The Evolutionary Interpretation of Treaties

EIRIK BJORGE

OXFORD
UNIVERSITY PRESS

OXFORD
UNIVERSITY PRESS
Great Clarendon Street, Oxford, OX2 6DP,
United Kingdom

Oxford University Press is a department of the University of Oxford.
It furthers the University's objective of excellence in research, scholarship,
and education by publishing worldwide. Oxford is a registered trade mark of
Oxford University Press in the UK and in certain other countries

First Edition published in 2014

Impression: 1

Published in the United States of America by Oxford University Press
198 Madison Avenue, New York, NY 10016, United States of America

British Library Cataloguing in Publication Data
Data available

Library of Congress Control Number: 2014934938

ISBN 978–0–19–871614–3

Printed and bound by
CPI Group (UK) Ltd, Croydon, CR0 4YY

1
Introduction

1.1 Research Question and Argument

What is the place of the evolutionary interpretation of treaties within the rules of treaty interpretation codified in the Vienna Convention on the Law of Treaties (VCLT)?[1] That is the question to which this book seeks to provide an answer. The point of departure in this regard is the working definition of 'evolutionary interpretation' proffered by the International Court of Justice in *Navigational Rights*.[2] The question there was whether the phrase 'for the purposes of commerce' in a Nicaraguan–Costa Rican treaty of limits of 1858[3] covered tourism, ie the carriage of passengers for hire. The Court held that the phrase must be interpreted so as to cover all modern forms of commerce, including tourism. Where the parties have used generic terms in a treaty, the parties presumably having been aware that the meaning of the terms was likely to evolve over time, and where the treaty has been entered into for a very long period, the Court said, the parties must be presumed, as a general rule, to have intended those terms to have an evolving meaning.[4] Thus the words 'evolutionary interpretation' the Court explained, refer to:

> situations in which the parties' intent upon conclusion of the treaty was, or may be presumed to have been, to give the terms used—or some of them—a meaning or content

[1] Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331; (1969) 8 ILM 679. Article 31, entitled 'General rule of interpretation' provides: '1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty. 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.' Space precludes the citation of the full text of Arts 32–33.

[2] *Dispute regarding Navigational and Related Rights (Costa Rica v Nicaragua)* Judgment ICJ Rep 2009 p 213. See also: J Crawford, *Brownlie's Principles of Public International Law* (8th edn, Oxford University Press, 2012), 379–80; R Gardiner, *Treaty Interpretation* (paperback edn, Oxford University Press, 2011), xviii–xx; M Dawidowicz, 'The Effect of the Passage of Time on the Interpretation of Treaties: Some Reflections on *Costa Rica v Nicaragua*' (2011) 24 LJIL 201.

[3] Treaty of Limits, 15 April 1858, 118 CTS 439 (in the Spanish original: '*con objetos de comercio*').

[4] *Dispute regarding Navigational and Related Rights* (n 2), 343 at [66].

capable of evolving, not one fixed once and for all, so as to make allowance for, among other things, developments in international law.[5]

As will be seen from the Court's judicious choice of words, the concept of intent—surprisingly, it might be thought—has a role to play in the evolutionary interpretation of treaties. Indeed, treaties are, as the International Law Commission (ILC) has explained, 'embodiments of the common will of their parties'.[6] It follows logically, therefore, that 'interpretation must seek to identify the intention of the parties'.[7] International courts and tribunals have, in keeping with this approach, made clear just how important the concept of the intention of the parties is in treaty interpretation.[8]

The thesis of this book is that the evolutionary interpretation of treaties can be explained by a proper understanding of the intention of the parties, the intention of the parties being the most important thread running through the law of treaties. As such, the evolutionary interpretation of treaties is not a separate method of interpretation; it is rather the result of a proper application of the usual means of interpretation, as means by which to establish the intention of the parties.[9] It is in this regard important to make clear at the outset what is meant by the phrase 'the intention of the parties'. As will become clear in Chapter 3, the term is used here in the objectivized sense relied on by the ILC. Thus the concept of the intention of the parties 'refers to the intention of the parties as determined through the application of the various means of interpretation';[10] it 'is thus not a separately identifiable original will, and the *travaux préparatoires* are not the primary basis for determining the presumed intention of the parties'.[11] The 'intention of the parties' is a construct to be derived from the articulation of the 'means of interpretation admissible'[12] in the process of interpretation. This objectivized, or objective,[13] nature of 'the intention of

[5] *Dispute regarding Navigational and Related Rights* (n 2), 242 at [64].

[6] ILC Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties 2013, ILC Report 2013 UN Doc A/68/10, 23.

[7] ILC Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties 2013 (n 6), 18.

[8] See *Argentina/Chile Frontier Case (Palena)* (1966) 16 RIAA 109, 174; (1966) 38 ILR 10, 89; *Dispute concerning Filleting within the Gulf of St. Lawrence ('La Bretagne') (Canada/France)* (1986) 82 ILR 591, 659 at [67]; *Young Loan Arbitration* (1980) 59 ILR 494, 530 at [19]; *Decision regarding delimitation of the border between Eritrea and Ethiopia* (2002) 25 RIAA 83, 110; (2002) 130 ILR 1, 34 at [3.4]; *Case Concerning the Auditing of Accounts between the Kingdom of the Netherlands and the French Republic Pursuant to the Additional Protocol of 25 September 1991 to the Convention on the Protection of the Rhine against Pollution by Chlorides of 3 December 1976 (Netherlands/France)* (2004) 25 RIAA 267; (2004) 144 ILR 259, 293 at [62]; *Award in the Arbitration regarding the Iron Rhine ('Ijzeren Rijn') (Belgium v Netherlands)* (2005) 27 RIAA 35, 65 at [53]. Ch 3 below.

[9] G Nolte, 'Report 1 for the ILC Study Group on Treaties over Time' in G Nolte (ed), *Treaties and Subsequent Practice* (Oxford University Press, 2013), 169, 188.

[10] Draft Report of the International Law Commission on the Work of Its Sixty-Fifth Session A/CN.4/L.819/Add.1, 17–18.

[11] Draft Report of the International Law Commission on the Work of Its Sixty-Fifth Session (n 10), 18.

[12] 1966 ILC Ybk II 218–19.

[13] RE Fife, 'Les techniques interprétatives non juridictionnelles de la norme internationale' (2011) 115 RGDIP 367, 372; M Fitzmaurice, 'Interpretation of Human Rights Treaties' in D Shelton (ed), *Handbook in International Human Rights Law* (Oxford University Press, 2014), 745.

the parties' is clear from the fact that the ILC set out by its own admission to codify, in the general rule of interpretation, 'the means of interpretation admissible for ascertaining the intention of the parties'.[14] Another way of putting the matter is to see the means of interpretation listed in Articles 31–33 as 'indicators of the intention of the Treaty Parties [which] may be admissible in defined circumstances for defined purposes'.[15]

This objective or objectivized nature of the concept of 'the intentions of the parties' is clear also from what the International Court said in *Navigational Rights*, where the Court stated that the aim of treaty interpretation is to establish 'the intentions of the parties as reflected by the text of the treaty and the other relevant factors in terms of interpretation'.[16]

It is difficult to answer the question 'what is the place of evolutionary interpretation within the rules of interpretation as codified in Articles 31–33?' without also looking into subjects other than treaty interpretation strictly defined, subjects with which evolutionary interpretation shares an extensive frontier. 'To define a territory is', after all, 'to define its frontiers'.[17] On this background, the research question posed above leads to two further questions, connected with it but larger in scope.

The first one of these further research questions is whether there are numerous methods of interpretation in the law of treaties or in fact only one. Though it is impossible fully to provide an answer to this question within the confines of this study,[18] it is necessary in order to answer the main research question also to provide an analysis of this problematic. This is closely connected with the issue of what the ILC has called 'the unity of the interpretation process',[19] the idea being that some of these tools of interpretation are by definition more pertinent for particular types of treaty than others. It is necessary, therefore, to enter into one sub-set of the (now largely exhausted)[20] debate about the fragmentation of international law,

[14] 1966 ILC Ybk II 218–19.

[15] Dissenting Opinion, Judge Sir Franklin Berman, *Industria Nacional de Alimentos SA and Indalsa Perú (formerly Lucchetti SA and Lucchetti Perú SA) v Peru (Annulment)* Case No ARB/03/4 at [8].

[16] *Dispute regarding Navigational and Related Rights* (n 2), 213, 237 at [48] ('conformément aux intentions de ses auteurs telles qu'elles sont révélées par le texte du traité et les autres éléments pertinents en matière d'interprétation'). Also Gardiner, *Treaty Interpretation* (n 2), xvii–xviii.

[17] *Territorial Dispute (Libya/Chad)* (Judgment) [1994] ICJ Rep 21, 26 (inverted commas removed).

[18] See M Waibel, 'Uniformity versus Specialisation: A Uniform Regime of Treaty Interpretation?' in C Tams, A Tzanakopoulos, and A Zimmermann (eds), *Research Handbook on the Law of Treaties* (Edgar Elgar, 2014); J Crawford, *International Law as an Open System: Selected Essays* (Cameron May, 2002), 28–37.

[19] ILC Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties 2013 (n 6), 19.

[20] See M Koskenniemi, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law' Report of the Study Group of the International Law Commission, finalized by Martti Koskenniemi A/CN.4/L.682 at [159]–[171]. Also: P Webb, *International Judicial Integration and Fragmentation* (Oxford University Press, 2013); J Crawford, 'Chance, Order, Change: The Course of International Law' (2013) 365 Hague *Recueil* 1, 205–29; M Andenas and E Bjorge (eds), *A Farewell to Fragmentation: Reassertion and Convergence in International Law* (Cambridge University Press, 2015); MA Young (ed), *Regime Interaction in International Law: Facing Fragmentation* (Cambridge University Press, 2012).

more specifically whether different types of treaty ought to be interpreted according to different methods.

The second further research question bears upon the complexity thrown up in treaty interpretation by the passage of time. If treaties are embodiments of the common intention of their parties, they are also 'time-bound promises or propositions that generally reflect a perspective at the time of being made'.[21] Notwithstanding General de Gaulle's quip that 'treaties are like roses and young girls; they last while they last',[22] the fact that the time-bound promises to which treaties give expression are meant in most cases to endure in many cases will give rise to the problem of the passage of time. This could be summed up as whether there is in general international law a background rule that demands that, in the interpretation of rules, account should be taken of 'the evolution of law'.[23] This bears on the question of intertemporality (that is, the principles which determine whether a provision is to be interpreted as at the time of the conclusion or of the application of the convention in which the provision is contained)[24] and *jus cogens superveniens* (that is, the appearance of new *jus cogens* rules through the evolution of peremptory rules of international law),[25] and will in the context of this book necessitate an analysis of the impact of changes in international law, both ordinary and peremptory rules, on treaty interpretation.

The analysis begins, in Chapter 2, with the general question of whether there exist in the law of treaties specific rules of interpretation for different types of treaty, and then moves on to the more specific question of what is the evolutionary interpretation of treaties. Before it is possible to answer the main question, however, there are other aspects whose relation to evolutionary interpretation need to be analysed. Thus the interplay between evolutionary interpretation and treaty interpretation on the basis of good faith and the intention of the parties is analysed in Chapter 3. This will situate the main question of evolutionary interpretation in that

[21] Crawford, *Chance, Order, Change* (n 20), 110.

[22] *Time*, 12 July 1963. Also: Crawford, *Brownlie's Principles of Public International Law* (n 2), 377.

[23] *Island of Palmas (Netherlands v United States of America)* (1928) 2 RIAA 829, 845.

[24] See eg *Affaire de la Compagnie agricole du détroit de Puget* (1869) 2 Recueil des arbitrages internationaux 513–17; *Award of the Alaska Boundary Tribunal* (1903) 15 RIAA 490, 491–3; *The Indo–Pakistan Western Boundary (Rann of Kutch) between India and Pakistan* (1968) 50 ILR 2; (1968) 17 RIAA 1, 481–5; *Eritrea v Yemen (Phase One: Territorial Sovereignty and Scope of the Dispute)* (1998) 114 ILR 1, 46, 115; *Decision regarding delimitation of the border between Eritrea and Ethiopia* (2002) 25 RIAA 83, 110; (2002) 130 ILR 1, 34 at [3.4]; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria: Equatorial Guinea intervening)* (Judgment) [2002] ICJ Rep 303, 404–7; *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)* [2008] ICJ Rep 12, 50–1.

[25] *Case Concerning the Delimitation of Maritime Boundary between Guinea-Bissau and Senegal* (1989) 20 RIAA 119; *Kuwait v American Independent Oil Co (AMINOIL)* (1982) 66 ILR 518, 588–9; *Aloeboetoe et al*, judgment 10 September 1993, Series C, No 15.I/A at [56]–[57]. Also: H Lammasch, *Die Lehre von der Schiedsgerichtsbarkeit* (Kohlhammer, 1913), 179; A Orakhelashvili, *Peremptory Norms in International Law* (Oxford University Press, 2006), 154; A Lagerwall, 'Article 64: Emergence of a New Peremptory Norm of General International Law ("jus cogens")' in O Corten and P Klein (eds), *The Vienna Convention on the Law of Treaties: A Commentary* (Oxford University Press, 2011), 1457; J Crawford, *State Responsibility: The General Part* (Cambridge University Press, 2013), 315–18.

which, on the approach taken in this book, is its right normative environment. It should be added that the judgments by international courts and tribunals on which the analysis in Chapters 2–3 is based does not make any claims to being completely *exhaustive*. Nonetheless, the hope is that the selection of judgments is *representative*, which it is believed is the case.

The time element, both the intertemporal law and *jus cogens superveniens*, is the focus of Chapter 4. An example of what has been seen as evolutionary interpretation but which ought, it is argued here, not to be understood in this way is analysed in Chapter 5. The example is taken from the jurisprudence of the European Court of Human Rights and relates to the issue of jurisdiction *ratione temporis* (that is, jurisdiction by reference to time). This particular jurisprudence is analysed in order to bring out that at times it may be unhelpful, in fact quite confusing, to analyse a judicial development as evolutionary interpretation. It is not the main object of this study to prove the veracity of Lowe's proposition that 'treaty interpretation is an area in which the returns on abstract theorizing are low, and diminishing'.[26] Nonetheless, Chapter 5 goes some way in showing that the interest in interpretive technique may certainly be taken too far, to the extent that one obscures, in fact confuses, the material questions in issue. Chapter 6 concludes the analysis.

The main thesis of this book can be summarized in the following way: there is nothing special about the evolutionary interpretation of treaties as compared with other types of interpretation. Like all other types of interpretation it must be, and is in fact, a function of the intention of the parties as determined objectively through the application of the means of interpretation recognized by Articles 31–33.[27]

Although it is argued here that it has broad support in Articles 31–33, and the way international courts and tribunals practice treaty interpretation, the proposition that evolutionary interpretation follows from the intention of the parties does have its detractors.[28] Crawford has observed that the issue of evolutionary interpretation 'is essentially one of the correct application of VCLT Article 31'.[29] As will become clear, it is argued in this book that, on the correct understanding of the law of treaties, this is entirely pertinent.

It will be argued here that evolutionary interpretation must be understood by departing from the insights, first, that evolutionary interpretation builds upon the intention of the parties,[30] and, secondly, that all the elements referred to in Article 31 provide, *by objective means*, the basis for establishing the common intention of the parties.[31]

[26] AV Lowe, *International Law* (Oxford University Press, 2007), 74.

[27] See ILC Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties 2013, ILC Report 2013 (n 6), 27 at [9].

[28] See Ch 3 below.

[29] Crawford, *State Responsibility: The General Part* (n 25), 247.

[30] See *Young Loan Arbitration* (1980) 59 ILR 494, 531 at [18]–[19]; *Dispute concerning Filleting within the Gulf of St Lawrence ('La Bretagne') (Canada/France)* (1986) 82 ILR 591, 624, 659–60; *Award in the Arbitration regarding the Iron Rhine ('Ijzeren Rijn') (Belgium v Netherlands)* (2005) 27 RIAA 35, 65, 73; *Dispute regarding Navigational and Related Rights* (n 2), 237 at [48].

[31] See *Case Concerning the Auditing of Accounts between the Kingdom of the Netherlands and the French Republic Pursuant to the Additional Protocol of 25 September 1991 to the Convention on the Protection of the Rhine against Pollution by Chlorides of 3 December 1976 (Netherlands/France) (Rhine Chlorides*

This main thesis builds on a set of propositions. There is in the law of treaties *one* method of interpretation; it varies not as a function of which type of Tribunal is interpreting the treaty, nor of the content of different types of treaty. It is a misunderstanding, therefore, to say that the method of treaty interpretation relied on, for example, by the Inter-American or the European Court of Human Rights is different in nature from that of the International Court of Justice, the tribunals composed under the aegis of the Permanent Court of Arbitration, or other traditional interpreters of general international law. This concerns the aspect of the main thesis that addresses the interpreter; the other aspect concerns that which is being interpreted. In this regard, too, it is argued that the method of construction relied upon—whether the instrument to be interpreted is a boundary treaty, a human rights treaty, a trade treaty, or the UN Charter—is the same. It is, moreover, not just that the starting coordinates are the same, and that, as could be argued, different regimes then take on particular hues according to their subject matter; the method is the same all the way.

Turning to the background rules of the intertemporal law and *jus cogens superveniens* is in line with the primacy in treaty interpretation of the intention of the parties. This is, as will be seen in Chapter 3.3, because treaty interpretation, while it is 'a single combined operation',[32] could be described as a process of progressive encirclement, where the interpreter goes about establishing the intention of the parties in the treaty text, in the disputed terms, in the whole of the treaty, in general international law, and in the general principles of law. In many cases it is by this concentric encirclement that the judge is able to establish the presumed intention of the parties, in conformity with the fundamental demands of the fullness of international law and justice.[33] As the ILC has stated, 'the general rules of international law' are among 'the primary criteria for interpreting a treaty'.[34] It is in line with the general approach taken in this book, therefore, to turn also to the intertemporal law and *jus cogens superveniens*.

1.5 Impermissibility of Courts Reconstructing Treaty Obligations

Treaty interpretation, as this book argues with respect to evolutionary interpretation, is subject to important limits set by the rules of interpretation. The operation

Arbitration) (2004) 25 RIAA 267; (2004) 144 ILR 259, 293 at [62]; *Decision regarding delimitation of the border between Eritrea and Ethiopia* (2002) 25 RIAA 83, 110; (2002) 130 ILR 1, 34 at [3.4]; *EC—Computer Equipment*, Report of the Appellate Body WT/DS62/AB/R; WT/DS67/AB/R; WT/DS68/AB/R at [84]; *US—Gambling*, Report of the Appellate Body WT/DS363/AB/R at [84].

[32] ILC Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties 2013 (n 6), 11; ILC Ybk 1966/II, 219–20.

[33] M Huber (1952) 45 Ann de l'Inst 200–1; Gardiner, *Treaty Interpretation* (n 2), 141–2.

[34] ILC Ybk 1964/II, 203–4 at [13], 204–5 at [15]. Also: ILC Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties 2013 (n 6), 27 at [9].

of interpreting a treaty is 'designed to determine the precise meaning of a rule, but it cannot change its meaning'.[35] One important question is how much evolutionary interpretation can be permitted before the interpretation extends beyond the bounds of the intention of the parties.

This question is equally pressing with respect to *all* types of interpretation, no less so for what has been called restrictive types of interpretation than it is for evolutionary ones. It is in other words not only interpretations deserving of etiquettes such as 'liberal' or 'droits-de-l'hommiste' which may overstep the mark and end up contravening the intention of the treaty parties; this is true also of 'conservative' ones or those based upon 'raisons d'État'.

Though this has been largely overlooked in the literature,[36] international jurisprudence has not been blind to this point. In fact, the first time the Permanent Court of International Justice touched upon this type of issue it did so *not* in order to allow for a large freedom for the states parties to act as they saw fit under the treaty; it was rather in order to secure an interpretation that was favourable to internationalist objects of minority protection. In this way, the Permanent Court in *Acquisition of Polish Nationality* declined to follow the interpretation suggested by Poland as to who was Polish for the purposes of Article 4(1) of the Treaty between the Principal Allied and Associated Powers and Poland.[37] The Permanent Court stated that seeing as the treaty clause left little to be desired in the nature of clarity, it saw itself bound to apply the clause as it stood, without considering whether other provisions might with advantage have been added to or substituted for it. The Court concluded: 'To impose an additional condition for the acquisition of Polish nationality, a condition not provided for in the Treaty of June 28th, 1919, would be equivalent not to interpreting the Treaty, but to reconstructing it'.[38]

The reconstruction in question was rejected because it would have led to a solution which would have been contrary to the very object of the treaty, to what the parties had intended. The text expressed that object and that intention very clearly; not to follow the clear text would therefore have amounted to reconstructing Article 4(1) of the treaty.[39] In other words, as the International Court would put it in *Interpretation of Peace Treaties*, 'it is the duty of the Court to interpret the Treaties, not to revise them'.[40] To contravene in this way, the intention of the treaty parties is, in other words, a danger that in no way is exclusive to evolutionary interpretation.

[35] *Case Concerning a Boundary Dispute between Argentina and Chile Concerning the Delimitation of the Frontier Line between Boundary Post 62 and Mount Fitzroy* (1994) 22 RIAA 3, 25 at [75].

[36] See, however, R Kolb, *Interprétation et création du droit international. Esquisse d'une herméneutique juridique moderne pour le droit international public* (Bruylant, 2006), 375–6.

[37] Treaty between the Principal Allied and Associated Powers and Poland, 28 June 1919, 225 CTS 412.

[38] *Acquisition of Polish Nationality* PCIJ (1923) Series B No 7, 7, 20.

[39] Kolb, *Interprétation et création du droit international* (n 36), 376.

[40] *Interpretation of Peace Treaties (Second Phase)* (Advisory Opinion) [1950] ICJ Rep 221, 229; *Rights of Nationals of the United States of America in Morocco (France v United States of America)* [1952] ICJ Rep 1952 176, 196. Also: *Case Concerning the Delimitation of the Maritime Boundary between Guinea-Bissau and Senegal (Guinea-Bissau v Senegal)* (1989) 10 RIAA 119, 151 at [85]; *Case Concerning a Boundary Dispute between Argentina and Chile Concerning the Delimitation of the Frontier Line between Boundary Post 62 and Mount Fitzroy* (1994) 22 RIAA 3, 25 at [75].

As adumbrated above,[41] what is central in the method of treaty interpretation is that a convention is interpreted so as to be effective in terms of the intention of the parties. As the ILC's first Special Rapporteur on the law of treaties, Brierly, put it: the object is 'to give effect to the intention of the parties as fully and fairly as possible'.[42] What one ought to understand by the words 'intention of the parties' will be set out in more detail below.[43] At any rate this full and fair giving of effect, plainly linked to the so-called principle of effectiveness, is taken as seriously by the International Court, and arbitral tribunals, as for example the European Court of Human Rights. Among many writers it has nonetheless become *de rigueur* to hold that the methods applied by different types of Tribunal are widely at variance with each other. It has been averred that the European Court of Human Rights, in interpreting the European Convention on Human Rights (ECHR),[44] 'departs from the canons of interpretation' to such an extent that it 'must have been an unacceptable (if not shocking) violation of the sacred principles of international law for classical international lawyers'.[45]

Here it will be argued that evolutionary interpretation is entirely in line with the approach taken to treaty interpretation in the classical law of treaties. Consider the example of effectiveness in treaty interpretation ('*effet utile*')[46] which, as the Tribunal in *Iron Rhine* explained,[47] can lead to an evolutionary interpretation.[48] The International Court brought out the importance of the principle of effectiveness in *Territorial Dispute*, where it relied in the interpretation of a boundary treaty on 'one of the fundamental principles of interpretation of treaties, consistently upheld by international jurisprudence, namely that of effectiveness'.[49] The same was underlined in *Airey v United Kingdom*, where the European Court held that the Convention 'is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective'.[50] In *Nada v Switzerland* a unanimous Grand Chamber of the European Court underlined that the provisions of the Convention must be 'interpreted and applied in a manner that renders its guarantees practical and effective'.[51]

41 See Ch 1.1.

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

43 See Ch 3.1.

44 Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 UNTS 222.

45 M Fitzmaurice, 'The Practical Working of the Law of Treaties' in MD Evans, *International Law* (3rd edn, Oxford University Press, 2010), 188; M Fitzmaurice, 'Dynamic (Evolutive) Interpretation of Treaties and the European Court of Human Rights' in A Orakhelashvili and S Williams (eds), *40 Years of the Vienna Convention on Treaties* (British Institute of International and Comparative Law, 2010), 92.

46 *Dispute between Argentina and Chile concerning the Beagle Channel* (1977) 21 RIAA 53, 231.

47 *Award in the Arbitration regarding the Iron Rhine ('Ijzeren Rijn') (Belgium v Netherlands)* (2005) 27 RIAA 35, 64 at [49].

48 See Ch 3.

49 *Territorial Dispute (Libya/Chad)* (Judgment) ICJ Rep 21, 23. Also: *Lighthouses Case between France and Greece* (Judgment) (1934) PCIJ Series A/B No 62, 27; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* [1971] ICJ Rep 16, 35 at [66]; *Aegean Sea Continental Shelf* [1978] ICJ Rep 3, 22 at [52].

50 *Airey v United Kingdom* App No 6289/73, judgment 9 October 1979 at [24].

51 *Nada v Switzerland* App No 10593/08, judgment [GC] 12 September 2012 at [182] and [195].

The Tribunal in *Iron Rhine* said of the principles relevant to the process of interpretation that: 'of particular importance is the principle of effectiveness *ut res magis valeat quam pereat*'.[52] The importance in general international law of this principle was also underscored in *Beagle Channel*. One may even be forgiven for thinking that the Tribunal in this boundary dispute put the matter rather strongly when it stated that it could only ignore the rule of *effet utile* 'with the result that the Treaty, instead of being "interpreted", is amended and adapted in a manner that contradicts its letter and spirit'.[53] There is, in other words, more than just a casual affinity between what the *Beagle Channel* Tribunal stated in this regard and what the Permanent Court held in *Acquisition of Polish Nationality*.[54]

The principle of effectiveness is no more than one facet of a larger picture. In his famous dissenting opinion in *Belgian Police*, Judge Fitzmaurice stated that it was not the case 'that a Convention such as the [European Convention on Human Rights] should be interpreted in a narrowly restrictive way'. Instead, he continued, the Convention should:

> be given a reasonably liberal construction that would also take into consideration manifest changes or developments in the climate of opinion which have occurred since the Convention was concluded.[55]

Fitzmaurice had, in fact, made the point, as early as in 1951, that 'there may well be a special case for the use of what might be called creative or dynamic methods of interpretation'.[56]

1.3 Outline of the Positions with Which this Book Takes Issue

The claim that there is one method only, and that it is applied across the board, leads on to the next element of the main thesis of this book: the evolutionary interpretation of treaties. It is argued here that evolutionary interpretation is nothing if not an expression of the traditional canons of treaty construction. Furthermore, it is argued that there are times when it is necessary, in order to respect the parties' common intention at the time when the treaty was concluded, to take account of the meaning acquired by the terms in question upon each occasion on which the treaty is to be applied.[57] In some cases, *not* to make an evolutionary interpretation would be that which would run counter to the intentions of the parties, and by extension go against the grain of the classical canons of interpretation.

[52] *Award in the Arbitration regarding the Iron Rhine ('Ijzeren Rijn') (Belgium v Netherlands)* (2005) 27 RIAA 35, 64.

[53] *Dispute between Argentina and Chile concerning the Beagle Channel* (1977) 21 RIAA 53, 231.

[54] *Acquisition of Polish Nationality* (1923) PCIJ Series B No 7, 7, 20.

[55] Separate Opinion of Judge Sir Gerald Fitzmaurice, *National Union of Belgian Police* (1980) 57 ILR 262, 295.

[56] G Fitzmaurice, 'The Law and Procedure of the International Court of Justice: Treaty Interpretation and Certain other Treaty Points' (1951) 28 BYIL 1, 8.

[57] See *Dispute regarding Navigational and Related Rights* (n 2), 242.

Many leading authors have argued that evolutionary interpretation is best understood as instances of international courts and tribunals departing (that is, deviating) from the intention of the parties at the time of conclusion of a treaty.[58] This seems at times to be based on an assumption that correct application of Article 31 of the VCLT does not lead to the intention of the parties.[59]

Another position with which this book takes issue is the view that evolutionary interpretation is in principle more suited for some types of treaty than it is for others. Simma has cast this view in the following terms: the interpretation adopted by the International Court in *Navigational Rights*, where the Court made an evolutionary interpretation of the treaty term 'commerce', was an indication of 'the willingness of the Court to test the application of progressive traits originally developed in specialized human rights jurisprudence to other branches of international law'.[60] The former Judge of the International Court, in other words, viewed treaty interpretation in a boundary case as a situation for which evolutionary interpretation was not naturally suited, whereas it *was* naturally suited to the interpretation of human rights treaties. Simma's point is forcefully made. It is, however, also wrong.

Here it will be argued that evolutionary interpretation is a natural part of the classical canons of construction, and thus also of the rules codified in Articles 31–33 of the Vienna Convention. Evolutionary interpretation has also been applied as a matter of course in international jurisprudence in fields far removed from that of human rights, arguably even before the human rights bodies came into existence.

One example which goes some way in illustrating this is the 1925 *Spanish Zone of Morocco Claims*, in respect of British rights, dating back to 1783, to a 'maison convenable' to be used as British consulate in the Spanish Zone of Morocco.[61] The long timespan between 1783 and 1925 gave rise to the question of whether the concept of an appropriate house for consular purposes had evolved. 'Ces droits', sole arbitrator Huber held, 'ne visent que l'usufruit d'une résidence "convenable"; sans doute, cette dernière expression doit être interprétée au point de vue des exigences de nos jours'.[62] The right to the usufruct of a consular residence in 1925 must be appropriate according to the conditions of the present day and not to the conditions prevailing at an earlier time. Given that the Tribunal made allowance for developments in international law which had occurred since the treaty was concluded,[63] *Spanish Zone of Morocco Claims* is an example of the evolutionary interpretation of treaties, in a case far removed both in time and content from modern human

[58] See eg Crawford, *State Responsibility: The General Part* (n 25), 246.

[59] R Bernhardt, 'Evolutive Treaty Interpretation—Especially of the European Convention on Human Rights' (1999) 42 GYIL 11, 14.

[60] B Simma, 'Mainstreaming Human Rights: The Contribution of the International Court of Justice' (2012) 3 JIDS 1, 20; B Simma, 'Human Rights before the International Court of Justice: Community Interest Coming to Life?' in CJ Tams and J Sloan (eds), *The Development of International Law by the International Court of Justice* (Oxford University Press, 2013), 323.

[61] *British Claims in the Spanish Zone of Morocco* (1925) 2 RIAA 722; (1923–24) 2 *Annual Digest and Reports of Public International Law Cases* 19.

[62] *British Claims in the Spanish Zone of Morocco* (1925) 2 RIAA 722, 725.

[63] *Dispute regarding Navigational and Related Rights* (n 2), 242 at [64].

rights law. McNair said about the evolutionary approach adopted in *Spanish Zone of Morocco Claims* that it gave the terms of the treaty 'a proper and common-sense interpretation'.[64]

It is true that the European Court of Human Rights takes the same approach, and it has done so using almost the same language as was used in *Spanish Zone of Morocco Claims*. The European Court held in *Tyrer v United Kingdom* that the ECHR 'est un instrument vivant à interpréter…à la lumière des conditions de vie actuelles'—'a living instrument' to be 'interpreted in the light of present-day conditions'.[65]

The Inter-American Court of Human Rights, too, has taken this approach. As the Inter-American Court has held in a number of cases: 'human rights treaties are live instruments whose interpretation must adapt to the evolution of the times and, specifically, to current living conditions'.[66] The same is the case with the African Commission on Human and Peoples' Rights, which in *Endorois* adopted a living instrument approach in interpreting the term 'peoples' to extend also to indigenous groups.[67]

Other human rights treaty bodies have followed suit. In *Judge v Canada* the UN Human Rights Committee said of the International Covenant on Civil and Political Rights (ICCPR)[68] that it 'should be interpreted as a living instrument and the rights protected under it should be applied in context and in the light of present-day conditions'.[69] The same is the case with the UN Committee on the Elimination of Racial Discrimination, which held in *Hagan v Australia* that the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD),[70] 'as a living instrument, must be interpreted and applied taking into [account] the circumstances of contemporary society'.[71]

The human rights bodies have followed the approach taken in general international law. Waldock pointed out that 'the problem of interpretation caused by an evolution in the meaning generally attached to a concept embodied in a treaty provision is, of course, neither new nor confined to human rights'. He went on, in a

[64] AD McNair, *The Law of Treaties* (2nd edn, Oxford University Press, 1961), 468.

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

[66] *The Mayagna (Sumo) Awas Tingni Community v Nicaragua* (2008) 136 ILR 73, 192 at [146]–[148] [146]; *Bámaca Velásquez v Guatemala*, Series C No 70, judgment 2 November 2000 at [158]; *Case of the Gómez Paquiyauri Brothers*, Series C No 110, judgment 8 July 8 2004 at [165]; *Case of the 'Street Children' (Villagrán Morales et al)*, Series C No 63, judgment 19 November 1999 at [193]; *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, Series A No 16 Advisory Opinion OC–16/97, 14 November 1997 at [114]; *Juridical Condition and Rights of the Undocumented Migrants*, Series A No 18 Advisory Opinion OC–18/03, 17 September 2003 at [120].

[67] *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on Behalf of Endorois Welfare Council v Kenya*, Communication 276/2003, 4 February 2010.

[68] International Covenant on Civil and Policial Rights, 16 December 1966, 999 UNTS 171.

[69] *Judge v Canada* No 829/1998, Communication 5 August 2002, UN Doc CCPR/C/78/D/829/1998 at [10.3].

[70] International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965, 660 UNTS 195.

[71] *Hagan v Australia* No 26/2002, Communication 20 March 2003, UN Doc CERD/C/62/D/26/2002 at [7.3].

discussion of *Airey* and *Tyrer*, to describe the method of the European Court as one according to which 'the meaning and content of the provisions of the Convention will be understood by the Commission and the Court of Human Rights as intended to evolve in response to changes in legal or social concepts'; 'this approach to the construction of the Convention is in harmony with the general principles governing the interpretation of treaties', he concluded.[72]

It is only fitting, therefore, that it took someone with a background in general international law to coin the phrase 'living instrument'. For it was Sørensen, nothing if not a classical international lawyer,[73] who seems to have been the first to use the phrase when he stated in 1975—three years before the European Court was to adopt the coinage—that: 'The European Convention on Human Rights is a living instrument'; 'its provisions are capable of being interpreted in such a way as to keep pace with social pace'.[74] It later became clear, in the jurisprudence of the European Court, that the Convention was then seen as being a living instrument to be interpreted in the light of present-day conditions.[75] On this background, it is possible to argue for a different reading than the one propounded by Simma.

Bernhardt, a former President of the European Court of Human Rights, has gone further than Simma in arguing that evolutionary interpretation is particular to human rights treaties. Thus Bernhardt has argued that although the provisions on treaty interpretation contained in the VCLT on their face seem to make no distinction between different types of treaty, this ought not to detract from the fact that the object and purpose of human rights treaties set them apart from other types of treaty. Human rights treaties must, therefore, he maintains, be interpreted differently from other types of treaty in international law. The impression that the principles of treaty interpretation apply similarly to all types of treaty, he says, 'is either misleading or else correct only on a highly abstract level'; when it comes to human rights treaties, he concludes, the traditional rules of treaty interpretation 'need some adjustment'.[76] Velu and Egrec have taken the same view on the interpretation of the ECHR. The ECHR, they argue, is a *sui generis* instrument. They have held that the classical canons of interpretation 'doivent s'infléchir au contact des

[72] H Waldock, 'The Evolution of Human Rights Concepts and the Application of the European Convention on Human Rights' in *Mélanges offerts à Paul Reuter—Le droit international: unité et diversité* (Pedone, 1981), 536, 547.

[73] See Dissenting Opinion of Judge *ad hoc* Sørensen, *North Sea Continental Shelf (Federal Republic of Germany/Netherlands; Federal Republic of Germany/Denmark)* [1969] ICJ Rep 3, 242; M Sørensen, *Les sources du droit international: Étude sur la jurisprudence de la Cour permanente de justice internationale* (Einar Munksgaard, 1946); M Sørensen (ed), *Manual of Public International Law* (Macmillan, 1968).

[74] M Sørensen, 'Do the Rights Set forth in the European Convention on Human Rights in 1950 have the Same Significance in 1975? Report presented by Max Sørensen to the Fourth International Colloquy about the European Convention on Human Rights, Rome 5–8 November 1975': reprinted in *Max Sørensen: A Bibliography* (Aarhus University Press, 1988), 23, 54–5.

[75] E Bates, *The Evolution of the European Convention on Human Rights: From Its Inception to the Creation of a Permanent Court of Human Rights* (Oxford University Press, 2010), 328–33.

[76] R Bernhardt, 'Thoughts on the Interpretation of Human-Rights Treaties' in F Matscher and H Petzold (eds), *Protecting Human Rights: The European Dimension. Studies in Honour of Gérard J Wiarda* (Carl Heymanns Verlag, 1988), 65, 70–1.

méthodes plus adaptées à cet aspect spécifique de la Convention, méthodes qui évoquent, à certains égards, celles dont usent les cours constitutionnelles nationales'.[77]

Letsas has taken a strong position in this regard. He argues that different kinds of project will call for different methods of interpretation; it is thus necessary to adopt a particular interpretive approach to international human rights treaties. This, in Letsas's view, is partly because a 'first misconception is to think that Articles 31–33 VCLT set out single rules of interpretation for all treaties'; 'there are *no* general methods of treaty interpretation'.[78] Weiler draws similar conclusions, with respect to the classical canons of interpretation on the one hand and EU law on the other. He has stated about the interpretation adopted by the European Court of Justice that it is teleological and purposive, 'drawn from the book of constitutional interpretation' and not from the law of treaties.[79] Indeed, he has called for a re-examination of treaty interpretation; in his view a stronger emphasis must be put on the fact that different types of international Tribunal apply different hermeneutics to different types of treaty regime.[80] He thus sees treaty interpretation as a wide-ranging set of practices. In fact the thread that runs through his work in this field is that the general rule of interpretation in 'Article 31 is both descriptively and prescriptively an "unreal" signpost of contemporary treaty interpretation'.[81] As will become clear in Chapters 2–3, this book takes another view of these issues.

With regard to the temporal aspect, it will be argued that the prominent place of evolutionary interpretation in the law of treaties is further reinforced by the rules of intertemporal law. It will in this regard be necessary to analyse and to take issue with the view, prevalent in the decisions of international tribunals, that evolutionary interpretation goes against the grain of the intertemporal law. This view, I shall argue, is often based upon a misconstruction of the principle of intertemporality, which takes into account only the first limb of the rule.[82] An attendant view is that it is only as an exception to this (limited and ultimately erroneous) understanding

[77] J Velu and R Ergec, *La Convention européenne des droits de l'homme* (Bruylant, 1990), 51. Also: MA Eissen, 'La Cour européenne des droits de l'homme' (1986) 102 RdP 1539, 1586–7; G Cohen-Jonathan and JP Jacqué, 'Activité de la Commission européenne des droits de l'homme' (1982) 28 AFDI 513, 527; WJ Ganshof van der Meersch, 'Quelques aperçus de la méthode d'interprétation de la Convention de Rome du 4 novembre 1950 par la Cour européenne des droits de l'homme' in *Mélanges offerts à Robert Legros* (Éditions de l'Université de Bruxelles, 1985), 209–10; WJ Ganshof van der Meersch, 'Le caractère "autonome" des termes et "la marge d'appreciation" des gouvernements dans l'interprétation de la Convention européenne des droits de l'homme' in F Matscher and H Petzold (eds), *Protecting Human Rights: The European Dimension. Studies in Honour of Gérard J Wiarda* (Carl Heymanns Verlag, 1988), 202.

[78] G Letsas, 'Strasbourg's Interpretive Ethic: Lessons for the International Lawyer' (2010) 21 EJIL 509, 512, 538–41. Also C Brölmann, 'Specialized Rules of Treaty Interpretation: International Organizations' in D Hollis (ed), *Oxford Guide to Treaties* (Oxford University Press, 2012), 507–12.

[79] JHH Weiler, 'The Transformation of Europe' (1991) 100 Yale LJ 2403, 2416.

[80] JHH Weiler, 'The Interpretation of Treaties—A Re-Examination' (2010) 21 EJIL 507.

[81] JHH Weiler, 'Prolegomena to a Meso-Theory of Treaty Interpretation at the Turn of the Century', IILJ International Legal Theory Colloquim: Interpretation and Judgment in International Law (NYU Law School, 14 February 2008), 14.

[82] *Award in the Arbitration regarding the Iron Rhine ('Ijzeren Rijn') (Belgium v Netherlands)* (2005) 27 RIAA 35, 72–3; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria: Equatorial Guinea intervening)* (Judgment) [2002] ICJ Rep 303, 405.

of the principle of intertemporality that evolutionary interpretation becomes possible.[83] This view is built upon a misunderstanding of what the rule of intertemporal law is.

The second limb, I shall argue, is quite as important as the first. The corollary in the second limb of the rule, the one focusing on the evolution of the law, goes entirely with the grain of evolutionary interpretation, and it will be argued that the two are in fact cut from the same cloth.

1.4 Methodological Questions

1.4.1 Treaties as a source of law

It is appropriate to say a few words about the nature of the treaty as a source of law in international law, and what this might mean for the topic of the present study. Article 38(1) of the Statute of the International Court of Justice identifies 'international conventions, whether general or particular, establishing rules expressly recognized by the contesting states' as one of the formally recognized sources of international law.[84] A treaty, according to Fitzmaurice, is strictly speaking not a source of law as much as a source of obligation under law. On this understanding, treaties are a *material* rather than a *formal* source of law. Treaties are no more a source of law than an ordinary contract which simply creates rights and obligations, according to Fitzmaurice.

Conventional instruments thus do not create law; they create obligations. The only 'law' that enters into treaties, Fitzmaurice concluded, is derived not from the treaty which creates them, but from the rule of customary international law summed up by the words *pacta sunt servanda*.[85]

This view is echoed in the modern literature, where it is argued that the incidence of particular conventional obligations is a matter distinct from the sources of general international law, which is made by more diffuse processes. On this view treaties *as such* are a source of obligation and not a source of rules of general application.[86]

[83] See eg Separate Opinion of Judge El-Khasawneh in *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria: Equatorial Guinea intervening)* (Judgment) [2002] ICJ Rep 303, 503.

[84] Statute of the International Court of Justice, 26 June 1945, 892 UNTS 119. Also: M Sørensen, *Les sources du droit international: Étude sur la jurisprudence de la Cour permanente de justice internationale* (Einar Munksgaard, 1946), 28–30; S Besson, 'Theorizing the Sources of International Law' in S Besson and J Tasioulas (eds), *The Philosophy of International Law* (Oxford University Press, 2010), 163–85.

[85] G Fitzmaurice, 'Some Problems Regarding the Formal Sources of International Law' in *Symbolae Verzijl: Présentées au Professeur JHW Verzijl à l'occasion de son LXX-ième anniversaire* (Martinus Nijhoff, 1958), 157–60. Also Sørensen, *Les sources du droit international* (n 84), 58. Cf A Pellet, 'Article 38' in A Zimmermann, K Oellers-Frahm, C Tomuschat, and CJ Tams, *The Statute of the International Court of Justice: A Commentary* (2nd edn, Oxford University Press, 2012), 761.

[86] Crawford, *Brownlie's Principles of Public International Law* (n 2), 21; A Clapham, *Brierly's Law of Nations: An Introduction to the Role of International Law in International Relations* (7th edn, Oxford University Press, 2012), 55–7; M Shaw, *International Law* (6th edn, Cambridge University Press, 2008), 94.

For the purposes of the present study, however, this distinction has little importance, except for the importance accorded to this debate in relation to the distinction between contractual treaties and law-making treaties and the proposition that different methods of treaty interpretation apply to these allegedly different types of treaty. This I shall return to in Chapter 2 which concerns the question whether there exist in the law of treaties different types of method of treaty interpretation for different types of treaty, and what this means for the topic of evolutionarily interpreted treaty terms.

1.4.2 'Interpretation' as opposed to 'application' of treaties

Adjudication plays a very minor role in settling international disputes when the meaning of a treaty term is at issue. The role played in deciding the meaning of a statutory term in domestic systems is largely displaced in international law by the role of the parties to the treaty. This has the effect upon the rules of interpretation that it reinforces the consensual nature of treaties, and according to some authors also that the distinction between 'interpretation' and 'application' of treaties becomes paramount within the law of treaties. On this understanding, 'application' opens up a wider scope for case-to-case variation than does 'interpretation' narrowly understood.[87] Sir Franklin Berman set this distinction out in his dissenting opinion in *Industria Nacional de Alimentos SA and Indalsa Perú v Peru (Annulment)*, where he held that: 'Whereas treaty interpretation can often be a detached exercise, it is virtually inevitable that treaty application will entail to some extent an assessment of the facts of the particular case and their correlation with the legal rights and obligations in play'.[88]

McNair thus observed that 'the words "interpret", "interpretation" are often used loosely as if they included "apply", "application". Strictly speaking, when the meaning of the treaty is clear, it is "applied", not "interpreted" '. This way of conceptualizing the issue has been convincingly criticized by Gardiner, as it 'sets on its head the natural sequence that is inherent in the process of reading a treaty: first ascribing meaning to its terms and then applying the outcome to a particular situation'.[89] McNair went on by saying that: 'Interpretation is a secondary process which only comes into play when it is impossible to make sense of the plain terms of the treaty, or when they are susceptible of different meanings'.[90] This statement seems to owe something to Vattel's famous dictum about 'clear meaning', according to which 'il n'est pas permis d'interpréter ce qui n'a pas besoin d'interprétation',[91] and

[87] F Berman, 'International Treaties and British Statutes' (2005) 26 SLR 1, 10. Also: Fife, 'Les techniques interprétatives' (n 13); A Gourgourinis, 'The Distinction between Interpretation and Application of Norms in International Adjudication' (2011) 2 JIDS 31.

[88] Dissenting Opinion, Judge Sir Franklin Berman, *Industria Nacional de Alimentos SA and Indalsa Perú (formerly Lucchetti SA and Lucchetti Perú SA) v Peru (Annulment)* Case No ARB/03/4 at [15].

[89] Gardiner, *Treaty Interpretation* (n 2), 27–8.

[90] McNair, *The Law of Treaties* (n 64), 365.

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

is susceptible to the same criticism that was levelled at the 'clear meaning' rule, that is, as Lauterpacht put it, the statement 'assumes as a fact what has still to be proved and that it proceeds not from the starting point of the inquiry but from what is normally the result of it'.[92]

A better definition than McNair's is perhaps that given by Judge Ehrlich at the jurisdictional stage in *Factory at Chorzow*, who said that 'interpretation' and 'application':

> refer to processes, of which one, interpretation, is that of determining the meaning of a rule, while the other, application, is, in one sense, that of determining the consequences which the rule attaches to the occurrence of a given fact; in another sense, application is the action of bringing about the consequences which, according to a rule, should follow a fact. Disputes concerning interpretation or application are, therefore, disputes as to the meaning of a rule or as to whether the consequences which the rule attaches to a fact, should follow in a given case.[93]

Nonetheless, as Judge Shahabuddeen pointed out in *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*, the distinction will often be a highly academic one, given that on the one hand 'it is not possible to apply a treaty save with reference to some factual field' and, on the other, 'it is not possible to apply a treaty except on the basis of some interpretation of it'.[94]

Of interest for the present purposes is the way in which interpretation and application are seen as discrete exercises in relation to the meaning of treaty terms and the passage of time. The principle of intertemporality refers to the principles which determine whether a provision is to be interpreted as at the time of the conclusion or of the application of the convention in which the provision is contained.[95] It is in relation to the question of intertemporality that the debate on 'interpretation' and 'application' has had the greatest purchase within the law of treaties.[96] The first draft of the provision which would become Article 31(3)(c), the projected draft Article 56, was meant, before it was discarded by the ILC, to translate the intertemporal law in terms of 'interpretation' and 'application'. Thus the article provided:

> (1) A treaty is to be *interpreted* in the light of the law in force at the time when the treaty was drawn up.
>
> (2) Subject to paragraph 1, the *application* of a treaty shall be governed by the rules of international law in force at the time when the treaty is applied.[97]

[92] H Lauterpacht, *The Development of International Law by the International Court* (Stevens & Sons, 1958), 52.

[93] Dissenting Opinion of Judge Ehrlich, *Factory at Chorzow, Jurisdiction* (1927) PCIJ Series A No 9, 39.

[94] *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947* (Advisory Opinion) [1988] ICJ Rep 57, 59. Also: Gardiner, *Treaty Interpretation* (n 2), 28; MK Yasseen, 'L'interprétation des traités d'après la convention de Vienne sur le droit des traités' (1976) 151 Hague *Recueil* 1, 10.

[95] See Ch 4. [96] Gardiner, *Treaty Interpretation* (n 2), 256–8.

[97] ILC Ybk 1964/II, 8–9 (emphasis added). See Ch 4 for the intertemporal law.

The *interpretation* of the treaty must, on this model, take consideration only of those rules and facts obtaining at the time when the treaty was concluded; the *application*, however, must, at any given time, take account of the rules and facts obtaining at the time when the treaty is being interpreted.[98]

This model is mirrored by Milanovic, who sees interpretation as meaning the activity of establishing the linguistic or semantic meaning of a text, whereas application is the activity of translating that text into workable legal rules to be applied in a given case. In his view, when a court engages in evolutionary interpretation, the interpretation of the term at issue stays the same; it is only the application that has been altered. Whilst Milanovic admits that the distinction between interpretation and application may be hard to draw, he sees it as indispensable, as it is the only way of assuring the fixation of the core of a legal norm, and thus the only way of assuring a level of legal certainty and predictability, all the while allowing for non-legislative change in the law.[99]

In fact, the consequences of adopting this approach was carefully weighed by the ILC and in the end discarded.[100] The ILC considered that to formulate, on the basis of the distinction between 'interpretation' and 'application', a rule covering the temporal element would present difficulties. Instead, the ILC went back to the basics of the law of treaties: 'the relevance of rules of international law for the interpretation of treaties in any given case was dependent on the intentions of the parties'; 'correct application of the temporal element would normally be indicated by interpretation of the term in good faith'.[101] For the purposes of analysis of what is the evolutionary interpretation of treaties, this book follows the approach taken by the ILC; it does not rely upon the distinction between 'interpretation' and 'application'. Rather than searching for the wellspring of evolutionary interpretation in the interstices of the distinction between 'interpretation' and 'application', this book follows Simma in seeing the means of interpretation enumerated in Article 31 as making up the *sedes materiae* of the phenomenon.[102] As will become clear, this means searching for the objectivized intention of the parties.

1.4.3 The theoretical approach taken in this book

Secondly, a word should be said about the theoretical approach taken in this study. Increasingly, studies of the sources of law in international law, of treaty interpretation, and of legal evolution take theoretical approaches which go far in questioning,

[98] ILC Ybk 1964/II, 8–10.

[99] M Milanovic, 'The ICJ and Evolutionary Interpretation' (EJIL: Talk!, 14 July 2009) <http://www.ejiltalk.org/the-icj-and-evolutionary-treaty-interpretation/>. Also B Simma, 'Miscellanous Thoughts on Subsequent Agreements and Practice' in G Nolte (ed), *Treaties and Subsequent Practice* (Oxford University Press, 2013), 48–9.

[100] ILC Ybk 1966/II, 222.

[101] ILC Ybk 1966/II, 222 at [16]. Also: Hersch Lauterpacht, *International Law—Collected Papers IV* (Cambridge University Press, 1978), 437–8; Berman, 'International Treaties and British Statutes' (n 87), 10; Gardiner, *Treaty Interpretation* (n 2), 256–9.

[102] Simma, 'Miscellanous Thoughts on Subsequent Agreements and Practice' (n 99), 48.

if not undermining, the possibility of believing in international law as law.[103] This type of analysis may certainly have an important role to play, as it may enrich our understanding of international law, and the relation between international law and international politics.[104] Sometimes it seems the danger may arise, however, that this type of analysis goes too far in undermining the legal nature of international law.[105] As will become clear in the following, this study does not apply this type of analysis.

Evolution and evolutionary changes have made up the basis for many theories of (linguistic) interpretation.[106] Perhaps the fascinating element with respect to 'evolution' in relation to law is that it represents change which builds upon that which already exists, rather than change which makes a clean break with the past. As Robin Cooke, later ennobled as Lord Cooke of Thorndon, once put it in relation to the developments of the common law designed to meet the changing circumstances of modern conditions, 'developments of this kind are evolutionary: they do not represent a break with the past'.[107]

This view has been taken also more generally with respect to developments of international law, whether they are based upon treaty interpretation or not. Weiler, for example, sees this type of development as accretion, and thus brings out how legal change indeed builds upon already existing elements.[108] One gets the impression that this is one of the reasons why Luhmann, in his works on law in society turned to 'legal evolution' in developing a theory of legal change.[109] Related to Luhmann's view is that of Bourdieu, who in his sociological works on law was interested in that which he termed 'the force of law'.[110] Bourdieu saw law in terms of social fields. Such fields are settings in which agents, with their social positions, are located:

It is not by chance that the attitudes concerning exegesis and jurisprudence, concerning the sanctity of doctrine on the one hand and its necessary adjustment to concrete realities on the other, seem to correspond rather closely to the positions that their holders occupy within the field. On one side of the debate today, we find the adherents of private law, and

[103] J d'Aspremont, *Formalism and the Sources of International Law: A Theory of Ascertainment of Legal Rules* (Oxford University Press, 2011); I Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists* (Oxford University Press, 2012); C Focarelli, *International Law as a Social Construct: The Struggle for Global Justice* (Oxford University Press, 2012).

[104] See eg S Marks, *The Riddle of All Constitutions: International Law, Democracy, and the Critique of Ideology* (Oxford University Press, 2000); S Marks (ed), *International Law on the Left* (Cambridge University Press, 2008); A Lang, *World Trade after Neoliberalism: Reimagining the Global Economic Order* (Oxford University Press, 2011).

[105] Crawford, *Brownlie's Principles of Public International Law* (n 2), 18.

[106] See Venzke, *How Interpretation Makes International Law* (n 103), 38–46.

[107] RB Cooke, 'The Rights of Citizens' in RS Milne (ed), *Bureaucracy in New Zealand* (Oxford University Press, 1957), 99.

[108] JHH Weiler, 'The Geology of International Law—Governance, Democracy and Legitimacy' (2005) 64 ZaöRV 547, 549.

[109] N Luhmann, *Das Recht der Gesellschaft* (Suhrkamp, 1993), 239–69.

[110] P Bourdieu, 'The Force of Law: Toward a Sociology of the Juridical Field' (1987) 38 Hastings LJ 814.

particularly of civil law, which the neo-liberal tradition, basing itself upon the economy, has recently resurrected. On the other, we find disciplines such as public law or labor law, which formed in opposition to civil law. These disciplines are based upon the extension of bureaucracy and the strengthening of movements for political rights, or social welfare (*droit social*), defined by its defenders as the 'science' which, with the help of sociology, allows adaption of the law to social evolution.[111]

This type of analysis has as much (or as little, depending upon one's point of view) purchase on international law as it has on municipal law. Koskenniemi thus sees international law in similar terms and concludes, in a discussion specifically of legal evolution, in relation to the *South West Africa*[112] and *Namibia* cases,[113] that questions related to similar divides as those which Bourdieu draws up are questions to which no legal answers may be given:

> The making of a decision between claims of stability and change is always both contextual and indeterminate. It is contextual because we are able to make a preference only by looking at contextual will and justice. It is indeterminate because there exist no *legal* criteria whereby differing views about will and justice could be resolved.[114]

Indeterminacy—even radical indeterminacy—seems to be the conclusion which inexorably flows from this type of perspective.[115] The adoption of this type of perspective does, however, have a specious quality. It is true that the institutions of international law, of which the law of treaties is one, have at times given rise to undesirable outcomes, as wealth and power are extremely unequally divided and international law often fails where one might have hoped that it could make a difference. It is easy on this background to be sceptical about the claims that international law makes for itself—but it is also facile. Whilst one should be critical, one should also admit that there are things which can be done only by way of collective action and the kind of cooperation for which international law lays down a framework.[116] Sir Gerald Fitzmaurice made a similar point already in 1974. To his mind there were:

> fields in which it is becoming clear that the nation-State alone cannot assure the protection of the individual—even its own particular subjects of citizens—from the prospect of serious harm,—and where in the long run only international action, internationally

[111] Bourdieu, 'The Force of Law' (n 110), 852.

[112] *South West Africa, Second Phase* (Judgment) [1966] ICJ Rep 6.

[113] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* [1971] ICJ Rep 35.

[114] M Koskenniemi, *From Apology to Utopia* (2nd edn, Cambridge University Press, 2005), 461.

[115] See also M Koskenniemi, 'International Law in the World of Ideas' in J Crawford, M Koskenniemi, and S Ranganathan (eds), *The Cambridge Companion to International Law* (Cambridge University Press, 2012), 47.

[116] Eg Vienna Convention for the Protection of the Ozone Layer, 22 March 1985, 1513 UNTS 324; Montreal Protocol on Substances that Deplete the Ozone Layer, 16 September 1987, 1522 UNTS 28; Declaration of UN General Assembly on 'Permanent Sovereignty over Natural Resources' GA Res 1803, 18 December 1972; International Convention for the Regulation of Whaling, 2 December 1946, 161 UNTS 72. See Crawford, *Brownlie's Principles of Public International Law* (n 2), 18–19.

organized and carried out, will suffice, since the mischief knows no natural boundaries, and cannot be kept out by any purely national barriers;—such things as overpopulation and its consequences in overcrowding, malnutrition and disease; the pollution of waters, rivers, seas and airspace; the overexploitation and potential exhaustion of the earth's mineral resources and stores of fuel and power; the extinction of species and devastation of fish stocks; problems of drought, famine and hurricane damage; problems of poverty and underdevelopment; the possible misuse of outer space; terrorist activities that cross all frontiers, and 'hi-jacking' of aircraft and other threats to the safety of communication; the traffic in arms, narcotic drugs and slavery; forced labour; migration, emigration, conditions of work and other labour problems etc.[117]

Realizing this may have possible ramifications for the perspective one adopts on the particular topic of international law scrutinized in the present book. At all events, even authors such as Koskenniemi admit that it is useful to see international law as more than just indeterminate. 'Whatever else international law might be', he has observed,

at least it is how international lawyers argue, that how they argue can be explained in terms of their specific 'competence' and that this can be articulated in a limited number of rules that constitute the 'grammar'—the system of production of good legal arguments.[118]

From this it is possible to conclude that it is not the case that 'every argument goes'. There is, in the context of treaty interpretation, a grammar that structures which arguments are legitimate and which are not. Whatever view one takes of structural biases in international law, interpreters cannot escape this grammar.

This grammar, or structure, is spelled out, where treaty interpretation is concerned, in Articles 31–33 of the VCLT, which provide the widely accepted standard on how treaties ought to be interpreted. Whatever reasons or motivations underlie a suggested interpretation, the interpretation must be couched in the grammar of the rules of interpretation.[119] Going directly to the rules of interpretation, without really going into theoretical discussions which may anyway lead to the same result, is a pragmatic approach that may therefore be defended. This study does not take the route through sociological theory but instead uses the grammar of treaty interpretation without the external perspective that such theory can provide on international law.

It is worth noting that in *From Apology to Utopia* Koskenniemi does not only make points about the indeterminacy when he is discussing treaty interpretation. He also makes a contribution to the debate about treaty interpretation that is entirely within the positivist discourse on the subject. Commenting on the frequently made point that Article 31 of the VCLT is of the nature of a compromise,

[117] G Fitzmaurice, 'The Future of Public International Law and of the International Legal System in the Circumstances of Today' in Institut du droit international, *Livre du Centenaire 1873–1973: Évolution et perspectives du droit international* (Karger, 1973), 260. Also Clapham, *Brierly's Law of Nations* (n 86), 108–9.

[118] M Koskenniemi, 'Epilogue' in *From Apology to Utopia* (2nd edn, Cambridge University Press, 2005), 568.

[119] Venzke, *How Interpretation Makes International Law* (n 103), 47–50.

in that it is said to refer to all interpretative methods imaginable, Koskenniemi underscores that this is so because, as Special Rapporteur Sir Humphrey Waldock pointed out,[120] the text is the primary evidence of what the parties subjectively intended. As Koskenniemi concludes: 'The justification of the (objective) textual approach is (subjective) consensual'.[121]

This view is plainly borne out by the practice of international courts and tribunals. Thus the Tribunal in *Salini* (Sir Ian Sinclair, Cremades, and Guillaume, the last of whom presided), interpreting Article 9(2) of the Jordanian–Italian Bilateral Investment Treaty 'in conformity with Articles 31 to 33 of the Vienna Convention on the Law of Treaties', held that 'the common intention of the Parties is reflected in this clear text that the Tribunal has to apply'.[122] It is clear that the textual approach adopted by the prestigious Tribunal in *Salini* is justified subjectively.

In addition to Koskenniemi's important distinctly *critical* contributions to our understanding of the law of treaties, then, come his *constructive* contributions, confirmed by the most traditional of approaches in international dispute settlement.

In Koskenniemi's view, international law is nonetheless indeterminate, because it is required at the same time to be 'concrete' and 'normative'.[123] The dually competing and opposing values in international law will vie for domination over each other, leaving no possibility of determinately defined concepts. International law, on this understanding, can be used to argue for any outcome, with international lawyers playing the role of willing lackeys prepared to dress any argument up in legal garb. One way of opposing this view, offered by Crawford, is simply to make the point that it is not true that international law's substantive indeterminacy permits any position to be justified with impeccable legal reasoning, by asking 'how many permanent judges are there on the bench of the International Court?' The answer, Crawford continues, 'is 15: see Article 3(1) of the Court's Statute. How could "impeccable legal reasoning" produce any other answer?'[124] Another question to which Crawford also provides the answer, and one which is particularly relevant in the context of this book, is this:

> Article 31 of the Vienna Convention on the Law of Treaties is a powerful interpretive device capable of rendering sensible meaning to a text, whether or not that text was drafted with Article 31 in mind. Take the *Navigational and Related Rights* case, where the International Court had to interpret the Spanish phrase '*libre navigación . . . con objetos de comercio*' in the 1858 Treaty of Limits between Costa Rica and Nicaragua. The Court unanimously adopted the Costa Rican reading of the text—'for the purposes of commerce', and not

[120] ILC Ybk 1964/II, 56; ILC Ybk 1966/II, 219–20.

[121] Koskenniemi, *From Apology to Utopia* (n 114), 334.

[122] *Salini Costruttori SpA & Italstrade SpA v Hashemite Kingdom of Jordan*, ICSID Case No ARB/02/13, Award 31 January 2006 at [79].

[123] Koskenniemi, *From Apology to Utopia* (n 114), 590–6.

[124] J Crawford, *Chance, Order, Change* (n 20), 131. Crawford adds that 'Art. 25(3) provides that a quorum of nine judges will suffice to constitute the Court, Art. 26 permits the use of chambers of three or more judges as the Court may determine, and Art. 29 provides that a chamber of five judges may be formed for the purpose of hearing and determining cases via summary procedure. Naturally, the number of judges on the Court increases up to 17 with the addition of *ad hoc* judges per Art. 31(2) of the Statute'.

Nicaragua's—'with objects of trade'. It thus found the Treaty to extend to transport of persons as well as goods. That answer was, with respect, obviously right.[125]

International legal language, as Crawford concludes, is not so open-ended or mutable as to justify just anything; there comes a point at which a particular argument or interpretation becomes untenable.[126] That approach is the one taken in this book too.

[125] J Crawford, *Chance, Order, Change* (n 20), 119.
[126] J Crawford, *Chance, Order, Change* (n 20), 131.