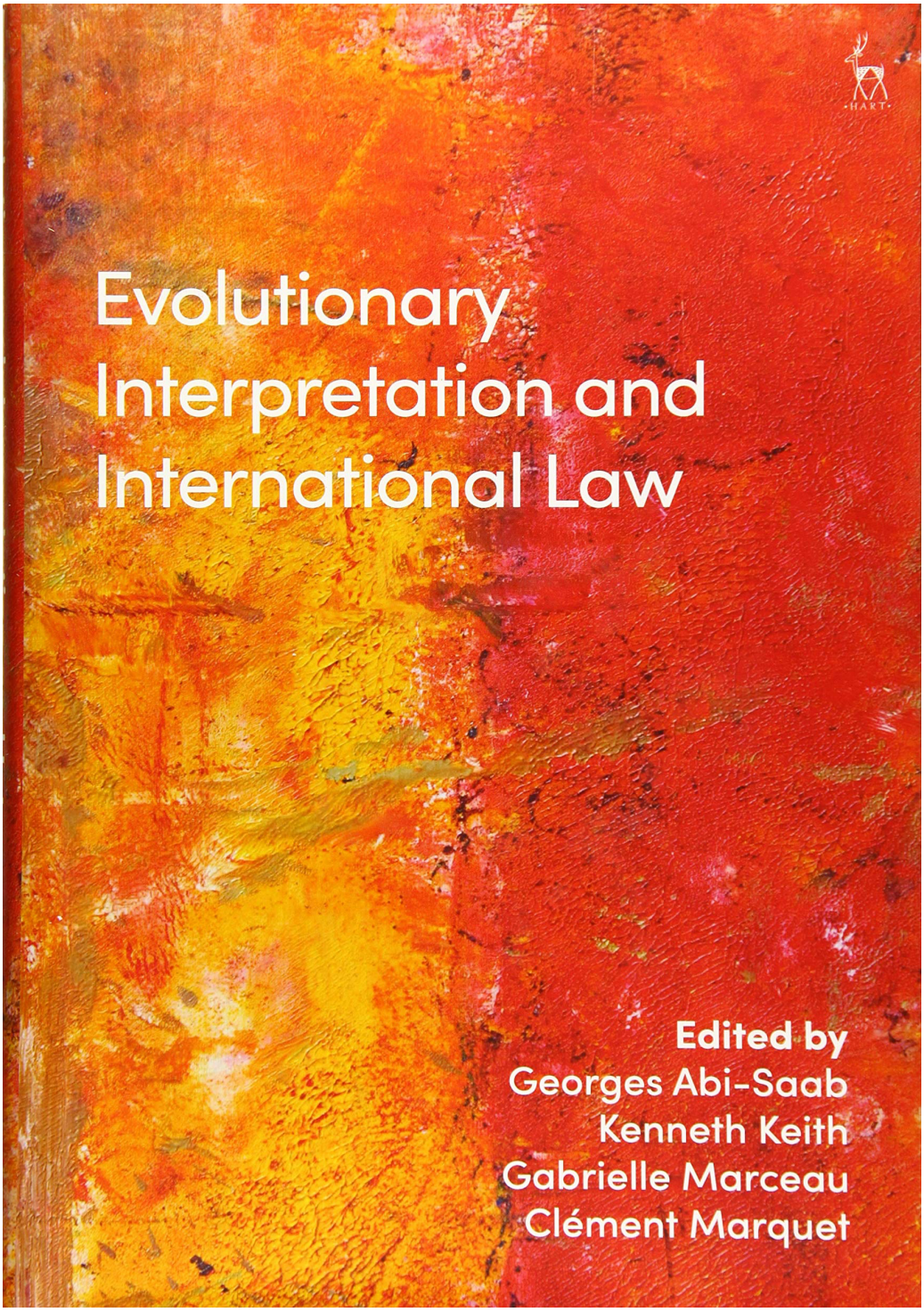

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4

An Interpreter's Guide to Static and Evolutive Interpretations: Solving Intertemporal Problems According to the VCLT

CHRISTIAN DJEFFAL

I. Introduction: Untying the Gordian Knot

The oldest questions never really get old. Take the intertemporal question of treaty interpretation as an example. Is an evolutive interpretation of international treaties possible and if so, how are interpreters to choose between static and dynamic interpretations? The earliest modern writers of international law like Hugo Grotius or Alberico Gentile already addressed the question whether and how treaties can be updated.[1] And they used examples stemming mostly from antiquity but also from their own times. The very same questions are still being discussed by coevals while the stream of publications, conferences and lectures never seems to dry up. On the contrary, scholars always disagree on how to answer these questions. What's more, the disagreement between scholars is almost perfectly symmetrical. Hugo Grotius, for example was generally in favour of an evolutive meaning of terms,[2] while Emer de Vattel found that international law generally had to be interpreted statically as it was construed at the time of the conclusion of the treaty.[3] To illustrate the problem, both authors used the very same example from antiquity between Rome and Carthage, in which the term 'allies' was under question. Was this term to be

[1] For an overview over the treatment of this question see C Djeffal, *Static and Evolutive Treaty Interpretation: A Functional Reconstruction* (Cambridge, Cambridge University Press, 2016) 48–54.

[2] H Grotius, *On the Law of War and Peace: Translation of the Edition of 1646 by Francis Kelsey, [De jure belli ac pacis libri tres]*, vol 2 (Oxford, Clarendon Press; Humphrey Milford 1925) 409 (original 276, Book II, chapter XVI, II).

[3] E de Vattel, *The Law of Nations or the Principles of Natural Law: Translation of the Edition of 1758 [Droit des gens ou principes de la loi naturelle, appliqués à la conduite et aux affaires des Nations et des Souverains]* (Fenwick trans) vol 3 (Buffalo, NY, WS Hein 1995; [1916]) 212 (Book 2, chapter 17, mn 297).

understood as referring to alliances at the time of the conclusion of the treaty or as dynamic reference to contemporaneous alliances? It is very telling that Grotius interpreted this statically and gave preference to the time of the conclusion of the treaty,[4] even though he generally favoured evolutive interpretations. The opposite is true for Vattel.[5] He found that the term ought to be interpreted dynamically, although his residual position was to interpret treaties statically. International legal scholarship has disagreed on this question ever since. One aspect that sets today's international legal scholarship apart from the times of Grotius and Vattel is the rule of interpretation contained in Articles 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT). The early modern writers and their heirs had to 'find' the rules of interpretation and what they found varied greatly over the course of history.[6] In contrast, the VCLT provides for a rule of interpretation that is agreed among the majority of States and that is considered to have the status of customary international law. This rule was designed to solve all interpretative issues including the intertemporal question of treaty interpretation. Is it really capable of doing that?

This chapter aims to show how the intertemporal question can be solved according to the VCLT rule of interpretation. In order to show this, the chapter will not limit itself to looking at the wording and the apparent elements of the rule of interpretation. To assist the interpreter to solve questions of interpretation, the chapter will explain what process lies behind the rule of treaty interpretation, ie, how the process of treaty interpretation as envisaged by the VCLT actually works. The chapter will then address how this process works in practice in different international legal regimes. It will conclude by assessing the pros and cons of the VCLT rule of treaty interpretation in order to deepen the understanding and the awareness of interpreters.[7]

The first step is, however, to arrive at a clear definition of the intertemporal question. It is assumed here that an intertemporal question occurs if there are or can be competing views on whether the meaning of the text of a treaty has changed over time. If the meaning of the text has changed, this is called an evolutive interpretation.[8] If the meaning of the text has not changed, this is called static interpretation. The necessary element to identify an evolutive interpretation is the

[4] Grotius, above n 2, 415 (original 278, Book II, chapter XVII, XIII).

[5] Vattel, above n 3, 217–18 (Book 2, chapter 17, mn 309).

[6] DJ Bederman, *Classical Canons: Rhetoric, Classicism and Treaty Interpretation* (Aldershot, Ashgate, 2001).

[7] This chapter denotes Arts 31 and 32 VCLT as rule of interpretation since Art 31 is called 'general rule of interpretation'. As will be shown, Arts 31 and 32 form an integrated system of interpretation which is best denoted as rule and not as rules of interpretation.

[8] The term 'evolutive' is synonymously used with other terms like 'evolutionary' or 'dynamic interpretation'. There is no apparent difference between those terms. See also the reflection by E Bjorge, *The Evolutionary Interpretation of Treaties* (Oxford, Oxford University Press, 2014). While the International Court of Justice (ICJ) uses the term 'evolutionary' when talking about the nature of a specific text, the European Court of Human Rights (ECtHR) calls changes of interpretation 'evolutive interpretation'.

change in its meaning. It is true that changes in interpretation are by far not the only interesting aspects of treaty interpretation in international law. They entail, however, specific problems and questions and are to be dealt with separately from broader categories such as activist interpretation.[9]

The question of how to deal with intertemporal problems of treaty interpretation was addressed on several occasions in the process of preparing the VCLT.[10] Despite several attempts to solve the problem directly or indirectly, the result of the discussions at the International Law Commission (ILC), the Sixth Committee of the General Assembly of the United Nations and Vienna Conference was always the same: to leave intertemporal questions to the ordinary process of treaty interpretation. After the conclusion of the VCLT, the prestigious Institut de droit international took another shot at the question and discussed it at length. The result, however, was again to leave the question open.[11] But how can interpreters deal with such questions using the VCLT rule of interpretation? This chapter argues that interpreters can use the VCLT more effectively if they have a deeper knowledge about how the VCLT actually works. Therefore, the chapter will first describe how the VCLT rule of interpretation can be applied to intertemporal questions irrespective of the context (II. 'A Pure VCLT Solution'). In a second step, the chapter will explain, how the VCLT rule of interpretation is to be used in different contexts such as before different courts and tribunals (III. 'Solutions in Practice'). The last part will highlight the upside and downside of such a system of interpretation in order to inform interpreters how to use it most effectively (IV. 'Conclusion and Theoretical Underpinnings'). This chapter aims to show that the VCLT rule of interpretation is a special method working well if applied to complex problems. The complexity of intertemporal problems might make it very complicated to solve them. They might look at a complex multitude of threads and knots. But cutting right through the issues, like cutting through the Gordian knot, it is important to reflect on how to use this tool.

II. A Pure VCLT Solution

Behind the words of Articles 31 and 32 VCLT lies a certain understanding of the process of interpretation. This part of the chapter will show how this process works and how it helps interpreters to solve issues of interpretation. To understand the VCLT rule of interpretation, one must take note of the difference between means and results of interpretation. Interpreters can use certain means to arrive at certain

[9] P Mahoney, 'Judicial Activism and Judicial Self-Restraint in the European Court of Human Rights: Two Sides of the Same Coin' (1990) 11 *Human Rights Law Journal* 57.

[10] Djeffal, *Static and Evolutive Treaty Interpretation*, above n 1, 158–62.

[11] M Sørensen, 'Le problème dit du droit intertemporel dans l'ordre international' (1973) 55 *Annuaire de l'Institut du droit international* 1.

results of interpretation. The ultimate obligation in Article 31 paragraph 1 is to take certain interpretative techniques into account. This points more to the means of interpretation and the process of using them than to any particular interpretative result.

According to this way of thinking, an evolutive interpretation is an interpretative result in which the meaning of a treaty has changed over time. In contrast, a static interpretation is an interpretation that has remained stable over time. Neither static nor evolutive interpretation is a means in the sense that it influences the process of interpretation. While it might be possible to invent and contend that there are means of interpretation like principles and presumptions pointing in one or the other direction, they have not found their way into the VCLT. This is of the utmost importance since it means that the VCLT is more focused on the process than on the actual result. The importance of this distinction also flows from the legally binding nature of the rule of interpretation. As the rule of interpretation is enshrined in a treaty, it is mandatory for interpreters. If the rule of interpretation directly impacts upon interpretative results, its legal nature would have grave consequences. Yet, the distinction between means and results also entails the possibility that interpreters are forced to use certain means of interpretation while having discretion regarding the interpretative result.[12]

A. Collecting Arguments

The VCLT rule of interpretation obliges the interpreter to 'take into account' certain means of interpretation. Article 31 VCLT refers to several means that are best described as interpretative techniques of interpretation. Techniques are categories of arguments that are typically used in legal interpretation. Article 31 paragraph 1 contains three techniques: the text of the treaty; its context and its object; and purpose. While Article 31 paragraph 2 describes what is to be understood by context, paragraph 3 mentions three more categories, namely: subsequent agreements; subsequent practice; and the relevant rules of international law. The interpreter is obliged to check for all arguments falling under the techniques mentioned. But what does it mean to look for arguments that fall under the techniques mentioned in Article 31 of the VCLT? It means checking each category to see whether there are arguments pointing towards a solution. What does the text of the treaty exactly say? Are there hints or arguments to be taken from

[12] For the fact that the VCLT leaves discretion to the interpreter see G Nolte, 'Introduction' in G Nolte (ed), *Treaties and Subsequent Practice* (Oxford, Oxford University Press, 2013) 2.

the context? Is there any subsequent practice in the application of the treaty? This approach is very different from other approaches the VCLT could have employed, such as the use of maxims, principles or presumptions.

Techniques are abstract in nature and not necessarily tied to any static or dynamic result. Interpretative techniques are open when it comes to intertemporal questions. So, the object and purpose can be used in favour of a dynamic solution and the parties' subsequent practice could reinforce an unchanging meaning of the treaty. On the contrary, the text and context can point towards a changing meaning. If an interpreter checks for possible arguments that fall under certain interpretative techniques, she or he must be open to the possibility that those arguments go either way. It is important to enquire into each of the techniques to have an overview of all arguments relevant for the resolution of the dispute. It is possible that more than one argument will fall under a certain category. Take, for example, the context of the treaty. One part of the treaty might indicate the static nature of the treaty while another clause indicates an evolutive reading.

B. Argumentative Weight and Balancing

If an argument falls under one of the categories in Article 31, it has to be taken into consideration. The interpreter must qualify the argument and assess its argumentative weight. This means that there is no natural hierarchy between arguments falling under Article 31. The interpreter must assess the argumentative weight in view of how they apply to the interpretative question. Is the ordinary meaning of the text clearly pointing in one direction or is it rather open and vague? Is there a subsequent agreement clearly addressing the issue? In answering such questions, the interpreter will assess whether she or he is dealing with strong or weak arguments. The techniques in Article 31 are not the only means of treaty interpretation within the scope of the VCLT rule of interpretation. They carry, however, more argumentative weight than the supplementary means of interpretation in Article 32. Those supplementary means, including the preparatory works of the treaty and the circumstances of its conclusion, can be resorted to according to Article 32 when certain requirements are met. This is the case when the interpretation according to Article 31 of the VCLT left the meaning obscure and ambiguous or leads to a result which is manifestly absurd or unreasonable. Considering that this test is itself subject to interpretation, the hierarchy inserted between Article 31 and Article 32 effectively results in more argumentative weight for arguments falling under the techniques mentioned in Article 31.[13]

[13] This goes in line with the ILC commentary which stresses that supplementary means should not be 'alternative autonomous means' but mere aids to the interpretation: ILC, 'Final Draft Articles on the Law of Treaties, Report of the International Law Commission on the Work of its 18th Session' (4 May to 19 July 1966) UN Doc A/CN.4/191 223. A difference in argumentative weight is also assumed in a slightly different terminology by W Karl, *Vertrag und spaetere Praxis im Voelkerrecht: zum Einfluß der Praxis auf Inhalt und Bestand völkerrechtlicher Verträge* (Berlin, Springer, 1983) 187.

The arguments based on techniques mentioned in Article 31 count more. They have more weight. If they point in one direction, they cannot be dethroned by supplementary means of interpretation. As a result, the *travaux préparatoires* carry by definition less argumentative weight. This result was very controversial at the Vienna Conference, especially when the US delegation introduced a different proposal.[14] This proposal failed. Therefore, interpreters will have to primarily resort to arguments derived from Article 31 VCLT. If they all point in one direction, supplementary means of interpretation do not need to be mentioned. This also applies to the *travaux préparatoires*.

When arguments deriving from the interpretative techniques are collected and weighed, they have to be balanced against each other. The fourth ILC Special Rapporteur on the Law of Treaties described the process of balancing as follows: there was no

> intention of creating an order in which a series of rules should be successively applied; the Commission's idea was rather that of a crucible in which all the elements of interpretation would be mixed: The result of that mixing would be the correct interpretation.[15]

This crucible metaphor is still popular today. The quote suggests that Waldock understood the process of interpretation as an integrated argumentative process rather than a mechanical application of specific rules. All arguments are to be seen together, when they point in different directions; they are to be weighed and balanced against each other. In particular in contentious cases, not only arguments will be balanced. There will be choice between solutions. There could be a contended meaning A and an alternative meaning B and the interpretative techniques could either point towards one or the other meaning. Intertemporal questions deal by definition with alternatives that relate to different points in time. The interpreter will finally have to decide among the different alternatives.

C. Summary

Sir Humphrey Waldock, the fourth Special Rapporteur on treaty interpretation, has famously described process as a 'single combined operation'.[16] All the techniques laid out in Article 31 are to be assessed. Arguments derived from the techniques take precedence over other supplementary means of interpretation. All arguments are to be put in a crucible. That means they are to be weighed and balanced against each other. Mostly, arguments will be made regarding two or more possible meanings of the treaty. Ultimately, the interpreter will have to decide the issue. The result

[14] See C Djeffal, 'Establishing the Argumentative DNA of International Law: A Cubistic View on the Rule of Treaty Interpretation and its Underlying Legal Culture(s)' (2014) 5 *Transnational Legal Theory* 128, 131–37.

[15] Comment by Special Rapporteur Waldock, ILC, above n 13, 267 para 96.

[16] ibid, 219.

of the argumentative exercise also functions as justification of that decision. This single combined operation also works in the case of intertemporal questions. First all techniques have to be considered, arguments for a static or dynamic solution have to be collected. The interpreter has to weigh the arguments against each other and balance them. In this process, neither the *travaux préparatoires* nor the circumstances at the conclusions of the treaty nor any other supplementary means carry as much weight as compared to the other rules of interpretation. Finally, the interpreter will have to decide between a static and dynamic meaning. It goes beyond the confines of this chapter to prove that the means of interpretation will have an effective impact on decision-making, but there are indications that this is the case.[17] Either way, it has long been recognised that the function of rules of interpretation also extend to ex post facto justifications. This means that an interpretation in accordance with the VCLT rule of interpretation also serves as effective justification for the answers to intertemporal questions.

III. Solutions in Practice

The VCLT rule of interpretation not only prescribes a certain process of interpretation, it also offers flexibility to interpreters on several levels. The whole set-up as a single combined operation leaves discretion to the interpreter considering interpretative results. Yet, an analysis of the practice of international courts and tribunals has shown that this flexibility also extends to other levels. Considering that the rules of interpretation have to operate in very different situations, such as different treaties, different categories of parties to the dispute and different dispute resolution mechanisms, this flexibility is crucial if the rule of interpretation is aimed to operate as a rule of general international law. This flexibility has allowed the coining of specific approaches in specific fora. Courts and tribunals for example have taken particular stances on how to interpret the VCLT when describing the goal of interpretation. It is of the utmost importance for interpreters dealing with intertemporal questions to be aware of these differences.

A. General Approach

While the VCLT rule of interpretation is characterised by openness towards the goals of interpretation and the intertemporal question, this is not necessarily the case for all interpreters using the VCLT. Interpreters often take a certain stance towards the intertemporal question favouring static or dynamic results.

[17] Y Shereshevsky and T Noah, 'Does Exposure to Preparatory Work Affect Treaty Interpretation? An Experimental Study on International Law Students and Experts' (2017) 28 *European Journal of International Law* 1287.

The European Court for example first established its general approach in *Tyrer*, in which it stated that the 'Court must also recall that the Convention is a living instrument which, as the Commission rightly stressed, must be interpreted in the light of present-day conditions'.[18] The Court continued to use this phrase whenever intertemporal questions were at issue.[19] This general approach signals that evolutive interpretations are possible and the treaty is to be viewed as developing over time. The International Court of Justice (ICJ) also allows for evolutive interpretations if they can be traced back to the 'presumed intentions' of the parties to the treaty.[20] The International Law Commission has re-emphasised this solution. Whereas the European Court of Human Rights (ECtHR) approach allows for arguments in a more objective manner, the ICJ's approach requires the interpreter to – at least rhetorically – put her- or himself in the shoes of the parties at the time of the conclusion of the treaty. When addressing an actor or speaking on behalf of an institution, the interpreter will have to pay homage to the general approach. This is even though both courts apply the VCLT rule of interpretation. The jurisprudence of the ICJ also shows how the general approach towards evolutive interpretation can shift significantly over time.[21] In a first phase, the ICJ openly found that evolutive interpretations were not possible but in effect interpreted in an evolutive manner on several occasions. In the course of the Namibia cases, the Court changed its general intertemporal stance and generally focused on the intentions of the parties as the focal point. In later case law, the Court broadened its approach even more, now looking into the presumed intentions. This process of opening up in relation to evolutive interpretation shows that the general stance on evolutive interpretation can differ substantially and arguments as well as justifications have to be mindful of that.

B. Interpretative Techniques

Another aspect that can differ depending on the forum is the exact interpretation of the interpretative techniques. The VCLT rule is enshrined in a treaty, and like any treaty it is open to interpretation. But how to interpret a rule of interpretation. Attempts to interpret a rule of interpretation run the risk of ending up in endless argumentative circles. In the absence of a general authority dealing with these issues, there is no choice but to allow authoritative decision-makers to choose one interpretation. These choices can put wider or narrower limits on interpretative techniques and at least indirectly impact the solution of intertemporal questions.

[18] *Tyrer v United Kingdom* Series A no 26 (1978) 2 EHRR 1, para 31.

[19] *Bayatyan v Armenia* [GC] (2012) 54 EHRR 15, para 102; *Christine Goodwin v the United Kingdom* [GC], (2002) 35 EHRR 18 and 35 EHRR 447, para 75.

[20] *Dispute Regarding Navigational and Related Rights (Costa Rica v Nicaragua) (Judgment)* [2009] ICJ Rep 213, 242, para 64.

[21] For a full discussion of the respective case law see Djeffal, *Static and Evolutive Treaty Interpretation*, above n 1, 234–51.

One question is how the object and purpose ought to be ascertained.[22] One could contend that the object and purpose of a treaty is to be derived from the preparatory works as a reflection of the intentions of the parties. Yet, one could also analyse the text of the treaty using the ordinary means of treaty interpretation excluding the object and purpose. One could also look at all possible evidence, even if it is not linked to the treaty. Differing opinions might have an impact on the answer to intertemporal questions.

Take, for example, the use of subsequent practice as established in different fora.[23] The WTO Appellate Body has famously required a practice that is concordant, common and consistent.[24] In contrast other courts such as the ICJ and the ECtHR have accepted subsequent practice even in the absence of universal practice. The ICJ, for example, referred to several resolutions of the UN General Assembly none of which was accepted unanimously.[25] The ECtHR also found that the practice of the 'great majority'[26] would be sufficient to count as subsequent practice and held in one case that practice not shared by four States out of 47 could amount to subsequent practice.[27]

C. Examples

There are multiple examples of courts and tribunals dealing with intertemporal questions.[28] In *Rantsev* the ECtHR, for example, had to deal with the question of whether human trafficking of persons would fall under Article 4 of the European Convention on Human Rights (ECHR) and amounted to slavery or forced and compulsory labour.[29] In these situations, humans are forced to go abroad and then find themselves in vulnerable situations and open to exploitation. The Court found that trafficking was a new phenomenon that did not fall under the meaning of the text of the treaty. Nevertheless, the Court found that new treaties in international law called for a change of interpretation. While the technique of looking at the

[22] R Bernhardt, 'Evolutive Treaty Interpretation, Especially of the European Convention on Human Rights' (1999) 42 *German Yearbook of International Law* 11, 24 ff; I Buffard and K Zemanek, 'The "Object and Purpose" of a Treaty: An Enigma?' (1998) 3 *Austrian Review of International and European Law* 311.

[23] See also Part II of this book.

[24] For an in-depth inquiry, see G Nolte, 'Subsequent Practice as a Means of Interpretation in the Jurisprudence of the WTO Appellate Body' in E Cannizzaro (ed), *The Law of Treaties Beyond the Vienna Convention* (Oxford, Oxford University Press, 2011).

[25] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136, 149, para 27.

[26] *Sigidur A Sigurjónsson v Iceland* Series A no 264 (1993) 16 EHRR 462, para 35.

[27] *Bayatyan v Armenia*, above n 19, para 103.

[28] M Fitzmaurice, 'Dynamic (Evolutive) Interpretation of Treaties, Part I' (2008) 21 *Hague Yearbook of International Law* 101; M Fitzmaurice, 'Dynamic (Evolutive) Interpretation of Treaties, Part II' (2010) 22 *Hague Yearbook of International Law* 3.

[29] *Rantsev v Cyprus and Russia* (2010) 51 EHRR 1, paras 272–82.

ordinary meaning of the text of a treaty favoured a static reading, the relevant rules as provided for in Article 31(3)(c) called for an evolutive interpretation. After weighing and balancing the arguments, the Court found that the law had changed. In *Stummer*, the Court had to decide whether the fact that detainees were excluded from a national pension scheme would amount to a violation and whether the exception in Article 4(3)(a) of the ECHR should be interpreted more restrictively.[30] The Court acknowledged the evolution in international law and the fact that the meaning of the text had not changed. It also found that subsequent practice of the parties to the treaty was not conclusive. In essence, it ruled that the treaty was to be interpreted statically in this instance. The ICJ had to deal with an intertemporal question in *Navigational and Related Rights*. The question was whether the term '*commercio*' in a treaty between Costa Rica and Nicaragua, which was concluded in 1858 would include the phenomenon of tourism. The Court relied on the ordinary meaning of the terms of the treaty, which it found to be generic and open to change, with the context and the object and purpose of the treaty all pointing towards an evolutive interpretation. Therefore, the Court decided in favour of an evolutive solution.[31] These examples show how collecting, assessing and balancing arguments in order to solve intertemporal issues works in practice.

IV. Conclusion and Theoretical Underpinnings

This chapter will conclude by highlighting reasons that lie behind the use of the VCLT rule of interpretation. When relying on the VCLT rule of interpretation, interpreters must also know and understand the implications, whether positive or negative, of using such an instrument.

A. Organising International Legal Argumentation

One consequence of using the VCLT rule is that it provokes interpreters to express legal arguments clearly and openly. Interpreters are forced to enquire into different legal aspects of the problem and to explain how they weigh and balance those arguments against each other. In contrast, the VCLT has no specific preference whether to interpret statically or evolutively. The consequence of this is that intertemporal disputes are looked at from a legal point of view in an all-encompassing manner. This cuts off any easy solution relying on presumptions or principles.

[30] *Stummer v Austria* [GC] (2012) 54 EHRR 11, paras 112–34.

[31] *Navigational and Related Rights*, above n 20, 240 ff, para 56 ff. See analysis by M Dawidowicz, 'The Effect of the Passage of Time on the Interpretation of Treaties: Some Reflections on *Costa Rica v Nicaragua*' (2011) 24 *Leiden Journal of International Law* 201.

Nonetheless, the rule of interpretation helps to gather a more complete picture of all available arguments. And it puts more pressure on the interpreter to justify her or his decision. The ability to organise international legal argument may be one of the major reasons for the success of the VCLT rule of interpretation. Today, the VCLT rule of interpretation is generally applied by courts and tribunals.[32] It has attained something of the status of an international grammar or language of treaty interpretation in international law. It helps in the exchange of arguments irrespective of ideological or professional assumptions. It can effectively bridge the gap between what some international lawyers conceive to be interpretative communities.[33]

B. Providing Flexibility to Interpreters

The fact that the VCLT provides flexibility for interpreters on different levels is another advantage. As was shown above, the interpreter has discretion concerning the interpretative result. Since the VCLT leaves the goal of interpretation as well as some interpretative issues regarding its interpretation open, authoritative bodies can agree on how to use this flexibility to coin an approach that fits the circumstances in which they operate. This can be done in the context of an overall framework that applies to all actors in international law. Important dispute resolution mechanisms have the authority to establish their own approaches to the interpretation of Articles 31 and 32 VCLT and even to define a fitting goal of interpretation. The ICJ recently adopted its own approach of looking into the assumed intentions of the parties. Extensive comparisons have shown the differences regarding certain techniques or aspects of the VCLT. These differences provide evidence of the adaptability of the VCLT rule of interpretation. Despite the great attention on theories of fragmentation and self-contained regimes it is hardly appreciated that the VCLT rule of interpretation provides for a general framework while staying adaptable and changeable in order to account for the specificity of certain treaties or dispute resolution mechanisms. Interpreters have to be aware of this flexibility. A successful communication requires them to frame their arguments in accordance with the context in which they are operating.

C. Cutting Off Unnecessary Doctrinal Debates

The fact that the VCLT works very well is also grounded in the absence of any unnecessary content that is doctrinal in nature and does not add anything to the

[32] R Gardiner, 'The Vienna Convention Rules on Treaty Interpretation' in DB Hollis (ed), *The Oxford Guide to Treaties* (Oxford, Oxford University Press, 2012).

[33] M Waibel, 'Interpretive Communities in International Law' in A Bianchi, D Peat and M Windsor (eds), *Interpretation in International Law* (Oxford, Oxford University Press, 2015).

process of treaty interpretation. This might be considered as one of the advantages of collective efforts in multi-stakeholder groups like the ILC, uniting practitioners in different functions, and academics having a rich body of experience, which is also complemented by its exchanges with the Sixth Committee of the UN General Assembly. If collective efforts work, they produce lean and workable solutions like the VCLT rule of interpretation and cut off everything that is not vital and necessary. The final result of the ILC is a lot leaner than the first proposals. It sets forth a single combined operation relying on interpretative techniques. It did not engage in the collection of maxims of interpretation, nor did it have a difficult system of presumptions or material principles. It even left the goal of interpretation open and did not take a stance in the discussion between the subjective and objective nature of interpretation. The fact that the VCLT came up with a well-defined process on how to solve interpretative issues with interpretative techniques and a process of balancing and weighing makes the old debate about the subjective or objective nature of interpretation practically superfluous. While it is possible for decision-makers to communicate a stance in that regard, the process of interpretation can well work without mentioning the objective or subjective nature of the process of treaty interpretation. It is therefore possible to avoid the difficult questions and intricacies in the debate between objective and subjective interpretation that have existed for a long time.[34] While this does not exclude any theoretical criticism of the VCLT rule of interpretation as a method, it ensures that the rule works in practice. It makes life easier for interpreters and has the potential to improve argumentative processes.

D. No Direct Normative Guidance

The absence of any normative guidance makes it easier and not harder to solve intertemporal questions. Intertemporal questions necessarily involve change. This can call into question the original interpretation of the text in issue, but it can also call into question the normative preference expressed in the rule of interpretation. In such cases, the rule of interpretation would become part of the problem instead of being part of the solution. The fact that the VCLT rule of interpretation contains so little direct normative preferences is most probably no coincidence. There is a very good historical explanation for applying this to the rule of interpretation as a whole as well as to its specific stance on intertemporal openness. During the time leading up to the conclusion of the VCLT in 1969, international relations were characterised by several divides in the international community. There was a divide between the Western and the Eastern blocs. The ideological differences between liberalism and communism were significant and the normative ideas

[34] M Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge, Cambridge University Press, 2005) 344–45.

regarding many topics of international law were very different. There was also a growing community of decolonised and non-aligned States that were confronted with a corpus of international law they had never negotiated and to which they could only accede. To even try to come up with a set of material norms guiding the content of all international legal treaties could only have been considered an impossible endeavour. In a time of uncertainty about how the world order would develop, it must have been even harder to agree on a clear-cut rule for solving future disputes arising out of intertemporal questions.

The history of treaty interpretation has shown that it is hard to predict and solve all interpretative issues using one set of interpretative means. It is even harder to come up with one set of interpretative means that can deal with all possible future intertemporal issues. This might also be the reason why collective bodies never came up with a clear-cut solution and left the intertemporal question for the ordinary process of treaty interpretation, while scholars have been trying to come up with solutions for some 400 years now. If a group contains enough experiences and perspectives, the normative preferences cancel each other out and they cannot agree on a solution. This does not mean that the VCLT is simply an agreement to disagree or to put it more elegantly a 'disagreement reduced to writing'.[35] On the contrary, there might be a lot of wisdom in leaving the intertemporal question open if there is a general way on how to deal with interpretative questions. The VCLT rule of interpretation provides for such a process. It is a general agreement on how to deal with questions of interpretation that works very well with intertemporal questions. It is a framework for exchanging legal arguments that sparks conversation and discourse. It is a flexible tool allowing for adoption in very different circumstances without losing its overall function. And it might be one of the best shots at fulfilling the promises of general international law. One day, there might be another and better system of interpretation. But until this day comes, it is crucial for interpreters to know how to deal with the VCLT rule of interpretation and to understand how and why it works. The practice of international courts and tribunals has shown that interpreters using the rule can solve intertemporal disputes successfully. This proves that the VCLT rule of interpretation is a tool that effectively aids the peaceful settlement of disputes on the international plane.

[35] P Allott, 'The Concept of International Law' (1999) 10 *European Journal of International Law* 31, 34.