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

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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.
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> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
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> (a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
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> (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:
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> (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.