere was established by the time of the 1894 treaty between Britain and Japan.
13. The British imperial predicament is strikingly similar to that faced regularly by the Canadian federal government since 1937: while it has an acknowledged power to conclude treaties with foreign states, it must rely on the provinces to perform those treaties if their subject matters fall within provincial legislative jurisdiction.
14. See generally Patricia Roy, *A White Man's Province: British Columbia Politicians and Chinese and Japanese Immigrants, 1858-1914* (Vancouver: UBC Press, 1989), especially ch 5.

adhering.[15] Even after this matter was agreed to by Japan in February 1896, however, Canada declined to consent, now citing concerns about the treaty's most favoured nation provisions.[16] It was not until 1905 – long past the treaty's deadline for adherence by British possessions – that Canada finally promulgated an order in council declaring its willingness to adhere to the treaty "absolutely and without reserve".[17] In 1906 Britain and Japan concluded a supplementary convention to extend the 1894 treaty to Canada,[18] and in January 1907 the federal Parliament implemented the 1894 treaty in Canadian law by means of the *Japanese Treaty Act*, *1906*.[19]

II. The Japanese Treaty of 1911

The 1894 treaty's guarantee to Japanese subjects of full liberty to enter, travel and reside in Canada was now federal law. Yet it was not long before the federal government sought ways to undo it. There were estimated to be about 7,500 Japanese in Canada in January 1907, mostly in British Columbia. In the following ten months, another 4,429 entered.[20] In September 1907, three days of anti-Asian rioting broke out in Vancouver and the Steveston area of Richmond, BC. The rioters targeted Chinese and Japanese people and businesses.[21] Despite Canada's having just adhered to the 1894 treaty and implemented it by statute, the federal government now moved quickly to negotiate a variation on the treaty's freedom of movement provisions. In December 1907, the Japanese foreign minister,

15. *Immigration of Japanese Labourers to British Colonies*, PC 1895-0929 J.
16. Raymond Buell, "Treatment of Japanese by Other Countries" (1924) World Peace Foundation Pamphlet Series 332 at 335.
17. *Treaty of Commerce and Navigation between Great Britain and Japan*, 25 September 1905, PC 1905-0677 (entered into force 25 September 1905).
18. *Convention Between the United Kingdom and Japan Respecting Commercial Relations between Canada and Japan*, 31 January 1906, UKTS No 13 (entered into force 31 January 1906).
19. 1906 SC 1907 c 50 (6-7 Edw VII).
20. Buell, *supra* note 16 at 336.
21. Roy, *supra* note 14 at 185-226. See also James Walker, *"Race," Rights and the Law in the Supreme Court of Canada: Historical Case Studies* (Osgoode Society for Canadian Legal History, 1997) at 68-69.

Tadasu Hayashi, advised the Canadian minister of labour, Rodolphe Lemieux, that Japan would not insist upon its rights under the treaty and would in fact act to restrict Japanese emigration to Canada.[22] This so-called Gentlemen's Agreement continued in place, with added strictures from time to time, well into the 1920s.

Meanwhile, relations between Britain and Japan continued to develop. In 1911, the two empires concluded a new treaty of commerce and navigation ("Japanese Treaty").[23] Like the previous agreement, this one provided (at Article XXVI) that it would not apply to British dominions and other territories unless notice of their adhesion was given within two years of the treaty's ratification. The new agreement also reaffirmed (at Article I) the "full liberty" of each state's subjects "to enter, travel and reside in the territories of the other". A further guarantee was added at Article I(2), namely that subjects of each of the parties shall have "the right, equally with native subjects, to carry on their commerce and manufacture, and to trade in all kinds of merchandise of lawful commerce".

This time it did not take Canada eleven years to adhere to the Japanese Treaty. The Dominion's main concern, it seems, was to ensure that implementing the agreement in federal law would not prejudice the power Parliament had granted the Governor-General in the *Immigration Act* of 1910,[24] to "prohibit for a stated period, or permanently, the landing in Canada … of immigrants belonging to any race deemed unsuited to the climate or requirements of Canada, or of immigrants of any specified class, occupation or character".[25] The federal government corresponded with Japan's consul general in Ottawa on the point, who advised that Japan would not object as the 1910 *Act* was "applicable … to the immigration of aliens into the Dominion of Canada from all countries" and thus involved no discrimination against Japanese subjects

22. Buell, *supra* note 16 at 336. See also Roy, *ibid* at 208-209.
23. *Treaty of Commerce and Navigation Between the United Kingdom and Japan*, 3 April 1911, UKTS No 15 (entered into force 3 April 1911).
24. 1910 SC c 27.
25. *Ibid*, s 38(c).

particularly.[26] With both the Dominion and Japan content to settle for this dodge, in April 1913 Parliament enacted *An Act respecting a certain Treaty of Commerce and Navigation between His Majesty the King and His Majesty the Emperor of Japan*[27] ("*Japanese Treaty Act*"). The *Japanese Treaty Act* sanctioned the new treaty and declared it to have the force of law in Canada, provided that nothing in either the treaty or the Act shall be deemed to repeal or affect any of the provisions of the *Immigration Act*.[28] British officials in Tokyo gave Japan notice of Canada's adhesion to the new treaty on 1 May 1913.[29]

Canada was now bound to observe and perform all the Japanese Treaty's obligations. Ironically, the stipulation that became the subject of litigation in British Columbia, taking the province to the Privy Council with stops at the Supreme Court of Canada on the way, was not about freedom of movement but freedom of contract. As noted, Article I(2) of the new treaty required each party to guarantee the other party's subjects "the right, equally with native subjects, to carry on their commerce and manufacture, and to trade in all kinds of merchandise of lawful commerce". This requirement was clearly at odds with a British Columbia legislative resolution of 15 April 1902 that "in all contracts, leases and concessions of whatsoever kind entered into, issued, or made by the Government, or on behalf of the Government, provision be made that no Chinese or Japanese shall be employed in connection therewith".[30] The British Columbia government gave legal effect to this resolution on 18 June 1902 by promulgating an order in council that "a clause embodying the provisions of the resolution be inserted in all instruments issued by officers of the Government for the various purposes above quoted",[31] and proceeded regularly to insert the discriminatory provision in a variety of

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26. Buell, *supra* note 16 at 337.
27. 1913 SC c 27 (3 and 4 Geo V) [*Japanese Treaty Act*].
28. *Ibid*, s 2.
29. *In re the Japanese Treaty Act, 1913* (1920) 29 BCR 136 at 137 [*Re Japanese Treaty Act* (BCCA)].
30. Reproduced in the Schedule to the *Oriental Orders in Council Validation Act*, SBC 1921 c 49 [*Validation Act*].
31. *Ibid*.

government contracts concerning public works and lands. The provision was one of over one hundred similarly discriminatory enactments adopted in British Columbia in the late nineteenth and early twentieth centuries.[32]

III. The *Treaty Act* at the British Columbia Court of Appeal

Anti-Asian agitation in British Columbia was briefly suspended during the First World War, in which Japan was a British ally. At the war's end, however, the old fears revived.[33] In 1920, the Lieutenant Governor of British Columbia referred four questions to the Court of Appeal concerning the lawfulness of the discriminatory, pre-war provisions. The first two questions asked whether the federal *Japanese Treaty Act* or its underlying Japanese Treaty limited the legislative jurisdiction of BC's Legislative Assembly. The third and fourth questions were whether it was competent to the Legislature to authorize the BC government to insert the discriminatory terms into contracts for public works and public lands.

Some of British Columbia's leading counsel presented the argument in the Court of Appeal for British Columbia in Victoria over a three day period in June 1920. The province's Attorney General, J.W. De B. Farris KC, appeared for the province. He later became a senator and was described in his 1970 obituary as "the Father of the British Columbia Bar".[34] His name lives on today in the leading Vancouver firm of Farris, Vaughn, Wills, & Murphy LLP. Sir Charles Tupper KC, son of the famous Nova Scotia father of Confederation and a remarkable person in his own right, represented the Canadian Japanese Association. Tupper was both a physician and a lawyer, served as a cabinet minister under Sir John A. Macdonald and other Conservative prime ministers, and continued as the Member of Parliament for Pictou, Nova Scotia for seven years

32. See Bruce Ryder, "Racism and the Constitution: the Constitutional Fate of British Columbia Anti-Asian Immigration Legislation, 1884-1909" (1991) 29 Osgoode Hall Law Journal 619 at 621.
33. Roy, *supra* note 14 at 265.
34. (1970) 28 *The Advocate* 168 at 168.

after his move to British Columbia in 1897. Like Farris, Tupper's name lived on, until very recently,[35] in the well-known Vancouver firm of Bull, Housser & Tupper LLP. Appearing for the federal Minister of Justice was A.P. Luxton KC, while C. Wilson KC appeared for a trade association of roof shingle manufacturers (the shingle business being one in which many Chinese and Japanese were employed).[36] Luxton and Wilson were well acquainted, having been jointly appointed in 1910 to revise the British Columbia statutes.[37]

The Court of Appeal gave its opinion on the reference questions, after deliberation, on 16 November 1920. It sided against the province. Macdonald CJ (with whom Galliher JA agreed) began by observing that neither the *Japanese Treaty Act* nor its underlying treaty strictly applied to limit the power of the provincial legislature "in relation to the rights, duties and disabilities in pursuit of their callings in this province of subjects of his Majesty the Emperor of Japan" for the simple reason that the provincial legislature had no such power in the first place.[38] This, in Macdonald CJ's view, was the effect of the Privy Council's decision in *Union Colliery of BC v Bryden*[39] ("*Bryden*") where, in a case about a BC law prohibiting "Chinamen" in underground coal mines, their Lordships held that in all matters directly concerning aliens and naturalized persons resident in Canada, legislative authority was exclusively vested in the Dominion Parliament by section 91(25) of the 1867 *British North America Act*[40] ("*BNA Act*"). "Neither the Treaty nor the Treaty Act can", said Macdonald CJ, "limit or affect that which has no existence".[41] Turning to the third and fourth questions (concerning the legislature's

35. Bull Housser announced a merger with Norton Rose Fulbright LLP on 12 September 2016 (Bull, Housser and Tupper LLP, News Release, "Bull Housser Combines with Global Law Firm Norton Rose Fulbright" (12 September 2016) online: < www.bht.com/our-firm/firm-news-press-releases/2016/09/bull-housser-combines-global-law-firm-norton-rose>.
36. Roy, *supra* note 14 at 251.
37. (1910) 30 Canada Law Times 177 at 181.
38. *Re Japanese Treaty Act* (BCCA), *supra* note 29 at 141-42.
39. [1899] AC 580 (PC) [*Bryden*].
40. 30 & 31 Vict, c 3 [*BNA Act*].
41. *Bryden*, *supra* note 39 at 142.

competence to authorize the government to insert discriminatory terms into contracts for public works and public lands), Macdonald CJ gave the same answer but added that if section 91(25) did not preclude such laws:

> then as the Treaty Act has made the Treaty the law of Canada, in so far as the subjects embraced in it are within the legislative powers of Parliament, any Act or resolution of the provincial Legislature repugnant thereto would be contrary to the Dominion Statute and therefore, beyond the competence of the provincial Legislature to enact or pass.[42]

Mr. Justice McPhillips gave his own, longer reasons concurring with the majority. He could not agree with Mr. Farris that the *Japanese Treaty Act* was passed in exercise of Parliament's trade and commerce power (section 91(2)) rather than its treaty implementation power (section 132). In the learned judge's view:

> [t]he sovereign Parliament of Canada in the full exercise of its powers – as extensive as the Imperial Parliament in such matters – has by statutory enactment given its adhesion to, and imposed upon Canada and all the provinces, the Treaty obligations as contained in the Japanese Treaty.[43]

His Lordship noted that the *Japanese Treaty Act* provided that the treaty should "have the force of law in Canada" and therefore "must be held to be destructive of all that has gone before … Nothing may be done in derogation of this statute law to the end that the Treaty obligations may be conformed to by Canada and the Provinces".[44] Turning specifically to the province's 1902 resolution and order in council requiring discrimination against Chinese and Japanese in government contracts, McPhillips JA held that the order in council could no longer have the force of law in British Columbia – "if it, at any time, had the force of law" – in view of the *Japanese Treaty Act* and section 132 of the *BNA Act* for the Lieutenant-Governor-in-Council "must perform the obligations of the province as contained in the Japanese Treaty given the force of law

42. *Re Japanese Treaty Act* (BCCA), *supra* note 29 at 142-43.
43. *Ibid* at 144.
44. *Ibid*.

throughout Canada" by the 1913 Act.[45]

After some consideration of *Union Colliery* and other authorities concerning Parliament's jurisdiction over aliens and naturalized persons, in which he reached a similar conclusion to the majority, McPhillips JA returned to the effect of the *Japanese Treaty Act*. He concluded that while there was no need for any specific answers to questions 1 and 2:

> it may be said that [the treaty] has the force of law in Canada and throughout the Provinces of Canada and any legislation, which, in its terms, is in conflict with, or repugnant to the Japanese Treaty, as validated by The Japanese Treaty Act, 1913, must be held to be repealed by necessary implication, and any future legislation, limiting the privileges guaranteed by the Japanese Treaty during the life of the Japanese Treaty, would be *ultra vires* legislation in that the Treaty, as long as it is existent, has the effect of inhibiting legislation, Federal or Provincial, which would be in conflict with the terms of the Treaty, *i.e.* to that extent the powers of the Parliament of Canada and the Parliaments of the Provinces of Canada, as conferred by *The B.N.A. Act*, 1867, are curtailed.[46]

It is remarkable how broadly McPhillips JA is willing to cast the effect of the Japanese Treaty and its implementing Act: not only is provincial legislation predating the implemented treaty *ultra vires*, but subsequent laws (both federal and provincial) are 'inhibited' for the life of the treaty. Most likely, McPhillips JA would have made an exception for federal legislation repealing the *Japanese Treaty Act*, or expressly derogating from it. Short of that, however, his Lordship's view appears to have been that the courts must ensure Canada's performance of its treaty obligations.

The strong opinions expressed by the Court of Appeal in this reference might have been expected to end the matter. But they proved to be only a prelude to the main litigation.

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45. *Ibid* at 146. This passage bears a resemblance to the observation of LeBel J in *GreCon Dimter Inc v J R Normand Inc*, 2005 SCC 46 at para 39 to the effect that both Canada and Quebec have "international commitments". The orthodoxy is that Canada as a state under international law can have international obligations, but its provinces and other organs do not.
46. *Re Japanese Treaty Act* (BCCA), *ibid* at 151.

IV. The *Treaty Act* at the Supreme Court of Canada

The British Columbia legislature responded to the Court of Appeal's opinion with defiance. On 2 April 1921, the Lieutenant Governor assented to what became chapter 49 of the 1921 statutes, the *Oriental Orders in Council Validation Act* ("*Validation Act*").[47] The law approved the discriminatory June 1902 order in council and purported to validate "any provision … relating to or restricting the employment of Chinese or Japanese" – despite the Court of Appeal's ruling.[48] This extraordinary turn of events prompted the Consul General of Japan to write the federal Minister of Justice, suggesting that the Governor General in Council disallow the *Validation Act* pursuant to sections 56 and 90 of the *BNA Act*. After all, the Court of Appeal's decision had held that the new law was *ultra vires* the provincial legislature. A report on the matter by a committee of Canada's Privy Council recorded that the BC government "maintains the constitutionality of the Act".[49] The same report recommended a reference to the Supreme Court of Canada to resolve the issue.[50]

Meanwhile, in the fall of 1921, the result of the BC Court of Appeal decision in the 1920 reference was applied by Murphy J of the Supreme Court of British Columbia in a claim by a BC timber licensee, Brooks-Bidlake & Whittall Ltd., for declaratory and injunctive relief to protect the company's right to employ Chinese and Japanese on its timber lands notwithstanding the discriminatory clause in its licence and the legislature's passage of the *Validation Act*. Mr. Justice Murphy held that the Court of Appeal's decision in the 1920 reference bound him. He granted the injunction.[51] That decision was then appealed by consent directly to the Supreme Court of Canada (a procedure known as a *per*

47. *Validation Act*, *supra* note 30.
48. *Ibid*, s 3(1).
49. Quoted in *In re Employment of Aliens* (1922), 63 SCR 293 at 295-96 [*Employment of Aliens*].
50. *Ibid*.
51. The decision was not reported but a transcript of the decision and counsels' submissions – both models of brevity – are found at pp 8-9 of the Case on Appeal document filed in the Registry of the Supreme Court of Canada.

saltum appeal).[52] The *Brooks-Bidlake* case was heard together with the federal government's reference on the constitutionality of the *Validation Act* over two days in December 1921.

At the Supreme Court, the Dominion's case against the *Validation Act* in the reference was put by E.L. Newcombe KC, the much-admired and long-serving Deputy Minister of Justice, who later became a judge of the Supreme Court of Canada.[53] Tupper appeared again for the Japanese Association, Wilson appeared again for the shingle manufacturers, and Farris appeared again for the Province, this time together with J.A. Ritchie KC. Ritchie, the son of Canada's second chief justice, Sir William J. Ritchie, was an Ottawa Crown Attorney to whom the aphorism "The Crown never wins; the Crown never loses" is ascribed.[54] He was also a poet and playwright. His verse, "The wholesome sea is at her gates/Her gates both east and west", which he appears to have written at about the time of the Supreme Court hearings, is carved over the main doorway of Parliament's Centre Block.[55] The report of the *Brooks-Bidlake* case in the *Supreme Court Reports* indicates that in that appeal Ritchie alone was counsel for the Province, while Wilson and Tupper acted for the timber company and Newcombe for the federal attorney-general.

The Supreme Court of Canada gave judgment in the two cases on 7 February 1922. The *Validation Act* reference prompted longer reasons than the *Brooks-Bidlake* appeal. Chief Justice Davies began by noting:

> the object and intention of these orders in council clearly is to deprive the Chinese and Japanese of the opportunities which would otherwise be open to them of employment upon government works carried out by the holders of provincial leases, licenses, contracts or concessions.[56]

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52. See, today, *Supreme Court Act* RSC 1985 c S-26, s 38.
53. Newcombe was deputy from 1893 until his appointment to the bench in 1924. See "The Late Honourable Edmund Leslie Newcombe, C.M.G." (1931) 9 CBR 737.
54. "The Crown Attorney", *The Ottawa Evening Citizen*, (3 April 1933) at 20.
55. Christopher Moore, "That's History: From Bar to Bard: the Poet Lawyers", *Law Times* (14 April 2008) online: <www.lawtimesnews.com/200804142474/commentary/thats-history-from-bar-to-bard-the-poet-lawyers>.
56. *Employment of Aliens*, *supra* note 49 at 300.

In a succinct but thorough judgment, he explained that the *Validation Act* was *ultra vires* the provincial legislature, both for being a matter of exclusive federal jurisdiction under sections 91(25) of the *BNA Act* (naturalization and aliens) and for being in conflict with the *Japanese Treaty Act*, *1913*. On the aliens point, Chief Justice Davies applied the Privy Council's decision in *Bryden*, as explained in *Cunningham v Tomey Homma*[57] ("*Tomey Homma*"), to the effect that the *Validation Act* was not really aimed at the regulation of industry but was "devised to deprive the Chinese, naturalized or not, of the ordinary rights of the inhabitants of British Columbia, and in effect, to prohibit their continued residence in that province".[58] As for the *Japanese Treaty Act*, Davies CJ noted that it sanctioned and gave the force of law in Canada to the Japanese Treaty, and that Article 3(1) of the Treaty states that subjects of the parties "shall in all that relates to the pursuit of their industries, callings, professions, and educational studies be placed in all respects on the same footing as the subjects or citizens of the most favoured nation". Parliament's authority to implement the Japanese Treaty was found in section 132 of the *BNA Act*, which granted the "Parliament and Government of Canada all powers necessary or proper for performing the obligations of Canada or any province thereof, as part of the British Empire towards foreign countries, arising under treaties between the Empire and such foreign countries". The *Validation Act*'s attempt to discriminate against Japanese was "contrary to the obligations of the treaty and in direct conflict with the Dominion statute which must prevail".[59] The Chief Justice noted that even if the *Validation Act* were *intra vires* the province in other respects it was "in absolute conflict with the Treaty and the Dominion statute".[60] He concluded:

> [t]he Crown was undoubtedly bound by the force of the "Japanese Treaty Act" of 1913 to perform within Canada its treaty obligations, and, if so, I cannot understand how it can successfully be contended that the Crown can by force of enactments of a provincial legislature directly or indirectly break its treaty

57. [1903] AC 151 (PC) [*Tomey Homma*].
58. *Ibid* at 157, quoted in *Employment of Aliens*, *supra* note 49 at 301.
59. *Employment of Aliens*, *ibid* at 302-303.
60. *Ibid* at 304.

obligations.[61]

Mr. Justice Idington, dissenting, would have upheld the *Validation Act* entirely. His reasoning was premised on the right of private persons to conclude racially discriminatory contracts with each other – a right later abolished in anti-discrimination laws throughout the country and much of the world but still in place in 1922.[62] Given that private owners remained free to discriminate in contracts concerning their properties, and given BC's ownership of lands, mines, minerals and royalties as assured by section 109 of the *BNA Act* read together with section 10 of the *British Columbia Terms of Union*,[63] Idington J concluded that "the responsible government of British Columbia …had power to enact such orders in council relative to the administration of all the said properties".[64] As for the effect of the *Japanese Treaty Act*, Idington J's answer is hard to follow but suggested that to permit that statute to override the *Validation Act* would "strain and positively wreck our constitution".[65]

The long and, at points, difficult reasons of Mr. Justice Duff (as he then was) concluded that the *Validation Act* did not encroach upon Parliament's exclusive jurisdiction over naturalization and aliens. Unlike the legislation at issue in *Bryden*'s case, the *Validation Act* did not directly

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61. *Ibid* at 305.
62. See *Re Drummond Wren* [1945] OR 778 (HCJ), in which Mackay J invalidated a racially discriminatory covenant in a deed of land on the ground of public policy, citing such post-1922 developments as the *Racial Discrimination Act, 1944* (Ontario Statutes 1944 c 51), the *Charter of the United Nations*, 26 June 1945, CanTS No 7 and the *Atlantic Charter*, 14 August 1941, reproduced in (1942) UNTS No 5.
63. Order of Her Majesty in Council admitting British Columbia into the Union, dated the 16th day of May, 1871, reproduced in Appendix to RSBC 1871.
64. *Employment of Aliens*, *supra* note 49 at 308.
65. *Ibid* at 311. His worry seems to be the same one that animated the Privy Council, in the *Labour Conventions* case, to limit the application of s 132 to Empire treaties. To do otherwise, said Lord Atkin, would permit the Dominion to "clothe itself with legislative authority inconsistent with the constitution that gave it birth": *Attorney-General for Canada v Attorney General for Ontario and others* [1937] AC 326 (PC) at 352.

prohibit Chinese and Japanese people from pursuing their occupation:

> the legislature has not by the Act of 1921 attempted to deny the Chinese and Japanese the right to dispose of their labour in the province nor has it attempted to prohibit generally the employment of Chinese and Japanese by grantees of rights in the public lands of the province.[66]

Mr. Justice Duff went on to explain:

> [i]n some of the provinces perhaps the most important responsibility resting upon the legislature was the responsibility of making provision for settlement by a suitable population …. I find it difficult to affirm that a province in framing its measures for and determining the conditions under which private individuals should be entitled to exploit the territorial resources of the province is passing beyond its sphere in taking steps to encourage settlement by settlers of a class who are likely to become permanently (themselves and their families) residents of the province.[67]

But while the *Validation Act* was not void on division of powers grounds, it was nevertheless, in Duff J's view, invalid for inconsistency with the *Japanese Treaty Act*. The learned judge began his analysis with an admirable explanation of the nature of treaties in both international and Canadian law:

> [a] treaty is an agreement between states. It is desirable, I think, in order to clear away a certain amount of confusion which appeared to beset the argument to emphasize this point that a treaty is a compact between states and internationally or diplomatically binding upon states. The treaty making power, to use an American phrase, is one of the prerogatives of the Crown under the British constitution[.] That is to say, the Crown, under the British constitution, possesses authority to enter into obligations towards foreign states diplomatically binding and, indirectly, such treaties may obviously very greatly affect the rights of individuals. But it is no part of the prerogative of the Crown by treaty in time of peace to effect directly a change in the law governing the rights of private individuals, nor is it any part of the prerogative of the Crown to grant away, without the consent of parliament, the public monies or to impose a tax or to alter the laws of trade and navigation and it is at least open to the gravest doubt whether the prerogative includes power to control the exercise by a colonial government or legislature of the right of appropriation over public property given by such a statute as the B.N.A. Act. All these require legislation.[68]

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66. *Employment of Aliens*, *supra* note 49 at 324, 326.
67. *Ibid* at 326-27.
68. *Ibid* at 328-29.

As to whether the authority given by section 132 was broad enough to support the *Japanese Treaty Act*, Duff J was satisfied it was:

> [t]he treaty validated by statute of 1913 deals with subjects which are ordinary subject matters of international convention: with precisely the kind of thing which must have been in the contemplation of those who framed this section [132]. The effect of the Act of 1913 is, in my opinion, at least this: that with respect to the right to dispose of their labour, the Japanese are to be in the same position before the law as the subjects of the most favoured nation. Equality in the eye of the law in respect of these matters is what I think the legislation establishes. Does the Act of 1921 in its true construction infringe these rights of Japanese subjects? In my opinion it does. It excludes them from employment in certain definite cases. It is not, I think, material that the province in passing the Act is engaged in administering its own corporate economic affairs. If it goes into effect, it goes into effect (as a law of the province) abrogating rights guaranteed by the treaty. It is thus not only a law passed against the good faith of the treaty but it is, in my opinion, a law repugnant to the treaty and as such I think it cannot prevail.[69]

Of course the Japanese Treaty offered no protection to people of Chinese descent. Despite this, Duff J took the view that the *Validation Act* "must be treated as inoperative *in toto*".[70]

The reasons of Mr. Justice Brodeur were similar in thrust to those of Duff J but more briefly put. He noted that the question of restricting the employment of Chinese and Japanese labour had been a subject of legislative discussion in BC, and diplomatic discussion between the interested countries, for years.[71] After referring to the *Tomey Homma* case and the Supreme Court of Canada's decision in *Quong Wing v The King*,[72] in which the Court upheld a Saskatchewan law prohibiting a naturalized Canadian of Chinese origin from employing "any white woman or girl" in his restaurant, Brodeur J concluded that the *Validation Act* would be *intra vires* were it not for the Japanese Treaty. On the effect of the treaty, Brodeur J cited *Walker v Baird*[73] for the proposition that "[i]f the treaty had not been adhered to [*i.e.*, implemented] by the Dominion parliament, it could be contended with force that a Canadian province

69. *Ibid* at 330-31.
70. *Ibid* at 331.
71. *Ibid* at 336.
72. [1914] SCR 440.
73. [1892] AC 491 (PC).

was not bound to obey the provisions of this treaty". The learned judge explained:

> [t]he King has the power to make a treaty, but if such a treaty imposes a charge upon the people or changes the law of the land it is somewhat doubtful if private rights can be sacrificed without the sanction of Parliament. The bill of rights[74] having declared illegal the suspending or dispensing with laws without the consent of parliament, the Crown could not in time of peace make a treaty which would restrict the freedom of parliament.
>
> In the United States a different rule prevails. Under the United States constitution the making of a treaty becomes at once the law of the whole country and of every state. In our country such a treaty affecting private rights should surely become effective only after proper legislation would have been passed by the Dominion parliament under section 132 B.N.A. Act.[75]

The necessary implementing legislation having been adopted, the Japanese Treaty "becomes binding for all Canadians and for all the provinces".[76] British Columbia could not, consistent with the Japanese Treaty, give the Japanese treatment different than that given to other foreigners, and so the *Validation Act* was illegal "as far as the Japanese are concerned".[77] Here Brodeur J differed from Duff J, concluding that the legislation remained valid in respect of Chinese.

Finally, Mr. Justice Mignault briefly held that the *Validation Act* "comes well within the rule of the *Bryden Case* as explained in the *Tomey Homma Case*, and therefore the statute and the orders in council are *ultra vires*".[78] Having so concluded, Mignault J found it unnecessary to consider whether the Japanese Treaty furnished a further ground of nullity.[79]

The Court's short judgment in the *Brooks-Bidlake* companion appeal was unanimous in the result but varied in its reasoning.[80] Recall that the issue here was whether the BC Supreme Court was right to grant

74. That is, the Bill of Rights 1689 1 William & Mary sess 2 c 2.
75. *Employment of Aliens*, *supra* note 49 at 339.
76. *Ibid* at 339.
77. *Ibid* at 339-40.
78. *Ibid* at 341.
79. *Ibid* at 340-41.
80. *Attorney-General for British Columbia and the Minister of Lands v Brooks-Bidlake and Whitall, Ltd* (1922), 63 SCR 466 [*Brooks-Bidlake*].

declaratory and injunctive relief to the timber licensee to protect its right to employ Chinese and Japanese despite the licence's express requirement (inserted pursuant to the discriminatory June 1902 order in council) that it not do so. Mr. Justice Idington again emphasized the right of an owner to impose limitations or conditions upon grants such as the right to cut provincial timber under licence. As for the Japanese Treaty, the learned judge blithely concluded that it was "certainly never intended to deprive the owners of property, whether private citizens or provinces, of their inherent rights, much less to destroy a contract made before the Act in question".[81] He would have allowed the appeal.

Mr. Justice Duff, for his part, was prepared to assume that the *Japanese Treaty Act* did make the June 1902 order in council inoperative. But it did not follow that the licensee was entitled to have its licence renewed, for it had failed to observe a condition precedent of the licence, namely that it not employ Japanese and Chinese on its timber lands.[82]

In the most succinct of reasons, Mr. Justice Anglin explained that the licensee's claim was bound to fail whether the discriminatory provision in the licence was valid or not, for "[i]f the condition was good, the plaintiffs have no grievance; if it was bad, the licence I think fails with the result that the plaintiffs have no status as licensees".[83]

Mr. Justice Mignault, with whom Chief Justice Davies agreed, reached the same conclusion. He quoted *Anson's Law of Contract*:

> [w]here there is one promise made upon several considerations, some of which are bad and some good, the promise would seem to be void, for you cannot say whether the legal or illegal portion of the consideration most affected the mind of the promisor and induced his promise.[84]

Thus, if the discriminatory clause in the licence were bad, the entire licence was bad and the company could not sustain or renew it. The constitutional issue did not require a decision.[85] The province's appeal was

81. *Ibid* at 473.
82. *Ibid* at 477-78.
83. *Ibid* at 478-79.
84. *Ibid* at 480.
85. Curiously, Brodeur J did not take part in this judgment, despite having heard and decided the companion appeal.

allowed and the injunction granted by the BC Supreme Court vacated.

V. The *Treaty Act* at the Privy Council

As a result of the Supreme Court of Canada's opinion in the reference, on 31 March 1922 the Governor-General in Council disallowed the *Validation Act*.[86] Meanwhile the timber company sought and was granted leave to appeal to the Judicial Committee of the Privy Council from *Brooks-Bidlake*. Local counsel were instructed. Sir Malcolm Macnaghten KC, later a judge in the King's Bench Division, appeared for the company together with Hugh Bischoff. The Attorney General of British Columbia was represented by Sir John Simon KC, a future Lord Chancellor, and Geoffrey Lawrence, later Lord Oaksey and the presiding judge at the International Military Tribunal at Nuremburg. In a judgment of 13 February 1923, Viscount Cave (with Viscount Haldane and Lords Dunedin, Shaw and Carson) dismissed the appeal.

Viscount Cave began with an account of the facts that included this unusual (and perfectly fair) remonstration of the BC legislature for enacting the *Validation Act* in the first place:

> It is not easy to understand why it was considered worth while to pass this enactment, for if (as the Court of Appeal had held) the stipulation was void as conflicting with Imperial or Dominion statutes, no provincial legislation could give it validity.[87]

Viscount Cave was also gently critical of the Supreme Court of Canada, observing that the result of its varied reasons in the reference was "to leave the law in some doubt".[88] Rather than attempt a clarification, however, Viscount Cave's reasons in *Brooks-Bidlake* sidestep the Japanese Treaty and its implementing Act, resolving the case instead on conventional federalism lines. Viscount Cave explained that while section 91(25) of the *BNA Act* reserves to Parliament the general right to legislate as to the rights and disabilities of aliens and naturalized persons, "the Dominion

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86. See *Attorney-General of British Columbia v Attorney-General of Canada* [1923] 3 WWR 945 at 945 (headnote).
87. *Brooks-Bidlake & Whittall Ltd v Attorney General of British Columbia* [1923] AC 450 (PC) at 455 [*Brooks-Bidlake* (PC)].
88. *Ibid* at 456.

is not empowered by that section to regulate the management of the public property of the province, or to determine whether a grantee or licensee of that property shall or shall not be permitted to employ persons of a particular race".[89] His Lordship distinguished *Bryden* as being on the ground that the enactment there "was in truth devised to prevent Chinamen from earning their living in the province", whereas the present case more resembled *In re Provincial Fisheries*,[90] in which the Board held that Parliament's jurisdiction to legislate as to the sea coast and inland fisheries did not prevent the provinces from imposing their own conditions on fishing rights.[91] The licence having been found valid on this (fishy) basis, the only remaining question was whether the company had complied with its terms. Of course it never claimed to have done so; the company admitted having employed both Chinese and Japanese labour. The licence's stipulation against doing so having been broken, Viscount Cave concluded that the company could claim no right to renew the licence, endorsing Mr. Justice Brodeur's reasons in the court below.[92] The point raised on the *Japanese Treaty Act* did not, therefore, arise and their Lordships found it unnecessary to deal with it – for now.

An appeal to the Board from the Supreme Court of Canada's decision in the *Validation Act* reference came later in 1923.[93] This time Canadian counsel appeared. Newcombe KC argued the respondents' position with T. Mathew. The Attorney General of British Columbia, appellant, was represented by Sir John Simon KC and Mr. Lawrence (BC's counsel in *Brooks-Bidlake*) together with the attorney general himself, Farris KC. The Board consisted of Viscount Haldane and Lords Buckmaster, Atkinson, Shaw (also a judge in *Brooks-Bidlake*) and Sumner. Viscount Haldane delivered the judgment.

After reviewing the facts and litigation history, Viscount Haldane noted that the *Brooks-Bidlake* case had been brought on appeal to the

89. *Ibid* at 457.
90. (1896) 26 SCR 444.
91. *Brooks-Bidlake* (PC), *supra* note 87 at 457.
92. *Ibid* at 458.
93. I have been unable to determine why the two appeals were not heard together.

Privy Council but the Board had found no need to deal with the *Japanese Treaty Act* point as the appeal was resolved on the basis of the company's licence having been breached. "On the present occasion", Viscount Haldane explained, "a wholly different question presents itself",[94] namely the constitutionality of the *Validation Act* generally. On this point their Lordships "entertain no doubt [that] … the provincial statute violated the principle laid down in" the *Japanese Treaty Act* and:

> if re-enacted in any form will have … to be re-enacted in terms which do not strike at the principle in the Treaty that the subjects of the Emperor of Japan are to be in all that relates to their industries and callings in all respects on the same footing as the subjects or citizens of the most favoured nation.[95]

In conclusion, Viscount Haldane suggested that it "may not be necessary to enact [the *Validation Act*] in a fresh form" but reiterated that "if this is to be done it may be possible so to redraft it as to exclude from the operation of its principle all subjects of the Japanese Emperor and also to avoid the risk of conflict with sec. 91 (25) of *The B.N.A. Act*".[96]

VI. Conclusion

Aside from its historical interest as a chapter in British Columbia race relations, the *Japanese Treaty Act* litigation is important as an early instance of Canada's international obligations being invoked by litigants to challenge domestic law. However unfamiliar the subject matter today, the legal and constitutional questions raised, directly or indirectly, in these cases remain relevant: What use can be made of an international agreement in domestic proceedings? What are the implications of such agreements for Canadian federalism? Why do such agreements require implementation by legislation, and what are the domestic effects of such implementing laws? How should courts balance the location of the treaty-making power in the Crown (whether imperial, as then, or federal, as today) with the self-government rights of provincial jurisdictions? How do treaty-making entities (the imperial government at the time, the

94. *Attorney-General of British Columbia v Attorney-General of Canada* [1924] AC 203 (PC) at 211.
95. *Ibid* at 212.
96. *Ibid.*

federal government today) avoid incurring responsibility for breaches of international law by provincial executives and legislatures? All of these questions are raised, and in some respects left unanswered, in the *Japanese Treaty Act* cases.

While the outcome of the *Japanese Treaty Act* litigation was ultimately a victory (however partial) for those opposing BC's discriminatory labour practices, it certainly did not bring about racial harmony in the province. The result only applied to Japanese in BC, there being no Britain-China friendship treaty for Chinese nationals to rely on against BC's discriminatory laws. Even for the Japanese, the litigation was at best a minor advance. In particular, it did nothing to prevent the internment of Japanese nationals and Canadians of Japanese descent during the Second World War. Despite this brief setback to its discriminatory policy, the governments of British Columbia and Canada continued, in the euphemistic words of Duff J, to "[make] provision for settlement by a suitable population" in British Columbia for many years to come.

Inspiration for Integration: Interpreting International Trade and Investment Accords for Sustainable Development

Marie-Claire Cordonier Segger*

This article considers whether States have obligations, in international law, to proactively integrate environmental and social considerations into economic decision-making for sustainable development. In an era of international cooperation shaped inter-actionally by several decades of global debate, culminating in the adoption of universal Sustainable Development Goals (SDGs) at the United Nations, the article considers opportunities to support sustainable development through the interpretation and implementation of international economic treaty law and practice. In particular, the article comparatively discusses a new generation of trade and investment treaties that explicitly mention sustainable development as part of the object and purpose, examining approaches which can define and characterise the Parties' commitments. The article briefly offers considerations for a regulator, arbitrator or jurist seeking to interpret, in accordance with the Vienna Convention on the Law of Treaties[1] ("VCLT"), *a diverse range of environmental and social development provisions that are increasingly being integrated into international economic agreements.*

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1. 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) [*VCLT*].

I. Policy and "Soft Law" Rationales for Addressing Social and Environmental Concerns in Economic Treaties

II. International Legal Reasons for Countries to Address Environmental and Social Impacts of Trade and Investment Agreements

A. Sustainable Development as an Interstitial Norm

B. Integration as an International Customary Norm of Relevance to Trade and Sustainable Development

III. International Trade and Investment Agreements in Light of the Integration Principle

A. Addressing Sustainable Development Tensions in Trade and Investment Agreements through Integration

B. Interpreting Sustainable Development Provisions in Economic Accords

IV. Conclusions

> We assume a collective responsibility to advance and strengthen the interdependent and mutually reinforcing pillars of sustainable development - economic development, social development and environmental protection - at the local, national, regional and global levels.[2]

When States commit to promote sustainable development in a trade or investment treaty, or agree to conduct their economic relations in accordance with a principle of sustainable development, the implications of this commitment are not obvious in international law or policy.

In recent decades, there has been extensive international treaty-making on the protection of the environment. Many multilateral environmental accords ("MEAs") contain provisions to secure sustainable development

2. *Johannesburg Declaration on Sustainable Development*, UNWSSD (4 September 2002) UN Doc A/CONF.199/20 1 at para 5 [*Johannesburg Declaration*].

in different ways, across diverse fields.[3] Parallel to these MEAs, international economic treaties are being negotiated and adopted. While it is less documented, a growing number of these accords also address sustainable development, including in the World Trade Organisation[4] ("WTO") and an increasing range of Regional Trade Agreements[5]. As the WTO Appellate Body noted in the 1998 US-Shrimp Dispute:[6]

> [t]he preamble of the *WTO Agreement* — which informs not only the GATT 1994, but also the other covered agreements — explicitly acknowledges "the objective of *sustainable development*".[7]

The WTO also recognised in the corresponding footnote that "[t]his concept has been generally accepted as integrating economic and social

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3. Alexandre Kiss & Dinah Shelton, *International Environmental Law* (Leiden, The Netherlands: Koninklijke Brill NV, 2004); Patricia Birnie, Alan Boyle & Catherine Redgwell, *International Law & the Environment* (Oxford: Oxford University Press, 2009) at 106-14; Philippe Sands, *Principles of International Environmental Law* (Cambridge: Cambridge University Press, 2003) at 252-66 [Sands, *Principles of International Environmental Law*]; Sumudu A Atapattu, *Emerging Principles of International Environmental Law* (Ardsley, NY: Transnational Publishers, 2006) at 140-45; David Hunter, James Salzman & Durwood Zaelke, *International Environmental Law and Policy* (New York: Foundation Press, 2002) at 19, 923.
4. Gary P Sampson, *The WTO and Sustainable Development* (Tokyo: United Nations University Press, 2005); Markus W Gehring & Marie-Claire Cordonier Segger, eds, *Sustainable Development in World Trade Law* (The Hague: Kluwer Law International, 2005) at 129-52; *Agreement Establishing the World Trade Organization*, 15 April 1994 1867, UNTS 154 (entered into force 1 January 15) [*WTO Agreement*].
5. Marie-Claire Cordonier Segger, "Sustainable Development in Regional Trade Agreements" in Lorand Bartels & Federico Ortino, eds, *Regional Trade Agreements and the WTO Legal System* (Oxford: Oxford University Press 2006) at 313-40.
6. WTO, *United States: Import Prohibition of Certain Shrimp and Shrimp Products — Report of the Panel*, WTO Doc WT/DS58/R (1998); WTO, *United States: Import Prohibition of Certain Shrimp and Shrimp Products — Report of the Appellate Body*, WTO Doc WT/DS58/AB/R (1998) [*Shrimp Products*, Appellate Body]; collectively [*US-Shrimp*].
7. *Shrimp Products*, Appellate Body *ibid* at n 107.

development and environmental protection".[8]

There may be sound policy reasons for this economic law trend. As will be discussed below, the principle that environmental priorities must be integrated in economic development decision-making is gaining traction,[9] and international trade and investment law and policy is part of economic decision-making. The need to take both environmental and social priorities into account in efforts to achieve sustainable economic development is also increasingly recognised, as reflected in the consensus of the United Nations in the 2015 Declaration on *Transforming our World: The 2030 Agenda for Sustainable Development*, with its 17 universal Sustainable Development Goals ("SDGs"), in the 2012 Declaration on *The Future We Want* from the UN Conference on Sustainable Development, in the 2002 outcomes of World Summit on Sustainable Development ("WSSD"), and other inter-actional international discussions.[10] However, there remains comparatively little legal scholarship or analysis on how trade and investment rules can affect a State's potential for sustainable development, and how trade and investment treaties might be interpreted to foster rather than frustrate

8. *Ibid* at para 129.
9. *Award in the Arbitration Regarding the Iron Rhine (Ijzeren Rijn) Railway (Kingdom of Belgium v Kingdom of the Netherlands)* (2005), 2007 Permanent Court of Arbitration Award Series at paras 58-59 (Permanent Court of Arbitration) [*Iron Rhine*].
10. *Johannesburg Declaration, supra* note 2; *The Future We Want* (27 July 2012) UN Doc A/RES/66/288; *Transforming our World: The 2030 Agenda for Sustainable Development* (25 September 2015) UN Doc A/RES/70/1 [*Transforming our World*].

sustainable development.[11]

Do States have binding hard, customary or soft law obligations, in international law, to proactively integrate environmental and social considerations into economic decision-making for sustainable development? If sustainable development commitments are taken seriously, what does this mean for international economic treaty law and practice? This article analyses a new generation of trade and investment treaties relating to sustainable development, examining approaches which can define and characterise Parties' commitments to sustainable development. The article briefly discusses options for a regulator, arbitrator or jurist seeking to interpret, in accordance with the *VCLT*, an increasingly diverse range of environmental and social development provisions found today in economic agreements.

I. Policy and "Soft Law" Rationales for Addressing Social and Environmental Concerns in Economic Treaties

Commitments to sustainable development are increasingly found, not just as provisions of environmental agreements, but also in accords related mainly to human rights and social concerns, and in treaties focused on economic development.[12] This should not be surprising. Taken together, the range of trade and investment treaty impact assessments

11. See Alan Boyle & David Freestone, *International Law and Sustainable Development* (Oxford: Oxford University Press, 1999) at 10 in which trade is identified as an area where scope for integration or conflict remains and Hans Christian Bugge & Christina Voigt, eds, *Sustainable Development in International and National Law* (Groningen: Europa Law Publishing, 2009) at 271-95 which calls for new research on sustainable development in economic law. See also Birnie, Boyle & Redgwell, *supra* note 3 at 117 identifying international trade as an area with "significant scope for improvement" for integration of environmental considerations, and Vaughan Lowe, *International Law* (Oxford: Oxford University Press, 2009) at 4 [Lowe, *International Law*].

12. See *e.g.* Marie-Claire Cordonier Segger & Ashfaq Khalfan, *Sustainable Development Law: Principles, Practice and Prospects* (Oxford: Oxford University Press, 2004).

commissioned by States over recent decades raises concerns about the potential effects of new global and regional economic agreements.[13] Assessment findings suggest that trade and investment liberalisation agreements can lead to environmental and social impacts. Potential and actual impacts may depend on the specifics of each accord, which are often shaped by pre-existing economic relationships of the trading partners, the types of industries and sectors that are stimulated by the treaty, the perceived effectiveness of existing measures to protect or improve environmental protection and social development in relation to trade and investment led economic growth within the territory of the Parties to the accord, and other factors.

One response to concerns regarding impacts of trade treaties, advocated by neo-liberal economic and legal scholars, may be to simply let burdens fall where they may.[14] From this view, sovereign States negotiate trade treaties, and are surely in the best position to decide what

13. See *e.g.* Gehring & Cordonier Segger, *Sustainable Development in World Trade Law*, *supra* note 5; Marie-Claire Cordonier Segger, Markus W Gehring & Andrew Newcombe, eds, *Sustainable Development in World Investment Law* (The Netherlands: Kluwer Law International, 2011). See also online compilations of EU Sustainability Impact Assessments of Trade Agreements, US Environmental Reviews of Trade Agreements, US Labour Reviews of Trade Agreements, Canadian Environmental Assessments of Trade Agreements, etc.

14. See Milton Friedman, *Capitalism as Freedom* (Chicago: University of Chicago Press, 1962) at 57-58; Robert A Lawson, "Economic Freedom and the Well-Being of Nations" in Emily Chamlee-Wright, ed, *The Annual Proceedings of the Wealth and Well-Being of Nations* (Beloit: Beloit College Press, 2010) 65 at 67-69; Jennifer Schultz, "The Demise of 'Green' Protectionism: The WTO Decision on the US Gasoline Rule" (1996) 25 Denver Journal of International Law and Policy 1 at 3-5; Simon J Evenett & John Whalley, "Resist green protectionism – or pay the price at Copenhagen" in Richard Baldwin & Simon J Evenett, eds, *The Collapse of Global Trade, Murky Protectionism and the Crisis: Recommendations for the G20* (London: VoxEU.org and Center for Economic and Policy Research, 2009) 93.

risks and impacts are most acceptable to their national interests.[15] Just as the benefits of trade agreements will accrue to those States most astute in securing them, so should the costs fall upon the governments and citizens of those less wary.[16] Higher social and environmental standards may even be inappropriate to the special circumstances of certain States, limiting the comparative advantages of developing countries in trade.[17] Attempts to address or integrate social and environmental concerns into trade negotiations, from such perspectives, would be simply "disguised protectionism", to be rejected or at least addressed separately from "pure" economic law.[18] From this view, the only purpose of a trade or investment agreement is to accelerate economic growth by exploiting comparative advantage, and any other "non-trade" issue should be regarded with extreme caution.[19] For many, however, this position is no longer realistic, due to both policy and emerging inter-actional legal reasons.

Recent decades of trade and investment treaty-making take place against a backdrop of broader international policy debates in which States have not been silent on linkages with environmental, human rights, and sustainable development considerations. Legal literature covers trade

15. See Thomas Cottier & Krista Nadakavukaren Schefer, "The Relationship between World Trade Organization Law, National and Regional Law" (1998) 1 Journal of International Economic Law 83 at 84-86 on *pacta sunt servanda* in the WTO.
16. *Ibid* at 120-22.
17. Friedman, *supra* note 14 at 56-58 and Evenett & Whalley, *supra* note 14 at 93-96.
18. US National Foreign Trade Council, *"Enlightened" Environmentalism or Disguised Protectionism? Assessing the Impact of EU Precautionary-Based Standards on Developing Countries* (Washington: National Foreign Trade Council, 2004) at iv-vii.
19. Richard N Cooper, *Environment and Resource Policies for the World Economy* (Washington: Brookings Institution, 1994); letter from Jagdish N Bhagwati (1999) on "Third World Intellectuals and NGOs Statement Against Linkage" (drafted by Bhagwati and signed by several dozen academics, copy on file with author).

and investment linkages with human rights,[20] as canvassed in the 1995 Copenhagen United Nations Conference on Social Development,[21] the 2002 Monterrey International Conference on Financing for Development,[22] and later events. Environmental aspects of these global policy debates are also documented in the leading international environmental law texts.[23] International debates on globalisation are also analysed in studies of international law in the field of sustainable development.[24] On sustainable development, international discussions began before the 1972 United Nations Conference on the Human Environment[25] ("UNCHE") and were informed by the 1987 World Commission on Environment and Development ("WCED") mandate[26]

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20. See Rumu Sarkar, *International Development Law: Rule of Law, Human Rights and Global Finance* (Oxford: Oxford University Press, 2009) 257-331(for human rights in the context of global finance); see also Olivier De de Schutter, "Transnational Corporations as Instruments of Human Development" in Philip Alston and Mary Robinson, *Human Rights and Development: Towards Mutual Reinforcement* (Oxford: Oxford University Press, 2005) 403.
21. *World Summit for Social Development* (6-12 March 1995) Copenhagen, Denmark, online: <www.un.org/esa/socdev/wssd/text-version/>.
22. *International Conference on Financing for Development* (18-22 March 2002), Monterrey, Nuevo León, Mexico, online: <www.un.org/esa/ffd/ffdconf/>.
23. Sands, *Principles of International Environmental Law*, *supra* note 3 at 25-69; Birnie, Boyle & Redgwell, *supra* note 3 at 106-208; Kiss & Shelton, *supra* note 3 at 67, 51; Hunter, Salzman & Zaelke, *International Environmental Law and Policy*, *supra* note 3 at 210; Birnie, Boyle & Redgwell, *ibid* at 106-14; Atapattu, *supra* note 3 at 140-45.
24. Sands, *Principles of International Environmental Law*, *ibid* at 231; Hans Christian Bugge "1987-2007: Our Common Future Revisited" in Hans Christian Bugge & Christina Voigt, eds, *Sustainable Development in International and National Law* (Groningen: Europa Law Publishing, 2008) at 271-95.
25. (5-16 June 1972), Stockholm, Sweden, online: <sustainabledevelopment.un.org/milestones/humanenvironment>.
26. *Process of preparation of the Environmental Perspective to the Year 2000 and Beyond*, GA Res 16, UNGAOR, 38th Sess, UN Doc A/RES/38/16 (1983) [UNGA, *Process of preparation*].

and Report.[27] Through the 1992 Rio Conference on Environment and Development[28] ("UNCED"), a series of regional sustainable development summits such as the 1996 Summit of the Americas on Sustainable Development,[29] the 1997 United Nations General Assembly Special Session on Sustainable Development,[30] and the 2002 WSSD, a certain consensus on the challenges began to emerge. In an attempt to address these challenges constructively, in the 2012 United Nations Conference on Sustainable Development,[31] States called for a "green economy in the context of sustainable development and poverty eradication".[32]

Through the 'soft law' consensus declarations emerging from these

27. World Commission on Environment and Development, *Report of the World Commission on Environment and Development: Our Common Future*, 1987, UN Doc A/42/427 [WCED, *Our Common Future*].
28. *Rio Declaration on Environment and Development*, UNCED (3-14 June 1992) A/CONF.151/26 Vol 1, online: <sustainabledevelopment.un.org/milestones/unced> [*Rio Declaration*].
29. *Declaration of Santa Cruz de la Sierra Summit of the Americas on Sustainable Development* (7-8 December 1996) Santa Cruz de la Sierra, Bolivia, online: <www.summit-americas.org/summit_sd.html>.
30. *Programme for the Further Implementation of Agenda 21: Report of the Special Session of the General Assembly to Review and Appraise the Implementation of Agenda 21 23-28 June 1997* (19 September 1997) UN Doc A/RES/S-19/2, New York, online: <www.un.org/esa/earthsummit/> [UNGASS, *Programme for Further Implementation*].
31. *The Future We Want, supra* note 10.
32. See *Report of the Second Committee (Economic and Financial)*, UNGAOR, 64th Sess, UN Doc A/64/420/Add.1 (2009) (on Implementation of Agenda 21, the Programme for the Further Implementation of Agenda 21, and Outcomes of the World Summit on Sustainable Development). See also Commission on Sustainable Development, *Fifth Committee Report*, UNCSDOR, 1997, UN Doc A/64/600.

events,[33] it is possible to trace a growing clarification of the relationship between trade and investment law, and sustainable development. These debates reveal sound policy justifications for the proposal that negative social and environmental impacts of trade liberalisation should *not* simply be left to "fall where they may" onto the most vulnerable groups in developing State Parties to economic agreements, or kept completely separate from trade and investment policy.

The 1972 *Declaration of the United Nations Conference on the Human Environment*[34] ("*Stockholm Declaration*"), by focusing on the need for

33. "Soft law" describes high level declarations of intent, consensus declarations agreed by States, technical standards, codes of conduct and guidelines that are not aligned with the classical sources of law defined in the United Nations, *Statute of the International Court of Justice*, 18 April 1946, TS 993, 39 AJIL Supp 215 art 38 [*SICJ*]. One nuanced understanding of "soft law" suggests that in certain circumstances, such declarations can still give rise to legitimate expectations among States. For discussion see Gerry Simpson, "The Situation on the International Legal Theory Front: The Power of Rules and the Rule of Power" (2000) 11:2 European Journal of International Law 439; Joseph HH Weiler & Andreas L Paulus, "The Structure of Change in International Law or Is There a Hierarchy of Norms in International Law?" (1997) 8 European Journal of International Law 545; Ulrich Fastenrath, "Relative Normativity in International Law" (1993) 4 European Journal of International Law 305; Tadensz Grnchalla-Wesierski, "A Framework for Understanding Soft Law" (1984) 30 McGill Law Journal 37; Michael Bothe, "Legal and Non-Legal Norms – A Meaningful Distinction in International Relations?" (1980) 11 Netherlands Yearbook of International Law 65; Ignaz Seidl-Hohenveldern, "International Economic Soft Law" (1980) 163 Collected Courses of the Hague Academy of International Law 164; Joseph Gold, "Strengthening the Soft International Law of Exchange Arrangements" (1983) 77:3 American Journal of International Law 443. But see Christine Chinkin, "The Challenge of Soft Law: Development and Change in International Law" (1989) 38:4 International and Comparative Law Quarterly 850 and Hartmut Hillgenberg, "A Fresh Look at Soft Law" (1999) 10:3 European Journal of International Law 499.

34. *Declaration of the United Nations Conference on the Human Environment,* UNGAOR, 1972, UN Doc A/Conf.48/14/Rev.1 3 [*Stockholm Declaration*].

financial assistance and economic stability, in Principles 9 and 10 located "the debate on the environment clearly in the context of the international economy".[35] States also recognised in Principle 8, that "economic and social development is essential ... for the improvement of the quality of life",[36] and agreed in Principle 14 on the need for rational planning to reconcile conflicts "between the needs of development and the need to protect and improve the environment".[37] The UNCHE also increased the impetus for certain MEAs that use specific trade obligations as incentives to secure compliance, such as the Montreal Protocol.[38]

After Stockholm, the 1983 WCED was given a mandate to discuss trade matters.[39] In its seminal 1987 Report, *Our Common Future*,[40] the WCED called for a "sustainable world economy".[41] At that time, the WCED also found that:

> … these issues have not been taken up systematically by intergovernmental organizations. The mandates of … GATT and UNCTAD — should include sustainable development. Their activities should reflect concern with the impacts of trading patterns on the environment and the need for more effective instruments to integrate environment and development concerns into

35. Lowe, *International Law*, *supra* note 11 at 253.
36. *Ibid* at 8.
37. *Ibid* at 14.
38. *Convention on International Trade in Endangered Species of Wild Fauna and Flora*, 3 March 1973, 993 UNTS 243 (entered into force 1 July 1975); Duncan Brack, ed, *Trade and Environment: Conflict or Compatibility?* (London: Earthscan, 1998) at 323; Duncan Brack, *International Trade and the Montreal Protocol* (London: RIIA and Earthscan, 1996); *Montreal Protocol on Substances that Deplete the Ozone Layer*, 16 September 1987, 1522 UNTS 3 arts 2, 4 (entered into force 1 January 1989); *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal*, 22 March 1989, 1673 UNTS 57 arts 3-6, 8-9 (entered into force 5 May 1992); United Nations Environment Programme & International Institute for Sustainable Development, *Environment and Trade: A Handbook*, 2d (Winnipeg: UNEP and IISD, 2005) [UNEP & IISD, *Environment and Trade*].
39. UNGA, *Process of preparation*, *supra* note 26.
40. WCED, *Our Common Future*, *supra* note 27.
41. *Ibid* at para 41.

> international trading arrangements …[42]

Agreed by consensus in the 1992 UNCED, the 1992 *Rio Declaration on Environment and Development*[43] ("*Rio Declaration*") and Agenda 21[44] further elaborated the links between economic law and sustainable development.[45] At Principle 2, States recognised both their sovereign rights to exploit their own resources pursuant to their own environmental and developmental policies, and their responsibility to ensure they do not cause damage to others.[46] Principle 27 calls for "the further development of international law in the field of sustainable development", and Principle 12 focuses on international trade, calling for a "supportive and open international economic system that would lead to economic growth and sustainable development".[47] In Principle 4, States declared that "in order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it".[48] The *Rio Declaration* also highlighted the need for procedural innovations such as impact assessment and public participation mechanisms. Agenda 21 called for further efforts to codify and develop "international law on sustainable development",[49] and recognises the need to bring international economic law into accordance with the rest of this international law.[50] Although a section on "making

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42. *Ibid* at paras 55-56.
43. *Rio Declaration, supra* note 28.
44. *Agenda 21*, UNGAOR, 46th Sess 21, UN Doc A/Conf.151/26 (1992) [*Agenda 21*].
45. *Rio Declaration*, *supra* note 28. See also Experts Group on Environmental Law of the World Commission on Environment and Development, *Environmental Protection and Sustainable Development* (London: Martinus Nijhoff, 1987) which was a key input to the 1992 *Rio Declaration*.
46. *Rio Declaration*, *ibid.*
47. *Ibid.*
48. *Ibid*. See especially analysis in Birnie, Boyle & Redgwell, *supra* note 3 at 116-23.
49. *Agenda 21*, *supra* note 44 at para 39.1(a).
50. *Ibid* at paras 39.1-39.10

trade and the environment mutually supportive" is mainly cited,[51] policy guidance on trade, investment and sustainable development for States is actually found throughout Agenda 21 in diverse sections on social and economic dimensions,[52] conservation and management of resources for development,[53] strengthening the role of major groups,[54] and various means of implementation.[55]

By 1992, through consensus, States had affirmed the need for an open, rule-based, non-discriminatory, equitable, secure and transparent multilateral trading system. They reaffirmed the 1972 *Stockholm Declaration* principle that certain social and environmental standards may not be appropriate in all countries. But there is no indication that States intended for developing countries to bear significant risks from negative social and environmental impacts related to trade and investment liberalisation. Indeed, the opposite is constantly repeated. Global agendas called for the international economy to "provide a supportive international climate for achieving environment and development goals" through four principal sets of policies: (a) promoting sustainable development through trade; (b) making trade and environment mutually supportive; (c) providing adequate financial resources to developing countries; and (d) encouraging

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51. Hunter, Salzman & Zaelke, *supra* note 3 at 151; Sands, *Principles of International Environmental Law*, *supra* note 3 at 940.
52. *International co-operation to accelerate sustainable development in developing countries*, poverty, consumption patterns, demographic dynamics, human health, human settlements, and *integrating environment and development in decision-making*.
53. Atmosphere, land resources, deforestation, desertification and drought, mountain ecosystems, sustainable agriculture and rural development, biological diversity, biotechnology, oceans and seas, fresh waters, toxic chemicals, hazardous wastes, solid and sewage wastes, and radioactive wastes.
54. Roles of women, children and youth, indigenous people, non-governmental organisations, local authorities, workers and trade unions, business and industry, science and technology, and farmers.
55. Financing mechanisms, technology transfers, science, education, capacity building in developing countries, *international institutional arrangements, international legal instruments*, and information for decision-making.

economic policies conducive to environment and development.[56] They highlighted the need for global efforts to build consensus on the intersections of environment, trade and development issues, both through existing international forums and in the domestic policy of each country.[57] Indeed, UNCED led to the signing of three international treaties which each aimed to achieve sustainable development in different ways, with distinct linkages to international economic policy and law: the 1992 *UN Framework Convention on Climate Change*[58] ("*UNFCCC*"), the 1992 *UN Convention on Biological Diversity*[59] ("*UNCBD*") and the 1994 *UN Convention to Combat Desertification*[60].

UNCED created a United Nations Commission for Sustainable

56. *Agenda 21*, *supra* note 44 at paras 2.3, 2.43-2.5.
57. *Ibid* at para 2.4.
58. 4 June 1992, 1771 UNTS 107 (entered into force 21 March 1994). See *e.g. Climate and Trade Policies in a Post-2012 World*, UNEP (2000) at 22. See also Gary Sampson, "WTO Rules and Climate Change: The Need for Policy Coherence" in W Bradnee Chambers, ed, *InterLinkages: The Kyoto Protocol and the International Trade and Investment Regimes,* UNU Policy Perspectives No. 5 (2001) 75 where the author notes, *infra,* Kyoto Protocol provisions on measures to enhance energy efficiency, enhance sinks and reservoirs, increase use of new and renewable forms of energy, phase out fiscal incentives in GHG-emitting sectors, and promote the application of market instruments.
59. 5 June 1992, 1760 UNTS 79 art 143 (entered into force 29 December 1993). See also *e.g.* Philippe G LePrestre, ed, *Governing Global Biodiversity: The Evolution and Implementation of the Convention on Biological Diversity* (Burlington, Vermont: Routledge, 2002); Ian Walden, "Intellectual Property Rights and Biodiversity" in Catherine Redgwell & Michael Bowman, eds, *International Law and the Conservation of Biological Diversity* (London: Kluwer Law International, 1995) 171 at 172, 178.
60. 14 October 1994, 1954 UNTS preamble and arts 1, 11, 14 (entered into force 26 December 1996); see also *e.g.* Karel Mayrand, "Integrated Assessment of Trade-Related Policies: Agricultural Trade Liberalisation and the Convention to Combat Desertification" (2006) 24:4 Impact Assessment and Project Appraisal 311.

Development[61] ("UNCSD"), which served for two decades as a forum for consensus-building. In its discussions, the UNCSD expressed concerns about failure to adequately address economic and sustainable development links, including in the UNCSD Third Session,[62] and UNCSD Eighth Session.[63] In the 1997 United Nations General Assembly Special Session on Sustainable Development (Earth Summit+5) ("UNGASS") Programme for the Further Implementation of Agenda 21,[64] States laid out a further agenda for trade to support sustainable development, also highlighting the need to "further strengthen and codify international law related to sustainable development".[65] States agreed that:

> [i]n order to accelerate economic growth, poverty eradication and environmental protection, particularly in developing countries, there is a need to establish … instruments and structures enabling all countries, in particular developing countries, to benefit from globalization … There should be a balanced and integrated approach to trade and sustainable development, based on a combination of trade liberalization, economic development and environmental protection.[66]

In the 1997 UNGASS Programme, both procedural and substantive guidance can be found for this "integrated approach". States noted

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61. See *Establishment of the Commission on Sustainable Development*, UNESCOR, 1993, UN Doc E/1993/207; *Institutional Arrangements to Follow Up the United Nations Conference on Environment and Development*, GA Res 191, UNGAOR, 47th Sess, UN Doc A/RES/47/191 (1993) at 3-5; Michael McCoy & Patrick McCully, *The Road from Rio: An NGO Action Guide to Environment and Development* (Amsterdam: Utrecht International Books, 1993) at 45.
62. Commission on Sustainable Development, *Report on the Third Session*, UNCSDOR, 1995, Supp No 12, UN Doc E/1995/32 at paras 37-40, online: <www.un.org/ga/search/view_doc.asp?symbol=E/CN.17/1995/36&Lang=E>.
63. Commission on Sustainable Development, *Report on the Eighth Session*, UNCSDOR, 1999-2000, Supp No 9, UN Doc E/2000/29 at paras 28-34, online: <www.un.org/ga/search/view_doc.asp?symbol=E/CN.17/2000/20&Lang=E>.
64. UNGASS, *Programme for the Further Implementation of Agenda* 21, *supra* note 30.
65. *Ibid* at paras 109-10.
66. *Ibid* at para 29.

that further liberalisation of trade should take effects on sustainable development into account, urging national governments to make every effort to ensure policy coordination on trade, environment and development in support of sustainable development. They identified the need for renewed system-wide efforts to ensure greater responsiveness to sustainable development objectives, recommending strengthened cooperation and support for capacity-building in trade, environment and development at both international and national levels, for international cooperation to ensure mutual supportiveness among economic and environmental agreements, and for trade liberalisation to be accompanied by new policies for more efficient allocation and use of resources.[67] The GA also warned that "any future agreements on investments should take into account the objectives of sustainable development and, when developing countries are Parties to these agreements, special attention should be given to their needs for investment".[68]

Responses were uneven, however, and in a ten-year review at the 2002 WSSD,[69] States re-focused on means to better *implement* sustainable development commitments. In the 2002 *Johannesburg Plan of Implementation*[70] ("*JPOI*"), States established a broadened institutional architecture for sustainable development,[71] to further implement Agenda 21 and the WSSD outcomes, and to meet emerging sustainable

67. *Ibid*.
68. *Ibid* at para 29(g).
69. *Ten-year Review of Progress Achieved in the Implementation of the Outcome of the United Nations Conference on Environment and Development*, GA Res 191, UNGAOR, 55th Sess, UN Doc A/RES/55/199 (2000) [UNGA, *Ten-year Review*].
70. *Johannesburg Plan of Implementation*, UNWSSD, 2002, UN Doc A/CONF.199/20 7 [*JPOI*].
71. UNGA, *Ten-year Review*, *supra* note 69; *Report of the World Summit for Sustainable Development*, UNWSSD, 2002, UN Doc A/CONF.199/20 at paras 140-70 [*Report of the WSSD*]; Marie-Claire Cordonier Segger & Maria Ivanova, "Sustainable Development Governance: Take Two" (2003) Concept Paper for South African Chair of UNCSD (on file with author).

development challenges.[72] In *JPOI* Chapter XI, economic institutions such as the WTO and regional trade bodies were tasked to enhance their work to realise sustainable development objectives.[73] Rather than repeating the UNCED and UNGASS texts, the guidance on trade and sustainable development is brief, with a change in tone that strongly focuses the agenda on the social development dimensions of trade and investment policy. States noted that "[g]lobalization offers opportunities and challenges for sustainable development"[74] and emphasised the special difficulties faced by developing countries, calling for globalisation to become fully inclusive and equitable. In addition to calls for WTO trade negotiations to take development concerns into account, the need to strengthen "regional trade and cooperation agreements... with a view to achieving the objectives of sustainable development" was highlighted.[75] At X, as a means of implementing sustainable development, an agenda for integrating social development and environmental priorities into global and regional trade negotiations was set forth.[76] States, *inter alia*, called for "efforts to promote cooperation on trade, environment and development"; "the voluntary use of environmental impact assessments as an important national-level tool to better identify trade, environment and development inter-linkages …"; and "further action ... to enhance the benefits, in particular for developing countries ... of trade liberalization" and to "establish and strengthen existing trade and cooperation agreements ... with a view to achieving sustainable development".[77] While WSSD outcomes may be hortatory, this clear consensus was made available to guide and influence future treaty-making.

This approach was emphasized in the 2015 Declaration *Transforming*

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72. Report of the Secretary General, *Follow-up to Johannesburg and the Future Role of the CSD – The Implementation Track*, UNESCOR, 2003, UN Doc E/CN.17/2003/2.
73. *JPOI*, *supra* note 70 at paras 47-48, 51, 151, 154-55, 158-61.
74. *Ibid* at paras 47-52.
75. *Ibid* paras 90-100.
76. *Ibid* at paras 81-136.
77. *Ibid* at paras 90-100.

Our World: The 2030 Agenda for Sustainable Development.[78] At paragraph 2, States committed by consensus to achieve "sustainable development in its three dimensions – economic, social and environmental – in a balanced and integrated manner" and at paragraph 3, they resolved to create conditions for sustainable, inclusive and sustained economic growth. At paragraph 18, States reaffirmed their commitment to international law, and at paragraph 30 urged each other to refrain from "any unilateral economic, financial or trade measures not in accordance with international law ... that impede the full achievement of economic and social development" particularly for developing countries. Annexed, in the SDGs, trade and investment were characterised as a means of implementation for sustainable development. SDG 8 commits to "promote sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all", including by, *inter alia*, increasing aid for trade support. SDG 9 commits to "build resilient infrastructure, promote inclusive and sustainable industrialization and foster innovation". At SDG 17.5, States agreed to "adopt and implement investment promotion regimes for least developed countries" and at SDG 17.11 they called to significantly increase the exports of developing countries. At the same time, at SDG 10.a, States also committed to "implement the principle of special and differential treatment for developing countries, in particular least developed countries, in accordance with [WTO] agreements". The trade and investment being promoted is expected to be coherent, integrated, pro-poor – sustainable. For instance, at SDG 17.13-14, States highlighted the need to enhance global macroeconomic stability through policy coordination and policy coherence for sustainable development, while at SDG 17.15 they agreed to respect "each country's policy space and leadership to establish and implement policies for poverty eradication and sustainable development". Indeed, at paragraph 68, States explicitly underscore that "international trade is an engine for inclusive economic growth and poverty reduction", but one which "contributes to the promotion of

78. *Transforming our World*, *supra* note 10.

sustainable development".[79]

In all, there is scant indication from the global consensus statements of the 1972 UNCHE, the 1992 UNCED, the UNCSD deliberations, the 1997 UNGASS, the 2002 WSSD, the 2012 UNCSD, or the 2015 SDGs, that the risks and burdens of trade-led economic growth should be left to fall upon the most vulnerable in developing country trading partners, or that social and environmental decision-making should be kept separate from trade law. Indeed, the opposite is prioritised, though much remains to be done.

The 1992 *Rio Declaration* and other documents are not hard, binding international law: indeed, they are often cited as the quintessential examples of soft law.[80] However, soft law can be relevant to the future development of international law, in a more nuanced manner than the hard law found in treaties, established customary rules, or other formal sources recognised in Article 38 of the 1946 *Statute of the International Court of Justice*.[81] Soft law norms and standards can evolve into binding obligations upon States through subsequent negotiation of international treaties or eventual recognition as international customary rules.[82] In an inter-actional manner, the initial phases of development of new international treaty regimes, including recognition of relevant legal principles, can be shaped by the inter-State debates and consensus

79. *Ibid*.

80. See *supra* note 33 for the nuances of soft law.

81. *SICJ*, *supra* note 33, art 38.

82. See Alan Boyle, "Soft Law in International Law-Making" in Malcom D Evans, ed, *International Law* (Oxford: Oxford University Press, 2010) 122 at 141-58 which suggests the 1992 *Rio Declaration* is an instrument which both codifies existing international law and seeks to develop new law at 145; Simpson, *supra* note 33; Weiler & Paulus, *supra* note 33; Fastenrath, *supra* note 33. For earlier discussions, see Grnchalla-Wesierski, *supra* note 33 and Jonathan Charney, "Compliance with International Soft Law" in Dinah Shelton, ed, *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (Oxford: Oxford University Press, 2000) 115 at 115-18.

building that characterises these processes.[83] Indeed, taking into account the doctrine of good faith in international law, very widely-supported soft law may generate *legitimate expectations* among other States.[84] Such expectations may not be decisive, as they can be rebutted, for instance through explicit statements that a particular 'soft law' standard, principle or policy consensus is not applicable in the circumstances,[85] but in this case the preponderance of unanimous guidance is convincing. Certain conclusions can be drawn with respect to State intentions for the trade and sustainable development relationship.

First, economic policies and agreements are *not* intended to constrain the adoption and enforcement of legitimate new environment and social development measures, nor to make it more inherently difficult to implement specific obligations from international treaties. Rather, the consensus declarations and instruments on these topics are replete with calls for trade policies to mutually support environment and development priorities in a balanced and integrated way for sustainable development,[86]

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83. Jutta Brunnée & Stephen J Toope, *Legitimacy and Legality in International Law* (Cambridge: Cambridge University Press, 2010) at 5-9 [Brunnée & Toope, *Legitimacy and Legality in International Law*].

84. Philip Allott, "The Concept of International Law" (1999) 10:1 European Journal of International Law 31; Nico Krisch, "International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order" (2005) 16:3 European Journal of International Law 369; Martti Koskenniemi, "The Politics of International Law" (1990) 1 European Journal of International Law 4; Nico Krisch, "The Pluralism of Global Administrative Law" (2006) 17:1 European Journal of International Law 247.

85. Charney, *supra* note 82 at 115-18. But see Pierre-Marie Dupuy, "Soft Law and the International Law of the Environment" (1991) 12 Michigan Journal of International Law 420 at 428 and Christine Chinkin, "The Challenge of Soft Law" (1989) 38:4 The International and Comparative Law Quarterly 850 at 859.

86. UNGASS, *Programme for the Further Implementation*, *supra* note 30, in which States agreed at para 29 that "[t]here should be a balanced and integrated approach to trade and sustainable development, based on a combination of trade liberalization, economic development and environmental protection".

to strengthen sustainable natural resources management,[87] to strengthen and encourage environmental regulations and standards,[88] and to support poverty eradication, including through the realisation of human rights.[89]

Second, trade and investment policies and agreements are *not* expected to create incentives for trade-led economic growth that will add to serious environmental and social problems which already exist at domestic levels, and curtail the enforcement of laws intended to support sustainable development, especially in developing countries. Rather, the detailed action plans and other "soft law" instruments on these topics emphasise and re-emphasise an urgent need for accompanying cooperative measures to increase social and environmental regulatory capacity and provide technical assistance,[90] and for cooperative measures to generate new and additional financial, human and other resources to address environmental or developmental challenges associated with trade

87. *Ibid*, "[t]rade liberalization should be accompanied by environmental and resource management policies in order to realize its full potential contribution to improve environmental protection and the promotion of sustainable development through the more efficient allocation and use of resources".

88. Commission on Sustainable Development, *Report on the Fourth Session*, UNCSDOR, Supp No 8, UN Doc E/1996/28 (1996) ("[s]tresses that it would be inappropriate to relax environmental laws, regulations and standards or their enforcement in order to encourage foreign direct investment or to promote exports" Decision 4/1, 4(c)) [UNCSD, *Fourth Session Report*].

89. *JPOI*, *supra* note 70 at paras 7-13.

90. UNCSD, *Fourth Session Report*, *supra* note 88 "[r]ecognizes that positive measures, such as improved market access, capacity-building, improved access to finance, and access to and transfer of technology, taking into account the relationship between trade-related agreements and technology, are effective instruments for assisting developing countries in meeting multilaterally agreed targets in keeping with the principle of common but differentiated responsibilities" Decision 4/1, 3(b).

and investment treaties.[91]

Third, and perhaps most challenging, trade and investment policies and treaties need not serve to encourage *unsustainable growth* in obsolete technologies, goods or economic sectors, or to stimulate, through pollution havens, subsidies and other means, the growth of these sectors. Soft law declarations continue to firmly call for the phase-out of such measures.[92] States have not committed to support the imposition of social or environmental standards that are not appropriate for developing countries. However, in internationally negotiated treaties, resolutions, standards and guidelines, States are calling for measures to encourage *increased* trade and investment in more sustainable low-carbon technologies,[93] the sustainable use of genetic resources,[94] more sustainably

91. UNGASS, *Programme for Further Implementation*, *supra* note 30 notes "[t]he multilateral trading system should have the capacity to further integrate environmental considerations and enhance its contribution to sustainable development, without undermining its open, equitable and non-discriminatory character. The special and differential treatment for developing countries, especially the least developed countries, and the other commitments of the Uruguay Round of multilateral trade negotiations 18 should be fully implemented in order to enable those countries to benefit from the international trading system, while conserving the environment" at para 29.

92. *The Future We Want, supra* note 10 reaffirms calls for phase out of subsidies that impede the transition to sustainable development, including those on fossil fuels, unsustainable agriculture and fisheries, at para 126.

93. *Report of the WSSD*, *supra* note 71 at paras 20, 59; Commission on Sustainable Development, *Report on the Seventeenth Session Session*, UNCSDOR, 2009, UN Doc E/2009/29, s 12(g)(i); *Report of the Conference of the Parties on its Seventh Session*, UNFCCC, 2002, UN Doc FCCC/CP/2001/13/Add.1.

94. *Decisions Adopted by the Conference of the Parties to the Convention on Biological Diversity at its Tenth Meeting* (Nagoya, Japan, 18-29 October 2010) Decision X/1; UNEP & IISD, *Environment and Trade*, *supra* note 38 at 55-56; Mary Seely et al, "Creative Problem Solving in Support of Biodiversity Conservation" (2003) 54:1 Journal of Arid Environments 155.

produced or harvested goods,[95] environmental goods and services, [96] and pesticide-free products. [97]

In summary, there is a convincing international policy rationale for States to undertake measures to prevent, or at least mitigate, the environment and social development impacts of trade and investment agreements, addressing the main tensions identified between trade and sustainability. States have repeatedly committed, in consensus declarations of principles,[98] detailed action plans,[99] UN conference debates,[100] solemn resolutions,[101] and international guidelines and

95. UNGASS, *Programme for Further Implementation*, *supra* note 30 in which States find, "[t]rade obstacles should be removed with a view to contributing to the achieving of more efficient use of the earth's natural resources in both economic and environmental terms" at para 29.

96. OECD, Public Affairs Division, Public Affairs and Communications Directorate, *Opening Markets for Environmental Goods and Services*, Policy Brief (2005), online: <www.oecd.org/dataoecd/63/15/35415839.pdf>; WTO, *Ministerial Declaration* (20 November 2001, Doha, Qatar), WTO Doc WT/MIN(01)/DEC/1 at paras 31-33, online: <www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm>; Zhong Xiang Zhang, "Liberalizing Climate-Friendly Goods and Technologies in the WTO: Product Coverage, Modalities, Challenges and the Way Forward" (2009) 1 UNCTAD Trade and Environment Review 1.

97. *Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade*, 10 September 1998, 2244 UNTS 337 preamble (entered into force 4 February 2004); *Stockholm Convention on Persistent Organic Pollutants*, 22 May 2001, 2256 UNTS 119 preamble (entered into force 17 May 2004); Gavin Fridell, "Free Trade, Fair Trade and the State" (2010) 15:3 New Political Economy 457 at 457-58.

98. See *e.g. United Nations Declaration on the Rights of Indigenous Peoples*, UNGAOR, 2007, UN Doc Res 69-295; *Report of the Secretary-General on Trade, Environment and Sustainable Development*, UNCSD, 1996, UN Doc E/CN.17/1996/8.

99. *Agenda 21*, *supra* note 44; *Report of the WSSD*, *supra* note 71.

100. See *e.g.* IISD Reporting Services, "Summary of the First Prepcom for the UN Conference on Sustainable Development" (21 May 2010) Winnipeg: IISD, 2010.

101. UNGASS, *Programme for Further Implementation of Agenda 21*, *supra* note 30.

standards,[102] to make increased efforts to ensure that trade can support sustainable development, especially in developing countries. It can be argued that States are justified in forming legitimate expectations about sustainable development in trade negotiations.[103] In this context, it is not credible to maintain that negative social and environmental effects of economic agreements should be simply left to roll downhill onto the weakest Parties. Rather, it can be suggested, States agree in practice that where possible in economic agreements, measures can and should be taken. Absent explicit instructions to the contrary, both developed and developing country Parties to such negotiations should be able to rely on these expectations.

II. International Legal Reasons for Countries to Address Environmental and Social Impacts of Trade and Investment Agreements

There are important international policy and soft law reasons that the impacts of trade and investment liberalisation should not simply be left to "fall where they may" onto the fragile ecosystems and vulnerable populations of developing country trading partners. Are there also international hard law considerations?

States could also be legally bound to address the sustainability impacts of economic liberalisation – not just to prevent harm, but to actually integrate environmental and social development considerations in order to strengthen and enhance the contribution of trade to sustainable development. To determine whether it is the case, an examination of customary and interstitial norms can be carried out. Noting the relevance of *pacta sunct servanda*, it remains to be considered whether international law requires States to integrate significant environmental and social considerations into economic development plans, including into the negotiations of new trade and investment agreements.

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102. See *e.g.* EC, Commission, *Impact Assessment Guidelines* (Brussels: EC, 2005).
103. Phillip Allot, *The Health of Nations: Society and Law beyond the State* (Cambridge: Cambridge University Press, 2002).

A. Sustainable Development as an Interstitial Norm

Beyond soft law policy rationales, are there any legal obligations for States to promote sustainable development through trade and investment? The legal status of State commitments to sustainable development has been debated in academic literature for two decades.[104] Certain States, scholars and NGOs argued that the obligation to develop sustainably is a new customary principle of international law, binding upon all but a few persistently objecting States.[105] However, as Gunter Handl argued in 1990, "[n]ormative uncertainty, coupled with the absence of justiciable standards for review, strongly suggest that there is as yet no international legal obligation that development must be sustainable",[106] and that as such "decisions on what constitutes sustainability rest primarily with individual

104. See updated legal scholarship in Birnie, Boyle & Redgwell, *supra* note 3 at 116-18. See also Philippe Sands, "International Law in the Field of Sustainable Development: Emerging Legal Principles" in Wilfred Lang, ed, *Sustainable Development and International Law* (London: Martinus Nijhoff, 1995); Konrad Ginther, Erik Denters & Paul JIM De Waart, eds, *Sustainable Development and Good Governance* (Boston: Dordrecht Kluwer Academic Publishers, 1995); "Sustainable Development: The Challenge to International Law: Report of a Consultation held at Windsor 27 to 29 April 1993" (1993) 2:4 Review of European, Comparative & International Environmental Law 1; Phillipe Sands, "International Law in the Field of Sustainable Development" (1994) 65:1 British Yearbook of International Law 1 at 303.

105. Hunter, Zaelke and Salzman, *supra* note 3 at 210; Kiss & Shelton, *supra* note 3 at 51; Sands, *Principles of International Environmental Law*, *supra* note 3 at 231; Lang, *ibid*; Atapattu, *supra* note 3; Bugge, *supra* note 24 at 20. But see Boyle & Freestone, *supra* note 11 at 6 and Birnie, Boyle & Redgwell, *ibid* at 116-18, 126-27.

106. See Günther Handl, "Environmental Security and Global Change: The Challenge to International Law" (1990) 1:1 Yearbook of International Environmental Law 3 (rejects the possibility that sustainable development is a peremptory norm of international law); see also Günther Handl, "The Legal Mandate of Multilateral Development Banks as Agents for Change towards Sustainable Development" (1998) 92:4 American Journal of International Law 642.

governments".[107] As Vaughan Lowe notes wryly, "the argument that sustainable development is a norm of customary international law, binding on and directing the conduct of states, and which can be applied by tribunals, is not sustainable".[108] It is not novel to conclude that States have not yet accepted a customary legal obligation to always develop sustainably.[109] Indeed, a search for one agreed customary norm that development must be sustainable might actually steer one in the wrong direction.

As observed by the revered late Judge Weeramantry in his extraordinary Separate Opinion in the *Case Concerning the Gabčikovo-Nagymaros Project (Hungary v Slovakia)*[110] ("*Gabčikovo-Nagymaros* Case"), there is "wide and general acceptance by the global community"[111] of sustainable development. The concept has become legally relevant, informing tribunals and treaties, particularly in its procedural dimensions.[112] As Lowe has further argued, State commitments to sustainable development might engage a certain interstitial normativity, acting "upon other legal

107. Boyle & Freestone, *supra* note 11 at 16.

108. Vaughan Lowe, "Sustainable Development and Unsustainable Arguments" in Alan Boyle & David Freestone, eds, *International Law and Sustainable Development: Past Achievements and Future Challenges* (Oxford: Oxford University Press, 1999) 19 at 30 [Lowe, "Sustainable Development"].

109. See Birnie, Boyle & Redgwell, *supra* note 3 at 125-27 and Marie-Claire Cordonier Segger, "Sustainable Development in International Law" in David Armstrong, ed, *Routledge Handbook of International Law* (New York: Routledge, 2009) 355 at 359-71.

110. Separate Opinion of Vice-President Weeramantry, [1997] ICJ Rep 7 [*Gabčikovo-Nagymaros Case*].

111. *Ibid* at 95.

112. Esther Kentin, "Sustainable Development in International Investment Dispute Settlement: The ICSID and NAFTA Experience" in Nico Schrijver & Friedll Weiss, eds, *International Law and Sustainable Development: Principles and Practice* (Leiden, The Netherlands: Martinus Nijhoff Publishers, 2004) 309; Marie-Claire Cordonier Segger, "Sustainability, Global Justice, and the Law: Contributions of the Hon. Justice Charles Doherty Gonthier" (2010) 55:2 McGill Law Journal 337. See also Marie-Claire Cordonier Segger & Judge CG Weeramantry, eds, *Sustainable Development in International Courts and Tribunals* (New York: Routledge, 2017).

rules and principles – a legal concept exercising a kind of interstitial normativity, pushing and pulling the boundaries of true primary norms when they threaten to overlap or conflict with each other".[113] There is:

> an immense gravitational pull exerted by concepts such as sustainable development, regardless of their standing as rules or principles of *lex lata*. That is plain when they are used by judges as modifiers; but it is also true when they are used in the same way by states as they negotiate (either with other states, or within their own governmental apparatus) on ways of reconciling conflicting principles.[114]

As an interstitial norm which can play a role in importing a "group of congruent norms",[115] the broadly held commitment to promote sustainable development may push or pull States to use and apply certain international practices *and even other emerging customary principles*, to guide the future development and implementation of treaty regimes. From an inter-actional perspective, sustainable development commitments can be argued to be shaping the initial phases of development of new international treaty regimes, including relevant legal principles.[116] Taking this inter-actional account seriously, global commitments to sustainable development can engender further normative consequences for States' economic development planning, including in their negotiations of trade and investment agreements. Such further principles *for* sustainable development may become recognised as customary rules, binding on all

113. Lowe, "Sustainable Development", *supra* note 108 at 31; Vaughan Lowe, "The Politics of Law-Making: Are the Method and Character of Norm Creation Changing?" in Michael Byers, ed, *The Role of Law in International Politics: Essays in International Relations and International Law* (Oxford: Oxford University Press, 2001) 207 at 214-15.
114. Lowe, "Sustainable Development", *ibid* at 35.
115. *Ibid* at 26.
116. Brunnée & Toope, *Legitimacy and Legality in International Law*, *supra* note 83.

States that have not persistently objected.[117] From this perspective, it is important to consider which, of such principles, could be most relevant to economic treaty negotiation and interpretation.

B. Integration as an International Customary Norm of Relevance to Trade and Sustainable Development

The process of crystallising principles of international law related to sustainable development has been complex, and is not yet complete. The most important undertakings emerged from the global debates. In the 1987 Annex on Legal Principles to the Brundtland Report, the WCED called for the international adoption of legal principles to promote sustainable development. The Commission provided a considered legal analysis, commentary and clear normative proposals for a series of 22 legal principles.[118] In Article 7, the experts recommended recognition of the principle that the conservation of natural resources and the environment shall be treated as an integral part of the planning and implementation of development activities.[119] The 1992 *Rio Declaration* echoed many of the Principles recommended by the Brundtland Report, and was followed by the Report of the Expert Group Meeting on Identification of Principles of International Law for Sustainable Development, commissioned by the United Nations Division for Sustainable Development in accordance with a request of States at the UCSD Second Session in 1994.[120] This Report identified 19 principles and concepts of international law for

117. Cordonier Segger & Khalfan, *supra* note 12 at 47-50 (wide-spread adoption of such principles in the 1992 Rio Treaties, might even support a contention that certain principles are already gaining this level of recognition. The practical implications of such recognitions, given that the nearly universal membership of these treaties, might be minimal. But it does not discount the value of examining these principles themselves, particularly if they could also be relevant to trade law and policy).
118. WCED, *Our Common Future*, *supra* note 27 at 65.
119. *Ibid*.
120. Commission on Sustainable Development, *Report of the Expert Group Meeting on Identification of Principles of International Law for Sustainable Development*, UNCSD, 4th Sess (1996) online: <www.un.org/documents/ecosoc/cn17/1996/background/ecn171996-bp3.htm>).

sustainable development in the context of international legal instruments of that time, though it was not exhaustive. In 1997, in light of the recommendations of the Report, States noted in the Programme for Further Implementation of Agenda 21[121] that: "[w]hile some progress has been made in implementing United Nations Conference on Environment and Development commitments through a variety of international legal instruments, much remains to be done to embody the Rio principles more firmly in law and practice".[122]

Building on these processes, in 2002 at its 70th Conference in New Delhi,[123] the International Law Association's Committee on the Legal Aspects of Sustainable Development released a *Declaration of Principles of International Law Relating to Sustainable Development*[124] ("*New Delhi Declaration*"). As noted in the *Declaration*, it was found that "sustainable development is now widely accepted as a global objective and that the concept has been amply recognised in various international and national legal instruments, including treaty law and jurisprudence at international and national levels …"[125] and that seven principles of international

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121. UNGASS, *Programme for Further Implementation*, *supra* note 30.
122. *Ibid* at para 14 (the General Assembly also noted that "[p]rogress has been made in incorporating the principles contained in the Rio Declaration on Environment and Development – including the principle of common but differentiated responsibilities, which embodies the important concept of and basis for international partnership; the precautionary principle; the polluter pays principle; and the environmental impact assessment principle – in a variety of international and national legal instruments", *ibid*).
123. (2-6 April 2002), New Delhi, India.
124. International Law Association, "Declaration of Principles of International Law Relating to Sustainable Development" in International Environmental Agreements: Politics, Law and Economics 2 (Netherlands: Kluwer Academic Publishers, 2002) [*New Delhi Declaration*]; International Law Association, *Report of the Sixty-Second Conference* (Seoul: International Law Association, 1987) 1-11, 409-87; Nico Schrijver & Friedll Weiss, "Editorial Introduction" (2002) 2 *International Environmental Agreements* 105.
125. *New Delhi Declaration*, *ibid* at 211.

law on sustainable development could be outlined.[126] Analysis of each principle in the *New Delhi Declaration*, documenting both relevance and doubts as to international legal status, is available elsewhere.[127] However, among these seven principles identified in the *New Delhi Declaration* reappeared a duty to integrate environmental and social considerations into economic decision-making.[128] This built on Principle 4 of the *Rio Declaration,* which stated that: "[i]n order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it".[129]

If one customary international rule *named* a "sustainable development principle" were to be recognised, given its first six words Principle 4 of the *Rio Declaration* seems a likely candidate. However, as found in the *New Delhi Declaration*, this norm could also simply called the "integration principle". The *New Delhi Declaration* emphasises recent developments in soft law, such as the need to recognise the social and human rights pillar of sustainable development, essentially advocating an integration principle which requires States to take social and human rights, as well

126. *Ibid* at 213-16.

127. *Ibid* at 1-152, 699-706; Duncan French, "Treaty Interpretation and the Incorporation of Extraneous Legal Rules" (2006) 55:2 International and Comparative Law Quarterly 281; see also Cordonier Segger & Khalfan, *supra* note 12 at 95-191; Marie-Claire Cordonier Segger, "International Law on Sustainable Development" in Hans Christian Bugge & Christina Voigt, eds, *Sustainable Development in International and National Law* (Groningen: Europa Law Publishing, 2009) 87; Marie-Claire Cordonier Segger, "Sustainable Development in International Law" in David Armstrong, ed, *Routledge Handbook of International Law* (London: Routledge, 2009). See also publications on <www.cisdl.org> for notes on how each principle has been reflected in international treaty law on sustainable development over several decades.

128. *Ibid*.

129. *Rio Declaration*, *supra* note 28, Principle 4.

as environmental protection, into account in the development process.[130] Such an integration principle could be considered an emerging customary norm.

As noted in the 1903 *Gentini Case (Italy v Venezuela)*,[131] a principle "expresses a general truth, which guides our action, serves as a theoretical basis for the various acts of our life, and the application of which to reality produces a given consequence".[132] As argued by Professor Martii Koskenniemi more recently, when "States enter an agreement, or when some behaviour is understood to turn from habit into custom, the assumption is that something that was loose and disputed crystallises into something that is fixed and no longer negotiable".[133] Customary principles, if recognised, can establish obligations for all States except those which have persistently objected to a practice and its legal consequences.[134]

According to Article 38(1)(b) of the *SICJ*: "[t]he Court, whose

130. *Ibid* at 102-09. See *Convention on Biological Diversity*, 5 June 1992, 1760 UNTS 79 art 6 (entered into force 29 December 1993); *Cartagena Protocol on Biosafety to the Convention on Biological Diversity*, 29 January 2000, 2226 UNTS 208 preamble and art 2.4-2.5 (entered into force 11 September 2003); *International Treaty on Plant Genetic Resources for Food and Agriculture*, 3 November 2001, 33 ILM 81 preamble and art 5.1 (entered into force 29 June 2004) [*FAO Seed Treaty*]. See also *North American Free Trade Agreement*, 17 December 1992, Can TS 1994 No 2 arts 103-104.1, 1114, 2101 (entered into force 1 January 1994). See also Sebastien Jodoin, *The Principle of Integration and Interrelationship in International Sustainable Development Law*, in A Usha, ed, *Environmental Law: Principles and Governance* (Hyderabad, India: ICFAI University Press, 2008) at 83-121.

131. (1903), 10 RIAA 551 (Mixed Claims Commission).

132. *Ibid* at 556 as cited in Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Cambridge: Cambridge University Press, 2006) at 24 and in Sands, *Principles of International Environmental Law*, *supra* note 3 at 233.

133. Martti Koskenniemi, "What is International Law For?" in Malcolm Evans, ed, *International Law*, 4d (Oxford: Oxford University Press, 2014) at 69.

134. Malcolm Shaw, *International Law*, 6d (Cambridge: Cambridge University Press, 2008) at 68-88.

function is to decide in accordance with international law such disputes as are submitted to it, shall apply ... international custom, as evidence of a general practice accepted as law".[135] These rules of international custom can be derived from the consistent conduct of States acting in the belief that international law requires them to so act, and jurists, to prove an international customary principle, must show State practice by demonstrating the widespread repetition by States of similar international acts over time.[136] Such acts must be taken by a significant number of States, and not be rejected by too many others with an interest in the matter.[137] The International Court of Justice ("ICJ") has stated that "it might be that, even without the passage of any considerable period of time, a very widespread and representative participation in the convention might suffice of itself, provided it included that of States whose interest were specifically affected".[138] The bar to rapidly transform a broadly practiced principle into one accepted as customary law, as set by the ICJ in the *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands)*[139] ("*North Sea Continental Shelf Cases*"), is relatively high:

> an indispensable requirement would be that within the period in question, short though it might be, State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in

135. *SICJ*, *supra* note 33, art 38(1)(b); *Charter of the United Nations*, 26 June 1945, Can TS 1945 No 7 (entered into force 24 October 1945); see also Shaw, *supra* note 134.

136. Hugh Thirlway, *The Sources of International Law* in Malcolm Evans, ed, *International Law*, 4d (Oxford: Oxford University Press, 2014) 95 at 121-27.

137. Anthony D'Amato, *The Concept of Custom in International Law* (Ithaca: Cornell University Press, 1971); Michael Akehurst, "Custom as a Source of International Law" (1976) 47:1 British Yearbook of International Law 1 at 1-53; Maurice Mendelson, "The Formation of Customary International Law" (1999) 272 Recueil des Cours de l'Académie de Droit International 9 at 155.

138. *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands)* (Judgement) [1969] ICJ Rep 3 at para 73 [*North Sea Continental Shelf Cases*].

139. *Ibid.*

> the sense of the provision invoked; — and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved.[140]

The ICJ has also found that it is sufficient that the conduct of States should, in general, be consistent with a customary principle, and that instances of inconsistent conduct have been generally treated as breaches of the rule rather than indications of a new rule having emerged.[141] If a norm has been accepted as a principle of customary international law, the international acts that follow the rule should occur out of sense of legal obligation. As noted by the ICJ, in the *North Sea Continental Shelf Cases*, "[t]he need for such a belief, i.e. the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitates*".[142] Further, if a norm that is enshrined in a treaty is still followed in the practices of non-Parties, it can, provided that there is *opinio juris*, lead to the evolution of a customary rule which will be applicable between states that are not Party to the treaty and between Parties and non-Parties, even before the treaty has entered into force.[143] However, as was demonstrated in the *Fisheries Case (United Kingdom v Norway)*[144] at the ICJ, a State can avoid being bound by a customary rule if it persistently objects to that rule.[145]

Before a discussion of general State practice and *opinio juris*, a further potential "precondition" should also be addressed. To prove the existence of a norm of customary law, there is a need to show that State practice and *opinio juris* has been extensive and virtually uniform *in the sense of the provision invoked.* This element relates to the requirement that a principle have the "fundamentally norm-creating character such as could be regarded as forming the basis of a general rule".[146] Several

140. *Ibid* at para 74.
141. *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Judgement) General List No 70, [1986] ICJ Rep 14 at para 186.
142. Shaw, *supra* note 134 at 44.
143. Hugh Thirlway, "The Law and Procedure of the International Court of Justice" (1990) 60:1 British Yearbook of International Law 4 at 87.
144. [1951] ICJ Rep 116 [*Fisheries Case*].
145. *Ibid* at 138-39.
146. *North Sea Continental Shelf Cases, supra* note 138 at para 63.

legal scholars have been critical of whether such a precondition is needed at all in the context of treaties and custom.[147] However as others such as Hans Kelsen have noted, an international legal norm, whether derived from an international treaty or international customary law, should be understood in reference to its function.[148] In international law, as Kelsen explains, most norms have one of four functions. Either they impose an obligation on States to do something, as a command (prescriptive norms); or they impose an obligation on States not to do something, as a prohibition (prohibitive norms).[149] They can also grant a right to a State not to do something, as an exemption (exempting norms), or grant a right to a state to do something, as a form of permission (permissive norms).[150]

Indeed, if "integration" were proposed as a principle of customary law, there would need to be some clarity as to what the commitment actually prescribes, prohibits, exempts or permits States to do. Like a prohibition against armed attack, or a permission of each State to control an exclusive economic zone 200 miles from their coast, a commitment to integrate would normatively require or permit States to take (or not take) certain actions. A customary principle should be specific – or at least normative enough to form the basis of a claim against a State.[151]

Could a requirement to "integrate social and environmental considerations into economic decision-making" be emerging as a customary rule? Certain guidance can be found in the decision of the ICJ

147. See Richard Baxter, "Treaties and Custom" (1970) 129 Recueil des Cours 44 (Professor Baxter argues that the notion of norm-creating rules was redundant: "if a rule does pass into international law, it is norm-creating…" at 62). See also Mark Villiger, *Customary International Law and Treaties* (Leiden: Martinus Nijhoff, 1985) at 190-202. But see Robert Jennings, "What is International Law and How Do We Tell It When We See It?" (1981) 37 Schweizerisches Jahrbuch für Internationales Recht 59 at 59-88.

148. Hans Kelsen, *Theorie Generale des Normes* (Paris: Presses Universitaires de France, 1996) at 1.

149. *Ibid*.

150. *Ibid*.

151. Lowe, "Sustainable Development", *supra* note 108.

in the *Gabčikovo-Nagymaros* case. In that case, faced with the question as to whether one Party could compel another to continue building a dam in accordance with a treaty, in spite of concerns about the impacts of the project, the majority stated that:

> throughout the ages, mankind has, for economic and other reasons, constantly interfered with nature. In the past, this was often done without consideration of the effects upon the environment. Owing to new scientific insights and to a growing awareness of the risks for mankind – for present and future generations – of pursuit of such interventions at an unconsidered and unabated pace, new norms and standards have been developed, set forth in a great number of instruments during the last two decades. Such new norms have to be taken into consideration, and such new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past. This *need to reconcile economic development with protection of the environment* is aptly expressed in the concept of sustainable development. For the purposes of the present case, this means that *the Parties together should look afresh at the effects on the environment* of the operation of the Gabcíkovo power plant. In particular they *must find a satisfactory solution* for the volume of water to be released into the old bed of the Danube and into the side-arms on both sides of the river.[152]

Perhaps only procedural requirements were imposed on the Parties, where they are required to "look afresh" at the effects.[153] Indeed, it has been argued that the word "concept" was carefully chosen by the majority to defer recognition of custom.[154] However, it can also be proposed that the Court ordered the Parties to integrate environmental protection into their development project by requiring them, after their assessment, to also "find a satisfactory solution". From this view, the Court applied a nascent *principle of integration,* a requirement to reconcile economic development with the protection of the environment, *in order to achieve an objective of sustainable development*.

Review of the 2005 award of the Arbitral Tribunal in the *Arbitration Regarding the Iron Rhine (Ijzeren Rijn) Railway (Kingdom of Belgium v*

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152. *Gabčikovo-Nagymaros Case*, *supra* note 110 at paras 140-41 [emphasis added].
153. Philippe Sands, "International Courts and the Concept of Sustainable Development" (1999) 3 United Nations Year Book 390 at 391-94.
154. Lowe, "Sustainable Development", *supra* note 108.

Kingdom of the Netherlands)[155] ("*Iron Rhine*") struck under the auspices of the Permanent Court of Arbitration lends support to this view. The Tribunal found that there is "considerable debate as to what … constitutes "rules" or "principles"; what is "soft law"; and which environmental treaty law or principles have contributed to the development of customary international law".[156] It further states that: "… [t]he emerging principles, whatever their current status, make reference to conservation, management, notions of prevention and of sustainable development, and protection for future generations...".[157] As the Tribunal then explains:

> [t]oday, both international and EC law require *the integration of appropriate environmental measures in the design and implementation of economic development activities*. Principle 4 of the Rio Declaration on Environment and Development, adopted in 1992 which reflects this trend, provides that '*environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it*.' Importantly, *these emerging principles now integrate environmental protection into the development process*. Environmental law and the law on development stand not as alternatives but as mutually reinforcing, integral concepts, which require that where development may cause significant harm to the environment there is a duty to prevent, *or at least mitigate*, such harm …. This duty, in the opinion of the Tribunal, has now become a principle of general international law.[158]

It may be that the Court only meant that the "duty to prevent ... such harm" is an accepted principle. But it can be equally argued that an emerging principle to *integrate environmental protection into the development process* was further recognised by the Court. As explained: "[t]his principle applies not only in autonomous activities but also in activities undertaken in implementation of specific treaties between the Parties".[159] And as further noted: "[t]he reactivation of the Iron Rhine railway cannot be viewed in isolation from the environmental protection measures necessitated by the intended use of the railway line. These measures *are to be fully integrated* into the project and its costs".[160]

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155. *Iron Rhine*, *supra* note 9.
156. *Ibid* at paras 58-59.
157. *Ibid*.
158. *Ibid* at para 59 [emphasis added].
159. *Ibid*.
160. *Ibid* at para 223 [emphasis added].

This suggests that the "duty to integrate appropriate environmental measures in the design and implementation of economic development activities", as recognised by the Tribunal, could be recognised as a principle of customary law. Such a duty is normative. It is both corollary *and an extension* of the established duty that "where development may cause significant harm to the environment, there is a duty to prevent, or at least mitigate, such harm".[161] This customary principle of integration, as highlighted in the 1972 *Stockholm Declaration* at Principles 12 and 13, analysed in the 1987 Brundtland Report's Legal Experts Group Recommendations at Article 7 on planning and implementation of development activities,[162] and further recognised in Principle 4 of the *Rio Declaration*, can be characterised as *lex ferenda*, an emerging customary norm.

For economic treaties, the principle is relevant to cases where the economic development activities involve measures to stimulate increases in trade and investment flows, particularly State initiatives undertaken in implementation of specific trade and investment treaties. While the international application of a customary principle may suggest that the rule is only relevant in a transboundary context, it is becoming rapidly recognised that ecological systems themselves are globally and regionally inter-related in complex ways that science and technology have only begun to discover.[163] Many environmental challenges have transboundary scope, from biodiversity and migratory species at risk, to transboundary watercourses, to oceans, to climate change and the global atmosphere.

The integration principle also has limits: "constituting an integral part" is not the same as "becoming a trump card". Indeed, another ICJ case suggests outer boundaries for application of the emerging norm, also linked directly to sustainable development. Positive claims based on a State's "sovereign right to implement sustainable economic development

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161. Birnie, Boyle & Redgwell, *supra* note 3 at 137-52; Sands, *Principles of International Environmental Law*, *supra* note 3 at 241-46, 117.
162. *Stockholm Declaration*, *supra* note 34 at 12-13; WCED, *Our Common Future*, *supra* note 27 at 65.
163. Pushpam Kumar, ed, *The Economics of Ecosystems and Biodiversity: Ecological and Economic Foundations* (London: Routledge, 2012).

projects"[164] were used by States in the 2006 *Case concerning Pulp Mills on the River Uruguay (Argentina v Uruguay)*.[165] The ICJ notes that in pleadings on Provisional Measures in this case, Uruguay maintained that "the provisional measures sought by Argentina would ... therefore irreparably prejudice Uruguay's sovereign right to implement sustainable economic development projects in its own territory".[166] Concern for this right appears in the ICJ's reasoning in its initial Order with Regards to Provisional Measures, where the Court found that:

> the present case highlights the importance of *the need to ensure environmental protection of shared natural resources while allowing for sustainable economic development* … it is in particular necessary to bear in mind the reliance of the Parties on the quality of the water of the River Uruguay for their livelihood and economic development … from this point of view account must be taken of the need to safeguard *the continued conservation of the river environment and the rights of economic development* of the riparian States;[167]

In the ICJ's final Judgement for this case, this perspective is reinforced:

> … regarding Article 27, it is the view of the Court that its formulation reflects not only the need to reconcile the varied interests of riparian States in a transboundary context and in particular in the use of a shared natural resource, but also *the need to strike a balance between the use of the waters and the protection of the river consistent with the objective of sustainable development* … The Court wishes to add that such utilization could not be considered to be equitable and reasonable if the interests of the other riparian State in the shared resource and the environmental protection of the latter were not taken into account. Consequently, it is the opinion of the Court that Article 27 embodies this *interconnectedness between equitable and reasonable utilization of a shared resource and the balance between economic development and environmental protection that is the essence of sustainable development*.[168]

Principle 21 of the 1972 *Stockholm Declaration*, which was re-affirmed in Principle 2 of the *Rio Declaration*, recognises that:

> States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources

164. *Case concerning Pulp Mills on the River Uruguay (Argentina v Uruguay)*, Order of 13 July 2006, [2006] ICJ Rep 113 at para 48.
165. *Ibid* and *Case concerning Pulp Mills on the River Uruguay (Argentina v Uruguay)*, Judgement, [2010] ICJ Rep 14.
166. *Ibid.*
167. *Ibid* at para 80 [emphasis added].
168. *Ibid* at para 177 [emphasis added].

> pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.[169]

As noted by Schrijver and others, this principle of sovereignty over natural resources is well recognised in international law.[170] Indeed, a right to sustainable use of natural resources, held by indigenous peoples against their own countries, and by States against other States, appears to be gaining further recognition in, for instance, recent decisions of regional human rights tribunals.[171] This right to sustainable development, based on the principle of sovereignty and the duty to prevent activities within their control from causing damage outside their jurisdiction, provides the outer boundaries of the integration principle. It also obliquely addresses the social development dimension of sustainable development, as emphasized in the 2002 *JPOI*, if overlaps or conflicts occur.[172]

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169. *Stockholm Declaration*, *supra* note 34, Principle 21.
170. *Permanent Sovereignty over Natural Resources*, GA Res 3016 (XXVII), UNGAOR, 27th Sess, UN Doc A/Res/3016 (1972) 1. See Nico Schrijver, *Sovereignty over Natural Resources: Balancing Rights and Duties* (Cambridge: Cambridge University Press, 1997). See also *Case Concerning East Timor (Portugal v Australia)*, Judgment, Dissenting Opinion of Judge Weeramantry, [1995] ICJ Rep 90 at 197-200; *Case Concerning the Fisheries Jurisdiction (United Kingdom of Great Britain and Northern Ireland v Iceland)*, Merits, Dissenting Opinion of Judge Petren, [1974] ICJ Rep 3 at 161; *Case Concerning the Barcelona Traction, Light and Power Company, Limited – New Application: 1962 (Belgium v Spain)*, Second Phase, Separate Opinion of Judge Jessup, [1970] ICJ Rep 3 at 165-67.
171. See *Case of the Sawhoyamaxa Community (Paraguay)* (2006), Inter-Am Ct HR (Ser C) at paras 137-41; Rights *Case of the Saramaka Peoples (Suriname)* (2007), Inter-Am Ct HR (Ser C) at paras 93-95, 122, 129-32; *Case of the Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria*, [2002] 155/96 as published in (2002) 96 American Journal of International Law 937.
172. Joost Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (Cambridge: Cambridge University Press, 2003) at 137-43. But see Nancy Kontou, *The Termination and Revision of Treaties in the Light of New Customary Law* (Oxford: Oxford University Press, 1994) at 145-47.

An emerging customary "integration" principle does not provide a panacea for the process of treaty-making.[173] States can deliberately elect to deviate from customary norms in their treaties, in accordance with the maxim *pacta sunct servanda*, in all but a few instances.[174] It also remains disputed, in international law, whether the emergence of a new customary rule would lead to the revision of an earlier treaty which contradicts the norm.[175] But under the *VCLT*, a customary norm of integration does become directly relevant for the *interpretation* of trade and investment treaties by tribunals. Or, as is more common in this field, it can become relevant for interpretation of an economic agreement by a sustainable development regulator seeking to understand the limits of their discretion. As noted in Article 31(3)(c) of the *VCLT*, a treaty shall be interpreted in good faith, in accordance with the ordinary meaning to be given to its terms in their context, and in the light of its object and purpose, and there shall be taken into account, together with the context, "any relevant rules

173. Birnie, Boyle & Redgwell, *supra* note 3 at 118; *Agenda 21*, *supra* note 44, ch 39; French, *supra* note 127.

174. For instance, a treaty that deviates from *jus cogens* preremptory norms is invalid. See Hugh Thirlway, *The Structure of International Legal Obligation*, in Malcolm Evans, ed, *International Law*, 4d (Oxford: Oxford University Press, 2014) 117 at 137-38; Tim Hillier, *Sourcebook on Public International Law* (London: Cavendish Publishing, 1998) at 74. See also *Fisheries Case*, *supra* note 143.

175. Hillier, *ibid*, "[c]ustomary law and treaty have equal authority. However if there is a conflict between the two it is the treaty that prevails" at 65. See also *Wimbledon Case* (1923), PCIJ (Ser A) No 1.

of international law applicable in the relations between the Parties".[176] While the integration rule may not trump a clear obligation to ignore all environmental and social consequences, such a provision might be hard to secure presently, given the inter-actional dynamics and consensus policy context discussed above. In its absence, the regulator or treaty interpreter could appeal to the integration principle in order to interpret obligations that might, if understood in particular sense, risk causing or exacerbating trade and investment-led social and environmental damage.

III. International Trade and Investment Agreements in Light of the Integration Principle

As highlighted by the Tribunal in the *Iron Rhine* award, Principle 4 of the 1992 *Rio Declaration* provides that "environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it".[177] Just as States negotiate to secure access to foreign markets through a trade accord, States may also be seeking to negotiate to ensure economic agreements do not led to negative environmental and social consequences. This article concludes with a brief discussion of how the principle might assist in guiding the negotiation and

176. *VCLT*, *supra* note 1, art 31(3)(c); See Pauwelyn, *supra* note 172 at 241; Jacques-Michel Grossen, *Les Presomptions en Droit International Public* (Neuchatel & Paris: Delachaux & Niestle, 1954) at 114-17 (where it is argued that customary norms are included among relevant rules of international law applicable in the relations between the Parties). See also Ian Sinclair, *The Vienna Convention on the Law of Treaties* (Manchester: Manchester University Press, 1984) at 119 (who suggests art 32(3)(c) may be taken to include not only the general rules of international law but also treaty obligations existing for the Parties, as followed in *Al-Adsani v United Kingdom*, No 35763/97, [2001] XI ECHR 761 [*Al-Adsani*]). And see Philippe Sands, "Treaty, Custom and Cross-fertilization of International Law" (1998) 1:1 Yale Human Rights and Development Law Journal 85 at 102-03 (who notes that while these norms are relevant, the treaty being interpreted retains a primary role and "there can be no question of the customary norm displacing the treaty norm, either partly or wholly" at 103).

177. *Rio Declaration*, *supra* note 28.

later interpretation of the provisions of trade and investment agreements, for the consideration of those developing new economic accords which make explicit commitments to sustainable development.

A. Addressing Sustainable Development Tensions in Trade and Investment Agreements through Integration

First, if sustainable development, as a policy objective, is explicitly recognised as part of the "object and purpose" of a trade agreement, might this recognition assist in treaty implementation? In international law, the object and purpose is important for interpretation. Article 31 of the *VCLT,* as a general rule of interpretation, provides at Article 31(1) that "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". And at Article 31(2), the *Convention* further states that: "[t]he context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes …".[178] In essence, the ordinary meaning of the terms of a treaty, in their context and taking into account the treaty's stated *object and purpose*, are taken together to guide a lawyer in understanding the

178. *VCLT*, *supra* note 1, art 2 (note also the relevance of "… (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty … (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; …. A special meaning shall be given to a term if it is established that the parties so intended". Also, art 32 permits recourse to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion. These reflect pre-existing customary international law, applying to treaties concluded before the *VCLT* and also to non-Parties: *Case Concerning the Territorial Dispute (Libyan Arab Jamahiriya v Chad)*, [1994] ICJ Rep 6; *Kasikili/Sedudu Island (Botswana/Namibia)*, [1999] ICJ Rep 1045; *Case Concerning Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia v Malaysia)*, [2002] ICJ Rep 625 at paras 37-38).

intentions of the Parties, as the prevailing elements for interpretation.[179] As explained by Professor Richard Gardiner, the "object and purpose function as a means of shedding light on the ordinary meaning" of a treaty.[180]

This solution is not quite so simple, however. The precise nature and role of the "object and purpose" of a treaty remains something of an enigma in the law of treaties.[181] The combining of "object" and "purpose" in the *VCLT* has been ascribed in part to an ILC members' suggestion in relation to the draft Article on *pacta sunt servanda*, that "the English word 'objects' be better rendered in French by the expression 'l'objet et la fin'... for the object of an obligation was one thing and its purpose was another".[182] In French public law, as Buffard and Zemanek explain, a distinction has developed between "l'objet" of a legal instrument, which refers to the means chosen by the Parties to create a set of rights and obligations, and "le but" which refers to the reason(s) for establishing "l'objet" of the accord.[183] The term "object" indicates thus the substantial content of the norm, the provisions, rights and obligations created by the norm. The object of a treaty is the instrument for the achievement of the treaty's purpose, and this purpose is, in turn, the general goal or result which the [P]arties want to achieve by the treaty".[184] As Gardiner notes, while the Preamble provides guidance to discern the object and purpose

179. Paul Reuter, *Introduction to the Law of Treaties* (London: Kegan Paul International, 1995); Ravi Aryal, *Interpretation of Treaties: Law and Practice* (New Delhi: Deep & Deep, 2003).

180. Richard Gardiner, *Treaty Interpretation* (Oxford: Oxford University Press, 2008) at 190.

181. Isabelle Buffard & Karl Zemanek, "The Object and Purpose of a Treaty: An Enigma?" (1998) 3 Austrian Review of International and European Law 311; Anthony Aust, *Modern Treaty Law and Practice* (Cambridge: Cambridge University Press, 2000).

182. "Summary Records of the Sixteenth Session" (UN Doc A/CN 4/SER A/1964) in *Yearbook of the International Law Commission*, vol 1 (New York: UN, 1965) at 26 (UNDOC. A/CN4/SER.A/1965); Gardiner, *supra* note 180 at 191. See also *Reservations to the Genocide Convention Case*, [1951] ICJ Rep 15 at 23, which actually uses "l"objet et le but".

183. Buffard & Zemanek, *supra* note 181 at 325-28, Gardiner, *ibid* at 192.

184. Buffard & Zemanek, *ibid* at 326.

of a treaty, the whole treaty text and associated matter listed in Article 31(2) should be taken into account as well. An object and purpose can also be discerned by comparing a treaty to others of its type, as the ICJ did in the Oil Platforms case by comparing the provisions of the 1955 *Treaty of Amity, Economic Relations and Consular Rights between the United States of America and Iran*,[185] with others of treaties of friendship.[186] This said, as the Appellate Body of the WTO has clarified, "most treaties have no single, undiluted object and purpose but rather a variety of different, and possibly conflicting, objects and purposes ... This is certainly true of the WTO Agreement".[187] Of importance for the instant discussion, the object and purpose of the treaty can be discerned, they are legally relevant for interpretation, and there may be more than one.

The object and purpose of a treaty is raised multiple times in the *VCLT*, serving, for instance, as a means to determine the incompatibility of a reservation at Article 19(c), as a possible characteristic of a multilateral treaty to which reservations require the consent of all Parties at Article 20(2), as a way to characterise the material breach of a treaty at Article 60(3)(b), and as part of general guidance for interpretation at Article 31(1).[188] This last point is especially important, as it guides the implementation of the agreements, arguably including the further evolution of the treaty regimes themselves.[189]

Taking the guidance of Gardiner, Buffet and Zemanek into account, it can be noted that sustainable development is reflected as a "purpose" for over thirty treaties which explicitly commit to achieve it across a range of very diverse sectors and ways – particularly those highlighted by States as delivery mechanisms for the 2002 *JPOI*, and the 2015 SDGs.[190] As just

185. 15 August 1955, 284 UNTS 93 (entered into force 16 June 1957).
186. *Oil Platforms (Iran v USA)*, [1996] ICJ Rep 803 at para 27.
187. *WTO Agreement*, *supra* note 4 at 17.
188. Buffard & Zemanek, *supra* note 181 at 320.
189. *Ibid* at 333; Gardiner, *supra* note 180 at 190-200.
190. Cordonier Segger & Khalfan, *supra* note 12 at 45-50 lists the treaties explicitly highlighted as international law in the field of sustainable development in the 2002 WSSD *JPOI*, including those which contain key provisions on sustainable development in addition to other environment, economic or social purposes.

one example, in the *FAO Seed Treaty,* the Parties establish a Multilateral System for Access and Benefit-Sharing that is meant to provide an efficient, effective and transparent framework to facilitate access to plant genetic resources for food and agriculture, and to share the benefits in a fair and equitable way.[191] In Objectives at Article 1.1, States agree that the "objectives of this Treaty are the conservation and *sustainable use of plant genetic resources for food and agriculture* and the fair and equitable sharing of the benefits arising out of their use, in harmony with the Convention on Biological Diversity, *for sustainable agriculture and food security*".[192] Sustainable use of plant genetic resources for food and agriculture is an "object" of this international treaty, and overall sustainable agriculture is set as one of two ultimate purposes.[193] Further, the Parties include provisions in Article 6 to define what is meant by sustainable use, committing to develop and maintain legal measures in this respect. At Article 6.1, the Contracting Parties accept a duty to "develop and maintain appropriate policy and legal measures that promote the sustainable use of plant genetic resources for food and agriculture".[194] In Article 6.2, the Parties offer specific guidance what constitute these measures, for their treaty regime.[195] Through careful debate in the treaty negotiations,[196] further clarifications through the regime's multi-lateral Conferences of the

191. *FAO Seed Treaty*, *supra* note 130. The Multilateral System applies to over 64 major crops and forages. Resources may be obtained from the Multilateral System for utilization and conservation in research, breeding and training. When a commercial product is developed using these resources, equitable contributions are made to the System. The Governing Body sets out conditions for access and benefit-sharing in a "Material Transfer Agreement".
192. *FAO Seed Treaty*, *ibid*, art 6 [emphasis added].
193. Muriel Lightbourne, "The FAO Multilateral System for Plant Genetic Resources for Food and Agriculture: Better than Bilateralism?" (2009) 30 Washington University Journal of Law and Policy 465 at 507.
194. *FAO Seed Treaty*, *supra* note 130, art 6.
195. *Ibid.*
196. Stewart Coupe & Robert Lewins, *Negotiating the Seed Treaty* (Warwickshire: Practical Action Publishing, 2007).

Parties,[197] guided by scholarly legal analysis, the regime has clarified their commitment to sustainable development.[198] In this specific treaty sector, the Parties pinpointed the meaning of sustainable use of plant genetic resources for food and agriculture, and operationalised their commitment in the treaty by agreeing on a set of legal measures for implementation. Although sustainable development may be recognised in Preambles as part of the purpose of many trade and investment agreements,[199] such legal clarity has only begun to be sought in the context of economic treaty law.[200]

B. Interpreting Sustainable Development Provisions in Economic Accords

While a joint intention of the Parties to promote sustainable development may be found in a trade or investment treaty Preamble, and may be considered part of the "object and purpose" of the accord in question, this recognition has limits. As Gardiner explains, according to the *VCLT*, though such recognition can shed light on the meaning of a provision within the context of the treaty itself, a broader or different "object and purpose" does not provide a valid means of challenging a clear operational term.[201] Essentially, if a regulator from the EU or another Party sought to demonstrate that a clear obligation in a trade accord should be interpreted to accommodate the tensions identified above, in order to integrate environmental and social considerations, reference to a Preambular

197. Report of the Third Session of the Governing Body of the International Treaty on Plant Genetic Resources for Food and Agriculture (Tunis, Tunisia, 1-5 June 2009) IT/GB-3/09/Report, online: Food and Agriculture Organization of the United Nations <www.fao.org/3/a-be138e.pdf>.
198. Lightbourne, *supra* note 193.
199. Gehring & Cordonier Segger, *supra* note 4; Schrijver & Weiss, *supra* note 112; Boyle & Freestone, *supra* note 11.
200. Birnie, Boyle & Redgwell, *supra* note 3 at 123-27; Sampson, *supra* note 4 at 78-109.
201. See Gardiner, *supra* note 180 at 74.

commitment alone may not provide the strongest guidance.[202]

The *VCLT*, as noted earlier, enshrines customary rules of treaty interpretation. Article 30 governs the application of successive treaties relating to the same subject-matter, and may assist in the interpretation of treaty obligations which appear to differ, from sustainability commitments that are enshrined in other accords.[203] Indeed, the tensions noted above do invoke certain types of conflicts among treaties. For instance, there may be a conflict where trade liberalisation obligations could constrain effective implementation of other treaty obligations which govern the same subject matter related to sustainable development.

However, in international law, there is a generally accepted presumption against conflicts. As Pauwelyn explains, in theory every new treaty norm is created within the context of pre-existing international law, and the presumption is that this new norm builds upon the existing laws.[204] Not only would an explicit conflict of norms need to be found in treaty text and proven by the claimant to limit an environmental or social measure, but if faced with two possible interpretations, one of which harmonises the meaning of the norms in question, the treaty will be "interpreted as producing and as intended to produce effects in

202. See also, *ibid*; *Case Concerning the Arbitral Award of 31 July 1989 (Guinea-Bissau v Senegal)*, [1991] 1CJ Rep 53 at 67-72; *Land, Island and Maritime Frontier Dispute (El Salvador v Honduras)*, [1992] ICJ Rep 351 at paras 375-76, the ICJ was unwilling to expand its jurisdiction beyond the very specific limits set out in the arbitration agreements, even to accommodate the express object and purpose of the accord it had identified; for cases where the WTO Appellate Body simply interpreted treaty provisions in the context of object and purpose; *US-Shrimp*, *supra* note 6 at 12-17; *EC-Measures Concerning Meat and Meat Products (Hormones*) (1998), WTO Doc WT/DS26/AB/R at 70; *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products (Complaint by Argentina)* (2002), WTO Doc WT/DS207/AB/R at 196-97 (Appellate Body Report); and *EC-Measures Affecting the Approval and Marketing of Biotech Products* (2006), WTO Doc WT/DS291/R at 4.162.

203. *VCLT*, *supra* note 1, art 30; see also Pauwelyn, *supra* note 172 at 361-85.

204. See Pauwelyn, *ibid* at 241; Grossen, *supra* note 176.

accordance with existing law and not in violation of it".[205]

For a trade tribunal, or as is more likely in this field, for a regulator charged with interpreting a new trade obligation and how it will apply to efforts to secure more sustainable development in their sector of economic law and policy, it is therefore important under *VCLT* Article 31 to look first to other provisions in the trade treaty in question, to see if there is further guidance provided in their ordinary meaning, in the context of the treaty, in light of its object and purpose, that can assist in interpreting the scope and application of problematic obligations. If little guidance appears in the text itself, an analysis might also be conducted under the *lex posteriori* and other rules of the *VCLT* at Article 30. But before applying formal rules, a careful analysis of the other provisions of the economic treaty in question is important, particularly as Parties may have included other provisions that are part of the treaty context and specifically address the issue being raised, or have made explicit references to further *lex specialis,* such as environmental or human rights treaties which govern the same subject matter.[206] A careful search by the regulator may reveal textual solutions (or relevant ambiguities) in the trade or investment treaty itself. Certain types of provisions that could be present, particularly given Parties' tendency to innovate in regional or bilateral trade and investment agreements, may be used to address a concern, avoiding a *prima facie* conflict of obligations.

From this textual interpretation viewpoint, other provisions in the treaty are therefore doubly important. In the examination of the terms of a trade or investment treaty, the interpretive rules of the *VCLT* will be relevant. The customary principle of integration can be taken into

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205. *Right of Passage over Indian Territory (Portugal v India)* (Preliminary Objections), [1957] ICJ Rep 3 at 142.

206. *Legality of the Threat or Use of Nuclear Weapons Case,* Advisory Opinion, [1996] ICJ Rep 226; see also Martti Koskenniemi, International Law Commission Study Group on Fragmentation, *Study on the function and scope of the lex specialist rule and the question of self-contained regimes* (Geneva: International Law Commission, 2003) at 160, online: International Law Commission <legal.un.org/ilc/sessions/55/pdfs/fragmentation_outline.pdf>; Gardiner, *supra* note 180 at 260.

account in the interpretation of the terms of the trade and investment agreement itself.[207] A great deal turns on the specific mechanisms agreed by the Parties to the trade or investment accord, and whether these measures include ways to integrate social and environmental priorities in order to prevent or at least mitigate the impacts in question.[208]

207. *VCLT*, *supra* note 1, art 31(3)(c); French, *supra* note 127; Gardiner, *supra* note 180 at 288-91 ("[t]hat article 31(3)(c) may have a useful role in handling such potential conflicts has been considered in academic study, in the work of the ILC and in some instances ... invoked in ... rulings of courts and tribunals ... A particular issue in the realm of treaty implementation is what account is to be taken of developments in international law, particularly the striking emergence of new specialist fields such as environmental law and human rights law … the Court did give a clear indication that developments in environmental law were to be taken into account, and did so quite clearly in a context of treaty interpretation" at 331). See also *Al-Adsani, supra* note 176 ("[t]he Convention should so far as possible be interpreted in harmony with other rules of international law of which it forms part …" at para 55); *Gabčikovo-Nagymaros Case, supra* note 110; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa), notwithstanding Security Council Resolution 276* (1970), Advisory Opinion, [1971] ICJ Rep 16 at 31 ("[a]n international instruments has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation" at para 53); *Iron Rhine*, *supra* note 9 at 58 ("[a]n evolutive interpretation, which would ensure an application of the treaty that would be effective in terms of its object and purpose will be preferred to a strict application of the intertemporal rule" at para 80). See also International Law Commission, *Report of the Study Group on Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law,* UNGAOR, 58th Sess, A/CN.4/L.682 (2006) at 206-44.

208. *VCLT*, *ibid*, art 31(3)(c) (the *VCLT* at art 31 permits interpretation to take into account, in addition to context and in light of the object and purpose, at art 31(3)(c) any relevant rules of international law applicable in the relations between the Parties); see also Pauwelyn, *supra* note 172 at 251-56; Sinclair, *supra* note 176 (who suggests art 32(3)(c) may be taken to include not only the general rules of international law but also treaty obligations existing for the Parties, and customary law at 119); Sands, *supra* note 176 at 103 (who notes that in the sense of art 31(3)(c), the treaty being interpreted retains a primary role).

In this respect, concerns raised by impact assessments and reviews become opportunities for the principle of integration to be taken into account in interpreting the treaty. First, the regulator can examine the economic treaty in question for provisions that would prevent the trade or investment disciplines from constraining the regulatory flexibility of the Parties for social and environmental purposes in the field of sustainable development. In the terms of Kelsen, there may be provisions in the economic treaty which grant a series of permissions, providing the Parties with exceptions to certain disciplines, where it can be shown that the disciplines might unduly constrain measures necessary to achieve other legitimate policy objectives. Should the overall treaty follow overwhelmingly along economic liberalisation in its context and structure, this could influence interpretation away from the preferred "integrated" outcome. However, general and specific exceptions, if found in the operational texts of the treaty, may provide clear exemptions that permit the sustainable development measures to be adopted. Similarly, provisions in a trade treaty itself or its preamble might set out an order of precedence between the accord and other treaties. If these provisions seem clear, the regulator would simply look, in good faith, to the context and the treaty object and purpose to confirm their ordinary meaning.[209] The context will include the treaty text, with its preamble and annexes, along with any agreement relating to the treaty, and also any instrument made by one or more Parties.[210] If notes appear in an annex to the accord, clarifying that the treaty will not apply for certain economic sectors, such notes would be considered part of the treaty context, in addition

209. See Gardiner, *supra* note 180; see also *Aguas del Tunari v Bolivia* (2005), ARB/02/3 (International Centre for Settlement of Investment Disputes) at para 21 (which notes the *Vienna Convention* does not privilege any of these three aspects of the interpretation method) and Humphrey Waldock, "Third Report" (UN Doc A/CN4/167) in *Yearbook of the International Law Commission 1964,* vol 1 (New York: UN, 1965) at 20 (UNDOC. A/CN4/SER.A/1964) (which noted the need to interpret the treaty as a whole in good faith).

210. *VCLT*, *supra* note 1, art 31.2.

to any further agreements provided in the annexes.[211] There is also the possibility to take into account any subsequent agreement between the Parties regarding the interpretation of the treaty or the application of its provisions, and this might include a subsequent joint statement between the Parties clarifying how the trade and investment rules should be interpreted to take customs into account.[212]

Second, the regulator may find that there are provisions in the trade or investment agreement to secure environmental and social cooperation, or that such provisions run alongside the trade agreement in a separate accord. In Kelsen's terms, these accords might include permissions or prescriptions to cooperate on key environmental and social problems, as well as mechanisms to investigate situations in which laws appear to be weakened or not enforced, and even in some cases, permissions to provide resources, capacity-building and other support for programs to address trade-related environmental and social concerns. Again, *VCLT* rules will be relevant to interpretation. There may be clearly operational terms of the treaty committing to ensure cooperation on environment, labour or sustainable development matters, and the regulator can consider these in context, and in light of any provisions showing a sustainable development object and purpose. Annexes that are provided can be taken into account as part of this context, as will side agreements which were made between all the Parties in connection with the conclusion of the treaty, and there may also be separate memoranda of agreement which, if they were accepted as related to the trade and investment treaty by the other Parties, can be considered authentic means for interpretation.[213]

Third, integrated substantive trade or investment liberalisation rules

211. *Ibid*; in connection with the conclusion of the treaty that is accepted by the other Parties as an instrument related to the treaty, see art 31.2(b); if made by all the Parties in connection with the conclusion of the treaty, see art 31.2(a).

212. *Ibid*, art 31.3(a); see also "Reports of the Commission to the General Assembly" (UN Doc A/6309/Rev.1) in *Yearbook of the International Law Commission 1966*, vol 2 (New York: United Nations, 1967) at para 15 (UNDOC. A/CN4/SER.A/1966/Add.1).

213. *VCLT*, *ibid*, arts 31.2, 31.2(a), 31.2(b); Gardiner, *supra* note 180 at 265-75.

may be included in the economic treaty itself, delivering sustainable development benefits through increases in liberalisation in targeted sustainable sectors of the economies, or for certain types of goods or services that meet an internationally agreed Sustainable Development Goal. Essentially, in Kelsen's terms, the States would need to include prescriptive provisions that oblige the Parties to liberalise trade or investment in specific economic sectors that they agree will contribute to sustainable development. Again, the regulator might seek integral provisions which agree to promote trade in sustainable goods and services, or to develop new markets, together with annexes, side agreements, or separate memoranda of agreement.[214] Such provisions, if the regulator finds them included in the text of the treaty, can assist in avoiding conflicts, and may have greater weight than turning to documents exchanged during treaty negotiations as *travaux preparatoires* as supplementary means of interpretation.[215] From the textual viewpoint, therefore, it is important to consider the further provisions of a new economic treaty, particularly inasmuch as they might avoid conflicts of obligations.

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214. *VCLT*, *ibid*, art 31(3)(a) (which includes any subsequent agreements between the Parties as to interpretation or application of its provisions. Art 31(3)(b) also includes any subsequent practices in the application of the treaty which establish agreement of Parties regarding its interpretation. Gardiner stated, "an agreement as to the interpretation of a provision reached after the conclusion of the treat represents an authentic interpretation by the parties which must be read into the treaty for the purposes of its interpretation", Gardiner, *ibid* at 34, 216-25). "Reports of the Commission to the General Assembly" (UN Doc A/6309/Rev.1) in *Yearbook of the International Law Commission 1966*, vol 2 (New York: United Nations, 1967) at para 14 (UNDOC. A/CN4/SER.A/1966/Add.1); see also *Kasikili/Sedudu Island (Botswana v Namibia)*, [1999] ICJ Rep 1045 at para 49.

215. *VCLT*, *ibid*, art 32 (provides for supplementary means of interpretation to which recourse is often had, but which are used to confirm the meaning resulting from the application of art 31, or to determine meaning if the ordinary meeting in context and in light of the object and purpose is either left ambiguous or obscure, as per art 32(a) or leads to a result which is manifestly absurd or unreasonable, art 32(b)). See Gardiner, *ibid* at 316-19.

As mentioned above, a further dimension of analysis is also important, informed by advances in international relations theory. Few international treaties today are simply textual contracts among States. As John Ruggie and Stephen Krasner have suggested, to understand the norms found in international treaties and how they are implemented, it is important to analyse the implicit understandings between a broad range of actors in a treaty regime, not only the formal views of States.[216] A regime is an institution that might coalesce or be structured around certain legal rules and certain formal organisations, but goes well beyond them, and develops iteratively.[217] Such regimes, as posited by John Vogler, can be defined as "sets of implicit or explicit principles, norms, rules and decision-making procedures around which actors' expectations converge in a given area of international relations".[218] Principles, norms, rules and decision-making procedures are all necessary parts of an international treaty regime, which exists to achieve the common object and purpose of States and other international actors.[219]

Regimes, in international relations theory, therefore, can be

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216. John Ruggie, "International Responses to Technology: Ideas and Trends" (1975) 29 International Organization 557 at 557-83 [Ruggie, "International Responses"]. See also John Ruggie, "Reconstituting the Global Public Domain-Issues, Actors, and Practices" (2004) 10 European Journal of International Relations 499 at 499-531 ["Ruggie, "Reconstituting the Global Public Domain").
217. Ruggie, "International Responses", *ibid* at 557-83; Ruggie, "Reconstituting the Global Public Domain", *ibid* at 499-531.
218. John Vogler, ed, *The Global Commons: Environmental and Technological Governance,* 2d (Chichester: John Wiley and Sons, 2000) at 20-43.
219. See especially John Ruggie, "International Regimes, Transactions and Change: Embedded Liberalism in the Postwar Economic Order" in Stephen Krasner, ed, *International Regimes* (Ithaca: Cornell University Press, 1983). See also Stephen Haggard & Beth Simmons, "Theories of International Regimes" (1987) 41 International Organization 491; Olav Stokke, "Regimes as Governance Systems" in Oran Young, ed, *Global Governance: Drawing Insights from the Environmental Experience* (Boston: MIT Press, 1997) at 27-64.

described as governing specific issue areas in an interactive way.[220] This distinguishes them from broader international orders which imply an authority superintending over a wide range of institutions and issues.[221] As such, regimes are more "specialised arrangements that pertain to well defined activities, resources or geographical areas and often involve only some subset of the members of international society".[222] As Vogler observes, the boundaries of a regime are thus determined partly by perceptions of the extent and linkage between issues. A regime analysis of trade and investment treaties calls attention to the way that principles, rules and decision-making procedures develop, interact and evolve in one "sub-system", focusing on the converging expectations of a group of international actors. As noted by Stephen Toope and Jutta Brunnée, regime analysis can serve the study of international law, drawing on the "inter-actional" behaviours of legal subjects and rules originally observed by Lon L Fuller.[223] Inter-actional regimes, as they note, coalesce around international treaty commitments, which evolve and deepen over time through interactions between states and non-state actors, shaping and being shaped by the norms and rules, knowledge and networks generated by the regime. [224]

From this perspective, both the "hard" and "soft" law between Parties to a treaty (or a series of treaties) evolves with the regime, engagement

220. Oran Young, *International Cooperation: Building Regimes for Natural Resources and The Environment* (Ithaca: Cornell University Press, 1989) as cited in Vogler, *supra* note 218 at 23.

221. Vogler, *ibid* at 20-43.

222. Young, *supra* note 220 at 23.

223. See Jutta Brunnée & Stephen Toope, "International Law and Constructivism: Elements of an Interactional Theory of International Law" (2000) 39:1 Columbia Journal of Transnational Law 19 at 19-74 [Brunnée & Toope, "International Law and Constructivism"]; see also Jutta Brunnée & Stephen Toope, "The Changing Nile Basin Regime: Does Law Matter?" (2002) 43 Harvard International Law Journal 105 at 105-59.

224. See Brunnée & Toope, "International Law and Constructivism", *ibid* at 19-74; see also Jutta Brunnée & Stephen Toope, "Persuasion and Enforcement: Explaining Compliance with International Law" (2002) XIII Finnish Yearbook of International Law 1 at 1-23.

a broader spectrum of actors than the States in its implementation.[225] A regime may start with a legally binding agreement with broad participation but shallow substantive commitments, then deepen in substantive content and engagement of more and better informed actors, leading to greater compliance over time. As such, the emergence, evolution and effects of normative systems can coalesce around a particular object and purpose in international law, reinforced by "epistemic communities" which share scientific information and data.[226] In certain circumstances, it may be undesirable to negotiate seemingly strong international treaties without first going through a careful, incremental process of regime-building. Without it, formal legal commitments are unlikely to be meaningful; States may simply assent with no intention of complying, or no capacity to comply.[227] As Brunnée and Toope suggest, once a contextual agreement (such as a framework convention) initiates the development of self-reinforcing norms and institutions, regimes can then evolve in the direction of deeper substantive legal commitments. A steady building process, focused on the object and purpose of the treaty, may yield increasingly complex and sophisticated regimes of nearly universal application.[228] For other treaties on sustainable development, such as the 1992 *UNCBD*[229] and the 1992 *UNFCCC*,[230] it has been convincingly argued that States established framework agreements which commit to certain common objects and purposes, and a process by which further more detailed and specific protocols are negotiated.[231] In emerging trade and investment regimes, from this perspective, it is possible that while agreed provisions appear likely to generate the tensions discussed above,

225. Dinah Shelton, *International Law and Relative Normativity* in Malcolm Evans, ed, *International Law*, 4d (Oxford: Oxford University Press, 2014) at 159-63. See also Birnie, Boyle & Redgwell, *supra* note 3.
226. Shelton, *ibid*; See also Jutta Brunnée, "COPing with Consent: Lawmaking under Multilateral Environmental Agreements" (2002) 15:1 Leiden Journal of International Law 1 at 1-52.
227. Brunnée, *ibid* at 5-6.
228. *Ibid* at 33-37.
229. *Ibid.*
230. *Ibid.*
231. *Ibid* at 37-38.

as the regime continues to evolve, new purposes can be accepted by the Parties, and new operational instruments negotiated to take evolving customary law into account. For instance, even if the WTO Agreements did not originally include sustainable development as part of the purpose, and even if there were WTO Members that had persistently objected to a principle of integration in customary law, the WTO may still be able to evolve as a regime for an eventual acceptance of this objective, taking into account an integration principle in certain areas of its work, and in that context, new obligations may be negotiated within the regime framework.

Whether one departs from a purposive, a textual or a regime perspective, if it is desirable to integrate social and environmental concerns into trade treaties for sustainable development, *either* for sound international policy reasons, *or* out of respect for an emerging customary principle of integration, *or* simply to achieve a common textual sustainable development goal that is set as an "object and purpose" of the trade and investment treaty instrument itself (either in a new accord, or as a new commitment while a treaty and investment regime evolves), the question remains as to which provisions might best be interpreted as doing so effectively. More research is necessary to identify and understand the types of obligations that might be included, in a manner similar to the *FAO Seed Treaty* Article 6, to add clarity to a commitment for sustainable development in an international trade and investment treaty.[232]

IV. Conclusions

In international debates on trade and investment, the environment and human rights, there have been significant concerns about the sustainability of entering into economic agreements which might lead to serious environmental and social impacts. In light of two decades of global and regional "soft law" commitments to sustainable development

232. See Marie-Claire Cordonier Segger, *Athena's Treaties: Crafting Integrated Trade and Investment Accords for Sustainable Development* (forthcoming, 2018).

through trade and investment, States may have legitimate expectations that these concerns will be addressed. Given the extensive global consensus on the importance of sustainable development, particularly if sustainable development has been included by Parties as part of the "object and purpose" of trade and investment treaties, or has an interstitial influence on the process of economic treaty negotiations, certain customary norms may be useful to address the tensions. The principle of integration, as defined in Principle 4 of the *Rio Declaration* and supplemented by social considerations from the 2002 *JPOI*, can be considered particularly relevant for trade, investment and other economic policy-making. Notwithstanding its potential interpretive weight as part of the object and purpose of a treaty, a preambular reference alone in a trade or investment treaty may not provide a comprehensive response to the tensions that are being identified in assessments and current political debates. By applying greater creativity and craftsmanship in treaty drafting, increasingly adopting additional measures that address actual environmental or human rights tensions and concerns, States can convert trade and investment law tensions to opportunities for sustainable development. As tribunals and regulators take up these accords for implementation and enforcement, such mechanisms can and should be interpreted in light of the emerging integration principle, supporting the achievement of global Sustainable Development Goals.

Choice of Law and Interpretive Authority in Investor-State Arbitration

Joshua Karton*

This article rejoins one of the core debates in investor-state arbitration, over the extent to which arbitrators may refer to sources of international law beyond the investment treaty that governs the dispute. This issue may appear esoteric, but the political backlash to investment treaty arbitration is largely fueled by uncertainty over the content of the substantive rules that bind states in their relations with foreign investors. Such uncertainty affords arbitrators room to indulge what is alleged to be a pro-investor bias. It may chill regulatory initiatives, even if in the end most states' actions are vindicated. The problem at the heart of investment arbitration is, therefore, a legal one, so there may be a legal response to the political backlash. This article argues that arbitrators are obligated by the choice of law clauses contained in most investment treaties to consider all potentially relevant sources of international law. Arbitrators are akin to agents of the states that enter into investment treaties, and are bound by choice of law provisions in those treaties. Since most of these refer simply to the text of the treaty and "international law", tribunals not only may *but* must *refer to international law beyond the treaty. Putting choice of law at the centre of determinations of tribunals' interpretive authority refocuses arbitrators' attention on states, which are, after all, the parties to the arbitration agreements that empower investor-state tribunals. It gives proper weight to the economic objectives of international investment law, but also provides arbitrators with an appropriate basis on which to account for the public interest, via international law doctrines of environmental protection, indigenous rights, and the like. Finally, it could help stave off a continued backlash to investor-state arbitration, which would harm the global investment climate and the global rule of law.*

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I. Introduction: Reconceiving the "Backlash" to Investment Arbitration

Arbitration of investment treaty disputes is in the news a lot these days, and usually because someone new is denouncing it. Most prominently, the proposed *Trans-Pacific Partnership* ("*TPP*") and *Trans-Atlantic Trade and Investment Partnership* ("*TTIP*") are probably now dead letters, attacked most bitterly in the places that pioneered – and historically benefitted the most from – investment treaty arbitration: the USA and Western Europe. Recent political events, especially the Brexit vote and the election of Donald Trump to the US presidency, indicate that new investment treaties are less likely to be ratified, especially if incorporated into multilateral trade conventions.

It is therefore all the more important that the existing system of investor-state dispute settlement (ISDS) be made to work better for its purported beneficiaries: the people of the states that engage in it.[1] Investment treaty arbitration, along with other means for peaceful

1. *Cf.* Ingo Venzke, "Investor-State Dispute Settlement in TTIP from the Perspective of a Public Law Theory of International Adjudication" (2016) 7:3 Journal of World Investment & Trade 374 (arguing that "the architects of TTIP as well as the critics of this edifice seem to share a core point – the demand, namely, that the law be spoken in the name of the peoples and citizens" at 380).

resolution of disputes between investors and the states that host their investments, has the potential to stimulate foreign direct investment (FDI) and promote the rule of law. Investment treaty arbitration is not now living up to that potential. However, should states abandon it because of its flaws, they may also miss out on its benefits.

This article advances a new way of thinking about the causes of hostility to arbitration between investors and states, then proposes a new way of thinking about how to improve the quality and consistency of the justice provided by investor-state arbitration without making structural changes to the ISDS system. The backlash to investor-state arbitration is driven by political concerns, but there may be a legal response to it.

One of the core debates about investor-state arbitration concerns the extent to which arbitrators may refer sources of international law outside the text of the investment treaty that governs the dispute. This is essentially a question of interpretation: to what sources may adjudicators refer when clarifying ambiguities and filling gaps in the treaties, statutes, and contracts that govern different aspects of an investor-state dispute, and how should they resolve conflicts between these sources. Some commentators argue that investment arbitration tribunals should decide, to the extent possible, within the text of the governing treaty and the investment contract – "restrictive interpretation".[2] Others argue that general international law is relevant both to interpret the relevant treaty and to introduce doctrines not referred to in the treaty, including principles developed in treaties and case law outside the investment context, in particular international

2. This view is perhaps most associated with Charles Brower. See *e.g.* Charles N Brower & Sadie Blanchard, "From 'Dealing in Virtue' to 'Profiting from Injustice': The Case Against Re-Statification of Investment Dispute Settlement" (2014) 55:45 Harvard International Law Journal Online, online: <www.harvardilj.org/wp-content/uploads/2014/01/Brower_Blanchard_to_Publish.pdf>; Charles N Brower & Shashank P Kumar, "Investomercial Arbitration: Whence Cometh It? What Is It? Whither Goeth It?" (2014) 30 ICSID Review 35; and Charles N Brower & Sadie Blanchard, "What's in a Meme? The Truth about Investor-State Arbitration: Why It Need Not, and Must Not, Be Repossessed by States" (2014) 52:3 Columbia Journal of Transnational Law 689.

trade and human rights law – "extensive interpretation".[3] A third school of thought emphasizes the public law nature of investment disputes, arguing that tribunals determining whether a state has breached its obligations to a foreign investor ought to take a public law approach that emphasizes national rather than international law.[4] These threads in the academic discourse are connected to more fundamental discussions about the place of investment law within international law, which are in turn related to broader debates over fragmentation and convergence in international law.[5]

Such matters may appear to be esoteric, of concern only to academics and policy wonks. In fact, the theoretical and political debates over investment treaty arbitration are both largely fueled by the same basic concern: uncertainty over the content of the substantive rules that bind states in their relations with foreign investors. The substantive provisions of most of the relevant instruments are incomplete and vaguely worded, and it is hotly contested how arbitrators should fill these gaps and resolve these ambiguities

The gaps and ambiguities create a zone of discretion for arbitrators that many see as too broad – an issue that affects international law generally,

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3. See *e.g.* Pierre-Marie Dupuy et al, eds, *Human Rights in International Investment Law and Arbitration* (Oxford: Oxford University Press, 2009).
4. See generally Stephan W Schill, ed, *International Investment Law and Comparative Public Law* (Oxford: Oxford University Press 2010); see also Stephan W Schill, "Enhancing International Investment Law's Legitimacy: Conceptual and Methodological Foundations of a New Public Law Approach" (2011) 52 Virginia Journal of International Law 57 at 68-71, 81; Benedict Kingsbury & Stephan W Schill, "Public Law Concepts to Balance Investors' Rights with State Regulatory Actions in the Public Interest – The Concept of Proportionality" in Stephan W Schill, ed, *International Investment Law and Comparative Public Law* (Oxford: Oxford University Press, 2010) at 75.
5. See generally Freya Baetens, ed, *Investment Law Within International Law: Integrationist Perspectives*, (Cambridge: Cambridge University Press, 2013).

but is particularly acute in international investment law.[6] The breadth of arbitral discretion gives arbitrators space to indulge what is alleged to be a pro-investor bias and permits tribunals to overrule reasonable attempts by states to regulate commerce in the public interest.[7] The uncertainty that results may chill regulatory initiatives, even if states' actions are vindicated by arbitral awards in the end.[8] The obscurity of the process (and, secrecy, although less than in the past) add to the sense that some kind of scam is being run.

The problem at the heart of ISDS is therefore a legal one, which means that there may be a legal response to the political backlash. Investor-state tribunals must recognize that their interpretive role in resolving individual disputes implies a more fundamental role as guardians of the coherence of investment law itself.[9] To play this role properly, tribunals must adopt a coherent interpretive approach. This article argues that, when interpreting investment treaties, arbitrators are not only permitted to consider sources of international law from outside investment treaties, but are in most cases obligated to do by the choice of law provisions in those treaties. Arbitral tribunals are akin to agents of the states that enter into investment treaties, and must follow choice of law provisions in investment treaties. In most cases, the law governing investor-state

6. Gleider Hernandez, "Interpretive Authority and the International Judiciary" in Andrea Bianchi et al, eds, *Interpretation in International Law* (Oxford: Oxford University Press, 2015) at 167.
7. Many of these charges are collected in a report published by the Corporate Europe Observatory and the Transnational Institute. See Pia Eberhardt & Cecilia Olivet, "Profiting from Injustice: How law firms, arbitrators, and financiers are fuelling an investment arbitration boom" (November 2012), online: <www.tni.org/files/download/profitingfrominjustice.pdf>.
8. Jürgen Kurtz, "Building Legitimacy Through Interpretation in Investor-State Arbitration: On Consistency, Coherence, and the Identification of Applicable Law" in Zachary Douglas et al, eds, *The Foundations of International Investment Law* (Oxford: Oxford University Press, 2014) ("[e]ven with an outcome ledger that tilts generally in favour of respondents, the deep variances in the jurisprudence make it almost impossible for states to isolate when and why particular regulatory initiatives might potentially engage investment treaty liability" at 270).
9. Hernandez, *supra* note 6 at 167-68.

arbitrations is simply the text of the treaty and "international law",[10] which means that arbitral tribunals not only may but must refer to international law outside the treaty.

This article is premised on the current ISDS system remaining roughly in its current form. Here, I take no position on whether or how the system ought to change structurally. Rather, my aim is to show that a greater attention to the governing law would improve arbitral decision-making without any structural changes – and moreover that the approach I advocate is dictated by the structure of the existing system of investor-state arbitrations. My line of argument is theoretical rather than pragmatic, although I believe that it will also yield practical benefits.

The proposed interpretive approach gives proper weight to the economic objectives of international investment law, but also provides arbitrators with an appropriate legal basis on which to account for the public interest, in the form of international law doctrines of environmental protection, indigenous rights, and the like. It also refocuses arbitrators' attention on states, which are, after all, the parties to the arbitration agreements that empower investor-state tribunals. Employment of a coherent interpretive approach that pays attention to the choice of law would help improve the quality and consistency of arbitral decision-making and, in turn, promote buy-in from governments and the populations they represent. It would also reaffirm investment law's place within international law and promote cross-fertilization between investment law and other international legal disciplines.

Part II provides background, explaining how many of the criticisms of investment treaty arbitration are rooted in uncertainty over how the governing law is interpreted and applied. Part III presents the core theoretical argument: that the structure of arbitral authority in international investment law requires arbitrators to consult the choice of law provision in the applicable investment agreement in order to determine not only which laws to apply, but also how to interpret them. Part IV applies those theoretical arguments to describe, in the abstract,

10. See *infra* notes 52-57 and accompanying text (this is something of an oversimplification).

how investment treaty tribunals ought to proceed. Finally, Part V explains the main implications of the proposed approach, making prescriptions about how states may act to shape arbitrators' interpretive authority and how arbitrators ought to interpret IIAs in the majority of cases where the treaty contains an unqualified choice of "international law" as the governing law.

Before proceeding, a brief note on terminology is needed, since authors in this field sometimes use the same terms to refer to different things and different terms to refer to the same things. I will refer to the overall system of resolving disputes between investors and the states in which they invest as "investor-state dispute settlement" (ISDS) and the heterogeneous body of rules relating to the international law obligations of states to foreign investors as international investment law (IIL). As the label for the main legal instruments of that system, I use "international investment agreements" (IIAs), which describes any agreement between states that has the purpose and effect of protecting cross-border investments, whether those agreements are bilateral or multilateral, whether they deal specifically with investment or with trade more generally, and whether they are memorialized in a treaty or in some other form. Finally, to describe the primary means of resolving disputes between investors and states that relate to IIAs, I will use "investor-state arbitration" (ISA), although that term might conceivably also refer to arbitrations between investors and states that do not arise from IIAs.

II. Understanding the "Backlash": Uncertainty over the Governing Law

It is now *de rigueur* to call political hostility to ISA the "backlash" against investment arbitration. It is an appropriate term, since it captures the reactive nature of much criticism of ISA, especially from politicians and civil society. For many years ISA proceeded without opposition, primarily because the general public and even most legislators had no idea it existed. Since the term "backlash" was introduced to the literature

in 2010,[11] hostility to ISDS, and in particular to ISA, has only grown.

The components of this backlash are various. Some critics are concerned about state sovereignty, some about environmental or human rights protection, some about inconsistent outcomes, some about democratic accountability, some about transparency, some about bias. But many of the critiques of ISDS derive in part from one common factor: the content of rules that will be applied to determine the merits of investor-state disputes.

The problem of inconsistency is most obviously traceable to uncertainty in the governing law, but other critiques can also be characterized in terms of uncertainty. Given that state liability through ISA is voluntary, it is not clear how much ISA could possibly "rob" states of their sovereignty, but it is fair to argue that states have given up more of their sovereignty than they realized when they ratified an IIA. Greater certainty would at least make possible more informed decisions by states on whether to enter into IIAs, how to draft them, whether to make interpretive pronouncements after the entry into force of an IIA, and how to pose arguments to a tribunal once a dispute arises.

Similarly, concerns about the ability of states to regulate in the public interest despite their IIL obligations are really concerns about the content of the governing law. How do the obligations created by IIAs relate to countervailing principles of domestic public law? Are IIL obligations supplemented or limited by substantive obligations created by other areas of international law, in particular human rights law? Finally, how do international law doctrines relating to the force of international obligations, such as the law on state responsibility and doctrines like proportionality and the margin of appreciation, affect states' obligations under IIL?

Of course, some of the critiques are not about the law being applied, but rather about who applies it. One strain of critique emphasizes the private character of arbitral tribunals, and argues that ISA tribunals in particular are populated by business lawyers who are subjectively biased

11. Michael Waibel et al, eds, *The Backlash Against Investment Arbitration* (Alphen aan den Rijn: Kluwer, 2010).

in favour of investors and who have material incentives to take an expansive attitude toward their own jurisdiction and the obligations of states to investors. Regardless of the accuracy of these charges, much of their force would be reduced if the content of IIL were more certain – the more concrete and precise the applicable rules are, the less room there is for adjudicator bias to affect outcomes.

Uncertainty over the governing law has a variety of causes, many of them not resolvable without altering the nature of international law or the structure of the ISDS system. Perhaps most importantly, IIL is expressed in thousands of different IIAs concluded by different states using different language; unlike other fields of international law, such as the law of the sea or international trade law, IIL has no common treaty or set of treaties that sets out the substantive obligations of states. The closest thing to a canonical treaty is the *Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*[12] ("*ICSID Convention*"), which deals only with the means by which disputes over IIL are to be resolved, and in any event applies only to a subset of investor-state disputes. But even when one looks beyond the various IIAs, public international law continues to have an inherent indeterminacy greater than any national law, something that no one ISDS tribunal can resolve. Even the status of international law as "law" continues to be contested in some quarters (although much less so than in the past). Relatedly, the youth of IIL as a distinct field of law means that many of its details remain to be worked out, simply because the issues have only arisen recently.

Moreover, the lack of any centralized legislative or judicial authority with the power to pronounce on matters of IIL necessarily slows the progressive development of the law, as is the fact that interpreting IIL is largely left to *ad hoc* arbitral tribunals that recognize neither an adjudicative hierarchy nor any doctrine of binding precedent. Sociologically, one might add that the community of international investment lawyers – and more specifically of ISDS arbitrators, do not share a common professional background or legal culture, and in fact may be divided between two

12. March 1965, 575 UNTS 159 (entered into force 14 October 1966) [*ICSID Convention*] (also called the "Washington Convention").

camps of commercial lawyers and public international lawyers. Finally, the parties to ISAs – investors and capital-importing states – are often repeat players who have irreconcilably opposed interests.

But regardless of the causes of legal uncertainty, many of them would be resolved or deprived of their significance by a more consistent approach to the interpretation of the governing legal instruments. Writes Kurtz, "Ultimately … it is the coherence and integrity of reasoning employed by arbitral tribunals that is of greatest import to states parties (with the highest potential to foster deeper commitment to the system)".[13] Unfortunately, ISA tribunals have not met this challenge. "[T]here is a distinct and peculiar 'moving target' quality to the hermeneutics of investment arbitration with arbitral tribunals often paying simple lip service to the customary rules on treaty interpretation".[14]

The decisions of ISA tribunals should not and will never be entirely consistent, given the variety of differently-worded IIAs that apply in various ISAs, the different national laws that may apply to some aspects of disputes, and the range of legitimate opinions on legal questions that arise in disparate ISAs. However, the impossibility and undesirability of consistent *outcomes* in ISDS should not make us give up on a consistent *interpretive approach*. In the next section, I argue that ISA tribunals are obligated by the structure of arbitral authority in ISDS to follow such a consistent interpretive approach.

III. The Structure of Arbitral Authority in the Investment Arbitration System

It is a common misconception that ISA tribunals have broad inherent discretion with respect to the governing law, for example to interpret IIAs in a restrictive or extensive manner, and to consider or reject principles of international law developed outside the investment context. In fact, while in a given case the tribunal may have such discretion, whether it does or does not depends on the terms of the choice of law provision in the relevant IIA. In other words, when states conclude an IIA, they

13. Kurtz, *supra* note 8 at 258.
14. *Ibid* at 275.

have the power to determine not only the set of rules that tribunals must apply, but also the way in which tribunals must interpret them.

The legal framework that supports ISA imposes very few constraints on the way arbitrators are to interpret the governing law. Rather, arbitral authority to interpret law, along with any restrictions on the exercise of that authority, comes from agreement that empowers the tribunal. For this reason, regardless of its public international law context, ISA has an inherently contractarian character, an inheritance of the international commercial arbitration models on which ISA jurisdictional and procedural rules are based. In IIL, the agreement that empowers the tribunal is usually contained in the applicable IIA. According to the "triangular" nature of ISA, when states ratify an IIA, they make an "open offer" to arbitrate. This offer may be accepted by any investor from another state party simply by filing a request for arbitration, even if the investor lacks a pre-existing legal relationship with the state.[15] The terms of the offer to arbitrate are specified in the IIA, and initiation of arbitration by the investor constitutes the investor's acceptance of those terms.

As will be seen, questions about the scope of the tribunal's powers and duties with respect to the decision on the merits cannot normally be answered by reference to general law, but rather according to the terms of the applicable IIA, and in particular the choice of law provision within it, along with and any other agreements entered into between the host state and the investor.

I will begin by examining the provisions of the treaties that form the framework of the ISDS system, but do not themselves contain arbitration agreements: the *ICSID Convention*[16] and the *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*[17] ("*New*

15. Julian Davis Mortenson, "Treaty Interpretation in International Investment Law" in Michael Bowman & Dino Krisiotis, eds, *Conceptual and Contextual Perspectives on the Modern Law of Treaties* (Cambridge: Cambridge University Press, forthcoming 2017) at 2, online: <ssrn.com/abstract=2757690/>.
16. *ICSID Convention*, *supra* note 12.
17. 10 June 1958, 330 UNTS 38 (entered into force 7 June 1959) [*New York Convention*].

York Convention"). The former applies to all investor-state arbitrations conducted under the auspices of ICSID,[18] and the latter applies to nearly all investor-state arbitrations conducted *ad hoc* (which are typically governed by the *UNCITRAL Arbitration Rules*) or under the auspices of other international arbitral institutions.[19]

The *ICSID Convention* and *New York Convention* do not directly bind arbitrators or arbitrants; rather, they are directed at national courts, which may be called upon to rule on the enforceability of arbitration agreements and arbitration awards. By design, the two conventions say next-to-nothing about the actual decisions made by arbitrators. For this reason, and with a few exceptions that will be discussed below, they do not regulate the decisions arbitrators make on the merits of disputes, or even the rules of decision which arbitrators must apply, but only the *way* in which arbitrators reach those decisions.

Under *New York Convention* Article V, which governs the enforcement of arbitral awards, the grounds for refusal of enforcement are generally jurisdictional and procedural. Only two provisions might conceivably be engaged by an inapposite or inaccurate application of the governing law. The first is Article V(2)(b), the public policy exception, which permits non-enforcement of an award only in narrow circumstances where enforcement would violate the fundamental public policy of the state.[20] To the author's knowledge, no commercial or investor-state arbitral award has ever been refused enforcement under Article V(2)(b) on the ground that the tribunal misinterpreted the governing law.

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18. See International Center for Settlement of Investment Disputes, "Recognition and Enforcement – Additional Facility Arbitration", online: <icsid.worldbank.org/en/Pages/process/Recognition-and-Enforcement-(AF-Arbitration).aspx>. The *New York Convention* also applies to the recognition and enforcement of awards not subject to the *ICSID Convention* that are administered by ICSID under the *ICSID Additional Facility Rules*.
19. As a general matter, the *New York Convention* applies equally to commercial and investor-state arbitration. Awards that arise from IIAs involving non-parties to the *New York Convention*, such as Taiwan, will not be subject to it.
20. *New York Convention*, *supra* note 17, art V(2)(b).

The second is Article V(1)(d), which provides that awards may be refused enforcement where the arbitral procedure was not in accordance with the agreement of the parties. In extreme cases where the tribunal blatantly applied a law different from the one chosen by the parties or where the tribunal's reasons display a total lack of legal reasoning, courts have held that the tribunal's actions constituted a procedural defect and refused enforcement on that basis.[21]

To the extent that arbitrators make errors of law or reach a decision other than by application of the governing law, courts will not normally interfere unless those errors were so egregious as to constitute arbitrator misconduct (harming a party's due process rights or other otherwise violating public policy), the award blatantly applies a different law than the law chosen by the parties, or the award so disregards all legal rules that the tribunal can be said to have arrogated to itself amiable composition powers.[22] If arbitrators apply the governing law incompetently, or if they pay lip service to the law while actually deciding on some other basis, the award is generally proof from challenge. Under *New York Convention* Article V and most national laws, including those based on the *UNCITRAL Model Law on International Commercial Arbitration*,

21. Only in a handful of commercial cases subject to the *New York Convention* have awards been annulled or refused enforcement on this basis. The case law is reviewed and discussed in James Hope & Mattias Rosengren, "Arbitrators: a law unto themselves?" (3 December 2013), *Commercial Dispute Resolution*, online: <cdr-news.com/categories/expert-views/4616-arbitrators:-a-law-unto-themselves>.

22. *Cf.* Jan H Dalhuisen, "Legal Reasoning and Powers of International Arbitrators" (2014), online: <papers.ssrn.com/sol3/papers.cfm?abstract_id=2393705/> ("[t]here are minimum standards but they are few and only geared to avoiding clear excess" at 22).

there is no recourse against a legally incorrect award.[23]

For arbitrations subject to the *ICSID Convention*, which includes most ISAs, the rules differ but the outcome is the same. The *ICSID Convention* itself imposes only one duty directly upon tribunals relating to how they should decide the merits of the dispute: the requirement in Article 42(2) that tribunals may not bring a finding of *non liquet* on the ground of silence or obscurity in the law. Arguably, this provision imposes an obligation to decide legally, that is, in accordance with legal rules, but it does no more than this. In any event, it says nothing about which rules should be applied or how they should be interpreted. Moreover, Article 42(3) makes clear that the parties may empower the tribunal to decide *ex aequo et bono*, so it is not even compulsory for ICSID tribunals decide according to legal rules.[24]

Article 42(1) contains the *ICSID Convention*'s main rules as to the governing law:

> The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.[25]

According to the first sentence of Article 42(1), the parties may make a choice of law and, if they do so, the tribunal must apply that law. In other words, the parties have absolute freedom to choose any rules

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23. Courts frequently reaffirm this principle; see *e.g. TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia* [2013] HCA 5. I leave aside whether parties may agree to confer upon courts (of the seat or otherwise) the power to review awards for substantive errors of law. State courts have divided on the validity of so-called heightened judicial review agreements; see, *e.g.* the divergent decisions of the US and German Supreme Courts: *Hall St Assocs v Mattel*, 552 US 576 (2008); BGH III ZB 07/06, 1 March 2007.
24. See generally Christoph Schreuer, "Decisions Ex Aequo et Bono Under the ICSID Convention" (1996) 11:1 ICSID Review 37. Determination *ex aequo et bono* permits adjudicators the greatest possible latitude to consider justice and fairness without the need to resort to any rules of law; it is quite rare in practice.
25. *ICSID Convention*, *supra* note 12, art 42(1).

of law and their choice is binding upon the tribunal. If the parties do not make a choice, the second sentence of Article 42(1) provides that the tribunal must apply the law of the respondent state, together with whatever rules of international law are applicable. This default provision does require tribunals to apply the named laws, but it does nothing to guide the tribunal's interpretation of national or international law, beyond specifying that a state's law includes its rules on the conflict of laws. Most importantly for the purposes of this article, it implicitly delegates to tribunals the determination of *which* rules of international law are applicable and places no constraints whatsoever upon that determination.

Awards subject to the *ICSID Convention* are even more broadly enforceable than those subject to the *New York Convention*. Under Article 54, contracting states "shall recognize [awards] rendered pursuant to" the *Convention*, and must enforce "the pecuniary obligations imposed by that award … as if it were a final judgment of a court in that State".[26] The only exception given in the *ICSID Convention* itself is the statement in Article 55 that national laws relating to sovereign immunity are not affected by the *Convention*. States may also refuse to enforce ICSID awards that violate the fundamental public policy of the state, but to the author's knowledge, as with *New York Convention* Article V(2)(b), no ICSID award has been refused enforcement on public policy grounds because the tribunal misinterpreted the law.

ICSID awards are also subject to annulment by a three-member *ad hoc* annulment committee constituted for that specific purpose.[27] Annulled awards have no force, so parties unwilling to treat the dispute as ended must request the constitution of a new tribunal.[28] The *ICSID Convention* lists only five grounds on which an award may be annulled, of which only two are potentially relevant here: that the tribunal "manifestly exceeded its powers"[29] or that the award fails to "state the reasons on which it is based".[30] An examination of the way these provisions have

26. *Ibid*, art 54(1).
27. *Ibid*, art 52.
28. *Ibid*, art 52(6).
29. *Ibid*, art 52(1)(b).
30. *Ibid*, art 52(1)(e).

been applied by annulment committees shows that each does little or nothing to restrain tribunals from interpreting the governing law in idiosyncratic or even incorrect ways.

In some early annulment decisions – the so-called "first generation", comprising *Klöckner v Cameroon I*[31] and *Amco v Indonesia I*[32] – the annulment committees closely scrutinized the tribunals' interpretation of the governing law and application of that law to the facts of the dispute, reasoning that a failure to accurately apply the governing law can constitute either (or both) an excess of powers or a failure to state reasons.[33] However, both annulment committees were heavily criticized for these decisions.[34] The modern annulment decisions, and the overwhelming weight of commentary, hold that tribunals only manifestly exceed their powers related to application of the governing law if they fail to apply the chosen law altogether or blatantly apply a different law.[35] If a tribunal defectively or incompetently applies the chosen law, the award is proof from annulment. Similarly, the modern position is that a tribunal has failed to give reasons only where the annulment committee is unable to follow the tribunal's reasoning or see how it relates to the issues before

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31. *Klöckner Industrie-Anlagen GmbH and others v United Republic of Cameroon and Soci*été *Camerounaise des Engrais II* (1985), ICSID Case No ARB/81/2, 2 ICSID Reports 95 [*Klöckner I*].
32. *Amco Asia Co and others v Republic of Indonesia* (1986), ICSID Case No ARB/81/1, 1 ICSID Reports 509 [*Amco I*].
33. See Christoph Schreuer, "Three Generations of ICSID Annulment Proceedings" in Emanuel Gaillard & Yas Banifatemi, eds, *Annulment of ICSID Awards*, IAI International Arbitration Series No 1 (New York: Juris, 2004) at 17.
34. Vladimír Balaš, "Review of Awards" in Peter Muchlinski et al, eds, *Oxford Handbook of International Investment Law* (Oxford: Oxford University Press, 2008) at 1148-49.
35. See *e.g. Malaysian Historical Salvors Sdn BHD v Malaysia* (2007) ICSID Case No ARB/05/10. The decision of the annulment committee criticizes the award's failure to examine the express terms of the IIA as applicable law, and instead to decide on the basis of default rules in the *ICSID Convention*. The annulment committee held that such failure constituted a manifest excess of powers requiring annulment under the *ICSID Convention*. *Ibid* at para 80.

the tribunal.[36] Whether the reasons given by the tribunal are correct, adequate, or convincing is irrelevant.[37]

In sum, there are only two obligations related to application of the governing law that are directly imposed upon ISA tribunals by positive law: that arbitrators may not refuse to apply the law on the grounds that it is silent or obscure, and that arbitrators must give some reasons for their decision. Neither mandates that the tribunal interpret the law in any particular way. Even if one were to follow the now-discredited first generation of annulment decisions and find that a failure to *accurately* apply the governing law can constitute a manifest excess of powers, the powers referred to are those granted by the arbitration agreement. We must therefore look to the arbitration agreement to find any constraints on the tribunal's power to apply the law.

What is meant by the arbitration agreement in this context is the provision in the relevant IIA that expresses a contracting state's consent to arbitrate, if an investor from another contracting state initiates arbitration. The term "parties" is not defined in the *ICSID Convention*, but it is clear from the context that the term refers to the parties to the dispute (*i.e.* the host state and the investor), rather than the parties to the IIA (*i.e.* the two or more states that ratified it).[38] Throughout the *ICSID Convention*, states involved in ISAs are referred to as "Contracting

36. The "second generation" of annulment decisions emphasized this point. See *e.g. Maritime International Nominees Establishment v Republic of Guinea* (1988), ICSID Case No ARB/84/4, *Klöckner I*, *supra* note 31 and *Amco* I, *supra* note 32.

37. The "third generation" of annulment decisions repeatedly affirmed this point. See *e.g. Wena Hotels Ltd v Arab Republic of Egypt* (2002), ICSID Case No ARB/98/4; *Empresas Lucchetti SA and Lucchetti of Peru SA v The Republic of Peru* (2007), ICSID Case No ARB/03/4; and *CMS Gas Transmission Co v The Republic of Argentina* (2007), ICSID Case No ARB/01/8.

38. See International Bank for Reconstruction and Development, *Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other* States, ICSID Convention, Regulations and Rules, Doc No ICSID/15/Rev. 1 (2003), at paras 28-30, online: <icsid.worldbank.org/en/Documents/resources/ICSID_Conv%20Reg%20Rules_EN_2003.pdf >.

States", whereas "parties" always refers to the parties to the dispute, rather than the parties to the IIA.

It may therefore seem that investors, as parties to a dispute, have the power to shape the governing law. Indeed they may, but only if the host state agrees. A host state's offer to arbitrate, as expressed in the dispute resolution provisions of the IIA, is a conditional offer – conditional on the investor's acceptance of the terms of the IIA's arbitration agreement. Nothing prevents a state and investor from making a subsequent agreement as to the choice of law; Article 42 of the *ICSID Convention* does not require that the parties make a choice of law at any particular time or in any particular form in order for that choice to bind the tribunal. However, unless the host state and the investor agree to law other than one stated in the IIA, the choice of law in the IIA binds the tribunal. In practice, although other laws (in particular domestic laws of the respondent states) are frequently applied to other aspects of an investor-state dispute, the content of the obligations created by the IIA is almost invariably determined according to the law specified in the choice of law provision of the IIA, if there is one.

The contractarian structure of arbitral authority in ISA thus renders fatuous arguments about whether investment arbitrators are agents of the parties or trustees of the treaty regime. International relations theory classically distinguishes between third party adjudicators who are agents of contracting states versus those who are trustees of the underlying regime.[39] The distinction is not binary; agent and trustee are opposing ends of a spectrum.[40] Where a particular adjudicative body sits within that spectrum depends primarily on the "zone of discretion" delegated to the adjudicative body by states parties to the treaty empowering the

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39. Kurtz, *supra* note 8 at 267 (citing Karen Alter, "Agent or Trustee: International Courts in their Political Context" (2008) 14:1 European Journal of International Relations 33l and Jean-Jacques Laffont & David Martimort, *The Theory of Incentives: The Principal – Agent Model* (Princeton: Princeton University Press, 2001)).

40. Anthea Roberts, "Power and Persuasion in Investment Treaty Arbitration: the Dual Role of States" (2010) 104 American Journal of International Law 179 at 187 [Roberts, "Power and Persuasion"].

tribunal.[41] The breadth of the zone of discretion is determined by the sum of competences explicitly delegated to an adjudicator minus the sum of control instruments available for use by principals to curb their operations.[42] Tribunals acting within a large zone of discretion act in a "permissive strategic environment as trustees of the values that inhere in the treaties that constituted them" and can "shape or control the evolution of the [treaty] regime".[43] Tribunals acting as agents, by contrast, must "align their adjudicatory activities far more closely with the immediate preferences" of their principals.[44]

To determine where ISA tribunals sit along that spectrum, one must examine the structural features of the system, in particular the "systems of control" within ISA.[45] Arbitral jurisdiction is limited to the specific set of disputes described in the arbitration provisions of IIAs. Arbitrators have no life tenure and are appointed ad hoc for each dispute; they are therefore vulnerable to retaliation for their decisions. Arbitral awards may be overturned, albeit on narrow grounds, and more generally may be overridden by the renegotiation of IIAs. States therefore possess a number of control powers that constrain the authority of investment arbitrators, suggesting that states parties expect arbitrators to exercise their authority closely in line with the states parties' objectives.[46]

Indeed, the only important aspect of ISA tribunals consistent with a

41. Alec Stone Sweet & Thomas L Brunell, "Trustee Courts and the Judicialization of International Regimes: The Politics of Majoritarian Activism in the European Convention on Human Rights, the European Union and the World Trade Organization" (2013) 1 Journal of Law and Courts 61 at 65.
42. *Ibid*; For an alternative formulation, see Roberts, "Power and Persuasion, *supra* note 40 at 185 (the scope of adjudicators' zone of discretion is defined by "the interpretive powers explicitly or implicitly delegated to them minus the formal and informal powers retained by treaty parties to influence their interpretations, including through dialogue" at 185).
43. Kurtz, *supra* note 8 at 267.
44. *Ibid* at 268.
45. See generally W Michael Reisman, *Systems of Control in International Adjudication and Arbitration: Breakdown and Repair* (Durham, North Carolina: Duke University Press, 1992).
46. Kurtz, *supra* note 8 at 268-69.

trustee type of role (beyond the simple fact that they may issue decisions that are binding on states) is the degree of interpretive authority that is typically delegated to arbitrators. Writes Roberts, investment treaties involve:

> a low level of precision, because the commitments themselves are broad and vague (*e.g.* the promise to treat investors fairly and equitably). Although imprecision is normally associated with state discretion, when it is coupled with a high degree of obligation and delegation, the opposite is true: the body charged with interpreting and applying the standard is afforded wide discretion. [47]

The net result is a significant shift of interpretive power from the treaty parties to ISA tribunals. The vague, standard-like substantive obligations contained in IIAs represent a greater degree of delegation to adjudicators than would be entailed by more precise, rule-like normative prescriptions.[48]

Nevertheless, while such delegation may be broad in a given arbitration, it is entirely contingent upon the language of the particular IIA, whose substantive previsions may be vague or precise. Either way, the tribunal's authority is entirely circumscribed. Unlike many matters relating to ISDS therefore, it is unarguable that arbitrators can only ever be agents of the states parties to the IIA. Given the radical decentralization of the ISDS system,[49] there is not even a treaty regime for them to be trustees of in the way that, for example the European Court of Human Rights is charged with developing, maintaining and, furthering the goals of the *European Convention on Human Rights*. Beyond treaty regimes, ISA tribunals have no inherent obligation to "international law", "civil society", or any other such abstraction. They have only the power and duty to resolve the individual disputes for which they are constituted by interpreting and applying the law chosen by the parties, in the manner and according to the procedures that the parties direct.

This is not to say that arbitrators are *merely* agents of the states

47. Roberts, "Power and Persuasion", *supra* note 40 at 190 [citations omitted].
48. Kenneth W Abbott et al, "The Concept of Legalization" (2000) 54:3 International Organization 401 at 413.
49. Mortenson, *supra* note 15 at 11.

party to the IIA and nothing else. At minimum, a tribunal's authority "derives from both the general grant of power by the treaty parties and the specific invocation of that grant by an investor of one treaty party (as claimant) against another treaty party (as respondent)".[50] This is the "signal innovation" of modern IIAs, and their defining feature – that they provide a direct remedy for individual investors against states, without any intermediation.[51] More concretely, the investor also has a role in appointing the members of the tribunal, which means that states "play a lesser role in determining the appointment and reappointment of investment arbitrators compared to most international judges".[52]

However, the investor normally plays no role in shaping the tribunal's interpretive authority. Writes Roberts, "Investment tribunals cannot be viewed only as agents of the disputing parties because the disputing parties' rights and the investment tribunal's powers are defined and delimited by the treaty's grant of power".[53] Accordingly, in exercising their power to interpret and apply the governing law – to decide the merits of disputes – ISA tribunals should act as if they were agents of the states parties alone.

IV. Interpretation of the Governing Law in Investment Treaty Arbitrations

ISA tribunals derive neither their power to apply the law nor their duties associated with the exercise of that power from the general law. Within the set of public international law dispute resolution institutions, those that are arbitral in character must be sharply distinguished from those that derive their authority in other ways, in particular the "standing" courts such as the ICJ and the World Trade Organization Appellate Body. No treaty regime empowers arbitral tribunals; even IIAs only provide for the establishment of tribunals if and when an investor makes a claim against

50. Roberts, "Power and Persuasion", *supra* note 40 at 182.
51. Mortenson, *supra* note 15 at 2.
52. Anthea Roberts, "Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System" (2013) 107:1 American Journal of International Law 45 at 61 [Roberts, "Clash of Paradigms"].
53. *Ibid*.

an individual state. Except to the extent that positive law imposes non-derogable duties upon the tribunal (such as a duty to declare conflicts of interest, not to take bribes, or, more prosaically, to provide reasons for their decision), tribunals owe only those duties that the parties impose and owe performance of those duties only to the parties.

The structure of interpretive authority in ISA has not been fundamentally altered by its transposition from the international commercial arbitration context to public international law disputes and "triangular" ISA. There is an arbitration agreement (the dispute resolution provisions of the IIA); there are parties to that arbitration agreement (the states that enacted the IIA); there are chosen procedures (the *ICSID Convention* and *Rules*, the *New York Convention* and *UNCITRAL Rules*, or whatever other combination the parties select); finally, there is a choice of the rules of law according to which the tribunal must decide the merits of the dispute: the choice of law provision in the IIA, potentially modified by other agreements between the host state and the investor. If there is no choice of law, this should be taken as an implied choice of the default law, such as that mandated by the second sentence of Article 42(1) of the *ICSID Convention*, or alternatively as a delegation to the tribunal of the power to choose the applicable law. One way or another, there will be an identifiable set of rules of law that the tribunal must apply, save only the rare circumstance where the parties have chosen *ex aequo et bono* determination.

To make these generalities more concrete, consider the question of whether tribunals have a duty to decide consistently with prior tribunals. The *Saipem* tribunal thought so; it found that it had a "duty to seek to contribute to the harmonious development of investment law".[54] On the other hand, the *Romak* tribunal held that, "Ultimately, the Arbitral Tribunal has not been entrusted, by the Parties or otherwise, with a mission

54. *Saipem SpA v The People's Republic of Bangladesh* (2009), ICSID Case No ARB/05/07, at para 90 [*Saipem*].

to ensure the coherence or development of 'arbitral jurisprudence'".[55] The point here is not so much that *Saipem* was wrongly decided and *Romak* was correct on the point that motivated these observation: how tribunals should treat precedents.[56] Rather, the point is that the *Saipem* tribunal was asking the wrong question – how should tribunals conceive of their role? – while the *Romak* tribunal was asking the right one – what role have the parties assigned to the tribunal?

Therefore, nearly all questions of the applicable law – how it is chosen, how its content is ascertained, and how it is applied to the facts – are at heart matters of interpretation. The tribunal should determine the intentions of the parties as expressed in the relevant agreements and, where those agreements do not provide a clear answer, should act according to the parties' presumed intentions. Applying rules beyond those the parties agreed to or in a manner not agreed to by the parties constitutes an excess of authority, which, if "manifest", constitutes grounds for annulment of the tribunal's award.

What laws do current IIAs call for? Most contain no choice of

55. *Romak SA (Switzerland) v The Republic of Uzbekistan* (2009), UNCITRAL PCA Case No AA280 at para 171 [*Romak*]; see also *AES Corporation v The Argentine Republic* (2005), ICSID Case No ARB/02/17 (concluding that "[e]ach tribunal remains sovereign and may retain, as it is confirmed by ICSID practice, a different solution for resolving the same problem" at paras 30-31).

56. The status of precedents in ISA is outside the scope of this article, but it is worth mentioning that citation of precedent is consistent with the structural argument advanced in this article. However, precedents are relevant not because tribunals have some obligation to decide consistently with each other or to advance the development of IIL. Rather, "judicial decisions" constitute a source of international law under the Statute of the International Court of Justice (albeit as "subsidiary means") for determining the content of international law. Therefore, even under a narrow, orthodox definition of the sources of international law, precedents are still within the scope of the law chosen by the choice of law provisions of most IIAs.

law provision whatsoever.[57] For ICSID arbitrations, that leads to the application of the residual rule of Article 42(1), which calls for the host state's law and the applicable rules of international law. For non-ICSID arbitrations, this generally means that the parties to the dispute may agree to the governing law or, failing such agreement, the tribunal chooses.[58]

Among the IIAs that contain choice of law provisions, the wording varies. However, the choice of law provisions fall into six categories.[59] The most common type of clause calls for the application of four sources of legal rules: the IIA itself, the municipal law of the host state, the provisions of any investment agreement or contract relating to the investment, and applicable principles of international law. The second type of choice of law clause is similar in that it lists various sources of law, but it provides the tribunal should "take [these sources] into account", as opposed to applying them, and may also provide that the list of sources is non-exhaustive. The third type calls for application of the IIA itself and international law. The fourth type is found in Indian BIT practice, and calls for application of the treaty text alone.[60] The fifth type, which appears only in more recent treaties and goes into more detail as to the relevant sources of law, specifies different laws to apply to different matters. For example, it might specify that the IIA text and international law apply

57. Christoph Schreuer, "Jurisdiction and Applicable Law in Investment Treaty Arbitration" (2014) 1:1 McGill Journal of Dispute Resolution 1 at 12.

58. See *UNCITRAL Arbitration Rules* GA Res 68/109, UNCITRAL, 2013, UN Doc A/68/462 art 35(1) (most non-ICSID ISAs are conducted under the *UNCITRAL Rules*, which determine the applicable law in this manner).

59. Andrew Newcombe & Lluis Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Alphen aan den Rijn: Kluwer, 2009) at 78. See generally Hege Elisabeth Kjos, *Applicable Law in Investor-State Arbitration: The Interplay Between National and International Law* (Oxford: Oxford University Press, 2013).

60. *Ibid* at 80 (It also provides that arbitrations may be submitted only to ad hoc arbitration under the *UNCITRAL Rules*, and not to ICSID, presumably to avoid Article 42(1), second sentence, *ICSID Convention*, which provides a backup choice of law that includes reference to international law).

to claims relating to breaches of treaty obligations, but that claims relating to investment authorizations are governed by the law specified in the authorization or, failing that, a combination of the law of the host state, the IIA text, and international law.[61] Finally, the sixth category of choice of law provisions may contain similar language to any of the previous types, but then adds that an interpretation of an IIA provision made jointly by the contracting states is binding on a tribunal.[62] These provisions vary between IIAs as to matters like the time limit for issuance of a joint interpretation and whether the tribunal must, if so requested by a state party, ask for a joint interpretation.

The apparent variety between IIAS does not, in the end, make much of a difference. "The only significant difference between the various rules on applicable law in treaties lies in the absence of a reference to host state law in some of them. The narrower clauses refer only to the treaty itself and to applicable rules of international law". [63] More generally, the default rule under Article 42(1) of the *ICSID Convention* captures most if not all elements contained in the more elaborate choice of law provisions in some IIAs. What all of these categories, except the last one, have in common is that they do not make any attempt to guide the tribunal's ascertainment or application of the chosen law; all they do is make an exclusive or non-exclusive list of the laws tribunals must consider.

The only exception to this pattern is the choice of law provisions that call for joint interpretations of the IIA by the states party to it. These do have the potential to significantly affect outcomes; however, as will be discussed below, states have the power to shape treaty interpretation

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61. See *e.g. Dominican Republic-Central America-United States Free Trade Agreement*, 5 August 2004, 32 ILM (entered into force 1 March 2006).
62. See *North American Free Trade Agreement Between the Government of Canada, the Government of Mexico, and the Government of the United States*, 17 December 1992, Can TS 1994 No 2 (entered into force 1 January 1994) [*NAFTA*] (*NAFTA* Chapter 11 is probably the most prominent example. Article 1131(2) provides that tribunals are bound by interpretations of the *NAFTA* Free Trade Commission, a joint body composed of representatives of the three *NAFTA* contracting states: Canada, the USA, and Mexico).
63. Schreuer, *supra* note 57 at 12-13.

through subsequent agreements and subsequent practice, regardless of whether the treaty contains a specific provision calling for binding joint interpretations.[64] Except for clauses relating to joint interpretations, IIAs typically give no guidance as to how the applicable law ought to be interpreted, nor does the default choice of law provision in the *ICSID Convention*. I call choice of law clauses of this standard kind "unqualified" choices of national or international law.[65]

How should tribunals proceed when faced with an unqualified choice of national or international law? Such a choice of law provision leaves unspecified a number of issues relating to interpretation of that law, such as how its rules are to be ascertained, whether reference may be made to other laws or to general principles, and how conflicts are to be resolved between these different sources of rules of law (*i.e.* which norms take precedence in case of conflicts).

Since the choice of law clause constitutes an agreement of the parties to the arbitration agreement, these questions should themselves be answered by reference to a set of interpretive principles. Unfortunately, in most cases involving unqualified choices of law, neither the text of the IIA nor any of the other means of interpretation prescribed by Articles 31-32 of the *Vienna Convention on the Law of Treaties*[66] ("*VCLT*") (such as an examination of the IIA's *travaux*) sheds any light. The tribunal's only safe option is to presume that, unless the parties carve out some area of the law or qualify the choice of law in some other way, choice of a legal system means a choice of *all* of that legal system's substantive rules.

With respect to national laws applied by ISA tribunals (for example, to determine whether the host state violated the terms of an investment authorization or investment contract governed by national law) this means applying *all* of the various sources of law recognized as valid within

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64. See *infra* notes 78-92 and accompanying text.
65. One sees the same thing in contract drafting practice, where most choice of law clauses simply name the law of some state without qualification. See Joshua Karton, "The Arbitral Role in Contractual Interpretation" (2015) 6:1 Journal of International Dispute Settlement 1 at 27-30.
66. *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331 arts 31-32 (entered into force 27 January 1980) [*VCLT*].

the chosen national legal system – not just relevant code provisions, but also to all relevant statutes and regulations, along with case law and customs recognized as authoritative within the named legal system.[67] Since all state laws exist within a normative hierarchy that national courts would unhesitatingly apply (although they may disagree on the outcomes in individual cases), ISA tribunals should also take into account the relationship between the various national rules of law, including constitutional norms that might invalidate some other rule of law.[68] As a corollary, for matters governed by national law, the chosen national law should be applied to the exclusion of any other national or transnational laws; when parties select a single state's law, they presumably intend that no other national laws should be applied.

With respect to international law, it means roughly the same thing: ISA tribunals should apply international law as a whole, not just rules developed in the investment context, and recognize supervening principles of public international law, such as *ius cogens* or rules of international human rights law, that may have priority over the investment treaty.

In all this, it is the intentions of the state parties to the investment treaty that matter, rather than the intentions of the parties to the dispute (*i.e.* the investor and the host state). Investment arbitrators are agents of

67. This specification is made in some IIAs; see US, Office of the United States Trade Representative, *2012 US Model Bilateral Investment Treaty* (2012), online: <ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf> (defines national law as "the law that a domestic court or tribunal of proper jurisdiction would apply in the same case" at 34, n 22. Without further specification, this must be taken to mean that the tribunal should situate itself in the position of a domestic court, consulting whatever sources of law are authoritative in that state in whatever hierarchy would be observed within that state) [*US Model BIT*].

68. International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries*, ILC 2001 A/56/10, art 3 (this is qualified by the principle that states may not plead conformity with their own municipal laws to excuse a violations of their international law obligations; "the characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law", art 3).

the treaty parties, not the disputing parties.

This rather bald statement will be instinctively rejected by many in the ISA community, who see the system of investment treaties as designed in large part to protect the legitimate expectations of investors. Therefore, two immediate qualifications are required. First, I do not mean to say that the legitimate expectations of investors are never relevant. They may matter greatly in a variety of circumstances, especially for issues that turn on the investment contract that the investor signed. In addition, the fact that some act of the host state was contrary to previous representations by the state to the investor – representations that gave rise to legitimate expectations by the investor that the state would follow through on those representations – may mean that the action constituted a treaty breach, specifically the fair and equitable treatment standard contained in most IIAs.[69] Recent treaty practice adopts this vision of legitimate expectations. For example, the *Canada-European Union Comprehensive Economic and Trade Agreement* ("*CETA*") provides:

> When applying the above fair and equitable treatment obligation, a Tribunal may take into account whether a Party made a specific representation to an investor to induce a covered investment, that created a legitimate expectation, and upon which the investor relied in deciding to make or maintain the covered investment, but that the Party subsequently frustrated.[70]

But the expectations of the investor cannot be applied to shape the meaning of treaty obligations themselves: the choice of law in the IIA constitutes a condition of the host state's standing offer to arbitrate, and investors accept that offer when they launch an arbitration under the IIA.

The second qualification is that the power of the state parties to the

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69. A consistent line of case law, especially under *NAFTA* Chapter 11, embraces this point of view. See *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc v Government of Canada* (2009), UNCITRAL PCA Case No 2009-04 at para 589; *Mobil Investments Canada Inc & Murphy Oil Corporation v Canada* (2012) ICSID Case No ARB(AF)/07/4 at para 152; *Glamis Gold Ltd v United States of America* (2009), UNCITRAL Arbitration Rules at para 22; *Waste Management Inc v United Mexican States* (2004), ICSID Case No ARB(AF)/00/3, at paras 98-99.

70. 30 October 2016, art 8.10(4) (not yet entered into force) [*CETA*].

IIA to shape the tribunal's interpretation and application of the IIA does not imply a requirement to interpret IIAs in a manner favourable to the host state in any given dispute. States enact IIAs in order to create a fair and predictable climate for foreign investments, with the ultimate (and sometimes directly expressed) goal of increasing FDI flows. In order to achieve those objectives, IIAs grant rights directly to investors, rights would be largely meaningless if states did not delegate to neutral and independent arbitral tribunals the power to enforce those rights.[71] Accordingly, some state conduct harmful to investors, even if conducted for a legitimate regulatory purpose, can and should be held to violate state obligations under the IIA and to give rise to an obligation to pay compensatory damages.

These qualifications aside, the contractarian structure of arbitral authority in ISA means that states effectively control the interpretive process. They are, to use the memorable phrase of Methymaki and Tzanakopoulos, "masters of puppets".[72]

V. Implications of the Proposed Approach

In this Part, I explain how the abstract points made in Part III apply to the interpretation of IIAs by arbitral tribunals. The most direct consequence of my focus on choice of law is that states have the ultimate power not only to choose the governing substantive rules of law, but also to direct their interpretation. This Part first describes how states can make use of that power to bind ISA tribunals to interpret IIAs in particular ways. Next, it explains how tribunals should interpret IIAs under the commonly-employed choice of law provisions that currently exist in IIAs.

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71. Roberts, "Power and Persuasion", *supra* note 40 at 183.
72. Eleni Methymaki & Antonios Tzanakopoulos, "Masters of Puppets? Reassertion of Control through Joint Investment Treaty Interpretation" (2016) Oxford Legal Studies Research Paper No 10/2016 at 1-2, online: <papers.ssrn.com/sol3/papers.cfm?abstract_id=2740127>.

A. States in the Driver's Seat

In the last few years, a number of states have pursued a number of strategies in an effort to "reassert control" over ISAs.[73] Some have "exited" the ISDS system by withdrawing from the *ICSID Convention* or from individual treaties they view as problematic, or by not renewing investment treaties when they expire.[74] More often, states have attempted to renegotiate the terms of existing treaties or draft new terms for treaties going forward. Leaving aside treaty terms that would change the structure of the ISDS system,[75] states have generally adopted one of two strategies: defining substantive obligations more narrowly and precisely than in past IIAs, and carving out specific exceptions to state liability in areas such as taxation, financial services, public health and the environment, and culture.[76] Taken together, these strategies suggest that states in general desire greater detail in investment treaties, with the aim of constraining arbitral discretion and promoting greater certainty.[77]

Despite some notable diplomatic successes, such as the conclusion of *CETA*, these efforts have been somewhat underwhelming. Some redrafting attempts fail on their own terms to introduce greater precision

73. See Andreas Kulik, ed, *Reassertion of Control over the Investment Treaty Regime* (Cambridge: Cambridge University Press, forthcoming 2017).
74. Roberts, "Power and Persuasion", *supra* note 40 at 191.
75. See European Commission, "Fact Sheet on Investment Provisions in the EU-Canada free trade agreement (CETA)" (February 2016), online: <trade.ec.europa.eu/doclib/docs/2013/november/tradoc_151918.pdf> (such as the EU's proposal for a permanent investment court, which has been incorporated into the recently-concluded *CETA*).
76. Mitchell Moranis, "Between power and procedure: the changing balance of investment treaty protections" (2015) 32:1 Arbitration International 81 at 83.
77. *Ibid* at 101.

and predictability.[78] But no matter how detailed and specific treaty language becomes, it can never resolve all questions as to the content of obligations arising under the treaty. There are two reasons for this, first, all treaty language, no matter how apparently clear, must be interpreted. As former President of the ICJ, Dame Rosalyn Higgins put it:

> Reference to the 'correct legal view' or 'rules' can never avoid the element of choice (though it can seek to disguise it), nor can it provide guidance to the preferable decision. In making this choice one must inevitably have consideration for the humanitarian, moral, and social purposes of the law.[79]

Second, not all potential areas of dispute can possibly be predicted at the time an IIA is negotiated or renegotiated. There will always be unforeseen gaps.

In other words, attempting to eliminate interpretive uncertainty *ex ante* by drafting more specific treaties is ultimately a doomed enterprise, based on a misunderstanding of how law works. Treaty text is never:

> … reducible to a fixed, immutable expression of the rule … the engagement of actors with a legal text is historically contingent: it is structured by the frame in which it is situated, and it is measured against rules contained within that frame, not to mention the past practices of other actors or disputants.[80]

As Schwebel writes of the EU's attempts to reassert control by redrafting treaty provisions with greater precision:

> There is … a troubling message throughout the EU's [proposals] … the notion that international law is simply a set of rules to be applied by judges mechanically. Under this view, the more the [treaty] text clarifies what the law is, the less doubt will exist, the more rigorous and consistent the analysis of

78. Federico Ortino, "Refining the Content and Role of Investment 'Rules' and 'Standards': A New Approach to International Investment Treaty Making" (2013) 28 ICSID Rev 152 at 158; but see Moranis, *ibid* (arguing that "States are beginning to fill the gaps in treaties, providing greater detail and setting clear limits to their obligations and investors' rights" at 83).

79. Rosalyn Higgins, *Problems & Process: International Law and How We Use It* (Oxford: Oxford University Press, 1994) at 5.

80. Hernandez, *supra* note 6 at 171 citing Ingo Venzke, *How Interpretation Makes International Law: Between Normative Twists and Semantic Authority* (Oxford: Oxford University Press, 2012) at 49.

> TTIP awards will be.[81]

This view is at best misguided and at worst wilfully obtuse. As Schwebel concludes, "[t]he fact is that applying rules always involves a certain degree of choice".[82]

A potentially more fruitful approach, adopted by some states but still significantly underused, is to promulgate interpretations of treaties *ex post*.[83] As discussed above, some IIAs expressly provide that the states parties may jointly issue interpretations of a treaty that are binding upon tribunals. But even where no such provision exists, first principles dictate that states, acting together, are masters of the treaties they make:

> ultimately the power of authoritative interpretation of a norm … rests with the organ which promulgated the norm and which has the power to revoke it. In the context of a treaty, the organ that has this power is the peculiar organ formed by *all* the states parties to it.[84]

When states agree on an authentic interpretation of the treaty, it has both retroactive and prospective effect: "[w]e are in the realm of the lawmaker *restricting the range of possible meanings of a norm once and for all*, by selecting one of them to control indefinitely, rather than selecting one among them to apply to a specific case".[85] Thus, the only legal effect of an IIA provision regulating joint interpretations is potentially to limit the scope of states' power to issue joint interpretations, for example by imposing temporal limits or by requiring that the joint interpretations

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81. Stephen M Schwebel, "The Outlook for the Continued Vitality, or Lack Thereof, of Investor-State Arbitration" (2016) 32:1 Arbitration International 1 at 7.
82. *Ibid* at 8.
83. Roberts, "Power and Persuasion", *supra* note 40 at 179.
84. Methymaki, *supra* note 72 at 5 citing *Question of Jaworzina (Polish-Czechoslovakian Frontier)* (Advisory Opinion) [1923] PCIJ Ser B No 8, 37: ("the right of giving an authoritative interpretation of a legal rule belongs solely to the person or body who has the power to modify or suppress it" at 5) [emphasis in original].
85. *Ibid* at 5 [emphasis in original].

take a particular form or be arrived at through a particular process.[86]

This conclusion is confirmed by customary international law principles of interpretation, as recognized by tribunals going back more than a century. In 1911, the US-Mexico International Boundary Commission in *The Chamizal Case*[87] found that joint interpretations were not only binding on the tribunal, but indeed also on the parties to the treaty. The Commission found it:

> impossible to come to any other conclusion than that the two nations have, by their subsequent treaties and their consistent course of conduct in connection with all cases arising thereunder, put such an authoritative interpretation upon the language of the treaties of 1848 and 1853 as to preclude them from now contending that the fluvial portion of the boundary created by those treaties is a fixed line boundary.[88]

The binding force of subsequent agreements and subsequent practice of the parties is also codified in the *VCLT*, which expresses customary principles of interpretation. Article 31(1) requires that treaties 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 light of its object and purpose".[89] At a minimum, joint interpretations of a treaty by the states party to it form part of that context, and are therefore relevant to all matters of interpretation. But in addition, paragraph 3 of Article 31 provides expressly that, together with the treaty's context, interpreters must also take into account:

> (a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) Any relevant rules of international law

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86. See *NAFTA*, *supra* note 62 (Chapter 11, art 1131(2) provides that interpretations of the *NAFTA* Free Trade Commissions are binding upon tribunals, and art 1132, which provides that disputing parties may require tribunals to request from the Free Trade Commission interpretations on the scope of a reservation or exception set out in one of the annexes to Chapter 11).
87. (1911), XI RIAA 309.
88. *Ibid* at 328.
89. *VCLT*, *supra* note 66, art 31(1) [emphasis added].

> applicable in the relations between the parties.[90]

The distinction in paragraph 3 between subsequent agreements and subsequent practice makes no difference in terms of their legal effects, but only in terms of the necessary evidence; a subsequent agreement under subparagraph (a) constitutes "an *ipso facto* authentic interpretation", while a party relying on subsequent practice under subparagraph (b) must show that the practice of the states parties substantiates a particular common understanding.[91] If the states that are party to an IIA promulgate any kind of document setting out their understanding of the meaning of treaty terms, such document would qualify as both subsequent agreement and subsequent practice. Either way, writes Villiger, "the parties' authentic interpretation of the treaty terms is not only particularly reliable, it is also endowed with binding force".[92] Here, I refer to subsequent agreements and subsequent practice that have the purpose and effect of specifying the meanings of treaty provisions collectively as "joint interpretations".

Under the *VCLT*, states' powers to issue joint interpretations are effectively unlimited. In the investment arbitration context, it has been argued that the direct rights that are vested in investors by IIAs may impose limits on the absolutely binding character of joint interpretations.[93] Investors may rely to their detriment on meanings of the applicable IIA as they are understood at the time the investment is made. In addition, a tension arises between states' dual roles, as parties to the IIA and as respondents in individual arbitrations. Roberts explains:

> Viewing investment treaty arbitration solely through a public international law, state-to-state prism is unsatisfactory because investment treaties create

90. *Ibid*.

91. First Report of Special Rapporteur Georg Nolte, *Subsequent Agreements and Subsequent Practice in Relation to Treaty Interpretation*, ILC, 65th Sess, UN Doc A/CN.4/660 (2013) at para 70; see also Rahim Moloo, "When Actions Speak Louder Than Words: The Relevance of Subsequent Party Conduct to Treaty Interpretation" (2013) 31:1 Berkeley Journal of International Law 39 at 58 (describing subsequent agreements and subsequent practice as existing along a single evidentiary continuum).

92. Mark Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Leiden: Martinus Nijhoff, 2009) at 429.

93. See Roberts, "Power and Persuasion", *supra* note 40 at 207-15.

> reciprocal rights and duties for the treaty parties *and* rights for nonstate actors (investors). To increase confidence in and enforcement of those rights, states have delegated the power to resolve investor-state disputes to arbitral tribunals. If the treaty parties could agree at any time on a binding interpretation of the treaty, they could use that authority to undermine not only investors' expectations but also tribunals' dispute resolution powers.[94]

For this reason, Roberts and others argue that states' power to issue joint interpretations of IIAs may be limited on two broad bases: reasonableness and timing. With respect to reasonableness, if a joint interpretation selects one of a set of reasonable interpretations of a disputed treaty provision, that is indisputably within the states parties' power, but adoption of an unreasonable or unexpected interpretation may constitute a *de facto* amendment of the treaty, which would be unfair to the investor to apply retroactively. With respect to timing, changing the terms of the treaty after an investment is made may involve harm to investors who have detrimentally relied on the treaty; fixing the treaty's terms after a claim is filed may harm not only the investor, but also the integrity of the arbitral process.[95] For this reason, Roberts concludes that "the persuasiveness of treaty party interpretations should be understood as a function of their timing and reasonableness".[96]

I reject limits based on reasonableness. States do indeed delegate to tribunals the power to interpret treaties, but that delegation is limited by subsequent agreements and subsequent practice. Writes Crawford:

> In the context of investment treaty arbitration there is a certain tendency to believe that investors own bilateral investment treaties, not the states parties to them … That is not what international law says. International law says that the parties to a treaty own the treaty and can interpret it. One might say within reason, but one might not question their application of reason as they see fit.[97]

The contractarian structure of authority in ISA means that investment arbitrators are, if anything, *more* bound by joint interpretations than

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94. *Ibid* at 183 [emphasis in original].
95. *Ibid* at 212.
96. *Ibid*.
97. James Crawford, "A Consensualist Interpretation of Article 31(3) of the Vienna Convention on the Law of Treaties" in Georg Nolte, ed, *Treaties and Subsequent Practice* (Oxford: Oxford University Press, 2013) 29 at 31.

adjudicators applying other kinds of treaties. A joint interpretation may be objectively unreasonable, but it is not within the power of ISA tribunals to declare it to be so.

In addition, there should not be any temporal limit on states' power to issue interpretations of treaties, unless a limit is imposed by the IIA itself or a legal stabilization clause in an investment agreement or other contract between the respondent state and the investor. Absent such a provision, investors have no legitimate expectation that the legal environment of their investment will remain stable for the entire life of that investment. Some recently-enacted treaties make this principle explicit. For example, *CETA* provides that, "[f]or greater certainty, the mere fact that a Party regulates, including through a modification to its laws, in a manner which negatively affects an investment or interferes with an investor's expectations, including its expectations of profits, does not amount to a breach of an obligation…".[98] In other words, states may regulate without fear that the mere fact that their regulations reduce foreign investors' profits will lead to a finding that they have breached the treaty. Therefore, *a fortiori* states must be able to enter into subsequent agreements or establish subsequent practice in order to clarify or change the meaning of treaty obligations, even if this restricts the range of possible interpretations tribunals may adopt.[99]

More importantly for present purposes, the choice of law provisions in IIAs or in the *ICSID Convention* state only that tribunals shall or may apply certain laws; they do nothing to fix the content of those laws in place. Accordingly, arbitrators are bound to apply the law as it stands at the time they render their decision. This arguably raises due process concerns, especially where states issue joint interpretations after a dispute arises. However, nothing about a change in the underlying law constitutes a procedural violation that might justify annulment of an award or refusal of enforcement. On the contrary – a tribunal's failure to apply the governing law as authoritatively interpreted by the states party to the treaty would constitute an excess of powers. In addition, as the

98. *CETA*, *supra* note 70, art 8.9(2).
99. Methymaki, *supra* note 72 at 19.

investor's home state has an opportunity to protect its investor by arguing that a subsequent agreement or practice alleged by the respondent states constitutes an impermissible moving of the goalposts. If it decides not to do so, that "must mean something".[100] It is therefore unfortunate that ISA tribunals tend toward "a certain reluctance … to embrace wholeheartedly … the unquestionable vesting with binding force of joint interpretations by the states parties of their own treaties".[101]

The correct approach is demonstrated by a recent decision of the High Court of Singapore annulling an investor-state award in favour of a Macanese investor under the *PRC-Laos BIT* on the basis of excess of jurisdiction ("*Sanum Investments*").[102] The basis of the annulment was an exchange of letters between China and Laos, which reflected the common position of China and Laos that the *BIT* did not extend to Macau. The court held that the letters constituted a subsequent agreement of the states parties under Article 31(3)(a) *VCLT*, establishing conclusively that the Macanese investor could not take advantage of the *BIT*.[103]

It made no difference that exchange of letters came after the tribunal had issued its decision upholding its jurisdiction; the Singaporean court dismissed the investor's due process concerns, reasoning that "parties relying on the provisions of BITs" should be aware of the potential impact of Article 31(3)(a). The letters reflected the "common understanding" of the parties rather than a retroactive amendment of the *PRC-Laos BIT*.[104] The *Sanum Investments* decision reflects the conception, advanced in this article, that while investors are third-party beneficiaries of IIAs and derive certain direct rights from them, investors have no claim to interpretive power over them.

These two avenues – redrafting of substantive IIA provisions and promulgation of binding interpretations after ratification of the IIA – have been employed by states and explored in the literature. The contractarian

100. *Ibid* at 20.
101. *Ibid* at 15.
102. *Government of the Lao Peoples' Democratic Republic v Sanum Investments Ltd* [2015] SGHC 15 [*Sanum Investments*].
103. *Ibid* at paras 69-70.
104. *Ibid* at paras 76-77.

theory advanced here points the way to a third strategy that, thus far, has been largely overlooked: states may shape the application of the governing law by adding content to the choice of law provisions in IIAs. For example, if states want arbitrators to follow or not to follow precedents, they can so provide in their treaties. The *US Model BIT* provides that "An award made by a tribunal shall have no binding force except between the disputing parties and in respect of the particular case".[105] This provision is modeled on Article 59 of the *ICJ Statute*, which has in no way prevented the ICJ from regularly treating its prior judgments as persuasive. Indeed, a *de facto* system of precedent has already existed in ISA for some time.[106] Thus, if tribunals are to be restrained from considering prior case law, the *Model BIT* should be redrafted accordingly; conversely, if the states party to the IIA want tribunals to take prior decisions into account, the clause can so state.

Similarly, if the states party to an IIA want to restrict the tribunal to certain international law doctrines and not others, it is within their power to do so. But even most recently-drafted treaties, including those promulgated by states intent on restricting arbitrators' zone of discretion, do not take advantage of this opportunity. For example, Article 8.31(1) of *CETA* provides:

> When rendering its decision, the Tribunal established under this Section shall apply this Agreement as interpreted in accordance with the Vienna Convention on the Law of Treaties, and other rules and principles of international law applicable between the Parties.[107]

Such a provision is effectively meaningless – a missed opportunity. The

105. *US Model BIT*, *supra* note 67, art 34(4).

106. See *e.g.* Eric De Brabandere, "Arbitral Decisions as a Source of International Investment Law" in Tarcisio Gazzini & Eric De Brabandere, eds, *International Investment Law: The Sources of Rights and Obligations* (Leiden: Martinus Nijhoff, 2012) at 245; Lucy Reed, "The *De Facto* Precedent Regime in Investment Arbitration: A Case for Proactive Case Management" (2010) 25:1 ICSID Rev 95; Andrea Bjorklund, "Investment Treaty Arbitral Decisions as Jurisprudence Constante" in Colin Picker et al, eds, *International Economic Law: The State and Future of the Discipline* (London: Bloomsbury, 2008) at 265.

107. *CETA*, *supra* note 70, art 8.31(1).

VCLT already applies (as treaty law and as an expression of customary international law) to the interpretation of all IIAs except the small minority that do not take the form of treaties. Stating that tribunals should apply "other rules and principles of international law applicable between the Parties" does nothing to constrain arbitrators' authority to determine which rules and principles are applicable.[108] Despite all its verbiage, it is no different from a simple choice of "international law".

States easily provide that particular treaties or areas of international law outside of the IIA text do or do not apply. They could contract out of the interpretive rules in the *VCLT*. They could even provide that interpretations other than those of the states parties are binding. For example, the choice of law provision in the IIA could declare opinions of the International Law Commission are binding. Such a provision could be accompanied by treaty language to the effect that failure to abide by reports of the ILC would constitute manifest excess of the tribunal's powers, so that awards could be annulled or refused enforcement. (Note that I am not arguing that this would necessarily be a good idea, only that it would be effective.)

The upshot is not that any particular interpretive approach is optimal, or even that any one approach can be considered optimal for all combinations of states parties. It is simply to encourage treaty drafters to be more creative and more assertive in shaping the interpretive authority of arbitrators beyond simply making unqualified choices of whole legal systems. Given the contractarian structure of interpretive authority in ISA, arbitrators would be bound by more specific choice of law provisions.

B. In Most Cases, International Investment Agreements Should be Interpreted Extensively

The previous section considered the ways in which states might act to take advantage of the contractarian structure of arbitral authority in ISA. But renegotiating treaties takes a great deal of time, and in the current

108. See Schwebel, *supra* note 81 at 8-9 (arguing that, by contrast, the *CETA* text is probably overzealous in its attempts to restrain tribunals' interpretations of national laws and regulations).

political climate there may be little support for new multilateral or bilateral IIAs. Even if the political will existed and the collective action problems could be overcome, the transaction costs involved in renegotiating the thousands of extant treaties would be prohibitive.[109] Even issuance of joint interpretations requires agreement between states with potentially opposed interests, as well as timely coordination between the states.

In the meantime, arbitrations continue to be commenced and tribunals must resolve them. To do so, they will have to interpret the IIAs that now exist. The contractarian structure of interpretive authority in ISA indicates that, in doing so, they should be guided by the choice of law provisions in those IIAs. As discussed above, most IIAs make, in effect, an unqualified choice of "international law" as the governing law. How should a tribunal interpret an IIA subject to such an unqualified choice of international law? This section sets out some brief rules of thumb as to how tribunals should proceed in this, the most common choice of law scenario under existing IIAs.

I argue that an unqualified choice of international law implies three more specific choices, all of which reflect the presumptive intention of the states party to the IIA as to how the IIA should be interpreted. First, (and least controversial) it constitutes a choice of international law rules of interpretation, as expressed in the *VCLT*. Second, it constitutes a choice of *all* international law, including customary and treaty law from outside the IIA and outside the IIL context – at a minimum, all of the sources of law envisaged by Article 38 of the *ICJ Statute*. Third, it constitutes a choice of *only* international law – which means, for example, that tribunals have no power to conduct a comparative public law analysis to determine the meaning of treaty obligations.[110] Regardless of whether a comparative public law analysis would increase the real or perceived legitimacy of ISA, it is outside the arbitral remit.

In what follows, I will discuss these three points in more detail. In the process, I will show how an unqualified choice of international law

109. Roberts, "Power and Persuasion", *supra* note 40 at 192.

110. As urged by commentators such as Kingsbury & Schill, *supra* note 4; see Roberts, "Power and Persuasion", *ibid*; see also note 4, *supra*, and accompanying text.

as the governing law mandates an extensive approach to interpretation – one that draws on sources of international law beyond the treaty text and that gives voice to the object and purpose of the treaty.

It is undisputed that international law rules of interpretation as expressed in Articles 31-32 of the *VCLT* apply to the interpretation of IIAs,[111] although tribunals are inconsistent in how they apply those rules and may pay mere lip service to the *VCLT*.[112] What remains more contested is the role of international law beyond the *VCLT* in interpreting IIAs and filling gaps within them. This is the question of restrictive versus extensive interpretation, which lies at the heart of interpretive disputes in many areas of international law adjudication: whether treaties such as IIAs should be interpreted restrictively, according to the literal meaning of their text and in isolation from broader international law except where necessary to fill gaps, or extensively, with broad reference to the treaties' object and purpose and to international law more generally.

Given the incomplete nature of most IIAs, including the recently-negotiated ones, some resort to international law beyond the IIA is unavoidable and uncontroversial. A good example is the customary international law rules on attribution described by the International Law Commission in its *Draft Articles on the Responsibility of States for Internationally Wrongful Acts with Commentaries.*[113] These are frequently

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111. J Romesh Weeramantry, *Treaty Interpretation in Investment Arbitration* (Oxford: Oxford University Press, 2012) at 24-30.

112. *Ibid* at 157-64 (observing that, while declaring that they would apply the *VCLT*, tribunals often rely instead on fairness, policy implications, practical consequences, efficiency, or reasonableness); see also Mahnoosh H Arsanjani and W Michael Reisman, "Interpreting Treaties for the Benefit of Third Parties: the 'Salvors Doctrine' and the use of Legislative History in Investment Treaties" (2010) 104:4 American Journal of International Law 597 at 599; Thomas Wälde, "Interpreting Investment Treaties: Experiences and Examples" in Christina Binder et al, eds, *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (Oxford: Oxford University Press, 2014) (observing that "[i]t is difficult to find a tribunal which formally and properly applied the Vienna Rules step by step" at 746).

113. ILC, 54th Sess, UN Doc A/56/10 (2001) arts 4-5.

cited by ISA tribunals and, to my knowledge, no commentator has criticized tribunals for citing them.

But beyond such "easy cases", debate continues. Ongoing disagreement as to restrictive versus extensive interpretation may be justified with respect to permanent international judicial bodies, but given the contractarian structure of interpretive authority in ISA, an unqualified choice of international law in an IIA mandates an extensive approach to interpretation of the IIA. International law from outside the applicable IIA should be applied not only to shed light on the meaning of the IIA – to resolve disagreements as to the meaning of the text – but also as a source of obligations of the parties to the arbitration beyond those created by the IIA. This may appear, at first glance, to be a pro-investor position, since only states, not investors, have obligations under IIAs and, more generally in international law, non-state entities enjoy rights more than they incur obligations. However, international law principles may also limit states' obligations or provide excuses for breaches of treaty obligations.

One's attitude toward the interpretation and application of international law is inextricable from one's attitude toward the independence of international law in relation to its main subject: states. If international law is always and entirely a product of state consent, and merely determines the reciprocal rights and duties of states that belong to an international community without limiting their sovereignty,[114] then the interpretation and application of international law should be limited to what is explicitly mentioned in the text of treaties and in written instruments in general. If, on the other hand, international law is an autonomous legal system that requires the consent of its subject to exist and determine its rules and principles, but that may have an impact beyond the express consent of states, then its interpretation and application might extend beyond the explicit words of written

114. See *e.g.* James Leslie Brierly, *The Law of Nations: An Introduction to the International Law of Peace* (Oxford: Clarendon Press, 1963) at 1 (this may be described as the "classical view"); Lassa Francis Lawrence Oppenheim, *International Law: A Treatise*, vol I (Peace) (New York: Longman, Green, 1912) at 366-67.

instruments and the clearly-defined customary law of state practice.[115]

The *VCLT* crystalizes the understanding that treaties should be interpreted based on "their context and in the light of its object and purpose".[116] It also recognizes that treaties, like other legal instruments, are not self-executing, nor are can they ever be entirely autonomous; they must therefore be interpreted within their broader legal context, including preambles, annexes, and agreements relating to treaties, as well as instruments connected to them and accepted by the parties.[117] Finally, the *VCLT* requires that, in addition to the treaty's context, subsequent agreements between the parties, or practice regarding the treaty's interpretation and "relevant rules of international law applicable in the relations between the parties" must also be taken into consideration.[118]

This is not to say that the *VCLT* is entirely contextualist in its approach; to the contrary, the first rule of *VCLT* Article 31 is that treaties should be "interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty". At the same time, though, Article 31 does not impose pure textualism.[119] The ordinary meaning of the treaty terms must be considered in their context and in light of their object and purpose. In this way, the *VCLT* adopts an approach that sits between pure textualism and pure contextualism. Most importantly for present purposes, the *VCLT* directs adjudicators to consider more than just the immediate context of the treaty – the circumstances surrounding its conclusion, including its drafting history – and to take into account

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115. See Antonio Augusto Cançado Trindade, *International Law for Humankind: Towards a New Jus Gentium* (Leiden: Martinus Nijhoff, 2010) at 429-49. On developments in treaty interpretation generally, see Richard K Gardiner, *Treaty Interpretation* (New York: Oxford University Press, 2008) and Gerald Fitzmaurice, Olufemi Elias & Panos Merkouris, eds, *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years On* (Boston: Martinus Nijhoff Publishers, 2010).
116. *VCLT*, *supra* note 66, art 31(1).
117. *Ibid*, art 31(2).
118. *Ibid*, arts 31(3)(a)-(c).
119. See *e.g.* Julian Davis Mortenson, "The *Travaux* of *Travaux*: Is the Vienna Convention Hostile to Drafting History?" (2013) 107:4 American Journal of International Law 780.

the treaty's broader political and legal context, including conduct of the states parties not directly related to the treaty, as well as the full scope of international law rules applicable between the states parties.

Some argue that the *VCLT* mandates a two-stage interpretive process similar to the process of contractual interpretation in many common law jurisdictions; in the first stage, only the ordinary meaning of the words is to be considered; if, and only if, that meaning is vague or ambiguous or leads to results that contradict other provisions of the treaty may the adjudicator proceed to the second stage of interpretation, in which it may consider the treaty's object and purpose.[120] There is some support for this position in the *travaux* of the International Law Commission at the time of the drafting of the *VCLT*, as some ILC members emphasized "the primacy of the text as the basis for the interpretation of a treaty, while at the same time giving a certain place to extrinsic evidence of the intentions of the parties and to the objects and purposes of the treaty as means of interpretation".[121]

However, applying this line of argument to the *VCLT* itself shows that it does not call for such strict textualism. Article 31(1) of the *VCLT* states simply that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". It says nothing about distinct stages of interpretation, nor does it limit the object and purpose of the treaty to a subsidiary or supplementary role. Rather, the ordinary meaning of the treaty text should be considered together with ("in light of") the treaty's object and purpose. The fact that other interpretive aids are expressly relegated to a subsidiary status[122] shows that the treaty's context and its object and purpose should not be left to a second stage of interpretation.

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120. See *e.g.* Ulf Linderfalk, *On the Interpretation of Treaties: The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties* (Dordrecht: Springer, 2007) at 203.
121. *Draft Articles on the Law of Treaties with Commentaries*, ILC, 18th Sess, UN Doc A/CN.4/191 (1966) 187 at 218 [*Draft Articles on Treaties*].
122. *VCLT*, *supra* note 66 (specifically, "the preparatory work of the treaty and the circumstances of its conclusion", art 32).

Indeed, the International Law Commission itself pointed out that "the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose should be the first element to be mentioned".[123] Consequently, preference must be given to the ordinary meaning, which "is not to be determined in the abstract but in the context of the treaty and in the light of its object and purpose".[124] Article 31(1) does not foreclose consideration of the treaty's object and purpose in the first instance; all it forecloses is "an investigation *ab initio* into the intentions of the parties".[125] The *VCLT* therefore prescribes a method of interpretation that takes into account, together with the ordinary meaning of the text, the purpose of a treaty as a whole, including its preamble, and the area being interpreted (international law in general or its specific subdivisions), including its evolution through time ("emergent purpose"). These contextual materials will be particularly useful to adjudicators when they are called upon to fill gaps and apply treaties to circumstances not considered at the time of the treaty's conclusion.

An example of this approach in action can be seen in the jurisprudence of international human rights courts. The object and purpose of human rights treaties is, generally speaking, the effective protection of individuals. Accordingly, the Inter-American Court of Human Rights ("IACtHR") and the European Court of Human Rights ("ECtHR") have both developed their jurisprudence by going beyond the mere grammatical interpretation of their respective treaties and seeking interpretations that advance such effective protection.

In *Loizidou v Turkey*,[126] the ECtHR affirmed that "the object and purpose of the Convention as an instrument for the protection of individual human beings requires that its provisions be interpreted and applied so as to make its safeguards practical and effective".[127] It added that a restrictive approach to the interpretation of the *European*

123. *Draft Articles on Treaties*, *supra* note 121 at 220.
124. *Ibid* at 221.
125. *Ibid*.
126. (1995), 20 ECHR (Ser A) 99.
127. *Ibid* at para 72.

Convention on Human Rights would "seriously weaken" the role of the ECtHR and would "diminish the effectiveness of the Convention as a constitutional instrument of European public order (*ordre public*)".[128] The corollary position that the *Convention on Human Rights* is a "living instrument" that requires dynamic interpretation to ensure that it continues to achieve its object and purpose, first expressed in *Tyler v the United Kingdom*,[129] is continually reaffirmed by the ECtHR.[130]

Arguably influenced by the ECtHR,[131] the IACtHR has gone even further in crystalizing and extending the notion that human rights treaties must be interpreted to be effective in protecting individuals. Invoking what it called the "*pro homine* principle",[132] the IACtHR has, for example, held that States cannot damage an individual's "life plan" without breaching their international law obligations;[133] that indigenous communities have special rights to their lands;[134] that the Court may take into consideration indigenous legal traditions;[135] and that international law prohibits forced disappearances.[136]

All of these judgements advanced the protection of human rights beyond the initial set of rights spelled out by the *Inter-American Convention on Human Rights*. The IACtHR, in its jurisprudence interpreting treaties *pro homine*, has made reference to other treaties, and to principles codified or developed in the context of international humanitarian law,

128. *Ibid* at para 75.
129. (1978), 21 ECHR (Ser A) 612 (the *Convention* "is a living instrument which … must be interpreted in the light of present-day conditions" at para 31).
130. See *e.g. Rantsev v Cyprus and Russia*, No 25965/04, [2010] I ECHR 1, at paras 273-75.
131. Magnus Killander, "Interpreting Regional Human Rights Treaties" (2010) 7:13 SUR – International Journal of Human Rights 145.
132. Sometimes called the *pro personae* principle.
133. *Loayza Tamayo Case* (*Peru*) (1998), Inter-Am Ct HR (Ser C) No 42 at paras 144-54.
134. *The Mayagna (Sumo) Awas Tingni Community Case* (*Nicaragua*) (2001), Inter-Am Ct HR (Ser C) No 79.
135. *Aloeboetoe et al Case* (*Suriname*) (1993), Inter-Am Ct HR (Ser C) No 11.
136. *Villagrán-Morales et al Case* (*Guatemala*) (1999), Inter-Am Ct HR (Ser C) No 63.

international environmental law, international investment law, and the international law of economic, social and cultural rights.[137] The IACtHR has held that international human rights law is a part of public international law, but is *lex specialis* in cases that come before the Court; that is, international human rights law prevails over conflicting principles of general public international law, but only when its provisions are *more favourable* to the rights bearers in a specific case.[138]

ISA tribunals should take a page from the international human rights courts (although not necessarily from international human rights law). The primary lesson is that an IIA which makes an unqualified choice of international law cannot be interpreted according to the text of the treaty alone; instead, tribunals must interpret and apply it in such a way as to preserve its effectiveness, including by drawing on doctrines that do not appear in the treaty and may have been developed in different contexts. Thus far, many tribunals have been tentative in their treatment of international law beyond the investment context, restricting themselves to citing the *VCLT*, the ILC's *Draft Articles on State Responsibility*, and a small handful of famous judgments like the *Barcelona Traction*[139] ruling on nationality and *locus standi* or the *Chorzów Factory* formula for compensation.[140]

Such hesitation is unwarranted. Interpretation in international law is a necessarily subjective process, bound up as it is with uncertainty as to the sources of international law. But the IIA's choice of law provision points the way. As Kelsen put it, "the work of interpretation is one of discovering the intention of the parties not only by reference to rules of interpretation, but to rules of international law bearing upon the subject-

137. See Lucas Lixinski, "Treaty Interpretation by the Inter-American Court of Human Rights: Expansionism at the Service of the Unity of International Law" (2010) 21:3 European Journal of International Law 585 at 603.

138. *Ibid* [emphasis in original].

139. *Barcelona Traction, Light and Power Company, Limited* (*Belgium v Spain)*, [1964] ICJ Rep 6.

140. *Factory At Chorzów Case (Germany v Poland)* (1928), PCIJ (Ser A) No 17.

matter of the disputed contractual stipulation".[141] If states call for a treaty to apply something as so open-ended as "international law" *simpliciter*, they thereby acquiesce, at minimum, to the arbitrators' determination of the sources of that law.[142] ISA tribunals should therefore take a wide view as to the scope of applicable norms in any given investment arbitration. In doing so, arbitrators will "give prudent effect to the truest expression of state intent in sacrificing sovereignty vis-à-vis foreign investments (thereby potentially fostering greater state commitment to the system)".[143]

None of this is to suggest that all international law is always relevant, or that the treaty text is subordinate to general international law. The IIA remains *lex specialis*. Just like a contract in private law, it constitutes a derogation from all conflicting rules of general international law except non-derogable *ius cogens*. As an example of such derogations, Kurtz cites the customary rules on diplomatic protection,[144] which entitles states to bring actions against other states for injuries caused to their nationals by internationally wrongful acts;[145] these principles are excluded by

141. Hans Kelsen, *Pure Theory of Law* (2d English ed) (Berkeley: University of California Press, 1970) at 355.

142. This point may also be shown by a counter-example, the phrase in many IIAs negotiated by the United States that the fair and equitable treatment standard be defined according to the customary international law standard for minimum treatment of aliens. See *e.g.* the final negotiated text of the *Trans-Pacific Partnership Agreement*, 4 February 2016 (not yet in force), online: <ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text> [*Trans-Pacific Partnership Agreement 2016*]. Article 9.6(2) states that, "for greater certainty", the obligation of states to provide to covered investments fair and equitable treatment and full protection and security "prescribes the customary international law minimum standard of treatment of aliens as the standard of treatment to be afforded to covered investments. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights.

143. Kurtz, *supra* note 8 at 281.

144. *Trans-Pacific Partnership Agreement 2016*, *supra* note 142 at 283-84.

145. *Draft Articles on Diplomatic Protection with Commentaries* ILC, 58th Sess, UN Doc A/61/10 (2006) art 1; see also *Ahmadou Sadio Diallo (Guinea v Congo)*, Preliminary Objections, [2007] ICJ Rep 582, at para 39.

the *ICSID Convention*, which prohibits the extension of diplomatic protection to individuals who have brought direct claims against other states under IIAs subject to the *ICSID Convention*, "unless such other Contracting State shall have failed to abide by and comply with the award rendered in such dispute".[146]

However, to the extent that the treaty is silent, or is vague or ambiguous (all of which are common in the existing IIAs), tribunals should consider the full sweep of international law to fill the gap or clarify the vagueness or ambiguity. In this exercise, tribunals should not limit themselves to doctrines specific to IIL or even to international economic law. IIL norms should only take precedence over other international law norms to the extent that the IIL norm is more favourable to the object and purpose of the IIA. Thus, tribunals' authority to pluck principles from other areas of international law is not unlimited. They may venture outside the treaty text, but must remain inside the treaty's legal and political framework.

In this light, it is important to remember that the object and purpose of IIAs, and of investment arbitration in particular, are to ensure fair, predictable, and non-discriminatory treatment of foreign investments, no more and no less.[147] It has been argued that, since investors gain direct rights as subjects of IIAs, just like individuals gain direct rights as subjects

146. *Ibid*, art 27(1).

147. As the *Suez/Vivendi* tribunal put it, "a recognized goal of international investment law is to establish a predictable, stable legal framework for investments". *Suez, Sociedad General de Aguas de Barcelona, SA and Vivendi Universal, SA v Argentine Republic* (2015), Case No ARB/03/19 at para 189 (International Centre for Settlement of Investment Disputes).

of human rights treaties, the purpose of IIAs is to protect investor rights.[148] Indeed, especially in the earlier years of ISA, some tribunals "seemed not solely to simply assume that IIAs were concluded exclusively to protect investors, but also to make this assumption their ultimate guide to the interpretation of the agreement, establishing the peculiar presumption *in dubio pro investore*".[149]

However, the analogy to human rights is misplaced. These tribunals confused the promotion of *investment* with the promotion of *investors.* The purpose of IIAs is not to protect the profit margins of investors, although of course the promotion of investment is an intended and welcome consequence. Rather:

> from a teleological point of view, investment treaties were initially concluded in order to induce FDI flows to states with developmental needs…. This differs a lot from the very idea at the heart of human rights or other individual-centered

148. See generally Martins Paparinskis, "Analogies and Other Regimes of International Law" in Zachary Douglas et al, eds, *The Foundations of International Investment Law: Bringing Theory into Practice* (Oxford: Oxford University Press, 2014) at 79-85. See also Martins Paparinskis, "Investment Treaty Arbitration and the (New) Law of State Responsibility" (2013) 24 European Journal of International Law 617 at 617; Anastasios Gourgourinis, "Investors' Rights *Qua* Human Rights? Revisiting the 'Direct'/'Derivative' Rights Debate" in Malgosia Fitzmaurice and Panos Merkouris, eds, *The Interpretation and Application of the European Convention of Human Rights: Legal and Practical Implications* (Leiden: Martinus Nijhoff, 2013) at 147; Francisco Gonzáles de Cossio, "Investment Protection Rights: Substantive or Procedural?" (2010) 25 ICSID Review 107. The issue has been taken up in some arbitrations, with mixed outcomes; see *e.g. Wintershall Aktiengesellschaft v Argentina* (2008), ICSID Case No ARB/04/14, at para 110; *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc v Mexico* (2007), ICSID Case No ARB(AF)/04/05, at paras 161-80; *ADF Group Inc v USA* (2003), ICSID Case No ARB(AF)/00/1, at para 152; *Corn Products International, Inc v United Mexican States* (2008), ICSID Case No ARB(AF)/04/1, at paras 167-179; and *Cargill Inc v Mexico* (2009), ICSID Case No ARB(AF)/05/2, at paras 403-28.

149. Methymaki, *supra* note 72 at 3 (this is intended to be analogous to the *pro homine* principle adopted by human rights courts); see above, notes 122-27 and accompanying text for clarification.

> regimes (eg, the law of consular relations), namely the protection of individuals because of considerations of humanity and due process.[150]

Equally, the object and purpose of IIAs is not to insulate states from liability, although of course states can and should draft IIAs to preserve their ability to regulate in the public interest. The reason states enter into investment treaties is analogous to the reason states enforce contracts within their borders: to ensure the predictable and fair enforcement of legal obligations, with the expectation that a private market will flourish as a result. Therefore, in interpreting and applying IIAs, tribunals should adopt the interpretation that most fosters a fair, predictable, and non-discriminatory (not necessarily profitable) regulatory environment for foreign investment.

VI. Conclusion

I have argued in this article that the interpretive authority of investment arbitrators is constrained primarily by the choice of law provisions in the IIAs that they interpret. The contractarian structure of arbitral authority in ISA means that arbitrators must not only apply the chosen laws as opposed to other laws, but must also interpret the chosen laws in the *ways* intended by the states parties to the IIA. I offered some rules of thumb for determining the states parties' presumed intention in (the majority of) cases where they have provided no guidance beyond naming "international law" as the law governing the dispute. I also offered something of a roadmap, drawing from the same theoretical principles about the structure of arbitral authority, for states to more effectively guide the discretion of arbitrators.

The main benefit of the proposed approach is greater certainty and consistency, assuming tribunals were to follow it – not consistency in the sense of absolute uniformity, which is impossible and probably undesirable, but a consistency of approach that is most likely to conform to the intentions of states when they issue regulations that may affect investors covered by the state's international law obligations.

More broadly, the proposed approach would also help to rationalize

150. Methymaki, *ibid* at 16.

the interests of states and investors. On the one hand, investors do have legitimate expectations from investment treaties and the dispute resolution systems created by them, expectations on which they should be able to rely with some degree of certainty. On the other hand, ultimate control remains with states, as it should: they are the ones issuing a standing offer to arbitrate, and are entitled to set the terms of that offer. They can restrict or expand the range of available rules of decision in the arbitration agreement, or simply define it more precisely. They may issue joint interpretations of treaty terms that are binding on tribunals, even after disputes arise. To the extent that such actions would narrow the range of claims that investors may make, or reduce the damages recoverable for breaches, they would still benefit investors to the extent that they would create greater certainty. Widespread renunciation of IIAs fueled by political backlash, or even just a drastic narrowing of states' obligations under IIAs, may be even more harmful to the global investment climate and the global rule of law.

Challenges in the Identification of the "General Principles of Law Recognized by Civilized Nations": The Approach of the International Court

Rumiana Yotova*

This article reassesses the legal character of 'the general principles of law recognized by civilized nations', being one of the two unwritten sources of international law. The general principles of law are, however, the most controversial source of international law and have continued to divide the opinions of scholars and judges alike since their inception. Some view them as private law analogies, others as emanations of natural law and there are those who conflate them with custom. This article seeks to identify the appropriate methodology for ascertaining the existence of the controversial 'general principles of law'. It does so by going back to the preparatory works of Article 38(1)(c) of the Statute of the International Court of Justice *and then critically assessing the practice of states and the case law of the Court on identifying general principles. It will be argued that general principles of law are an important source of international law in their own right with a systemic function in the international legal order and a distinct methodology for their ascertainment. Three categories of general principles will be distinguished based on the nuanced methodologies for their ascertainment applied by the International Court of Justice and its predecessor, namely, general principles of international law, general principles of domestic law and general principles of procedural law.*

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I. Introduction

Article 38(1) of the *Statute of the International Court of Justice*[1] ("*SICJ*") sets out the sources of international law that the International Court of Justice ("ICJ") shall apply, including treaties, custom and notably, "the general principles of law recognized by civilized nations".[2] The general principles of law proved to be the most controversial source during the drafting of the *Statute for the Permanent Court of International Justice*[3] ("*SPCIJ*") in 1929 and continues to divide the opinions of scholars and

1. 26 June 1945, Can TS 1945 No 7 (entered into force 24 October 1945) [*SICJ*].
2. *Ibid*, art 38(1)(c).
3. 16 December 1920, 6 LNTS 390 (entered into force 8 October 1921).

tribunals today. There is very little agreement on the interpretation of Article 38(1)(c) of the *SICJ* and arguably insufficient guidance by the ICJ itself on the methodology to be employed in its application.

This ongoing controversy is partly due to the unwritten character of general principles as a source of international law and the related challenges of evidence, capacity and burden of proof in their identification.[4] Another challenge lies in the different assumptions of civil and common law systems with respect to the function of general principles as a source of law and the perception of a law-making role of the judge in their identification including the resort to inductive but also deductive reasoning.[5] Finally, the identification of the general principles of law brings out the question of state consent and the corresponding division between the naturalist and the voluntarist approaches to international law, which became particularly apparent during the debates surrounding the drafting of Article 38(1)(c) of the *SICJ*. It is thus not surprising that in its latest annual report, the International Law Commission of the United Nations ("ILC"), which is the body responsible for the codification and progressive development of international law, identified the study of the general principles of law as one of the topics for its future programme of work.[6] Accordingly, a doctrinal engagement with the challenges in the identification and application of the general principles of law is both timely and much needed. This study will begin with the interpretation of Article 38(1)(c) of the *SICJ*, which sets out the definition of general principles as a source of international law, by reference to the general rule of treaty interpretation, as well as the preparatory works of the provision given its ambiguities. Next, it will assess critically the case law of the ICJ

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4. Jaye Ellis, "General Principles and Comparative Law" (2011) 22 European Journal of International Law 949 at 957.
5. Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Cambridge: Cambridge University Press, 1953) at 16-19; see also Clive Parry, *The Sources and Evidences of International Law* (Manchester: Manchester University Press, 1965) at 85-88.
6. International Law Commission, *Report of the International Law Commission*, 68th Sess, UNGAOR, 71st Sess, Supp No 10, UN Doc A/71/10 (2016) at 378.

and its predecessor, given that they are the primary addressees of the provision, so as to identify the methodology of the ICJ with respect to the identification and the application of the general principles of law. The article will conclude by offering some methodological conclusions, as well as a typology of the general principles of law and their respective roles in international adjudication.

II. The Doctrinal Debate on General Principles

It is worth noting briefly the ongoing doctrinal debate on the meaning, function and methodology for the ascertainment of general principles of law, given that the writings of scholars are one of the subsidiary sources for identifying the general principles of law in accordance with Article 38(1)(d) of the *SICJ*.[7] It is still true to say that the general principles are the most controversial of the sources of international law.[8]

A. The Scope of "General Principles of Law" and the Methodology for their Ascertainment

Scholars disagree on the methodology for the identification of the general principles of law. Some advocate a comparative law approach; others advocate an international law-based one and there are those who adopt a 'hybrid' approach consisting of a combination of the two. Authors supporting the comparative approach include, among others,

7. *SICJ*, *supra* note 1, art 38(1)(d).
8. Cheng, *supra* note 5 at xv.

Oppenheim,[9] Lauterpacht,[10] Grapin,[11] Schlesinger[12] and Herczegh.[13] Thirlway addresses this challenge by defining general principles as "those principles without which no legal system can function at all, that are part and parcel of legal reasoning" and the comparative methodology for their ascertainment is not so much a criterion but a guide.[14] Pellet adopts an attenuated comparative approach for deriving general principles from those common to national legal systems but with the additional requirement that they are "transposables dans l'ordre juridique international".[15] This additional requirement is fully in line with the text of Article 38(1) of the *SICJ*, requiring the ICJ to decide disputes "in accordance with international law".[16]

While firmly rooted in the tradition of voluntarism by requiring the consent of the majority if not all states for a principle to become a general principle of law as a source of international law, the conceptual difficulty with the comparative law approach lies in the transposition of domestic principles to the international plane which necessitates

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9. Sir Robert Jennings & Sir Arthur Watts, *Oppenheim's International Law: Volume 1 Peace*, 9d (Oxford: Oxford University Press, 1996) at 37.
10. Hersch Lauterpacht, *Private Law Sources and Analogies of International Law: With Special Reference to International Arbitration* (London: Longman's, Green and Co, 1927) at 67-69.
11. Pierre Grapin, *Valeur Internationale des Principes Générux du Droit* (Paris: Montchrestein, 1934) at 49.
12. Rudolph B Schlesinger, "Research on the General Principles of Law Recognized by Civilized Nations" (1957) 2 American Journal of International Law 734.
13. Géza Herczegh, *General Principles of Law and the International Legal Order* (Budapest: Akadémia Kiadó, 1969) at 124.
14. Hugh Thirlway, *The Sources of International Law* (Oxford: Oxford University Press, 2014) at 99.
15. Din Nguyen Quoc et al, *Droit International Public*, 6d (Paris: Librarie Générale de Droit et de Jurisprudence, 1994) at 344; see also Alain Pellet, "Article 38" in Andreas Zimmermann, Christian Tomuschat & Karin Oellers-Frahm, eds, *The Statute of the International Court of Justice: A Commentary* (Oxford: Oxford University Press, 2012) 677 at 840; see also Ellis, *supra* note 4 at 954.
16. *SICJ*, *supra* note 1, art 38(1).

reasoning by analogy[17] and involves an inherent degree of indeterminacy. As highlighted by Ellis, "once the rule is taken from one context and introduced to another, one can be fairly sure that it will be transformed, without being able to make predictions as to how much or in precisely what way".[18] Indeed, D'Aspremont opines that the difficulties of collecting representative domestic laws have lead to the ascertainment of general principles moving away from having any formal legal character at all.[19]

At the other end of the spectrum are those scholars who adopt a purely international law-based approach for the ascertainment of general principles. Kelsen forcefully rejects the comparative law methodology noting with some justification that "it is doubtful whether such principles common to the legal orders of civilized nations exist at all".[20] He argues instead that the general principles of law are only those that are already part of international law either as treaties or custom.[21] Cassese identifies two different classes of general principles of law, including the general principles of international law derived by induction from conventions and custom but also the "principles that are peculiar to a particular branch of international law".[22] It is difficult to see, however, how the latter category of principles meets the requirement of generality. Brownlie adopts a hybrid approach by including under the rubric of 'general principles'

17. André Nollkaemper, "The Role of Domestic Courts in the Case Law of the International Court of Justice" (2006) 5 Chinese Journal of International Law 301 at 308.
18. Ellis, *supra* note 4 at 967.
19. Jean d'Aspremont, *Formalism and the Sources of International Law: A Theory of the Ascertainment of Legal Rules* (Oxford: Oxford University Press, 2011) at 171.
20. Hans Kelsen, *Principles of International Law* (New York: Rinehart, 1952) at 393.
21. *Ibid* at 394; see also Grigory Tunkin, "'General Principles of Law' in International Law" in René Marcic et al, eds, *Internationale Festschrit Für Alfred Verdross* (Munich: Wilhelm Fink Verlag Munchen, 1971) 523 at 523.
22. Antonio Cassese, *International Law*, 2d (Oxford: Oxford University Press, 2005) at 189.

both principles derived from domestic laws and the general principles of international law defined as "abstractions … [that] have been accepted for so long and so generally as no longer to be *directly* connected to state practice".[23] The ILC, which is the UN body responsible for the codification and progressive development of international law, seems to adopt a hybrid approach too. For instance, in the report of its study group on fragmentation, it noted that the general principles of law could "refer to principles of international law proper and to analogies from domestic laws, especially principles of legal process".[24] The hybrid approach seems convincing as it is also in line with that of the ICJ.

Cheng distances himself from the methodological debate all together, noting that "[i]t is of no avail to ask whether these principles are general principles of international law or of municipal law; for it is precisely the nature of these principles that they belong to no particular system of law, but are common to them all".[25] He accordingly adopts an inductive method examining the decisions of international courts and tribunals as "the most important means for the determination of rules and principles of international law".[26] While this is somewhat in line with the approach of the ICJ of using international decisions to identify general principles of law, it does not answer the pertinent methodological question as to whether these decisions are themselves direct evidence of the recognition of general principles or merely an easy shortcut for their identification. Furthermore, requiring that general principles are common to all legal systems goes beyond the exigencies of Article 38(1)(c) of the *SICJ* and potentially narrows that category even further.

Finally, some scholars adhere to the naturalist school of thought, adding values and morality to the methodology for the identification

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23. James Crawford, *Brownlie's Principles of Public International Law*, 8d (Oxford University Press, 2012) at 36-37 [emphasis in original].
24. Study Group of the International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, International Law Commission OR, 58th Sess, UN Doc A/CN.4/L.682 (2006) at 254.
25. Cheng, *supra* note 5 at 390.
26. *Ibid* at 1.

of general principles. Besson takes the view that the material source of general principles lies in moral values, giving as an example the protection of human rights.[27] Voigt notes in a similar vein that the approach to identifying general principles is based on "'a common legal conscience'; an *opinio juris communis*" to be found in declarations and statements of states and international organisations.[28] While ethically appealing, these approaches find little support in the actual wording of Article 38(1)(c) of the *SICJ*, or in the practice of the ICJ on the application of this provision. Furthermore, it is far from clear whether one could simply equate the recognition required for the identification of the general principles of law with the acceptance as law or *opinio juris*, being the subjective element of customary international law under Article 38(1)(b) of the *SICJ*, not least due to the different wording of Article 38(1)(c).[29]

One question not well addressed in literature concerns the difference between custom and general principles, being the two unwritten primary sources of international law. Some argue that the two can and do at times overlap, others that general principles are a transitory stage between domestic law principles and custom,[30] and there are those who conceptualise general principles as inchoate custom that does not require support by state practice.[31] For example, the Special Rapporteur of the ILC on the Identification of Customary International Law implies that state practice is not a necessary element for the establishment of general principles, noting that "[t]he International Court itself may have recourse to general principles of international law in circumstances when

27. *Ibid* at 47-49, 57.
28. Christina Voigt, "The Role of General Principles in International Law and their Relationship to Treaty Law" (2008) 31 Retfærd: Nordic Journal of Law and Justice 3 at 8 [emphasis in original].
29. *SICJ*, *supra* note 1, arts 38(1)(b)-(c).
30. Humphrey Waldock, "General Course on Public International Law" (1962) 106 Rec des Cours 39 at 62.
31. Giorgio Gaja, "General Principles of Law" in *Max Plank Encyclopedia of International Law* by Rüdiger Wolfrum (Oxford: Oxford University Press, 2016) at para 16, online: Oxford Public International Law <www.mpepil.com>; see also Cassese, *supra* note 22 at 160-61.

the criteria for customary international law are not present".[32] While acknowledging that it may be difficult to distinguish between general principles and custom in practice, Sir Michael Wood stresses the need to differentiate the rules that by their nature do not need to be grounded in state practice.[33] The first view is preferable as general principles can overlap with custom when the latter has the requisite degree of generality, as will be seen in the practice of the ICJ referring to the same norm at some times as custom and at others, as a general principle.

Overall, disagreement persists among the eminent scholars of international law with respect to the legal character of the general principles of law, be they principles of international law, those common to the municipal legal systems or both, as well as with respect to the methodologies for their ascertainment.

B. The Distinction Between Principles and Rules

Scholars also disagree on how to distinguish between principles and rules. According to Sir Gerald Fitzmaurice:

> [b]y a principle, or a general principle, as opposed to a rule, even a general rule, of law is meant chiefly something which is not itself a rule, but which underlines a rule, and explains or provides the reason for it. A rule answers the question 'what': a principle in effect answers the question 'why'.[34]

Herczegh distinguishes principles from rules based on their level of generality, noting that "a principle of law is a norm of general content which manifests itself in a group or system of legal rules which are associated with one another".[35] Dworkin opines that "both sets of standards point to particular decisions about legal obligation in particular circumstances, but they differ in the character of the direction they give"

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32. Michael Wood, *First Report on Formation and Evidence of Customary International Law*, International Law Commission OR, 65th Sess, UN Doc A/CN.4/663 (2013) at para 36.
33. *Ibid*.
34. Gerald Fitzmaurice, "The Principles of International Law Considered from the Standpoint of the Rule of Law" (1957) 92 Rec des Cours 7 at 7.
35. Herczegh, *supra* note 13 at 122.

as rules apply in "an all-or-nothing fashion",[36] whereas principles have the dimensions of weight and importance and must be taken into account by decision makers as suggesting a given direction without necessitating a particular decision.[37] In his reply to Dworkin's criticisms, Hart defines principles as an aspect of legal reasoning and judicial decision-making[38] due to being "broad, general or unspecific … because they refer more or less explicitly to some purpose, goal, entitlement or value".[39]

Kolb sees principles as "neither simple 'rules' nor simple 'vague ideas'" but rather "norm-sources" as a type of source that "does not essentially deal with the *fixed* meaning of rules to be applied, but with the *adaptation* of the rules to some constitutional necessities, to new developments and needs, to conformity with basic value-ideas".[40] There are also those who deny the meaningfulness of the distinction between rules and principles, arguing that both can be a direct source of rights and obligations.[41]

Most scholars seem to distinguish between rules and principles based on their level of generality. This is in line with the ordinary meaning of the term "principle", deriving from the Latin "principium", meaning origin, source or basis,[42] as well as with the wording of the *SICJ* stressing the element of generality in the principles of law recognized by civilized nations.

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36. Ronald Dworkin, *Taking Rights Seriously* (Cambridge MA: Harvard University Press, 1978) at 24.
37. *Ibid* at 28.
38. Herbert Lionel Adolphus Hart, *The Concept of Law*, 2d (Oxford: Oxford University Press, 1997) at 263.
39. *Ibid* at 260.
40. Robert Kolb, "Principles as Sources of International Law" (2006) 53 Netherlands International Law Review 1 at 9 [emphasis in original].
41. Sienho Yee, "Article 38 of the ICJ Statute and Applicable Law: Selected Issues in Recent Cases" (2016) 7 Journal of International Dispute Settlement 472 at 488; Committee on Formation of Customary (General) International Law, "Statement of Principles Applicable to the Formation of General Customary International Law" (Report delivered at the International Law Association London Conference, 2000) at 10-11, online: International Law Association <www.ila-hq.org/download.cfm/docid/A709CDEB-92D6-4CFA-A61C4CA30217F376>.
42. *The Oxford English Dictionary*, 2016, sub verbo "principium".

C. The Function of General Principles

Scholars put different emphasis on the function of general principles in the system of international law. The views range from understanding general principles as gap-fillers to seeing them as the backbone of the international legal system. Verdross focuses on their interpretative function to conclude that both conventional and customary international law should be interpreted and applied in light of the general principles of law.[43]

McNair on the other side emphasises the role of general principles in investment contracts between states and corporations, reasoning that: "those contracts which, though not interstate contracts and therefore not governed by public international law *stricto sensu,* can more effectively be regulated by general principles of law than by the special rules of any territorial system".[44] Clearly, in contrast to Verdross, McNair had in mind the general principles of private law whose function is to regulate private as opposed to inter-state relations.

For Koskenniemi, the key function of general principles is that of constructivist thinking in legal argumentation,[45] requiring "constructive activity from the judge who must provide a set of arguments in light of which the decision seems coherent with [the community's] goals and values".[46] Parry reasons in a similar vein that the general principles are "not so much a source as a method [for the judge] of applying other sources".[47] In contrast, others, including Allott, adopt a 'constitutionalist'

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43. Alfred Verdross, "Les Principes Généraux du Droit dans la Jurisprudence Internationale" (1935) 52 Rec des Cours 191 at 227.
44. Arnold McNair, "The General Principles of Law Recognized by Civilized Nations" (1957) 33 British Yearbook of International Law 1 at 15 [emphasis in original]; see also Wolfgang Friedmann, "The Uses of 'General Principles' in the Development of International Law" (1963) 57 American Journal of International Law 279 at 281.
45. Martti Koskenniemi, "General Principles: Reflections on Constructivist Thinking in International Law" in Martti Koskenniemi, ed, *Sources of International Law* (Burlington VT: Ashgate Publishing, 2000) 359 at 361.
46. *Ibid* at 375.
47. Parry, *supra* note 5 at 84.

view observing that it is the 'generic principles' that systemize the interacting sub-systems of society, organise their functioning relationship to each other and constitute an instance of a system shared by all societies.[48] Cassese too sees the general principles of law as 'constitutional principles' forming the "pinnacle of the legal system".[49] Similarly, Kolb identifies eight constitutional functions of general principles including: the unification of the legal system; its 'flexibilizaton'; a value-catalysis function; a dynamic and evolutionary function; a guide to interpretation and corrective function; an autonomous source of law function; a necessary complement to a series of legal rules and finally; the function of facilitating legal compromise.[50] According to Besson, "principles ensure guidance and coherence in legal interpretation by reference to a set of values, but also dynamism through teleological interpretation".[51] Cheng identifies three more practically-oriented functions fulfilled by the general principles of law: as a source of rules; as "guiding principles of the juridical order according to which the interpretation and application of the rules of law are oriented"; and thirdly, as a gap-filler "wherever there is no formulated rule governing the matter".[52]

Overall, there is little accord in doctrine on the meaning, function and methodology for the identification of general principles as a source of international law. The only shared understandings seems to be that general principles are more abstract than other rules and that they play an important role in the interpretation of international norms. If anything, scholars seem to add to rather than to resolve the underlying controversy.

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48. Phillip Allott, *Eunomia: New Order for a New World* (Oxford: Oxford University Press, 1990) at 167-68; see also Malgosia Fitzmaurice, "History of Article 38 of the Statute of the International Court of Justice" in Samatha Besson & Jean d'Aspremont, eds, *The Oxford Handbook of Sources of International Law* (Oxford: Oxford University Press: 2017) [forthcoming in 2017] at 24.
49. Cassese, *supra* note 22 at 46, 188.
50. Kolb, *supra* note 40 at 27-35.
51. Samantha Besson, "General Principles in International Law – Whose Principles?" in Samantha Besson & Pascal Pichonnaz, eds, *Les Principes en Droit Européen* (Zurich: Schultess Verlag, 2011) 19 at 32.
52. Cheng, *supra* note 5 at 390.

Accordingly, it is difficult to use scholarly writings as a subsidiary source for the identification of general principles of law or indeed for the interpretation of Article 38(1)(c) of the *SICJ*, so recourse will be had instead to the preparatory works of the provision and to the subsequent practice of the ICJ in its application.

III. Interpreting Article 38(1)(c) of the *SICJ*

This section now turns to the interpretation of the provision establishing that "the general principles of law recognized by civilized nations" are one of the sources of international law to be applied by the ICJ.[53] Article 31 of the *Vienna Convention on the Law of Treaties*[54] ("*Vienna Convention*") sets out the general rule of interpretation providing that treaties are to be interpreted in good faith and in accordance with the ordinary meaning of their terms. The ordinary meaning of "principle" could be derived, for example, from the Oxford Dictionary which defines the term as either "[a] fundamental truth or proposition that serves as the foundation for a system of behaviour", as "[a] general law that has numerous special applications across a wide field", or "[a] fundamental source or basis of something".[55] In a similar way, the Institut de Droit International identifies different meanings of what constitutes a "principle" including "a norm of a higher or highest order"; "a norm that generates specific rules"; "a purpose to be achieved, a guiding idea"; or "rules or standards of interpretation".[56] Accordingly, the ordinary meaning of the term 'principle' is quite ambiguous and open to varying interpretations.

The requirement that principles be 'general' is also far from clear. It could refer either to their level of abstraction or indeed to the recognition

53. *SICJ*, *supra* note 1, art 38(1)(c).
54. 23 May 1969, 1155 UNTS 331 art 31 (entered into force 27 January 1980) [*Vienna Convention*].
55. *The Oxford English Dictionary*, 2016, sub verbo "principle".
56. Krzysztof Skubiszewski, "The Elaboration of General Multilateral Conventions and of Non-Contractual Instruments Having a Normative Function or Objective" (Report delivered at the Session of Cairo, 1987) online: The Institute of International Law <www.justitiaetpace.org/idiE/resolutionsE/1987_caire_02_en.PDF>.

necessary for their formation. The fact that the general principles of law ought to be "recognized by civilized nations" is underlined by open-endedness too. First, the term "recognize" is different from the expression "accepted as law", which is the subjective element of custom set out in Article 38(1)(b).[57] Yet, scholars have argued that recognition has more in common with the subjective attitude of states than with their practice.[58] The ICJ seems to confer a subjective meaning on "general recognition" as well as defining it as an indication that a rule of law or a legal obligation is involved.[59] Second, it is not clear whether all, or a representative majority of nations, ought to recognise the general principles. The latter interpretation is supported by the International Law Association, which is a professional body consisting of eminent international jurists from different states, arguing that the general principles ought to be recognised "by a prevailing – or at least a significant – number of nations within each legal culture".[60] Finally, it is also not obvious why Article 38(1)(c) of the *SICJ* requires the recognition of general principles by 'nations' whereas Article 38(1)(a) refers to the recognition of treaty rules by 'States' and whether any difference should be drawn between the two.[61] If anything, it seems that it might be easier to ascertain the acceptance of a rule by states as legal entities than the recognition of principles by nations, seen as communities of people. The reference to 'civilized nations' could also be understood as pointing to the international community of states as a whole.

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57. *SICJ*, *supra* note 1, arts 38(1)(b)-(c).
58. Waldock, *supra* note 30 at 49; Rein Müllerson, "The Interplay of Objective and Subjective Elements in Customary Law" in Karl Wellens, ed, *International Law: Theory and Practice – Essays in Honour of Eric Suy* (The Hague: Martinus Nijhoff, 1998) 161 at 163.
59. *North Sea Continental Shelf (Germany v Denmark; Germany v Netherlands)*, [1969] ICJ Rep 3 at para 74 [*North Sea Cases*].
60. Maurice H Mendelson et al, "The Use of Domestic Law Principles in the Development of International Law Study Group" (Report delivered at the Johannesburg Conference, 2016) at 57, online: International Law Association <www.ila-hq.org/en/committees/study_groups.cfm/cid/1033>.
61. *SICJ*, *supra* note 1, arts 38(1)(a), (c).

Given the ambiguities that persist after applying the general rule of treaty interpretation to Article 38(1)(c) of the *SICJ*, recourse should be had to the subsequent practice of states as to its interpretation, as well as to the preparatory works of the provision as a supplementary means for ascertaining its meaning in accordance with Article 32 of the *Vienna Convention*.[62]

A. State Practice on the Interpretation of General Principles of Law

The subsequent practice of states as to the interpretation and application of the provision on general principles is difficult to establish, given that Article 38 of the *SICJ* is an applicable law clause addressed to the ICJ.[63] However, one could resort to indirect evidence of the position of states with respect to the definition and identification of the general principles of law.

For example, the *Restatement (Third) of Foreign Relations Law*[64] evidences the US understanding of this source as a form of inchoate custom derived through a comparative law methodology whose functions include the development of international law, the administration of justice and providing rules of reason:

> [g]eneral principles common to systems of national law may be resorted to as an independent source of law. That source of law may be important when there has not been practice by states sufficient to give the particular principle status as customary law and the principle has not been legislated by general international agreement.[65]

Another source of evidence for the attitudes of states towards general principles can be found in the replies received in response to the ILC questionnaire on the Formation and Evidence of Customary

62. *Vienna Convention*, *supra* note 54, art 32.
63. *SICJ*, *supra* note 1, art 38.
64. *Restatement (Third) of Foreign Relations Law*, (Philadelphia: American Law Institute, 1987) §102.
65. *Ibid*.

International Law.[66] For instance, the Czech Republic stated that many of its treaties with states of the former Soviet Union refer to "principles of international law", indicating an international law-based approach towards general principles in its treaty practice, as well as that of states from the former Soviet Union.[67] In a similar manner, El Salvador affirmed the understanding espoused by its Constitutional Court that the resolutions of international organisations, even though not themselves binding, contribute significantly to the formation of the other sources of international law, including the general principles.[68] Ireland referred to Article 29(3) of its Constitution affirming that "Ireland accepts the generally recognised principles of international law as its rule of conduct in its relations with other states".[69] It also relied on a judgment by its High Court holding that "[t]he most compelling evidence of whether any principle is generally recognised is the conduct of other states", as well as international conventions.[70] A narrower international law-based approach is reflected in Russia's reply to the ILC, quoting an interpretative decision of its Constitutional Court holding that "the

66. Michael Wood, *Fourth Report on Formation and Evidence of Customary International Law*, International Law Commission OR, 68th Sess, UN Doc A/CN.4/695 (2016) at 4-12.

67. International Law Commission, Czech Republic, *Comments of the Czech Republic on the Specific Issues Raised in Chapter III of the Report of the International Law Commission on the Work of its 65th Session*, No 26/2014, 31 January 2014, at para B-II online: International Law Commission <legal.un.org/ilc/sessions/66/pdfs/english/ pat_czech_republic.pdf>.

68. Supreme Court of El Salvador, Judgment No. 26-2006, 12 March 2007, cited in El Salvador, *Identificación del Derecho Internacional Consuetudinario, Informe de la República de El Salvador* at 3, online: International Law Commission <legal.un.org/docs/?path=../ilc/sessions/66/pdfs/spanish/icil/_el_salvador.pdf&lang=S>.

69. Permanent Mission of Ireland to the United Nations, *Reply on the Formation and Evidence of Customary International Law*, at 127.

70. *Horgan v Ireland*, [2003] 2 IR 468 (HC) at 496, cited in International Law Commission, Ireland, *Decisions of National Courts of Ireland Relating to the Formation and Evidence of Customary International Law*, online: <legal.un.org/docs/?path=../ilc/sessions/66/pdfs/english/icil_ireland.pdf&lang=E>.

general principles of international law denote the fundamental imperative norms of international law, recognised and accepted by the international community of States as a whole from which no derogation is permitted".[71]

Other states adduced practice in support of the comparative law-based approach to general principles. Germany, for instance, adopted the definition of its Federal Constitutional Court stating that the general principles of law are "accepted legal principles, which are consistently applied in the different domestic legal systems and which can be transferred to interstate relations".[72] Similarly, Switzerland quoted the definition of general principles of law adopted by its Federal Council as "de normes dotées d'une validité universelle car connues de tous les grands systèmes juridiques dans le monde".[73] Notably, however, Switzerland noted that its authorities also refer expressly to the general principles of international customary law or the general principles of international law as an autonomous source.[74] Accordingly, the practice of Switzerland is most in line with the hybrid approach to the general principles of law.

Overall, the practice of states in the interpretation of the general principles of law recognised by civilised nations is difficult to establish and is no less divided than the opinions of eminent scholars. It can be concluded that the available state practice does not seem to offer any conclusive evidence of a dominant approach towards the definition or the identification of the general principles of law.

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71. Russian Federation, *Formation and Evidence of Customary International Law*, at 1-2 [translated by author] (referring to Interpretative Decision of the Plenary of the Constitutional Court No. 5 of 10 October 2003).
72. Bundesverfassungsgericht (Federal Constitutional Court), *Decision of the Second Chamber of the Second Senate of 4 September 2008*, 2 BvR 1475/07 (Germany) at para 20.
73. Switzerland, *La Pratique Suisse Relative* à *la Détermination du Droit International Coutumier*, at 12, (Quoting FF2010, Conseil federal, Rapport additionnel au Rapport du 5 mars 2010 sur la relation entre droit international et droit interne, 30 mars 2011, FF 2011 3401, at 3412).
74. *Ibid*.

B. Preparatory Works of Article 38(1)(c) of the *SICJ*

The preparatory works of the *SICJ* seem to raise more questions than they answer. Not surprisingly, the preparatory works confirm that the general principles of law were the most controversial source during the drafting of Article 38.

The Advisory Committee of Jurists ("ACJ") appointed by the League of Nations in 1920 prepared the draft of the *SPCIJ*, which later became the *SICJ* with minor modifications.

The idea of principles forming part of the applicable law was already present in the early governmental proposals which led the League of Nations to form the ACJ assigning to it the preparation of the draft *SPCIJ*. The Brazilian jurist Clóvis Beviláqua presented a draft on the organisation of the future court raising the issue as to the law to be applied in the absence of *jus scriptum.* He suggested that the tribunal would fill the lacuna in positive law "guided by the high principles, which constitute the basis of international judicial order … by abstracting it directly from the prevailing juridical conception, in which such definitely secured principles are embodied".[75]

Opinions as to the sources to be applied by the Permanent Court of International Justice ("PCIJ") in the absence of treaty provisions varied during the ACJ proceedings. The Five Neutral Powers proposed that the PCIJ should apply: "recognised rules of international law"; the International Law Union favoured "the principles of justice"; Switzerland suggested "the principles of the law of nations"; and Germany advocated "international customary law and … general principles of law and

75. Clovis Bevilaqua, "Explanatory Notes on the Draft Concerning the Organisation of a Permanent Tribunal of International Justice" (Delivered to The Committee Relating to the Existing Plans for the Establishment of a Permanent Court of International Justice, 1920) at 371, online: International Court of Justice <www.icj-cij.org/pcij/serie_D/D_documents_to_comm_existing_plans.pdf>.

equity".[76]

The first proposed formula on general principles was introduced by the President of the ACJ – the Belgian jurist Baron Descamps – and referred to: "the rules of international law as recognized by the legal conscience of civilized nations".[77] This provision raised the most questions in the drafting of Article 38 of the *SICJ*, reflecting the divide on the function of the Court as *la bouche de la loi* or as a motor in the development of international law. The US delegate, Root, did not understand the meaning of the clause and whether it referred to "something which had been recognized but nevertheless had not the character of a definite rule of law".[78] He cautioned that this article "constituted an enlargement of the jurisdiction of the Court which threatened to destroy it".[79] Similarly, the British representative, Lord Phillimore was concerned that the provision on general principles either came within the limits of the provision on custom or "gave the Court a legislative power", suggesting instead a reference to "rules of international law … from whatever source they may be derived".[80] The Dutch jurist Loder disagreed with these perspectives, reasoning that general principles referred to "[r]ules recognised and respected by the whole world" and that "it was precisely the Court's duty to develop law, to 'ripen' customs and principles universally recognised, and to crystallise them into positive rules".[81]

In response to these criticisms, Baron Descamps elaborated that, "[t]he principles which must guide the judge, in the solution of the disputes submitted to him are of vital importance",[82] giving as examples other instruments containing rules illustrating the 'legal conscience of civilized nations', including Article 7 of the *Convention Relative to the*

76. Permanent Court of International Justice, Advisory Committee of Jurists, *Procès-Verbaux of the Proceedings of the Committee June 16 - July 24 1920 with Annexes* (The Hague: Van Langenhuysen Brothers, 1920) at 89-91 [*Procès-Verbaux*].
77. *Ibid* at 306.
78. *Ibid* at 293-94.
79. *Ibid* at 294.
80. *Ibid* at 295.
81. *Ibid* at 294.
82. *Ibid* at 322.

Creation of an International Prize Court with its reference to "the general principles of justice and equity",[83] as well as the preamble of the 1899 *Hague Convention IV Respecting the Laws and Customs of War on Land*[84] referring to "the principles of the law of nations, as they result from the usages established among civilised peoples, from the laws of humanity, and the dictates of public conscience".[85] Descamps accordingly concluded that "it is impossible to disregard a fundamental principle of justice in the application of law, if this principle clearly indicates certain rules, *necessary for the system of international relations, and applicable to the various circumstances arising in international affairs*".[86] This statement indicates the understanding that the principles referred to in the draft statute were those applicable on the international plane, which was reinforced in the debates that followed.

In response, Root confirmed his acceptance of the jurisdiction of a court applying universally recognised rules of international law but stressed that he was not disposed to accept legislation through the application of "general principles, which are interpreted differently in different countries".[87] Descamps replied that this was a misunderstanding as the principles varying from country to country were rules of secondary importance whereas the provision referred to "the fundamental law of justice and injustice deeply engraved on the heart of every human being and which is given its highest and most authoritative expression in the legal conscience of civilized nations".[88] Descamps opined that rather than giving more discretion to judges, general principles in fact limited their liberty[89] as the solution that the judge was justified to apply had to be "approved by universal public opinion".[90] The Italian representative, Ricci-Busatti, gave as examples of such principles the rule that what is

83. 18 October 1907, 205 Cons TS 381 art 7 (not ratified).
84. 18 October 1907, 36 Stat 2277 (entered into force 26 January 1910).
85. *Ibid*, preamble.
86. *Procès-Verbaux*, *supra* note 76 at 324 [emphasis added].
87. *Ibid* at 309.
88. *Ibid* at 310-11.
89. *Ibid* at 311.
90. *Ibid* at 318.

not forbidden between states is allowed, the prohibition against abuse of rights and *res judicata*.[91] Lord Phillimore took the view that the serious differences of opinion on general principles "arose from the continental idea of justice" giving too much freedom to the judges.[92] He also pointed out, with notable ethnocentricity, that "all the principles of common law are applicable to international affairs"[93] giving as examples the principle of *res judicata* as applied in *the Pious Fund Case (United States of America v Mexico)*,[94] as well as the principle *onus probandi incumbit actori*.[95] Notably, Lord Phillimore was in the minority advocating for the transposition of principles of national law on the international plane.

Following these debates, Root presented a draft of the provision on general principles of law, which was prepared in collaboration with Lord Phillimore and became the current text of Article 38(1)(c) of the *SICJ*.[96] The French representative, De Lapradelle asked how were general principles to be obtained if not from custom unless it was from judicial decisions and writers.[97] Lord Phillimore replied to that question with a much quoted remark, stating that "the general principles referred to in point 3 were these which were accepted by all nations in *foro domestico*, such as certain principles of procedure, the principle of good faith, and the principle of *res judicata*", adding also the "maxims of law".[98] De Lapradelle admitted that "the principles which formed the bases of national law, were also sources of international law", but stressed that "the only generally recognised principles which exist, however, are those which have obtained unanimous or quasi-unanimous support".[99] He accordingly concluded that it was preferable to keep the formula open "without indicating exactly the sources from which these principles

91. *Ibid* at 314-15.
92. *Ibid* at 315.
93. *Ibid* at 316.
94. (1902) 9 Reports of International Arbitral Awards 1 (Permanent Court of Arbitration).
95. *Procès-Verbaux*, *supra* note 76.
96. *Ibid* at 331, 334.
97. *Ibid* at 335.
98. *Ibid* [emphasis in original].
99. *Ibid*.

should be derived".[100] The representative of Brazil, Clovis Bevilaqua, took the middle ground opining that the reference in the draft was to "those principles of international law which, before the dispute, were not rejected by the legal traditions of one of the States concerned in the dispute".[101] Accordingly, the question as to the source of the general principles of law was deliberately left open as was their relationship with customary international law.

During the final vote on Article 38 of the *SICJ*, De Lapradelle did not vote as he preferred that the provision referred to "general principles of law recognised by civilized Nations as interpreted by judicial decisions and by the teaching of the most highly qualified publicists of the various countries"; but he knew that his preference for this formula would not be shared.[102] The draft was adopted by a majority vote with the French and the Norwegian representatives abstaining and the Italian delegate against.[103]

The preparatory works of Article 38(1)(c) of the *SICJ* indicate that the provision was underlined by a lack of accord. It raised three major concerns among the ACJ. The first concern was the scope it left for judicial discretion, which was seen as law-making by the common law representatives from the US and the UK and as a normal exercise of judicial reasoning by the civil lawyers. Second, it was unclear throughout what methodology was to be applied for identifying general principles of law. Some opined that general principles were to be derived necessarily from custom, others favoured basing them upon judicial decisions and the writings of scholars as representative of the consciousness of their nations and finally the British representative opined that these were to be distinguished from custom as being rooted in the principles applied *in foro domestico,* a view that found limited support by other ACJ members. It should be noted in this context that the author of the final version of the provision himself, Elihu Root, expressly rejected the possibility of deriving general principles from domestic ones as they were

100. *Ibid* at 336.
101. *Ibid* at 346.
102. *Ibid* at 649.
103. *Ibid*.

applied differently in different states. Accordingly, adopting such an interpretation of the provision he drafted must be somewhat tenuous. Thirdly, there was disagreement as to whether general principles were rooted in international law, the majority of the members of the ACJ, including the President, stressed repeatedly that this was the case. It can be concluded that the formula "general principles of law recognised by civilized nations" was left open on purpose for two reasons, one short-term, the other long-term: namely the underlying lack of agreement within the ACJ, but also in order to enable the judges to exercise a certain amount of discretion in deriving general principles from custom, treaties or the maxims common to most or all legal orders. What the committee seemed to agree on, however, was that general principles ought to be generally recognised by most states and that they should be only those capable of international application.

Another aspect of the preparatory work of Article 38, which has not attracted much attention, is the single modification to it made when it became the *SICJ*, namely the addition in paragraph 1 pursuant to the second modified proposal of the Chilean delegate, providing that the Court's function is "to decide [disputes] in accordance with international law".[104] Chile's original proposal was to modify the wording of the paragraph on general principles to 'principles of international law'.[105] Interestingly, this was dismissed as unnecessary as the majority of the delegates found it already implicit.[106] Accordingly the specification was added to the paragraph as a whole.

This drafting episode is remarkable in two ways – first, because the proposal's original aim was to clarify the provision as referring to the general principles inherent in the system of international law, and further, because in effect the second proposal, which was eventually incorporated in the *SICJ*, achieved the object of the original one – it clarified that the reference in paragraph 3 is to principles (capable of international application) of international law. This interpretation is based on a

104. UNCIO, Vol. XIII, Doc. 240. (1945), at 164.
105. *Ibid.*
106. *Ibid.*

systematic and grammatical reading of Article 38 of the *SICJ* as a whole, showing that paragraph 1 of Article 38 applies to all its sub-paragraphs.

In conclusion, the preparatory works of Article 38(1)(c) of the *SICJ* indicate that the general principles of law have to be applicable on the international plane, arguably compatible with international law's structure, even if drawn from the principles common to national systems and that the main criteria for their crystallisation on the international plane is general recognition by nations which can be illustrated *inter alia* through judicial decisions. The general principles of international law should be read as implicit in Article 38(1)(c) of the *SICJ* alongside the general principles derived from domestic laws.

IV. The Approach of the International Court and its Predecessor Towards General Principles of Law

Since Article 38 of the *SICJ* is an applicable law clause addressed to the ICJ, the methodology used by the ICJ in its interpretation and application ought to provide the most valuable guidance as to its meaning. Yet, somewhat disappointingly, the *International Court of Justice: Handbook*[107] updated regularly by the Registry does not address at all the general principles of law even though it tackles all the other primary and some of the secondary sources of international law.[108] It is useful to assess the key cases in which the ICJ resorted to general principles of law so as to establish the process of their distillation. As cautioned by Talmon, however, methodology is not the strength of the ICJ.[109]

While the Court has never based a judgment explicitly on the general principles of law recognised by civilised nations, it arguably relied implicitly on general principles of international law to decide the *Corfu Channel Case* (*United Kingdom v Albania*)[110] ("*Corfu Channel*")

107. *International Court of Justice: Handbook*, 6d (New York: United Nations Publications, 2013).
108. *Ibid* at 95-99.
109. Stefan Talmon, "Determining Customary International Law: The ICJ's Methodology Between Induction, Deduction and Assertion" (2015) 26 European Journal of International Law 417 at 418.
110. [1949] ICJ Rep 4 [*Corfu Channel*].

discussed below. Notably, the Court relied recently on a general principle of international law in its Order of Provisional Measures in *Questions Relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v Australia)*[111] ("*Timor-Leste v Australia*"). This case arose from the seizure and detention by Australia of certain documents and data belonging to Timor-Leste. The Applicant argued that the confidentiality of communications between a lawyer and a client is covered by legal professional privilege as a general principle of law.[112] The ICJ, however, relied instead on the principle of sovereign equality of states as "one of the fundamental principles of the international legal order" set out in the *Charter of the United Nations* ("*Charter*") to conclude that the rights relied upon by the applicant are plausible.[113] This rare instance where the ICJ had to resort to general principles of law in the absence of customary or treaty rules to address the dispute is symptomatic of the ICJ's adamant reluctance to decide international cases by applying general principles of law derived from domestic laws using comparative law methodology. Despite the fact that the arguments of both parties were centred on the general principles of law, the ICJ deliberately chose to rely on established general principles of international law, regrettably, without explaining this different course of reasoning. In his dissenting opinion, Judge Greenwood expressed justified doubts as to whether the rights of confidentiality and of non-interference in communications with legal advisers relied upon by Timor-Leste could be derived from the *Charter* rather than from general principles of law.[114] The most problematic aspect of the order, however, is the ICJ's silence with respect to the applicant's express reliance on Article 38(1)(c) of the *SICJ* as a basis for its claims, supported by detailed evidence concerning the general recognition of the

111. Order of 3 March 2014, [2014] ICJ Rep 147.

112. *Ibid* at para 24.

113. *Ibid* at para 27.

114. *Questions Relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v Australia)*, Dissenting Opinion of Judge Greenwood, [2014] ICJ Rep 194 at para 12.

principle in domestic laws and international decisions.[115] The ICJ did not address Australia's counter-arguments either, which were focused on the methodology for ascertaining the existence of general principles, and in particular on the lack of international applicability of the principle of legal professional privilege.[116] Accordingly, *Timor-Leste v Australia* does not shed much light on the proper methodology for ascertaining general principles of law under Article 38(1)(c) of the *SICJ*, but does indicate that the general principles of international law can be derived from widely ratified international treaties, such as the *Charter*.

The ICJ has referred to 'general', 'fundamental' and 'cardinal' principles on a number of other occasions too. The references to principles in the case law of the Permanent Court of International Justice ("PCIJ") and the ICJ can be grouped in three main categories: (i) general principles of international law; (ii) general principles of domestic law; and (iii) general principles of international procedural law. These will be tackled in turn with specific focus on the methodology used by the ICJ in their ascertainment and the function they performed in its reasoning.

A. General Principles of International Law

1. The Jurisprudence of the PCIJ

The PCIJ referred to general principles of international law on a few occasions. It referred to the "elementary principle of international law that a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another State" in interpreting whether

115. *Questions Relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v Australia)*, "Memorial of the Democratic Republic of Timor-Leste" (28 April 2014) at paras 6.2-6.23, online: ICJ <www.icj-cij.org/docket/index.php?p1=3&p2=3&k=17&case=156&code=tla&p3=1>.

116. *Questions Relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v Australia)*, "Counter Memorial of Australia" (28 July 2014) paras 4.19-4.23, online: ICJ <www.icj-cij.org/docket/index.php?p1=3&p2=3&k=17&case=156&code=tla&p3=1>.

it had jurisdiction under Article 26 of the *Mandate for Palestine*[117] in *Mavrommatis Palestine Concessions.*[118] The PCIJ found that in light of the international law principle of diplomatic protection, it had jurisdiction over the dispute which was initially between a private person and a state but had now entered a new phase in the domain of international law.[119] Regrettably, the PCIJ did not elaborate on how it reached its finding of the principle at hand but merely asserted it as self-evident.

In the *Case Concerning Certain German Interests in Polish Upper Silesia*[120] the PCIJ referred to the "generally accepted principles of international law" on the treatment of the private property, rights and interests of foreigners abroad as informing its interpretation of Head III on Expropriation of the 1922 *Germano-Polish Geneva Convention Concerning Upper Silesia*.[121] The PCIJ found that Head III constituted a derogation from the general principles by allowing expropriation and accordingly should be construed strictly.[122] The PCIJ again did not offer any methodological guidance as to where it derived the generally accepted principles of international law on the treatment of foreigners abroad. However, its holding is a good illustration of the use of general principles as an interpretative tool informing the assessment of treaty provisions in the broader context of general international law. This judgment can be seen as a precursor of the principle of systemic integration which was incorporated later in Article 31(3)(c) of the *Vienna Convention*.[123]

In *the Case of the S.S. "Lotus"*[124] ("*Lotus*"), the PCIJ had to interpret the reference to "principles of international law" in Article 15 of the 1923 *Treaty of Peace with Turkey Signed at Lausanne*,[125] which regulated the

117. *The Mavrommatis Palestine Concessions,* PCIJ Ser. A, No. 2, Judgment of 30 August 1924, at 12.
118. *Ibid.*
119. *Ibid*.
120. (1926), PCIJ (Ser A) No 7 [*Polish Upper Silesia*].
121. *Ibid* at 21.
122. *Ibid*.
123. *Vienna Convention*, *supra* note 54, art 31(3)(c).
124. (1927), PCIJ (Ser A) No 10 [*Lotus*].
125. 24 July 1923, 28 LNTS 11 (entered into force 6 August 1924).

question of jurisdiction between Turkey and the other parties.[126] The PCIJ understood the reference as denoting "international law as it is applied between *all nations belonging to the community of States* … meaning the principles which are in force between all independent nations and which therefore apply equally to all the contracting Parties".[127] In a much-quoted paragraph, the PCIJ underlined that:

> [i]nternational law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by *usages generally accepted as expressing principles of law* and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed.[128]

The PCIJ here derived the general principles of international law from the usages generally accepted as such, *i.e.* by a process of induction from customary international law. In its reasoning, the PCIJ referred both to the community of states and to its common aims, arguably implying the systemic function of general principles of international law in the international legal order. This judgment confirms that general principles can be distilled from the other primary sources of international law. Notably, it also indicates the understanding of the PCIJ that the community of states consists of all nations and that, arguably, general principles ought to be recognised by the international community as a whole.

Last but not least, the PCIJ briefly discussed general principles of international law in *the Oscar Chinn Case*[129] where the British Government invoked them as an alternative source of obligation for the Belgian Government in addition to the *Convention of Saint-Germain-*

126. *Ibid*.
127. *Lotus*, *supra* note 124 at 16-17 [emphasis added].
128. *Ibid* at 18 [emphasis added].
129. (1934), PCIJ (Ser A/B) No 63 at 79 [*Oscar Chinn*].

en-Laye.[130] The PCIJ noted that the UK "relies on the obligation incumbent upon all States to respect the vested rights of foreigners in their territories"[131] but concluded that this obligation was not breached under the circumstances.[132] While the PCIJ did not apply the protection of vested rights being unwarranted under the facts, it did not question its status as a general principle of international law either, implicitly recognising it as such. The reliance on the principle can be seen as an instance of state practice in this respect too. In its memorial, the UK invoked the principles as "embodied in the law of nations, as recognised by the Court itself",[133] quoting *Polish Upper Silesia*.[134] Furthermore, the UK advocated that the treaty "must be [interpreted] with reference to principles of international law".[135] Notably, this is the second PCIJ case in which the protection of individual rights abroad was assessed as a general principle of international law.

In *Case Concerning the Factory at Chorzów*,[136] the PCIJ identified two general principles, notably by reference to case law. First, it observed that:

> [i]t is, moreover, a principle *generally accepted in the jurisprudence of international arbitration, as well as by municipal courts*, that one Party cannot avail himself of the fact that the other has not fulfilled some obligation or has not had recourse to some means of redress, if the former Party has, by some illegal act, prevented the latter from fulfilling the obligation in question, or from having recourse to the tribunal which would have been open, to him.[137]

Secondly, the PCIJ formulated the so-called 'factory at Chorzów principle'

130. *Treaty of Peace Between the British Empire, France, Italy, Japan and the United States (The Principle Allied and Associated Powers) and Belgium, China, Czechoslovakia, Cuba, Greece, Nicaragua, Panama, Portugal, Roumania, the Serb-Croat-Slovene State and Siam, and Austria*, 10 September 1919, 226 Cons TS 8 (entered into force 16 July 1920).
131. *Oscar Chinn*, *supra* note 129 at 81.
132. *Ibid* at 87.
133. *The Oscar Chinn Case*, "Case submitted by the Government of Great Britain and Northern Ireland" (12 May 1934), PCIJ (Series C) No 75, 12 at 40 [*Oscar Chinn (Great Britain Submissions)*].
134. *Polish Upper Silesia*, *supra* note 120.
135. *Oscar Chinn (Great Britain Submissions)*, *supra* note 133 at 45.
136. (1927), PCIJ (Ser A) No 9.
137. *Ibid* at 31 [emphasis added].

on reparation, reasoning:

> [t]he essential principle contained in the actual notion of an illegal act – a *principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals* – is that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.[138]

The PCIJ illustrated the existence of the general principles by reference to international practice, focusing in particular on the decisions of international arbitral tribunals, as well as, subsidiarily, on the case law of municipal courts. It is far from clear, however, whether the PCIJ relied on the decisions of international tribunals establishing certain principles as a subsidiary source or as direct evidence of their recognition by civilized nations.

Overall, it is remarkable that all these cases in which the PCIJ referred to general principles of law concerned the general principles of international law. Methodologically, the PCIJ either asserted the existence of the principles as self-evident or derived them from custom and arbitral decisions. States relied on the case law of the PCIJ to illustrate the existence of general principles. It can be concluded that the PCIJ interpreted Article 38(1)(c) of the *SPCIJ* as including the general principles of international law and by using an international law-based methodology for their ascertainment. Furthermore, both the PCIJ and the states appearing before it used general principles as a tool for systemic interpretation of the treaty provisions at hand. Accordingly, general principles played a predominantly interpretative function.

2. The ICJ

The ICJ similarly has had the occasion to identify and apply general principles of (international) law. The ICJ resorted to them in its very first case, the *Corfu Channel*.[139] In assessing Albania's obligations with respect to its territorial waters, the ICJ disagreed with the UK's argument based

138. *Case Concerning the Factory at Chorzow (Claim for Indemnity)*, PCIJ (Ser A) No 17 at 47 [emphasis added].

139. *Corfu Channel*, *supra* note 110.

on the 1907 *Convention Relative to the Laying of Automatic Submarine Contact Mines*[140] ("*Hague Convention XIII*"), as it applied only in time of war, and instead upheld its alternative argument based on "the general principles of international law and humanity".[141] The ICJ based its reasoning "on certain general and well-recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war; the principle of freedom of maritime communication; and every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States".[142] Unfortunately, the ICJ asserted these "general and well-recognized principles" as self-evident, without further discussion as to their origin or the method it used for their ascertainment. One can speculate that they could have been derived from the *Hague Convention VIII* to which the ICJ referred in the same sentence, yet only to dismiss its application in times of peace. Notably, general principles here were used as a direct source of legal rights and obligations rather than as a tool for interpretation. As such, they were outcome-determinative for the case.

In the *Reservations to the Convention on Genocide* Advisory Opinion,[143] the ICJ held that "the principles underlying the [Genocide] Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation".[144] This finding was based on the origins of the *Convention on the Prevention and Punishment of the Crime of Genocide*[145] ("*Genocide Convention*") and in particular the intention of the UN to condemn and punish genocide as expressed in *General Assembly Resolution 96(I), The Crime of Genocide*[146] of 11 December 1946 and the objective for the prohibition to be universal

140. 18 October 1907, 36 Stat 2332 (entered into force 26 January 1910).
141. *Corfu Channel*, *supra* note 110 at 9-10.
142. *Ibid* at 22.
143. Advisory Opinion, [1951] ICJ Rep 15 [*Genocide Convention*].
144. *Ibid* at 23.
145. *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, 78 UNTS 277 (entered into force 12 January 1951).
146. *The Crime of Genocide*, GA Res 96(1), UNGAOR, 1st Sess, UN Doc A/64/Add.1 (1946) 188 [*The Crime of Genocide*].

in scope as evidenced in the unanimously adopted *General Assembly Resolution 197(III), Admission of New Members*[147] of 8 December 1948.[148] The ICJ also took into account the 'objects' of the Convention, namely its "purely humanitarian and civilizing purpose … to safeguard the very existence of certain human groups and … to confirm and endorse the most elementary principles of morality".[149]

The Court in this opinion distilled the 'principles recognized by civilized nations' by reference to their inclusion in the *Genocide Convention* and notably, by the intention of the UN and the contracting parties for the prohibition to be universal in scope as evidenced by the voting pattern and wording of the two related General Assembly resolutions, as well as the Preamble of the *Genocide Convention*.[150] It is arguable that the ICJ distilled the requisite general recognition from the shared objectives of state parties to the treaty and the votes for the non-binding General Assembly resolutions, *i.e.* via deductive reasoning based on the will of the international community of states as a whole, rather than by induction from the attitudes of individual states. The moral and humanitarian dimensions of the *Genocide Convention* were also a consideration. The so-employed methodology indicates that general principles can be derived from treaties.

On a few occasions, the ICJ has resorted to legal maxims as axiomatic evidence of general principles of law. In the *Case Concerning the Temple of Preah Vihear (Cambodia v Thailand)*[151] for example, the ICJ based its finding that Thailand acquiesced the contested maps on the maxim *qui tacet consentire videtur si loqui debuisset ac potuisset.*[152] The ICJ quoted the Roman law maxim as self-sufficient evidence of recognition of the principle, without much further analysis. Notably, the argument of acquiescence was raised by Cambodia in the second and last rounds of

147. *Admission of New Members*, GA Res 197(III), UNGAOR, 3rd Sess, UN Doc A/900 (1948) 30.
148. *Genocide Convention*, *supra* note 143 at 23.
149. *Ibid*.
150. *The Crime of Genocide*, *supra* note 146, preamble.
151. [1962] ICJ Rep 6.
152. *Ibid* at 23.

oral pleadings and was formulated as one based on a principle of law, without any reference as to its sources.[153] Thailand did not contest the existence of the principle as such but rather its applicability under the circumstances.[154]

Another case where a general principle of law was illustrated merely by reference to a legal maxim is *Gabčikovo-Nagymaros Project (Hungary v Slovakia),*[155] where the ICJ sustained the principle *ex injuria non oritur jus.*[156] Instead of relying on the plethora of states incorporating the principle into their domestic legislation, the ICJ established its existence by referring solely to Roberto Ago's Report on the Draft Articles on State Responsibility published in the 1980 *Yearbook of the International Law Commission*. The argument was raised during the oral hearings by Hungary, using the same reference as an illustration.[157]

The *Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v United States of America)*[158] ("*Nicaragua*") sheds more light on the process of distilling general principles of international law employed by the ICJ, as well as on their relationship with custom. Due to the multilateral treaty reservation of the United States, the ICJ had to apply the unwritten sources of international law in deciding the case and did so by resorting extensively to both custom and general principles. Its reasoning on the prohibition against use of force is particularly instructive in this respect as the ICJ noted that: "both the Charter and the customary international law flow from a common fundamental principle outlawing the use of force in international relations".[159]

In assessing the legal status of the prohibition, the ICJ took note of the parties' agreement that "the fundamental principle in this area is

153. *Temple of Preah Vihear*, "Oral Arguments Concerning the Merits" (15 June 1962) (ICJ Pleadings (Vol 2) 120 at 208.
154. *Ibid* at 440.
155. [1997] ICJ Rep 7.
156. *Ibid* at paras 57, 133.
157. *Project Gabčikovo-Nagymaros* (*Hungary v Slovakia*), "Public sitting held on Thursday 6 March 1997, at 10 am at the Peace Palace, President Schwebel presiding" (6 March 1997), CR 97/5 2 at 68.
158. [1986] ICJ Rep 14.
159. *Ibid* at para 181.

expressed in the terms employed in Article 2, paragraph 4"[160] and went on to satisfy itself that there existed *opinio juris* in customary international law to this effect, deducing it "with all due caution" from:

> the attitude of the Parties and the attitude of States towards certain General Assembly resolutions, and particularly resolution 2525 (XXV) entitled "Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations".[161]

The ICJ also drew on the "United States acceptance of the principle of the prohibition of the use of force which is contained in the declaration of principles governing the mutual relations of States participating in the Conference on Security and Co-Operation in Europe (Helsinki, 1 August 1975)",[162] on the referral to Article 2(4) of the *Charter* "in statements by State representatives as being not only a principle of customary international law but also a fundamental or cardinal principle of such law",[163] as well as on the reference in the US Counter-Memorial on jurisdiction and admissibility to the prohibition as a "universally recognized principle of international law".[164]

In distilling the 'fundamental principle outlawing the use of force' underlying both the *Charter* and customary law, the ICJ again relied heavily on the acceptance of states as manifested in their attitude towards resolutions on principles adopted by international organisations, as well as on the statements of states' officials to this effect. Accordingly, the ICJ deduced the cardinal principle from both treaty and custom as sources of international law and placed particular emphasis with respect to the latter on the subjective element required. Notably, the ICJ's interchangeable references to the prohibition of the use of force as both a rule of custom and as a universally recognised principle of international law indicates either that the same norm can fall under both Articles 38(1)(b) and (c) of the *SICJ* or that the ICJ uses the terms indiscriminately. The former

160. *Ibid* at para 188.
161. *Ibid*.
162. *Ibid* at para 189.
163. *Ibid* at para 190.
164. *Ibid* (for criticism, see Crawford, *supra* note 23 at 5).

view is preferable.

In *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*,[165] ("*Namibia Opinion*"), the ICJ assessed at length self-determination as a principle of international law. It did so by starting with Article 73 of the *Charter*, following its development in *General Assembly Resolution 1514 (XV)*, *Declaration on the Granting of Independence to Colonial Countries and Peoples* of 14 December 1960 and the resulting birth of new states.[166] Based on these considerations, the ICJ concluded that Article 22 of the *League of Nations Covenant* ought to be interpreted not statically but in an evolutionary manner, taking into consideration new developments of international law through the *Charter* and custom, including in particular the principle of self-determination.[167] The ICJ stressed that "an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation" and that it ought to faithfully discharge its functions by not ignoring the areas where "the *corpus iuris gentium* has been considerably enriched".[168]

This case is another good example of the interpretative function of the general principles of international law in relation to treaties, particularly by way of systemic integration of their terms in the system of international law. It also proclaims the so-called principle of evolutionary interpretation of dynamic concepts, again by reference to the newly developed principles of international law. Last but not least, it confirms the ICJ's approach of giving particular weight to General Assembly resolutions in the ascertainment of the recognition, content and status of the general principles of international law. It can be deduced that the collective acceptance of states expressed in universal treaties such as the *Charter* and in certain General Assembly resolutions can constitute evidence of general recognition by civilised nations under Article 38(1)(c) of the *SICJ*.

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165. Advisory Opinion, [1971] ICJ Rep 16 [*Namibia Opinion*].
166. *Ibid* at para 52.
167. *Ibid* at para 53.
168. *Ibid* [emphasis in original].

The so-identified approach in distilling general principles of international law was followed in the *Western Sahara* Advisory Opinion,[169] again in relation to the principle of self-determination.[170] The ICJ assessed the principle by reference to the *Charter*, to its earlier *Namibia Opinion*, to *General Assembly Resolutions 1514 (XV)* and *1541 (XV)* and to the *General Assembly Resolution 2625 (XXV) Declarations on the Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations* ("*Declaration on Friendly Relations*") Based on this evidence, the ICJ concluded that the validity of the principle was not affected by instances where the General Assembly dispensed with the requirement of consulting the inhabitants of a given territory. Accordingly, the widespread and consistent recognition of self-determination was sufficient to validate the principle even in the face of instances of conflicting practice.

In *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v United States of America),*[171] a Chamber of the ICJ had to interpret the applicable law clause in the *Special Agreement*[172] between Canada and the United States, referring to "the principles and rules of international law".[173] In doing so, it made important pronouncements on the distinction between rules and principles, as well as on the methodologies for the ascertainment of principles of international law. The Chamber expressly acknowledged that: "'principles' clearly means principles of law, that is, it also includes rules of international law in whose case the use of the term 'principles' may be justified because of their more general and more fundamental character",[174] putting to rest the long scholarly debate as to whether the reference to general principles in Article 38(1)(c) of the *SICJ* includes or excludes the general principles of international law.

The Chamber interpreted the applicable law clause in the *Special*

169. *Western Sahara*, Advisory Opinion, [1975] ICJ Rep 12 [*Western Sahara*].
170. *Ibid* at paras 55-60.
171. [1984] ICJ Rep 246 [*Gulf of Maine*].
172. *Ibid* at *Special Agreement*.
173. *Ibid* at para 79.
174. *Ibid*.

Agreement as referring primarily to rules and principles of customary law. It stressed that in the context of maritime delimitation, "the practice is still rather sparse, owing to the relative newness of the question".[175] The Chamber went on to define its methodology:

> [f]or the purpose of the Chamber at the present stage of its reasoning, which is to ascertain the principles and rules of international law which in general govern the subject of maritime delimitation, reference will be made to conventions (Art. 38, para. 1 (a)) and international custom (para. 1 (b)), to the definition of which the judicial decisions (para. 1(d)) either of the Court or of arbitration tribunals have already made a substantial contribution. So far as conventions are concerned, only "general conventions", including, *inter alia*, the conventions codifying the law of the sea to which the two States are parties, can be considered … mainly because it is in codifying conventions that principles and rules of general application can be identified. Such conventions must, moreover, be seen against the background of customary international law and interpreted in its light.[176]

The Chamber considered in particular the 1958 *Convention on the Continental Shelf*;[177] the *United Nations Convention on the Law of the Sea*[178] (noting in particular the symmetry of their provisions on continental shelf delimitation); as well as the case law of the ICJ, including the *North Sea Continental Shelf (Germany v Denmark; Germany v Netherlands)*[179] ("*North Sea Continental Shelf*"), *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*;[180] and an arbitral award.[181]

The methodology for establishing general principles of international law is fully in line with the PCIJ's approach in *Lotus* and the ICJ's previous case law. It confirms that such principles can be deduced from the other sources of international law including custom and, notably, treaties of general character. Furthermore, it indicates the special authoritative weight of the previous pronouncements on general principles of the

175. *Ibid* at para 83.
176. *Ibid*.
177. 29 April 1958, 499 UNTS No 7302 at 312 (entered into force 10 June 1964).
178. 10 December 1982, 397 UNTS No 31363 (entered into force 16 November 1994).
179. *North Sea Cases*, *supra* note 59.
180. [1981] ICJ Rep 3.
181. *Gulf of Maine*, *supra* note 171 at paras 84-96.

ICJ itself, as well as of arbitral tribunals treated within the confines of a subsidiary source rather than as direct evidence of recognition. Finally, the approach underlines the requirement of generality with respect to the recognition required.

In *Frontier Dispute (Burkina Faso/Republic of Mali)*,[182] another Chamber of the Court interpreted and applied the principle of *uti possidetis juris*. When asked under the *Special Agreement*[183] between Burkina Faso and Mali to settle the dispute "based in particular on respect for the principle of intangibility of frontiers inherited from colonization",[184] the Chamber held it "cannot disregard the principle of *uti possidetis juris*", emphasising "its general scope".[185] The Chamber observed that: "the principle is not a special rule which pertains solely to one specific system of international law" but "is a general principle, which is logically connected with the phenomenon of the obtaining of independence, wherever it occurs".[186] It illustrated this generality by reference to: "the many declarations made by African leaders in the dawn of independence",[187] a 1964 resolution of the Organization of African Unity ("OAU") and "the numerous solemn affirmations of the intangibility of frontiers existing at the time of independence of African States, whether made by senior African statesmen or by organs of the Organization of the African Unity itself … [that] recognize and confirm an existing principle".[188] The Chamber did acknowledge that the practice supporting the principle was limited to Spanish America and Africa,[189] but held nonetheless that the rule was of general scope based on the numerous declarations by states and international organisations. Accordingly, the Chamber applied the general principle in deciding the case, even if it was not expressly referred to under the *Special Agreement* and despite the objection that the two

182. [1986] ICJ Rep 554.
183. *Ibid* at para 2.
184. *Ibid* at para 19.
185. *Ibid* at para 20.
186. *Ibid*.
187. *Ibid* at para 22.
188. *Ibid* at paras 21-24.
189. *Ibid* at paras 20-21.

disputing states achieved independence before its proclamation by the OAU in the 1964 resolution.[190]

The functional approach of the Chamber is significant as it confirms the trend of applying general principles of international law by way of systemic integration, even where the applicable law clause does not expressly include them. Furthermore, the methodology used in ascertaining the existence of *uti possidetis* is coherent with the previous instances, identifying general principles of international law by focusing on the existence of general recognition, evidenced by the states' support to resolutions of international organisations, as well as by official statements of senior statesmen and notably, of organs of the OAU. Notably, in this case, the Chamber seemed to link the requirement of generality to the scope of application of the principle, rather than to its recognition.

In *East Timor (Portugal v Australia)*[191] ("*East Timor*"), the ICJ affirmed that self-determination "is one of the essential principles of contemporary international law"[192] based on its recognition by the *Charter* and on the jurisprudence of the ICJ, in particular the *Namibia* and *Western Sahara* Advisory Opinions.[193] The ICJ's reasoning indicates that it is likely to follow its own case law establishing that a given rule has the character of a general principle of international law.

Similarly, in the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* Advisory Opinion,[194] the ICJ assessed the legality of the Israeli wall in the occupied Palestinian territory by reference to the applicable rules and principles of international law, including the principle of self-determination.[195] Following its methodology in *East Timor* and previous cases, the ICJ recalled that the principle was set out in: the *Charter*; the *Declaration on Friendly Relations*; and in its previous case law, including its *Namibia Opinion* as well as its opinion in *East*

190. *Ibid* at para 26.
191. [1995] ICJ Rep 90.
192. *Ibid* at para 29.
193. *Ibid*.
194. Advisory Opinion, [2004] ICJ Rep 136 [*Legal Consequences of the Construction of a Wall*].
195. *Ibid* at paras 86-88.

Timor.[196]

In the *Legality of the Threat or Use of Nuclear Weapons* Advisory Opinion,[197] ("*Nuclear Weapons*") the ICJ had to identify the principles and rules of humanitarian law applicable in armed conflict due to the absence of a conventional or customary rule on the legality of the threat or use of nuclear weapons.[198] It qualified these as "cardinal principles contained in the texts constituting the fabric of humanitarian law"[199] and derived them from the broadly ratified 1899 and 1907 *Hague Convention*s, the 1907 *Hague Regulations Respecting the Laws and Customs of War on Land*, the 1925 *Geneva Protocol to the Hague Convention IV*, the *Geneva Convention*s of 1864, 1906, 1929 and 1949, including the Additional Protocols and by reference to the Martens Clause in the preamble of the *Convention (II) With Respect to the Laws and Conventions of War on Land*. The ICJ also recalled its holding in *Corfu Channel*[200] and the statement of the Nuremberg International Military Tribunal that the humanitarian rules in the *Hague Convention IV* "were recognized by all civilized nations".[201] It took into account as an additional consideration that the humanitarian law principles are "so fundamental to the respect of the human person and 'elementary considerations of humanity'" to conclude that:

> [t]he extensive codification of humanitarian law and the extent of the accession to the resultant treaties, as well as the fact that the denunciation clauses that existed in the codification instruments have never been used, have provided the international community with a corpus of treaty rules the great majority of which had already become customary and which reflected the most *universally recognized humanitarian principles*.[202]

The ICJ conceptualised the rules of humanitarian law as fundamental and intransgressible principles of customary law. It established their status

196. *Ibid* at para 88.
197. *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, [1996] ICJ Rep 226 [*Nuclear Weapons*].
198. *Ibid* at para 74.
199. *Ibid* at para 78.
200. *Ibid* at para 79.
201. *Ibid* at para 80.
202. *Ibid* at para 82 [emphasis added].

by reference to the wide adherence to the conventions incorporating them, to international case law, as well as to their moral or humanitarian dimension. This methodology is arguably more akin to the one used in establishing general principles of international law rather than custom by focusing on the *opinio juris* of states and in this case, on its humanitarian dimension. This is illustrated by the reliance on the Martens Clause, which expressly refers to "the principles of international law derived from established custom … the principles of humanity and … the dictates of public conscience".[203] However, the ICJ's reasoning in this case highlights again the lack of clear boundaries between custom and general principles.

Another "basic principle" that the ICJ applied in this case is good faith. It identified it by reference to seven sources: Article 2(2) of the *Charter*; the *Declaration on Friendly Relations*; Security-Council Resolution 984 (1995); the *Final Act of the Conference on Security and Co-Operation in Europe*; the final document of the Review and Extension Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons; the *Vienna Convention*; and its *Nuclear Tests* case. Again, the ICJ's methodology focused on the incorporation of the principle in universal conventions, in resolutions expressing general recognition as well as on its own case law as a subsidiary source.

In conclusion, general principles were used by the ICJ and its predecessor where specifically mandated by the applicable law clause and by way of systemic integration in order to offer an interpretation that took into account new developments of the international legal system, as well as gap-fillers in the absence of crystallised custom *i.e.* in *Lotus* and the *Nuclear Weapons* opinion. The function of general principles most commonly informed the interpretation of treaties by way of systemic integration and evolutionary interpretation. However, in a few instances such as the *Corfu Channel*, *Nicaragua* and *Timor-Leste v Australia*, the general principles of international law served as a direct source of international obligations.

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203. *Ibid* at para 78, citing *Convention (II) with Respect to the Law and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land,* 29 July 1899, 32 Stat 1803 (entered into force 4 September 1900).

The methodology used by the ICJ for the ascertainment of general principles is somewhat inconsistent but has developed considerably over time. While the PCIJ asserted general principles as self-evident legal axioms, the ICJ gradually developed a more coherent methodology for their identification. A few common trends should be highlighted: first, the ICJ gives decisive weight to the recognition of the principles by the international community of states as a whole, expressed in voting patterns in general and regional international organisations; in official statements; as well as the wide participation of states in general treaties. Notably, the ICJ ascertains general recognition by deductive reasoning rather than by looking for evidence of recognition on a state-by-state basis. Such general recognition has at times outweighed practice to the contrary effect. Secondly, the ICJ has deduced general principles from the other main sources of international law, namely treaties and custom, underlying the former's more general or fundamental character. However, it is clear from the case law of the ICJ that the same norm can fall under both categories. Thirdly, the ICJ assigns special authoritative weight to the findings of general principles in its own case law and at times in the case law of other courts and arbitral tribunals used as a subsidiary means for the identification of general principles.

B. General Principles of Private Law

On even fewer occasions, the ICJ and its predecessor resorted directly to general principles of domestic law. This occurred when faced with questions of domestic rather than international law.

In *Mavrommatis Jerusalem Concessions* (*Greek Republic v His Britannic Majesty's Government*),[204] the ICJ briefly referred to the British argument based on "those principles which seem to be generally accepted in regard to contracts" in assessing the validity of the concession contract in light of the purported error regarding Mavrommatis's nationality, noted as Ottoman in the contract but actually Greek.[205] Following these principles,

204. (1925), PCIJ (Ser A) No 5.
205. *Ibid* at 30.

however, the ICJ found that the contract was valid.[206] It is notable that the UK did not rely on Turkish law, which was the proper law of the contract, but on the general principles of contract law instead.[207]

In *Barcelona Traction and Power Company, Limited (Belgium v Spain)*,[208] the ICJ not only took cognizance but also referred "to rules generally accepted by municipal legal systems which recognize the limited company whose capital is represented by shares, and not to the municipal law of a particular State".[209] This holding was in response to Spain's invocation in its Counter-Memorial of the general principle of separation of the legal personality of the corporation from its shareholders recognised "dans la généralité des systèmes juridiques, il est fait abstraction de l'idée d'autonomie de la personnalité morale".[210] Belgium objected that Spain: "ne peut être purement et simplement déduire d'institutions du droit prive interne", cautioning against such an unacceptable method of transposing private law constructs to the international plane without taking into account the specificities of inter-state relations.[211] The ICJ, however, followed Spain's approach.

It can be observed that the ICJ and its predecessor have considered and applied general principles of law common to the domestic laws of 'civilized' nations in the areas of contract and company law, but only when invoked by the parties and solely with respect to matters regulated by domestic law. The PCIJ and the ICJ referred to those principles

206. *Ibid*.
207. *Ibid* (stating: "The British Government does not contend that, in Turkish law, the Ottoman nationality of the beneficiary was a condition essential to the validity of concessions; moreover, no law nor any document in this sense regarding the practice of the courts or competent authorities in Turkey has been produced" at 29).
208. Second Phase Judgment, [1970] ICJ Rep 3.
209. *Ibid* at para 50.
210. *Barcelona Traction, Light and Power Company Limited (Belgium v Spain)*, "Pleadings, Oral Arguments, Documents" (19 June 1962) [1962] ICJ Pleadings (Vol 4) 5 at para 103.
211. *Barcelona Traction, Light and Power Company Limited (Belgium v Spain)*, "Pleadings, Oral Arguments, Documents" (19 June 1962) [1962] ICJ Pleadings (Vol 5) 1 at 641.

specifically as rules of domestic law, rather than as general principles of law under the *SPCIJ* and the *SICJ*, leaving it open to interpretation whether it qualified them as such. The methodology used by the ICJ for the ascertainment of these domestic principles seems to be more one of assertion than of comprehensive comparative law study. It can also be inferred that in practice, the burden of proving those principles has lain on the parties rather than the ICJ.

In contrast, in cases where principles of municipal law have been invoked before the ICJ to inform the application of international law, the ICJ has declined to apply them. This could arguably be due to the fact that the purported 'general principles' were not capable of international application.

In the *Case Concerning Right of Passage over Indian Territory (Portugal v India)*,[212] Portugal argued that "the municipal laws of the civilized nations are unanimous in recognizing that the holder of enclaved land has the right, for purposes of access to it, to pass through adjoining land" and that "it is rare to find a principle more clearly emerging from the universal practice of States in *foro domestico* and more perfectly meeting the requirements of Article 38, paragraph I(c), of the Statute of the Court".[213] In support of this proposition, Portugal appended a legal opinion by Professor Max Rheinstein surveying the national laws of 64 states containing the right to access to enclaved land.[214] The ICJ, however, based its conclusions on the established practice between the British and Indian authorities and Portugal, observing that it did "not consider it necessary to examine whether general international custom or the general principles of law recognized by civilized nations may lead to the same result",[215] and noted that "[s]uch a particular practice must prevail over any general rules".[216]

In *South West Africa, Second Phase* (*Ethiopia v South Africa; Liberia*

212. [1960] ICJ Rep 6 [*Passage over Indian Territory*].
213. *Ibid* at 43.
214. *Right to Passage over Indian Territory* (*Portugal v India*), (July 1958) ICJ Pleadings (Vol 1) 397 at 543ff, 858ff.
215. *Passage over Indian Territory*, *supra* note 212 at 43.
216. *Ibid* at 44.

v South Africa),[217] ("*South West Africa*") the ICJ refused the application of *actio popularis* as a general principle of law common to the national systems of most nations explicitly due to its inapplicability to international law at the time, noting:

> the argument amounts to a plea that the Court should allow the equivalent of an "actio popularis", or right resident in any member of a community to take legal action in vindication of a public interest. But although a right of this kind may be known to certain municipal systems of law, it is not known to international law as it stands at present: nor is the Court able to regard it as imported by the "general principles of law" referred to in Article 38, paragraph 1 (c), of its Statute.[218]

In *North Sea Continental Shelf*, Germany argued that, "the principle of the just and equitable share was one of the recognized general principles of law which, by virtue of paragraph 1(c) of the same Article, the ICJ was entitled to apply as a matter of the *justitia distributiva* which entered into all legal systems".[219] The ICJ dismissed this argument as being "wholly at variance with what the Court entertains no doubt is the most fundamental of all the rules of law relating to the continental shelf, enshrined in Article 2 of the 1958 Geneva Convention [on the Continental Shelf]" – that is to say that the rights of the coastal state over the continental shelf exist *ipso facto* by virtue of its sovereignty over the land.[220] This case illustrates an additional limitation to the application of general principles derived from domestic law on the international plane, namely, that they cannot apply where in conflict with a rule of international law as the latter always prevails.

Mexico argued in *Avena and Other Mexican Nationals* (*Mexico v United States of America*)[221] that the "exclusionary rule" was a general principle of law under Article 38(1)(c) of the *SICJ*.[222] The ICJ refused to uphold this submission on the basis that it related to a question it already discussed sufficiently, reasoning further: "this question is one

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217. Second Phase Judgment, [1966] ICJ Rep 6 [*South West Africa*].
218. *Ibid* at para 88.
219. *North Sea Cases*, *supra* note 59 at para 17.
220. *Ibid* at para 19.
221. [2004] ICJ Rep 12.
222. *Ibid* at para 127.

which has to be examined under the concrete circumstances of each case by the United States courts concerned in the process of their review and reconsideration".[223]

Overall, the ICJ has been very reluctant to address and uphold rights and obligations based on 'general principles' derived from an inductive comparative law analysis of domestic legal systems. Notably, the ICJ itself has never resorted to a comparative law methodology in identifying a general principle applicable to international disputes.

C. General Principles of Procedural Law

The general principles of (international) procedural law are seemingly the most resorted to and coherently identified category of general principles in the case law of the ICJ and its predecessor. Accordingly, it is important to identify the proper methodology for their ascertainment.

In some cases, the ICJ gave methodological guidance as to the evidence it used for the general recognition of principles of procedural law, including treaties, international decisions and even domestic laws, in line with the hybrid theory of general principles. In *Electricity Company of Sofia and Bulgaria (Belgium v Bulgaria)*,[224] ("*Electricity Company*") the PCIJ affirmed that the provision of the *SPCIJ* on provisional measures "applies the principle *universally accepted by international tribunals and likewise laid down in many conventions* to which Bulgaria has been a party – to the effect that the parties to a case must abstain from any measure capable of exercising a prejudicial effect in regard to the execution of the decision to be given".[225]

In *Corfu Channel*, the ICJ held that "indirect evidence is admitted in all systems of law, and its use is recognized by international decisions".[226] Based on this principle, it allowed the United Kingdom a "more liberal recourse to inferences of fact and circumstantial evidence".[227]

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223. *Ibid*.
224. Order of 4 April 1939, PCIJ (Ser A/B) No 79.
225. *Ibid* at 199 [emphasis added].
226. *Corfu Channel*, *supra* note 110 at 18.
227. *Ibid*.

In *LaGrand (Germany v United States of America)*,[228] the ICJ for the first time formulated expressly the binding character of its orders for provisional measures, giving particular weight to "the existence of a principle which has already been recognized by the Permanent Court of International Justice"[229] in the *Electricity Company* case. The ICJ also recalled its own previous case law indicating provisional measures to stop the aggravation or extension of disputes as an illustration of the principle.[230] It used the so-established principle to interpret as binding the character of orders under Article 41 of the *SICJ*. The ICJ followed a similar approach in identifying general principles of procedural law in *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia v Singapore)*,[231] holding that "[i]t is a general principle of law, confirmed by the jurisprudence of this Court, that a party which advances a point of fact in support of its claim must establish that fact".[232]

In a number of cases, the ICJ asserted general principles of procedural law as self-evident, without much methodological guidance. In the *Effect of Awards of Compensation Made by the UN Administrative Tribunal* Advisory Opinion,[233] the ICJ recalled the "well-established and generally recognized principle of law, [that] a judgment rendered by such a judicial body is *res judicata* and has binding force between the parties to the dispute".[234] In the *Application for Review of Judgment No. 158 of the UN Administrative Tribunal,* the ICJ noted that:

> [g]eneral principles of law … require that, even in advisory proceedings, the interested parties should each have an opportunity, and on a basis of equality, to submit all the elements relevant to the questions which have been referred to the review tribunal.[235]

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228. [2001] ICJ Rep 446.
229. *Ibid* at para 103.
230. *Ibid.*
231. [2008] ICJ Rep 12.
232. *Ibid* at para 45.
233. Advisory Opinion, [1954] ICJ Rep 47.
234. *Ibid* at 53.
235. *Application for Review of Judgment No 158 of the United Nations Administrative Tribunal*, Advisory Opinion, [1973] ICJ Rep 166 at para 36.

In *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*,[236] the *Cumarasawamy* opinion, the ICJ held that Malaysia was under an obligation to respect "a generally recognized principle of procedural law" that "questions of immunity are … preliminary issues which must be expeditiously decided *in limine litis*".[237] In *Land, Island and Maritime Frontier Dispute (El Salvador/ Honduras)*,[238] the Chamber of the ICJ in according permission for the first time under Article 62 of the *SICJ* observed that, "the intervening State does not become party to the proceedings, and does not acquire the rights, or become subject to the obligations, which attach to the status of a party, under the Statute and Rules of Court, or *the general principles of procedural law*".[239] As observed by Rosenne, the formulation of "'general principles of procedural law' is new to the lexicon of the International Court and its implications are not self evident".[240] In *South West Africa*, the ICJ, again axiomatically, recalled the "universal and necessary, but yet almost elementary principle of procedural law that a distinction has to be made between, on the one hand, the right to activate a court and the right of the court to examine the merits of the claim, and, on the other, the plaintiff party's legal right in respect of the subject-matter of that which it claims".[241]

It can be observed that the ICJ resorts to general principles of procedural law with some regularity, either asserting them as long-standing legal axioms arguably typical for all legal systems, deriving them from international treaties or from comparating domestic laws. The ICJ also commonly resorts to international judicial and arbitral decisions, arguably as a subsidiary source for the ascertainment of general principles of procedural law or as a short cut. This approach is not fully consistent

236. Advisory Opinion, [1999] ICJ Rep 62.
237. *Ibid* at para 63.
238. Judgment of 13 September 1990, [1990] ICJ Rep 92.
239. *Ibid* at para 102 [emphasis added].
240. Shabtai Rosenne, *The Law and Practice of the International Court 1920-2005*, 4d , vol 3 (Leiden/Boston: Martinus Nijhoff Publishers, 2006) at 1023.
241. *South West Africa*, *supra* note 217 at para 64.

with the ICJ's methodology used in ascertaining general principles of international law given its readiness to resort to comparative law on matters of procedure.[242] This could be explained by the easier adaptability and applicability of domestic procedural principles to the international legal process, given the inherent similarities between the two. However, it would be desirable for the ICJ to be more explicit in elaborating its methodology and justifying the differences in ascertaining general principles of substantive and of procedural law.

D. General Principles in Separate and Dissenting Opinions

General principles of law featured in a number of the individual opinions of the judges of the PCIJ and the ICJ. While some judges advocated importing general principles on the basis of a comparative law study of domestic laws, others conceptualised them as natural law constructs penetrating the international legal order, invariably linked to the protection of human dignity.

1. General Principles as Private Law Analogies

Most judges who relied on general principles in their individual or dissenting opinions adopted a comparative law methodology, arguing for their transposability on the international plane by way of private law analogy. Judge Anzilotti relied on principles of civil procedure in his dissent in *Chorzów Factory*,[243] to argue that the principle of *res judicata* should cover and preclude an action for indemnity based upon a declaratory judgment deciding it as a preliminary issue.[244] Judge Anzilotti reasoned that, "if there be a case in which it is legitimate to have recourse, in the absence of conventions and custom, to 'the general principles of law recognized by civilized nations', mentioned in No. 3 of Article 38 of the Statute, that case is assuredly the present one".[245]

242. *Corfu Channel*, *supra* note 110 at 18.
243. (1927), PCIJ (Ser A) No 13.
244. *Ibid* at 27.
245. *Ibid*.

Judge Hudson discussed the *exceptio non adimpleti contractus* as a general principle in a much-quoted Individual Opinion in *Diversion of Water From the Meuse (Netherlands v Belgium)*.[246] He derived it from the Anglo-American legal maxims of equity, supported by references to Roman law and the German civil code.[247] Judge Hudson did caution however that "[t]he general principle is one of which an international tribunal should make a very sparing application" in suggesting its application by analogy to international treaties.[248]

In his Separate Opinion in *International Status of South-West Africa*,[249] Judge McNair addressed South Africa's argument that the Mandate System under the League of Nations should be interpreted based on an analogy of the contract of mandate from private law.[250] Judge McNair cautioned, fully in line with the case law of the Court, that:

> [t]he way in which international law borrows from this source is not by means of importing private law institutions 'lock, stock and barrel', ready made and fully equipped with a set of rules. It would be difficult to reconcile such a process with the application of "the general principles of law". In my opinion, the true view of the duty of international tribunals in this matter is to regard any features or terminology which are reminiscent of the rules and institutions of private law as an indication of policy and principles rather than as directly importing these rules and institutions.[251]

While acknowledging that Anglo-American trust law, as well as the case law of the two Mandatories, South Africa and Australia, contained a confirmation of principle akin to the Mandate System,[252] McNair stressed the public interest and the principle of 'sacred trust of civilization' underlying the new Mandate regime to conclude that it had more than a purely contractual basis and accordingly to reject the analogy.[253] Judge McNair's approach is convincing in confirming that principles of municipal law could inspire the future development of similar institutions

246. (1937), PCIJ (Ser A/B) No 70 at 73.
247. *Ibid* at 77.
248. *Ibid*.
249. Advisory Opinion, [1950] ICJ Rep 128.
250. *Ibid* at 146.
251. *Ibid* at 148.
252. *Ibid* at 149-50.
253. *Ibid* at 154-55.

of international law while stressing that private law remains an analogy, rather than a direct source of international law.

Judge Lauterpacht has argued that the principle of severance could be applied as a general principle of law "as developed in municipal law" to treat as invalid part of the French declaration accepting as compulsory the jurisdiction of the ICJ under Article 36(2) of the *SICJ*.[254] In proposing this private law analogy, Judge Lauterpacht admitted that "[i]nternational practice on the subject is not sufficiently abundant to permit a confident attempt at generalization" on this question.[255] Indeed, it was over 50 years later in 2011 that the ILC finished its work on the *Guide to Practice on Reservations to Treaties* that incorporated the principle at hand with some qualifications.[256]

Judge Ammoun too resorted to municipal law reasoning in arguing that the principle of equity should be applied in *North Sea Continental Shelf*.[257] He referred to the legal systems of Western Europe, Latin America, China, Asian and African countries, Muslim law, Hindu law and Soviet law, to conclude that: "[a] general principle of law has consequently become established, which the law of nations could not refrain from accepting, and which founds legal relations between nations on equity and justice".[258] In addition, Judge Ammoun felt the need to illustrate that the so-established general principle was 'translated' in international practice, recalling the Truman Proclamation and the statements of various Arab states.[259]

Two judges relied on general principles derived from comparative law in interpreting the joint responsibility of states. In *Certain Phosphate Lands in Nauru (Nauru v Australia)*,[260] Judge Shahabudeen invoked the

254. *Case of Certain Norwegian Loans* (*France v Norway*), [1957] ICJ Rep 9 at 56-57.
255. *Ibid* at 56.
256. International Law Commission, *Report of the International Law Commission*, 63rd Sess, UNGAOR, 66th Sess, Supp No 10, UN Doc A/66/10/Add 1 (2011).
257. *North Sea Cases*, *supra* note 59 at 139.
258. *Ibid* at 140.
259. *Ibid*.
260. [1992] ICJ Rep 240.

"principles of the law of trust in English law" to argue that the joint and several responsibility of Australia, New Zealand and the United Kingdom was preferable to their exclusively joint responsibility triggering the principle of necessary third party.[261] In *Oil Platforms (Islamic Republic of Iran v United States of America)*,[262] Judge Simma undertook a comparative law analysis in support of his argument that "the principle of joint-and-several liability common to the jurisdictions … considered can properly be regarded as a 'general principle of law' within the meaning of Article 38, paragraph 1(c), of the Court's Statute".[263] He referred in particular to cases from the US and Canada, to French, Swiss and German tort law, noting that: "the question has been taken up and solved by these legal systems with a consistency that is striking".[264] Notably, Judge Simma did not stop at the municipal law analogy but adopted the qualified approach by also referring to the principles set out in the ILC Articles *on Responsibility of States for Internationally Wrongful Acts* as "an authoritative source addressing the issue".[265]

It can be observed that only a few judges have relied solely on comparative law as evidence for the recognition of general principles of law. A number of judges cautioned against the direct transposition of private law principles on the international plane and a few have illustrated the international applicability of the identified principles by reference to international practice. The approaches of qualified transposition and of going beyond mere private law analogies by reference to international practice are preferable.

2. General Principles as Natural Law

Fewer judges have conceptualised general principles as deriving from natural law. Two of the strongest proponents of this approach are Judges Tanaka and Cançado Trindade. In his Dissenting Opinion in *South West*

261. *Ibid* at 285.
262. [2003] ICJ Rep 161 [*Oil Platforms*].
263. *Ibid* at 324.
264. *Ibid* at 354-57.
265. *Ibid* at 358.

Africa,[266] Judge Tanaka stated that: "the concept of human rights and of their protection is included in the general principles" mentioned in Article 38(1)(c) of the *SICJ*.[267] He reasoned that natural law elements were inherent in the provision giving it "supra-national and supra-positive character".[268] With respect to the methodology for establishing general principles, Judge Tanaka noted that "recognition is of a very elastic nature", adducing as evidence the fact that human rights are "an integral part of the constitutions of most of the civilized countries in the world".[269] He noted further that recognition can also be manifested by "the attitude of delegations of member States in cases of participation in resolutions, declarations, etc. … adopted by the organs of the League of Nations, the United Nations and other organizations", as well as in custom and international conventions.[270]

In *Pulp Mills on the River Uruguay* (*Argentina v Uruguay*),[271] Judge Cançado Trindade conceptualised general principles of law "as an indication of the *status conscientiae* of the members of the international community as a whole", "ensuing from the idea of an objective justice, and guiding the interpretation and application of legal norms and rules".[272] He criticised the ICJ for overlooking the general principles of law and argued that both principles of domestic and of international law fall under the scope of Article 38(1)(c) of the *SICJ* due to their universal axiological dimension.[273] Judge Cançado Trindade focused on ascertaining the existence of the environmental law principles of prevention and the precautionary principle, by reference to the *Declaration of the United Nations Conference on the Human Environment* and the *Rio Declaration on Environment and Development*, the General Assembly resolution containing the *World Charter for Nature*, a number of universal and

266. *South West Africa*, *supra* note 217.
267. *Ibid* at 298.
268. *Ibid*.
269. *Ibid* at 299.
270. *Ibid* at 300.
271. [2010] ICJ Rep 14 [*Pulp Mills*].
272. *Ibid* at 214.
273. *Ibid* at 137, 155.

regional environmental treaties, as well as the case law of the ICJ itself.[274]

In conclusion, despite the difference in natural as opposed to positive law perspective on general principles, the methodology suggested by Judges Tanaka and Cançado Trindade is surprisingly similar to that adopted by the ICJ itself ascertaining the general recognition of the international community of states as a whole as evidenced in international treaties and declarations.

V. Methodological Conclusions

The case law of the PCIJ and the ICJ indicates a nuanced approach towards the interpretation and identification of the 'general principles of law recognized by civilized nations', pointing to three categories of such principles, namely: general principles of international law; general principles of domestic law; and general principles of international procedural law. Under the rubric of general principles of international law, the ICJ has applied 'general' and 'fundamental' or 'cardinal' principles of international law deriving their recognition from universal treaties; custom; widely supported General Assembly resolutions; other non-binding statements of international organisations; Security Council resolutions; the case law of the ICJ itself; and of arbitral tribunals. Accordingly, in the identification of general principles, the subjective attitudes of the majority of states would compensate for a less-than-general state practice. The methodology of the ICJ in ascertaining the existence of general principles of international law is mostly deductive, which leaves it open to criticism for being too liberal in its approach.

The ICJ resorted to general principles of domestic law on rare occasions, largely limited to the interpretation of questions regulated by domestic law. It has done so by identifying principles common to the 'generality' of legal systems, mostly in the areas of contract and company law. While such general principles have limited significance in the case law of the ICJ due to the types of disputes it has jurisdiction over, their use has grown considerably in the context of mixed arbitrations involving a state and a non-state entity, and in particular in investment

274. *Ibid* at 157-70.

treaty arbitration. This is underlined by the fact that quite a few bilateral investment treaties and investment contracts designate 'general principles of law' as applicable alongside national law and that tribunals have interpreted this formula to apply general principles of contract and other areas of private law instead of the designated national law. The methodology of the ICJ in ascertaining general principles of domestic law is primarily an inductive one, though heavily reliant on the evidence presented by the parties.

The ICJ also identified a number of principles of international procedural law, using a combination of inductive and deductive methodology by relying on international treaties, domestic laws, and international case law.

The different methodologies adopted by the ICJ with respect to the different categories of general principles can be justified theoretically but are also open to criticism for being inconsistent. It can be hoped that the ICJ will use future cases to set out more explicitly its interpretation of Article 38(1)(c) of the *SICJ* and a clear methodology for its application in practice.

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