UNITED NATIONS **A**

General Assembly

Distr.
LIMITED

A/CN.4/L.682
13 April 2006

Original: ENGLISH

INTERNATIONAL LAW COMMISSION
Fifty-eighth session
Geneva, 1 May-9 June and 3 July-11 August 2006

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*

* The Chairman gratefully acknowledges the help of a number of colleagues who have commented on the topic and provided advice and assistance on particular questions. Special mention should, among them, be made of Professor Campbell McLachlan, Dr. Anders Fischer-Lescano, Professor Gunther Teubner, Professor Emmanuelle Jouannet, Professor Pierre Marie Dupuy and Ms. Isabelle Van Damme. Several NYU interns provided assistance during the Study Group meetings and collecting background materials on particular items. They include Gita Kothari**,** Cade Mosley, Peter Prows, and Olivia Maloney. Anna Huilaja, Ilona Nieminen and Varro Vooglaid at the Erik Castrén Institute of International Law and Human Rights in Helsinki provided much appreciated help in research. Last but not least, the assistance throughout the years of Ms. Anja Lindroos from the University of Helsinki needs to be recognized. Without her careful notes of the Study Group meetings and her background research this Report would never have materialized. Nevertheless, the contents of this report - including any opinions therein - remain the sole responsibility of its author.

GE.06-61077 (E) 090506

CONTENTS

CONTENTS (*continued*)

CONTENTS (*continued*)

CONTENTS (*continued*)

CONTENTS (*continued*)

CONTENTS (*continued*)

meaningless. On the contrary, their relative openness allows their reasonable use in particular situations of normative conflict (*jus cogens*) or when having to decide on standing in regard to some obligations (obligations *erga omnes*).

409. But law is a systematic craft and debates on superior and inferior norms remains a fertile ground for deliberating "constitutionalization" and fragmentation. Article 103 of the United Nations Charter certainly suggests the hierarchically higher status of the Charter over other parts of international law while the very idea of a *jus cogens* suggests that even United Nations politics may meet with a "constitutional" limit. Of course, there no longer persists a meaningful challenge to the notion of *jus cogens*. Any actual disputes relate to the determination of its content, in particular in respect to the characterization of some action or event. Here, everything depends on the development of political preferences.[568] Nevertheless, the importance of the notion - like the importance of *erga omnes* obligations - may lie less in the way the concepts are actually "applied" than as signals of argumentative possibilities and boundaries for institutional decision-making. To that extent, the notions alleviate the extent to which international law's fragmentation may seem problematic.

F. SYSTEMIC INTEGRATION AND ARTICLE 31 (3) (c) OF THE VCLT

1. Introduction - the "principle of systematic integration"

410. The previous sections dealt with three types of relationship between rules and principles (norms) of international law: relations between special and general norms, between prior and subsequent norms, and with rules and principles with different normative power. In each

---

[568] In this regard, particularly important are the deliberations of the Court of First Instance of the EC in Case T-306/01, *Ahmed Ali Yusuf and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*. As pointed out above, the Court stated that it had the competence to examine the conformity of United Nations Security Council decisions with jus cogens. At one point it speculated about "fundamental rights of the human person falling within the ambit of jus cogens", indicating that not all "fundamental rights" were by the same token jus cogens, para. 286. However, in a later passage the Court went on to assess "whether the freezing of funds … infringes the applicants' fundamental rights", thus in fact conflating the two categories - "fundamental rights" and "jus cogens". See para. 288. Such a wide understanding of jus cogens surfaces also in the Court's view that an "arbitrary deprivation" of the right to property "might, in any case, be regarded as contrary to jus cogens", para. 293. Also of interest is the Court's view that while the right of access to the courts did possess jus cogens status, this did not mean that it was unlimited. On the contrary, its limitation by action taken in pursuit of Article 103 of the Charter appeared to be "inherent in that right as it is guaranteed by jus cogens", para. 343.

section, the argument was that legal technique was perfectly capable of resolving normative conflicts or overlaps by putting the rules and principles in a determinate relationship with each other. The sections highlighted that there was nothing automatic or mechanical about this process. The way the relevant techniques (*lex specialis; lex posterior; lex superior*) operated was dependent on what should be considered as the relevant aspects of each case. Whether a rule's speciality or generality should be decisive, or whether priority should be given to the earlier or to the later rule depended on such aspects as the will of the parties, the nature of the instruments and their object and purpose as well as what would be a reasonable way to apply them with minimal disturbance to the operation of the legal system.

411. Alongside contextuality, another conspicuous feature in the preceding surveys of international practice has been the effort to avoid invalidating the norm that will be set aside - with only the abstract and so far substantially quite thin doctrine of *jus cogens* as an exception. In other words, care has been taken so as not to suggest that a treaty duly adopted or a custom followed by States would become in some respect altogether without legal effect. This has been achieved in particular through two techniques. First is the effort to harmonize the apparently conflicting norms by interpreting them so as to render them compatible. Second is the technique whereby the question of validity has been replaced by a question of priority. The norm that will be set aside will remain as it were "in the background", continuing to influence the interpretation and application of the norm to which priority has been given.

412. It follows that, contrary to what is sometimes suggested, conflict-resolution and interpretation cannot be distinguished from each other. Whether there is a conflict and what can be done with prima facie conflicts depends on the way the relevant rules are interpreted. This cannot be stressed too much. Interpretation does not intervene only once it has already been ascertained that there is a conflict. Rules appear to be compatible or in conflict *as a result of interpretation*. Sometimes it may be useful to stress the conflicting nature of two rules or sets of rules so as to point to the need for legislative intervention. Often, however, it seems more appropriate to play down that sense of conflict and to read the relevant materials from the perspective of their contribution to some generally shared - "systemic" - objective. Of this, the technique of "mutual supportiveness" provided an example. But whichever way one goes, the

process of reasoning follows well-worn legal pathways: references to normal meaning, party will, legitimate expectations, good faith, and subsequent practice, as well as the "object and purpose" and the principle of effectiveness. And finally, if a definite priority must be established, this may, as we have seen above, be achieved through three criteria: (a) specificity (*lex specialis*); (b) temporality (*lex posterior*), and (c) status (*jus cogens*, obligations *erga omnes* and Article 103 United Nations Charter).

413. It is therefore not a surprise that the Vienna Convention on the Law of Treaties deals with the plurality of rules and principles in the context of treaty interpretation. In particular article 31 (3) (c) may be taken to express what may be called the principle of "systemic integration",[569] the process surveyed all along this report whereby international obligations are interpreted by reference to their normative environment ("system"). Article 31 (3) (c) VCLT provides:

> There shall be taken into account, together with the context:
>
> … (c) any relevant rules of international law applicable in the relations between the parties.

414. The rationale for such a principle is understandable. All treaty provisions receive their force and validity from general law, and set up rights and obligations that exist alongside rights and obligations established by other treaty provisions and rules of customary international law. None of such rights or obligations has any *intrinsic* priority against the others. The question of their relationship can only be approached through a process of reasoning that makes them appear as parts of some coherent and meaningful whole. This is why, as pointed out by McNair, they must also be "applied and interpreted against the background of the general principles of international law".[570] Or, as the Arbitral Tribunal in the *Georges Pinson* case noted, a treaty must be deemed "to refer to such principles for all questions which it does not itself resolve

---

[569] Jean Combacau & Serge Sur, "Principe d'intégration" in *Droit international public*, supra note 505, p. 175 and in much more detail Campbell McLachlan, "The Principle of Systemic Integration and Article 31 (3) (c) of the Vienna Convention", ICLQ vol. 54 (2005) pp. 279-320.

[570] A.D. McNair, *The Law of Treaties*, supra note 57, p. 466.

expressly and in a different way".[571] Reference to general rules of international law in the course of interpreting a treaty is an everyday, often unconscious part of the interpretation process. We have surveyed how this takes place in connection with the operation of special (and not "self-contained") regimes in section C above. In the activity of specialized treaty bodies, a thick legal background is constantly presumed in a non-controversial way. No tribunal will ask for evidence for the rule of "*audiatur et altera pars*" or put to question the nature of a United Nations Member as a "State". These matters are taken as given and if a party challenges the relevance of any such procedural standard or public law status, then it is up to that party to justify its (unorthodox) case.

415. But the principle of systemic integration goes further than merely restate the applicability of general international law in the operation of particular treaties. It points to a need to take into account the normative environment more widely. Nor is this anything new. Thus, for example, the Arbitral Tribunal in a Franco-Belgian case from 1937 was able to hold as follows, without any further explanation:

> [A]bstraction faite de l'interprétation grammaticale et logique, il faut tenir compte du fait qu'il faut placer et interpréter l'accord Tardieu-Jaspar dans le cadre des accords de La Haye de janvier 1930, c'est-à-dire dans le cadre du Plan Young qui détermine soigneusement par quelle méthode les 'paiements allemands' et les 'transferts allemands' s'effectueront.[572]

416. In this case, one treaty was interpreted by reference to another treaty. It was obvious that the Franco-Belgian issue had a relationship to the overall effort to settle the German reparations problem and that this fact - the linkage of the treaty to that general settlement - could not be ignored in the interpretation of the agreement. More generally, if it is indeed the point of international law to coordinate the relations between States, then it follows that specific norms must be read against other norms bearing upon those same facts as the treaty under interpretation. A case in point are what Fitzmaurice called "chains" of treaties that grapple with

---

[571] *Georges Pinson* case (*France/United Mexican States*) Award of 13 April 1928, UNRIAA, vol. V, p. 422.

[572] *Différend concernant l'accord Tardieu-Jaspar (Belgium/France)* Award of 1 March 1937, UNRIAA, vol. III, p. 1713.

the same type of problem at different levels or from particular (technical, geographical) points of view.[573] As the Arbitral Tribunal in the *Southern Bluefin Tuna* case (2000) put the point:

> … it is a commonplace of international law and State practice for more than one treaty to bear upon a particular dispute … There is frequently a parallelism of treaties … The universal range of international legal obligations benefits from a process of accretion and accumulation …[574]

417. In the era of framework treaties and implementation treaties, this seems self-evident. The doctrine of "treaty parallelism" addresses precisely the need to coordinate the reading of particular instruments or to see them in a "mutually supportive" light. At issue in the *Southern Bluefin Tuna* case was the relationship between the 1982 UNCLOS and a fisheries treaty concluded for the implementation of the former. It would have been awkward, and certainly not in accord with the intent of the parties, to read those instruments independently from each other. Although how that relationship should be conceived - where they part of what in section D.2 (a) was called a "regime" or were they not? - may remain the subject of some debate (particularly in view of the overlapping provisions on dispute-settlement), the Tribunal itself fully realized that it could not ignore the fact that the problem arose under both treaties.[575]

418. Yet the problem is not limited to relationships between framework treaties and implementation treaties (after all, these characterizations have no determined content). Surely it cannot be dependent on how a State chooses to characterize a problem that decides which treaty is applicable or how a tribunal's jurisdiction it delimited. Daillier and Pellet make the general point clearly:

---

[573] G.G. Fitzmaurice, Third Report, *Yearbook … 1958* vol. II, p. 44, para. 89 (b).

[574] *Southern Bluefin Tuna* case, ILM vol. 39 (2000) p. 1388, para. 52.

[575] For the debate concerning the problems that emerge as a result of the Tribunal's preferring the dispute settlement provisions of the regional treaty (Convention for the Conservation of Southern Bluefin Tuna) to the (compulsory) provisions of Part XV UNCLOS, Jacqueline Peel, "A Paper Umbrella Which Dissolves in the Rain? The Future for Resolving Fisheries Disputes under UNCLOS in the Aftermath of the Southern Bluefin Tuna Arbitration", Melbourne Journal of International Law, vol. 3 (2002) pp. 53-78 and Barbara Kwiatkowska, "*The Ireland v. United Kingdom (Mox Plant)* Case: Applying the Doctrine of Treaty Parallelism", International Journal of Marine & Coastal Law, vol. 18 (2003) p. 52 and notes therein.

> Un traité ne peut être considéré isolement. Non seulement il est encré dans les réalités sociales, mais encore ses dispositions doivent être confrontées avec d'autres normes juridiques avec lesquelles elles peuvent entrer en concurrence.[576]

419. None of this predetermines what it means to "confront" a norm with another or how they might enter into "concurrence". These matters must be left to the interpreter to decide in view of the situation. The point is only - but it is a key point - that the normative environment cannot be ignored and that when interpreting the treaties, the principle of integration should be borne in mind. This points to the need to carry out the interpretation so as to see the rules in view of some comprehensible and coherent objective, to prioritize concerns that are more important at the cost of less important objectives. This is all that article 31 (3) (c) requires; the integration into the process of legal reasoning - including reasoning by courts and tribunals - of a sense of coherence and meaningfulness. Success of failure here is measured by how the legal world will view the outcome.

420. This section may be understood as an elucidation of the place and operation of article 31 (3) (c) VCLT but also as a summary for much of what has been said in the previous sections. The systemic nature of international law has received clearest formal expression in that article. As was suggested by Ms. Xue Hanqin during the debates in the ILC on the significance of article 31 (3) (c), the provision operates like a "master key" to the house of international law. In case there is a systemic problem - an inconsistency, a conflict, an overlap between two or more norms - and no other interpretative means provides a resolution, then recourse may always be had to that article in order to proceed in a reasoned way.

421. It may of course often be the case that no formal reference to article 31 (3) (c) is needed because other techniques provide sufficiently the need to take into account the normative environment. As we have seen, customary law, general principles of law and general treaty provisions form the interpretative background for specific treaty provisions and it often suffices to refer to them to attain systemic integration. Sometimes article 31 (3) (c) is taken as merely confirming this. For example, in the recent *Affaire concernant l'apurement des comptes*

---

[576] Daillier & Pellet, *Droit international public*, supra note 73, p. 266.

(*the Netherlands v. France*, 2004) the Tribunal was requested to apply article 31 (3) (c) by one of the parties in support of its contention that the "polluter pays principle" might be applicable in the affair. The Tribunal examined this contention noting then as follows:

> le principe figure dans certains instruments, tant bilatéraux que multilatéraux, et se situe à des niveaux d'effectivité variable. Sans nier son importance en droit conventionnel, le Tribunal ne pense pas que ce principe fasse partie du droit international général.[577]

422. But if that were all article 31 (3) (c) covered, it would have been unnecessary. Its wording, however, is not restricted to "general international law" but extends to "any relevant rules of international law applicable in the relations between the parties". Adding the word "general" was proposed in the Commission but was not included. The predominant, though not exclusive, references in the Commission were other treaty rules. Whether, in case of multilateral treaties, this requires that all parties to the treaty to be interpreted are parties also to those other treaties "to be taken into account" will be discussed below.[578]

423. It is sometimes suggested that international tribunals or law-applying (treaty) bodies are not entitled to apply the law that goes "beyond" the four corners of the constituting instrument or that when arbitral bodies deliberate the award, they ought not to take into account rules or principles that are not incorporated in the treaty under dispute or the relevant *compromis*. But if, as discussed in section B.5 above, all international law exists in systemic relationship with other law, no such application can take place without situating the relevant jurisdiction-endowing instrument in its normative environment.[579] This means that although a tribunal may only have jurisdiction in regard to a particular instrument, it must always *interpret* and *apply* that instrument in its relationship to its normative environment - that is to say "other" international

---

[577] *Affaire concernant l'apurement des comptes entre le Royaume des Pays-Bas et la République Française en application du Protocole du 25 septembre 1991 additionnel à la Convention relative à la protection du Rhin contre la pollution par les chlorures du 3 décembre 1976 (the Netherlands/France)* Award of 12 March 2004, UNRIAA, vol. XXV, p. 312, para. 103.

[578] The (very limitative) suggestion that they should, was recently made by a WTO Panel in *EC - Measures Affecting the Approval and Marketing of Biotech Products* (7 February 2006) WT/DS291-293/INTERIM, pp. 300-301, paras. 7.70-7.72.

[579] See in this regard also Joost Pauwelyn, *Conflict of Norms* … supra note 21, pp. 460-463 and passim.

law.[580] This is the principle of systemic integration to which article 31 (3) (c) VCLT gives expression. It is true that the formulation of article 31 (3) (c) has been criticized as unclear both in its substantive and temporal scope and its normative force: How widely should "other law" be taken into account? What about prior or later law? And what does "taking into account" really mean? As Judge Weeramantry noted in the *Gabčikovo-Nagymaros* case, the provision "scarcely covers this aspect with the degree of clarity requisite to so important a matter".[581] Thirlway even doubts "… whether this sub-paragraph will be of any assistance in the task of treaty interpretation".[582] But if the article is merely the expression of a larger principle - that of "systemic integration" - and if that principle, again, expresses a reasonable or even necessary aspect of the practice of legal reasoning, then a discussion of its actual and potential uses would constitute a useful contribution to the study of the alleged fragmentation (or diversification) of international law.

2. Article 31 (3) (c) of the VCLT

(a) Construction

424. Article 31 (3) (c) is placed within Part III Section 3 of the Vienna Convention that deals with the interpretation of treaties. Article 31 provides the "General Rule of Interpretation" in the following terms:

> 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:

---

[580] This is not to say that it would in practice be easy - or even possible - to distinguish these aspects from each other. Indeed the impossibility to do this was a key reason for why the ILC refrained from adopting any rule on inter-temporal law (see below section 6.4.3). The point is conceptual and refers to the way any right or obligation is double-sided - a creation of a treaty that is "applicable" and in substance determined through "interpretation".

[581] *Case concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia) I.C.J. Reports 1997* (separate opinion of Judge Weeramantry) p. 114.

[582] Hugh Thirlway, "The Law and Procedure of the International Court of Justice 1960-1989", Part III, BYBIL vol. 62 (1991) No. 1, p. 58.

(a) Any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;

(b) Any instrument which was made by one or more of the parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) Any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

425. According to paragraph 3, three matters, not ranked in any particular order of priority, should be taken into account in treaty interpretation in addition to the context. The third of them are "any relevant rules of international law applicable in the relations between the parties". The provisions are a mandatory part of the interpretation process. Unlike the provision of article 32 on *travaux préparatoires* as a "supplementary means of interpretation" they are to be referred where the meaning of treaty terms is ambiguous, obscure, absurd or unreasonable.[583]

426. Textual analysis of article 31 (3) (c) reveals a number of aspects of the rule which deserve emphasis:

(a) It refers to "rules of international law" - thus emphasizing that the reference for interpretation purposes must be to rules of law, and not to broader principles or considerations which may not be firmly established as rules;

[583] This was confirmed also by the WTO Panel in *EC - Measures Affecting the Approval and Marketing of Biotech Products* (7 February 2006) WT/DS291-293/INTERIM, p. 300, para. 7.69.

(b) The formulation refers to rules of international law in general. The words cover all the sources of international law, including custom, general principles, and, where applicable, other treaties;

(c) Those rules must be both relevant and "applicable in the relations between the parties". The sub-paragraph does not specify whether, in determining relevance and applicability one must have regard to all parties to the treaty in question, or merely to those in dispute;

(d) The sub-paragraph contains no temporal provision. It does not state whether the applicable rules of international law are to be determined as at the date on which the treaty was concluded, or at the date on which the dispute arises.

427. Articles 31 and 32 VCLT are, of course, widely assumed to reflect customary international law.[584] Their appeal may be attributable to the fact that they adopt a set of practical considerations that are familiar from the national context and at the same time general and flexible enough to provide a reasonable response to most interpretative problems. The Convention avoids taking a stand on any of the great doctrinal debates on interpretation. The articles adopt both an "ordinary meaning" and a "purposive" approach; they look for party consent as well what is in accordance with good faith. It is in fact hard to think of any approach to interpretation that would be excluded from articles 31-32.[585] Yet the Convention does not purport to be an exhaustive statement of interpretive techniques - there is no mention, for example, of *lex specialis* or *lex posterio*r.

---

[584] See the summary of state practice, jurisprudence and doctrinal writings in Mark E. Villiger Customary International Law … supra note 76, pp. 334-343. Of more recent practice, see *Territorial Dispute case (Libyan Arab Jamahiriya/Chad) I.C.J. Reports 1994* p. 6; *Kasikili/Sedudu Island case (Botswana/Namibia) I.C.J. Reports 1999* p. 1059; *LaGrand case (Germany v. United States of America) I.C.J. Reports 2001* p. 501, para. 99. See also *Golder v. the United Kingdom*, Judgment of 21 February 1975, ECHR Series A (1975) No. 18, p. 14, para. 2+ 9; *Restrictions to the Death Penalty Cases*, Judgment of 8 September 1983, Advisory opinion, Int-Am CHR, OC-3/83, ILR, vol. 70 p. 449 and e.g. *United States - Standards for Reformulated and Conventional Gasoline* (29 April 1996) WT/DS2/AB/R, DSR 1996:I, p. 16.

[585] That the interpretative techniques cannot be firmly prioritized is discussed in Martti Koskenniemi, *From Apology to Utopia* supra note 78, pp. 333-345.

428. In State practice, and the practice of international tribunals, particular approaches to interpretation have of course developed. Thus it has become a practice of human rights bodies to adopt readings of human rights conventions that look for their *effet utile* to an extent perhaps wider than regular treaties. Certain treaties establishing international institutions have become interpreted in "constitutional" terms. The recent experience in the WTO, where the Appellate Body has been insisting that panels take the Convention's rules seriously, shows just how exacting a proper application of the principles may be.[586] Although the Convention does not require the interpreter to apply its process in the order listed in articles 31-32, in fact that order is intuitively likely to represent an effective sequence in which to approach the task. But there is no reason to separate these techniques too sharply from each others. As will be seen below, sometimes external sources mat usefully clarify the ordinary meaning of treaty words, or their object and purpose.

(b) The ILC debates

429. The text of what now is article 31 (3) (c) VCLT arose in the ILC from drafts dealing with the interpretation of treaties. Draft article 70 (1) (b) proposed by Waldock to the Commission in 1964 suggested that:

> the terms of the treaty shall be interpreted in good faith in accordance with the natural and ordinary meaning to be given to each term - … [and]
>
> (b) in the context of the rules of international law in force at the time of the conclusion of the treaty.[587]

430. The provision had two parts. One was the expression of the principle of systemic integration - namely that treaties should be interpreted "in the context of the rules of international law". Throughout the ensuing discussion, this principle was taken for granted. Nobody challenged the idea that treaties were to be read in the context of their normative environment.

---

[586] See the cases discussed below, and, more generally, James Cameron & Kevin R. Gray, "Principles of International law in the WTO Dispute Settlement Body", supra note 171, p. 248.

[587] Waldock, Third Report, *Yearbook … 1964* vol. II, p. 55, para. 10.

Some members did suggest that the reference therein might be to "principles" rather than "rules" or speculated about the addition of the word "general" ("general rules" or "general principles").[588] In the end, however, none of these suggestions found their way into the text.

431. All the discussion and controversy in the Commission was addressed to the second part of the provision - namely the suggestion that the normative environment should be constructed on the basis of the law in force at the moment of the conclusion of the treaty. This was the problem of inter-temporal law. In this regard, the provision was a synthesis between a resolution of the *Institut de Droit International* which called for interpretation "in the light of the principles of international law",[589] and a formulation by Fitzmaurice which emphasized the principle of contemporaneity.[590] In Waldock's original proposal, an additional rule (draft article 56, ultimately omitted from the convention) dealt specifically with inter-temporal law as follows:[591]

> (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 when the treaty is applied.

432. Although the proposal to incorporate a provision on inter-temporal law did not find favour with the Commission in 1964, the issue continued to provoke controversy in the context of the provision of treaty interpretation. As a result, the ILC Commentary confines its discussion on the meaning and application of what is now article 31 (3) (c) to an account of the discussion

---

[588] See especially Mr. Tunkin, ILC 756th meeting (14 July 1964), *Yearbook … 1964* vol. I, p. 278, para. 49.

[589] *Annuaire* … 1956 pp. 364-5. Inclusion of this reference in the resolution of the Institut had had a controversial history. It did not appear in Lauterpacht's original scheme in 1950 (*Annuaire* 1950-I, p. 433). A reference to the interpretative role of general principles of customary international law was subsequently added by him in 1952 (*Annuaire…* 1952-I, p. 223). It faced considerable opposition on grounds of uncertainty, and inconsistency with the Institut's codification role (*Annuaire* …1952-II, pp. 384-6, remarks of Guggenheim and Rolin *Annuaire…* 1954-I, p. 228). When Fitzmaurice was appointed to replace Lauterpacht as rapporteur, there was no reference of this kind in his draft (*Annuaire…* 1956, pp. 337-8). It was only added in the course of the debate, following an intervention of Basedevant (*Annuaire* … 1958, p. 344).

[590] Sir Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice*, vol. 1 (Grotius Publications Limited: Cambridge, 1986) p. 369.

[591] Waldock, Third report, *Yearbook … 1964* vol. II pp. 8-9.

on inter-temporality.[592] Nevertheless, it is useful to note here what is presumed in this discussion as well as in the whole doctrine of inter-temporality. This is the view that the interpretation and application of a treaty takes always place by reference to other rules of international law and the only question is should those "other rules" be conceived in terms of the normative situation at the conclusion of the treaty or at the moment of its application.[593] As some Commission members observed, this followed from the very objective of tracing party intent - for that intent was certainly influenced by the rules in force at the time when the treaty was negotiated and adopted but developed in the course of the treaty's life-span.[594]

3. Case law

433. Until recently, there have been few references to article 31 (3) (c) in judicial or State practice.

(a) Iran-US Claims Tribunal

434. The Tribunal has always found customary international law applicable. In an early case, it expressly confirmed that: "… the rules of customary law may be useful in order to fill in possible lacunae of the Treaty, to ascertain the meaning of undefined terms in its text or, more generally, to aid interpretation and implementation of its provisions".[595] The issue which prompted a specific reference to article 31 (3) (c) was the determination of the nationality requirements imposed by the Algiers Accords in order to determine who might bring a claim before the Tribunal. Thus, in *Esphahanian* v. *Bank Tejarat* the question arose whether a

---

[592] Articles on the Law of Treaties with commentaries adopted by the International Law Commission, *United Nations Conference on the Law of Treaties, Official records, Documents of the Conference*, First and second sessions, Vienna, 26 March-24 May 1968 and 9 April-22 May 1969 (United Nations: New York, 1971) pp. 42-3.

[593] See Waldock, Third report, *Yearbook … 1964* vol. II, p. 8-10 and the debate within the ILC in *Yearbook … 1964* vol. I, pp. 33-40.

[594] See e.g. Mr. Paredes, ILC 728th meeting (21 May 1964), *Yearbook … 1964* vol. I, p. 34, para. 12.

[595] *Amoco International Finance Corporation v. Iran*, Iran-US C.T.R., vol. 15, 1987-II, p. 222, para. 112.

claimant who had dual Iran/US nationality might bring a claim before the Tribunal.[596] The Tribunal expressly deployed article 31 (3) (c) of the Vienna Convention in order to justify reference to a wide range of materials on the law of diplomatic protection in international law.[597] These materials supported the Tribunal's conclusion that the applicable rule of international law was that of dominant and effective nationality.[598]

(b) European Court of Human Rights

435. As pointed out in section C above, the ECHR has routinely applied general international law. It has made specific reference to article 31 (3) (c), however, in construing the scope of the right to a fair trial protected by article 6 of the European Convention on Human Rights. In *Golder v. United Kingdom* the Court referred to article 31 (3) (c) where it had to determine whether article 6 guaranteed a right of access to the courts for every person wishing to commence an action in order to have his civil rights and obligations determined.[599] Through that route, the Court referred in turn to article 38 (1) (c) of the Statute of the International Court of Justice as recognizing that the rules of international law included "general principles of law recognized by civilized nations".[600] It found that a right of access to the civil courts was such a general principle of law, and that this could be relied upon in interpreting the meaning of article 6.

436. In *Loizidou* v. *Turkey*, the Court had to decide whether to recognize as valid certain acts of the Turkish Republic of Northern Cyprus ("TRNC").[601] It invoked article 31 (3) (c) as a basis

---

[596] *Esphahanian v. Bank Tejarat*, Iran-US C.T.R., vol. 2, 1983-I, p. 157.

[597] Ibid., p. 161.

[598] See also, to like effect, Case No. A/18, Iran-US C.T.R., vol. 5 1984-I, p. 260. The provision was also relied upon on a dissent in *Grimm v. Iran*, Iran-US C.T.R., vol. 2 1983-I, Dissenting opinion of Howard M. Holtzmann, p. 82 on the question of whether a failure by Iran to protect an individual could constitute a measure "affecting property rights" of his wife.

[599] *Golder v. the United Kingdom*, Judgment 21 February 1975, ECHR Series A (1975) No. 18, p. 13-14, paras. 27-31.

[600] Ibid., p. 17-18, para. 35.

[601] *Loizidou v. Turkey* (*Merits*) Judgment of 18 December 1996, ECHR 1996-VI, p. 2231, para. 44.

for reference to United Nations Security Council resolutions and evidence of State practice supporting the proposition that the TRNC was not regarded as a state under international law.[602] The Republic of Cyprus remained the sole legitimate Government in Cyprus and acts of the TRNC were not to be treated as valid.

437. In a trio of landmark decisions in 2001, the ECHR utilized article 31 (3) (c) in order to decide whether the rules of State immunity might conflict with the right of access to court under article 6 (1) of the European Convention.[603] In each case, the Court decided by majority to give effect to State immunity. The right of access to the courts was not absolute. It could be subject to restrictions, provided that they were proportionate and pursued a legitimate aim. In making that assessment, the Court reasoned as follows:

> … the Convention has to be interpreted in the light of the rules set out in the Vienna Convention … and … Article 31 (3) (c) … indicates that account is to be taken of "any relevant rules of international law applicable in the relations between the parties". The Convention, including Article 6, cannot be interpreted in a vacuum. The Court must be mindful of the Convention's special character as a human rights treaty, and it must also take the relevant rules of international law into account … The Convention should so far as possible be interpreted in harmony with other rules of international law of which it forms part, including to those relating to the grant of State immunity.
>
> It follows that measures taken by a High Contracting Party which reflect generally recognized rules of public international law on State immunity cannot in principle be regarded as imposing a disproportionate restriction on the right of access to court as embodied in Article 6 (1).[604]

---

[602] Ibid., p. 2231, para. 44.

[603] *Al-Adsani v. the United Kingdom,* Judgment of 21 November 2001, ECHR 2001-XI, p. 79; *Fogarty v. the United Kingdom,* Judgment of 21 November 2001, ECHR 2001-XI, p. 157; and *McElhinney v. Ireland,* Judgment of 21 November 2001, ECHR 2001-XI, p. 37. The ECHR also referred to article 31 (3) (c) in *Banković v. Belgium and others,* Decision of 12 December 2001, Admissibility, ECHR 2001-XII, p. 351, para. 57. For a critique of the Court's approach see Alexander Orakhelashvili, "Restrictive Interpretation of Human Rights Treaties in the Recent Jurisprudence of the European Court of Human Rights", EJIL vol. 14 (2003) No. 3, p. 529.

[604] *Al-Adsani v. the United Kingdom,* Judgment of 21 November 2001, ECHR 2001-XI, p. 100, paras. 55-6; see also *Fogarty v. the United Kingdom,* Judgment of 21 November 2001, ECHR 2001-XI, paras. 35-6; *McElhinney v. Ireland,* Judgment of 21 November 2001, ECHR 2001-XI, paras. 36-7.

438. It is useful to note that here the Court might have simply brushed aside State immunity as not relevant to the application of the Convention. But it did not do so. The conflict between article 6 and rules of customary international law on State immunity emerged only because the Court decided to integrate article 6 in its normative environment (doubtless because that is what was claimed by the respondent). The right provided under the European Convention was weighed against the general interest in the maintenance of the system of State immunity. In the end, the Court used article 31 (3) (c) so as to set aside, in this case, the rules of the Convention.[605]

(c) Mox Plant/OSPAR Arbitration

439. As noted in section B above, this was part of the series of cases brought by Ireland against the United Kingdom concerning the operation of the nuclear reprocessing plant at Sellafield.[606] The award was rendered under the 1992 Convention for the Protection of the Marine Environment of the North East Atlantic ("OSPAR Convention"), in proceedings dealing with access to information concerning the operation of the Mox Plant. Ireland contended that a reference to other rules of international law would affect the construction of the parties' obligations under the OSPAR Convention in two ways.

440. First, Ireland submitted that the provision in article 9 (3) (d) of the OSPAR Convention which referred to "applicable international regulations" entailed a reference to international law

---

[605] The decision did not go unchallenged. The dissenting judges did not claim that State immunity was irrelevant or should be excluded from consideration in what was a "pure article 6 matter". Rather, they found that State immunity should, as a matter of international law, cede precedence to what they saw as a peremptory rule of international law (*jus cogens*) prohibiting torture. *Al-Adsani v. the United Kingdom*, Judgment of 21 November 2001, ECHR 2001-XI, pp. 111-113, Joint dissenting opinion of Judges Rozakis and Caflisch, joined by Judges Wildhaber, Costa, Cabral Barreto and Vajić. Other dissenters wished to admit of an exception for torts committed on the territory of the state. *McElhinney v. Ireland*, Judgment of 21 November 2001, ECHR 2001-XI, p. 51-54, Joint dissenting opinion of Judges Caflisch, Cabral Barreto and Vajić.

[606] Dispute Concerning Access to Information Under Article 9 of the OSPAR Convention, Final Award (*Ireland v. the United Kingdom*) (2 July 2003) Permanent Court of Arbitration, ILM vol. 42 (2003) p. 1118. The other cases are: *the MOX Plant case, Request for Provisional Measures Order (Ireland v. the United Kingdom)* (3 December 2001) International Tribunal for the Law of the Sea, ILM vol. 41 (2002) p. 405; the MOX Plant case, Order No. 3 (*Ireland v. the United Kingdom*) (24 June 2003) Permanent Court of Arbitration, ILM vol. 42 (2003) p. 1187.

and practice. This, Ireland alleged, included the 1992 Declaration of the United Nations Conference on Environment and Development (Rio Declaration) and the 2001 Aarhus Convention on Access to Information, Public Participation in Decision-Making, and Access to Justice in Environmental Matters.[607] The United Kingdom replied that the Rio Declaration was not a treaty, and that the Aarhus Convention had not yet been ratified by either Ireland or the United Kingdom.

441. The Tribunal accepted that it was entitled to draw upon current international law and practice in construing this treaty obligation and in so doing made an express reference to article 31 (3) (c). However, it held that neither of the instruments referred to by Ireland were in fact "rules of law applicable between the parties". They were only "evolving international law" that, absent a specific authorization, a Tribunal could not apply.[608] One of the arbitrators, Gavan Griffith QC, dissented on this point.[609] He pointed out that the Aarhus Convention was in force, and that it had been signed by both Ireland and the United Kingdom. The latter had publicly stated its intention to ratify that Convention as soon as possible. At the least, this entitled the Tribunal to treat the Aarhus Convention as evidence of the common views of the two parties on the definition of environmental information.

442. Second, the United Kingdom had submitted that its only obligation under the OSPAR Convention had been discharged by its application of European Community Directive 90/313 having to do with the same subject-matter. The Tribunal did not, however, consider that

---

[607] Rio Declaration on Environment and Development, *Report of the United Nations Conference on Environment and Development*, Rio de Janeiro, 3-14 June 1992 (United Nations publication, Sales No. E.93.I.8 and corrigenda), vol. I: *Resolutions adopted by the Conference*, resolution 1, annex I. Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, United Nations, *Treaty series*, vol. 2161, p. 450.

[608] Dispute Concerning Access to Information Under Article 9 of the OSPAR Convention, Final Award (*Ireland v. the United Kingdom*) (2 July 2003) Permanent Court of Arbitration, ILM vol. 42 (2003) pp. 1137-1138, paras. 99, 101-105.

[609] Dispute Concerning Access to Information Under Article 9 of the OSPAR Convention, Final Award (Ireland *v.* the United Kingdom) (2 July 2003) Permanent Court of Arbitration, ILM vol. 42 (2003) pp. 1161-5.

following the European Community regulation would have constituted a bar for the procedure under OSPAR. Both regimes could coexist, even if they were enforcing identical legal obligations.[610] It observed:

> The primary purpose of employing the similar language is to create uniform and consistent legal standards in the field of the protection of the marine environment, and not to create precedence of one set of legal remedies over the other.[611]

(d) WTO

443. As explained in detail in section C above, several decisions of the Appellate Body of the WTO have considered the application of principles of customary and general international law in the interpretation of the WTO covered agreements. In the *Shrimp-Turtle* case, for example, the Appellate Body made extensive reference to international environmental law texts.[612] It found that the terms "natural resources" and "exhaustible" in paragraph (g) of article XX were "by definition evolutionary" and took account, therefore, of article 56 UNCLOS in support of the proposition that natural resources could include both living and non-living resources.[613] The AB also referred in support of this construction to Agenda 21[614] and to the resolution on assistance of developing countries adopted in conjunction with the Convention on the Conservation of

---

[610] The President of the Tribunal, Professor Michael Reisman, dissented on this issue: *Dispute Concerning Access to Information Under Article 9 of the OSPAR Convention, Final Award* (*Ireland v. the United Kingdom*) (2 July 2003) Permanent Court of Arbitration, ILM vol. 42 (2003) pp. 1157-1160.

[611] Dispute Concerning Access to Information Under Article 9 of the OSPAR Convention, Final Award (*Ireland v. the United Kingdom*) (2 July 2003) Permanent Court of Arbitration, ILM vol. 42 (2003) p. 1144, para. 143.

[612] *United States - Import Prohibition of Certain Shrimp and Shrimp Products* (12 October 1998) WT/DS58/AB/R, DSR 1998:VII, p. 2793-2798, paras. 126-134.

[613] Ibid., p. 2795-2796, para. 130 citing *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971* p. 31. The Tribunal noted that although the Complainant States had ratified UNCLOS, the United States had not done so, but had accepted during the course of the hearing that the fisheries law provisions of UNCLOS for the most part reflected international customary law.

[614] Adopted by the United Nations Conference on Environment and Development, 14 June 1992, *Report of the United Nations Conference on Environment and Development*, Rio de Janeiro, 3-14 June 1992 (United Nations publication, Sales No. E. 93.I.8 and Corrigenda).

Migratory Species of Wild Animals.[615] In so doing, it emphasized that the chapeau of article XX was "but one expression of the principle of good faith", which it found to be a general principle of international law.[616] "Our task here", said the Tribunal expressly relying on article 31 (3) (c), "is to interpret the language of the chapeau, seeking interpretative guidance, as appropriate, from the general principles of international law".[617] In deciding the question whether sea-turtles were "exhaustible", the Appellate Body referred to the fact that all of the seven recognized species of sea-turtles were listed in Appendix 1 of the Convention on International Trade in Endangered Species of Wild Fauna and Flora ("CITES").

444. The relations between the WTO covered treaties and multilateral environmental agreements (MEAs) and human rights instruments are now the subject of a growing scholarly literature.[618] The Appellate Body has always accepted that the requirement in article 3 (2) DSU that panels apply "customary rules of interpretation of public international law" requires rigorous application of articles 31-32 VCLT to the issues before it. It has not hesitated to reverse panel decisions on the ground that they have failed to do so.[619] In carrying out its interpretative function it has made extensive reference to other rules of international law. But it has never found that those other rules would have overridden anything under the covered agreements of the WTO - although they have influenced the interpretation and application of those agreements.

445. For example, the WTO bodies have frequently taken account of regional trade agreements (RTAs) and bilateral trade agreements (BTAs). In the *US-FSC (article 21.5-EC)*

---

[615] Final Act of the Conference to Conclude a Convention on the Conservation of Migratory Species of Wild Animals, ILM vol. 19 (1980) p. 11 and the Convention on the Conservation of Migratory Species of Wild Animals, p. 15.

[616] *United States - Import Prohibition of Certain Shrimp and Shrimp Prod*ucts (12 October 1998) WT/DS58/AB/R, DSR 1998:VII, p. 2807, para. 158.

[617] Ibid., p. 2807, para. 158.

[618] See e.g. Joost Pauwelyn, "The Role of Public International Law …", supra note 42, p. 535; Gabrielle Marceau, "WTO Dispute Settlement and Human Rights", supra note 42, Andreas F. Lowenfeld, *International Economic Law*, supra note 240, pp. 314-339; and Pauwelyn, *Conflict of Norms* … supra note 21.

[619] *United States - Standards for Reformulated and Conventional Gasoline* (29 April 1996) WT/DS2/AB/R, DSR 1996:I, p. 15-17.

case (2002*)*, the AB referred to a wide range of RTAs and BTAs and found that they shared what it chose to call a "widely accepted common element" in their definition of the term "foreign-source income" that it then used in order to interpret that expression in the context of the SCM agreement.[620] In *EC-Poultry* (1998), the AB explained its recourse to the 1994 Oilseeds Agreement as a "supplementary means of interpretation [of the relevant WTO commitment] pursuant to article 32 of the Vienna Convention, as it is part of the historical background of the concessions of the European Communities …"[621] In the *Korea-Beef* case (2000), again a Panel made reference to various BTAs entered into by Korea "not with a view to 'enforcing' the content of those bilateral agreements but strictly for the purpose of interpreting an ambiguous WTO provision".[622] It may be argued that these agreements have been used only as a "supplementary means of interpretation" and not by virtue of article 31 (3) (c).[623] Such recourse has often been rationalized as providing evidence of the intent of the parties or of the "ordinary meaning" of the treaty words.

446. Yet there is no reason not to search the legal basis for the "taking account" of such extraneous agreements precisely from that article - and especially in case such "taking account" reaches beyond a mere footnote reference. This would appear to be reasonable for example in cases such as the *Chile-Price Band* case (2002) where the Panel both interpreted and *applied* the Agreement between Chile and Mercosur in a way that excluded its consideration in the present case. The Panel referred to the Preamble and article 24 of that instrument (the so-called ECA 35 Agreement), noting that it suggested that the Parties (Chile and Mercosur) had not intended to exclude the possibility that different rules might be applicable in other international agreements - i.e. the WTO agreements. The Panel, in other words, applied a non-WTO treaty in order to

---

[620] *United States - Tax Treatment for "Foreign Sales Corporations" (Article 21.5 - EC*) (14 January 2002) WT/DS108/AB/RW, paras. 141-145 (especially footnote 123).

[621] *EC - Measures Affecting the Importation of Certain Poultry Products* (23 July 1998) WT/DS69/AB/R, DSR 1998:V, p. 2060, para. 83 and generally pp. 2057-2060, paras. 77-85.

[622] *Korea - Measures Affecting Imports of Fresh, Chilled and Frozen Beef* (10 January 2000) WT/DS161/R, WT/DS161/AB/R, DSR 2001:I, p. 59, para. 539.

[623] See Isabelle Van Damme, "What Role is there for Regional International Law in the Interpretation of the WTO Agreements?", supra note 421.

operate a *renvoi* - by interpreting it so as to allow a treatment in a WTO context that would not have been allowed under it (thus creating the presumption that had the ECA 35 Agreement not been interpreted in such a way, then the WTO standard would have been inapplicable).[624]

447. One sometimes hears the claim that this might not even be permissible in view of the express prohibition in the DSU according to which the "[r]ecommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements" (DSU 3:2 *in fine*). Such a view would, however, presume that the covered agreements are "clinically isolated" precisely in the way the AB has denied. Two considerations are relevant here. First, when article 31 (3) (c) VCLT is used, it is used with the specific authorization of the DSU itself. But second, and more important, interpretation does not "add" anything to the instrument that is being interpreted. It constructs the meaning of the instrument by a legal technique (a technique specifically approved by the DSU) that involves taking account of its normative environment. Here it appears immaterial whether recourse to other agreements is had under article 31 (3) (c), as supplementary means of interpretation, as evidence of party intent or of ordinary meaning or good faith (the presumption that States do not enter agreements with the view of breaching obligations). The rationale remains that of seeing States when they are acting within the WTO system as identical with themselves as they act in other institutional and normative contexts. Interpretation *does not add or diminish rights or obligations* that would exist in some lawyers' heaven where they could be ascertained "automatically" and independently of interpretation. All instruments receive meaning through interpretation - even the conclusion that a meaning is "ordinary" is an effect of interpretation that cannot have *a priori* precedence over other interpretations.

448. Finally, significant, though limited use of article 31 (3) (c) was made by a WTO Panel in the recent *EC - Biotechnical Products* case (2006). Here the European Community had argued that its ban on the importation of genetically modified organisms (GMOs) could be justified, inter alia, by certain non-WTO rules. It had argued, in particular, that account should be taken of the 1992 Convention on Biological Diversity and the related Biosafety Protocol of 2000. Having

---

[624] *Chile - Price Band System and Safeguard Measures Relating to Certain Agricultural Products* (3 May 2002) WT/DS207/R, paras. 7.81-7.86. Likewise in *EC-Regime for the Importation, Sale and Distribution of Bananas* (25 September 1997) WT/DS27/AB/R, DSR 1997:II, p. 661, para. 167.

first determined that the two instruments indeed established "rules of international law", the Panel then considered whether they were also "applicable in the relations between the parties". It found that the expression "party" there to mean "a State which has consented to be bound by the treaty and for which the treaty is in force".[625] It dismissed the view that the reference to "parties" in article 31 (3) (c) would have meant (merely) parties to the dispute. All the parties to the treaty to be interpreted needed to have become parties to that other treaty. The Panel, in other words, read the WTO treaty in a *non-bilateral* way so as to "ensure[ ] or enhance[ ] the consistency of the rules of international law applicable to these States and contribute[ ] to avoiding conflicts between the relevant rules".[626] Because the United States had not become a party to either one of these treaties (although it had signed the Biodiversity Convention), they could not be "taken into account".

449. The Panel also considered the argument by the EC that the precautionary principle might, since 1998 when the argument had been made in the *EC-Hormones* case, have been established as a general principle of international law (the Panel's language here is slightly unclear, however, occasional reference being made to "general principles of law"). The Panel approved that would this be the case, it would then become relevant under article 31 (3) (c). It found, however, though in a somewhat obscure way, both that the "legal status of the precautionary principle remains unsettled" and it "need not take a position on whether or not the precautionary principle is a recognized principle of general or customary international law".[627]

450. Two aspects of this case are important. First, the Panel accepted that article 31 (3) (c) applied to general international law and other treaties. Second, it interpreted article 31 (3) (c) so that the treaty to be taken account of must be one to which all parties to the relevant WTO treaty are parties. This latter contention makes it practically impossible ever to find a multilateral context where reference to other multilateral treaties as aids to interpretation under article 31 (3) (c) would be allowed. The panel buys what it calls the "consistency" of its

---

[625] *EC - Measures Affecting the Approval and Marketing of Biotech Products* (7 February 2006) WT/DS291-293/INTERIM, p. 299 para. 7.68.

[626] Ibid., p. 300, para. 7.70.

[627] Ibid., p. 307, para. 7.89.

interpretation of the WTO Treaty at the cost of the consistency of the multilateral treaty system as a whole. It aims to mitigate this consequence by accepting that other treaties may nevertheless be taken into account as facts elucidating the ordinary meaning of certain terms in the relevant WTO treaty. This is of course always possible and, as pointed out above, has been done in the past as well. However, taking "other treaties" into account as evidence of "ordinary meaning" appears a rather contrived way of preventing the "clinical isolation" as emphasized by the Appellate Body.

(e) International Court of Justice

451. Very significant use of article (31) (3) (c) was made by the International Court of Justice in the *Oil Platforms* case (*Iran v. United States of America*).[628] Here the Court was called upon to interpret two provisions of the 1955 Treaty of Amity, Economic Relations and Consular Rights between Iran and the United States. It was requested to determine whether actions by Iran which were alleged to imperil neutral commercial shipping in the Iran/Iraq war, and the subsequent destruction by the United States Navy of three Iranian oil platforms in the Persian Gulf, were breaches of the Treaty. The Court's jurisdiction was limited to disputes arising as to the interpretation or application of the Treaty. It had no other basis for jurisdiction which might have provided an independent ground for the application of customary international law.[629] One of the operative provisions of the Treaty provided that:

> The present Treaty shall not preclude the application of measures:
>
> … (d) necessary to fulfil the obligations of a High Contracting Party for the maintenance or restoration of international peace and security, or necessary to protect its essential security interests.[630]

---

[628] *Oil Platforms* case *(Iran v. United States of America) (Merits) I.C.J. Reports 2003*, p. 161, para. 41.

[629] Cf. the position in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) I.C.J. Reports 1986* p. 14, in which the Court was asked to interpret very similar treaty language, but also had an additional basis for its jurisdiction as a result of unilateral declarations made by both parties under Article 36, para. 2 of its Statute.

[630] Article XX, para. 1 (d) of the Treaty of Amity, Economic Relations and Consular Rights between the United States and Iran, *Oil Platforms* case (*Iran v. United States of America*) (*Merits) I.C.J. Reports 2003*, para. 32.

452. According to the United States this provision was intended simply to exclude from the scope of the treaty all such measures. It should be interpreted in accordance with its ordinary meaning, leaving a wide margin of appreciation for each State to determine its essential security interests.[631] It submitted that there was no place to read into the treaty rules derived from the customary international law on the use of force (as Iran had argued), and that to do so would violate the limits on the Court's jurisdiction.

453. The Court approached the question of interpretation rather differently. It asked first whether such necessary measures could include a use of armed force, and, if so, whether the conditions under which such force could be used under international law (including any conditions of legitimate self-defence) applied.[632] Having referred to other aids to interpretation, the Court then reasoned:

> Moreover, under the general rules of treaty interpretation, as reflected in the 1969 Vienna Convention on the Law of Treaties, interpretation must take into account 'any relevant rules of international law applicable in the relations between the parties' (Article 31, paragraph 3(c)). The Court cannot accept that Article XX, paragraph 1(d), of the 1955 Treaty was intended to operate wholly independently of the relevant rules of international law on the use of force, so as to be capable of being successfully invoked, even in the limited context of a claim for breach of the Treaty, in relation to an unlawful use of force. The application of the relevant rules of international law relating to this question thus forms an integral part of the task of interpretation entrusted to the Court by … the 1955 Treaty.[633]

454. The Court then proceeded to apply those general rules of international law to the conduct of the United States. It concluded that the measures could not be justified as necessary under the Treaty "since those actions constituted recourse to armed force not qualifying,

---

[631] *Oil Platforms* case (*Iran v. United States of America*) International Court of Justice, Rejoinder of the United States, 23 March 2001, Part IV, pp. 139-140, http://www.icj-cij.org/icjwww/idocket/iop/ioppleadings/iop_ipleadings_20010323_rejoinder_us_04.pdf (last visited 23 March 2006).

[632] *Oil Platforms* case (*Iran v. United States of America*) (*Merits)* International Court of Justice, *I.C.J. Reports 2003*, para. 40.

[633] Ibid., para. 41.

under international law on the question, as acts of self-defence, and thus did not fall within the category of measures contemplated, upon its correct interpretation, by that provision of the Treaty".[634]

455. The Court's judgment on the merits was supported by a large majority of the judges. Different views on the question of the proper approach to interpretation were, however, expressed in the separate opinions.[635] The narrowest view on article 31 (3) (c) was taken by Judge Buergenthal according to whom the Court's jurisdiction was limited to only those matters which the parties had agreed to entrust to it, and opined that this also limited the extent to which the Court could refer to other sources of law in interpreting the treaty before it. In his view, this limitation excluded reliance on other rules of international law, whether customary or conventional, and even if found in the United Nations Charter.[636] This would in practice nullify the meaning of article 31 (3) (c) and go against a wide international judicial and arbitral practice. Moreover, it would suggest arbitrarily that a treaty's meaning to its parties is independent of the normative environment in which the parties have agreed to conclude it.

456. The opposite position was taken by Judge Simma who considered that the Court might have taken the opportunity to declare the customary international law on the use of force, and the importance of the Charter even more firmly than it had.[637] Following a position earlier taken by Lauterpacht and others, he advocated a wide use of general international law and other treaty rules applicable to the parties, and held that this could be justified under article 31 (3) (c).[638] Judge Higgins was much more critical of the Court's use of article 31 (3) (c).[639] She pointed to

---

[634] Ibid., para. 78.

[635] The Court entered judgment by 14 votes to 2 declining to uphold Iran's claim (Judges Al-Khasawneh and Elaraby dissenting) and by 15 votes to 1 declining to uphold the United States' counterclaim (Judge Simma dissenting).

[636] *Oil Platforms* case (*Iran v. United States of America*) (*Merits) I.C.J. Reports 2003* (separate opinion of Judge Buergenthal), paras. 22-3.

[637] Ibid. (separate opinion of Judge Simma) International Court of Justice, paras. 5-16.

[638] Ibid., para. 9.

[639] Ibid. (separate opinion of Judge Higgins), paras. 40-54.

the need to interpret article XX para. 1 (d) in accordance with the ordinary meaning of its terms and in its context, as part of an economic treaty. She considered that the provision was not one that "on the face of it envisages incorporating the entire substance of international law on a topic not mentioned in the clause - at least not without more explanation than the Court provides".[640]

457. The position of Judge Kooijmans was situated somewhere in the middle. He suggested that the Court should have begun with an analysis of the text of the 1955 Treaty itself. But in order to determine whether a particular measure involving the use of force was "necessary" under that Treaty, the Court had "no choice but to rely for this purpose on the body of general international law".[641] Even as the Court had no jurisdiction under the Charter, recourse to the concept of self-defence under "general international law" could not be avoided in order to give a meaning to the treaty over which it did have jurisdiction.[642] This is, in fact, to say no more than what has been affirmed throughout this Report: general international law provides the background for all application of special law. At the same time, a wide number of rules about statehood, maritime passage, representation and responsibility underlay the *Oil Platforms* case and was unproblematically presumed as applicable by all parties.

458. The *Oil Platforms* case represents a bold application by the ICJ of article 31 (3) (c) in order to move from a technical treaty provision to what it saw as the real heart of the matter - the use of force.[643] The Court imports into its treaty analysis a substantial body of general international law, including the United Nations Charter. The conduct of the State in question was then assessed by reference to the position under general international law, which in turn was applied to assess its position under the Treaty. The Court for the first time acknowledged the pivotal role of article 31 (3) (c) in this process, but did not give further guidance as to when and how it should be applied.

---

[640] Ibid., para. 46.

[641] Ibid. (separate opinion of Judge Kooijmans) p. 1401, para. 48.

[642] Ibid., para. 52.

[643] As highlighted in Emmanuel Jouannet, "Le juge international face aux problèmes d' incoherence et d'instabilité du droit international …. ", supra note 126. The case has inspired varied reactions. For those who celebrate the Court's bold view of Article 31 (3) (c), see Pierre-Marie Dupuy, *Droit international public* (Paris: Dalloz, 2004) 7th edn pp. 314-315.

459. Recourse by the Court to article 31 (3) (c) VCLT inasmuch as it was to *general international law* may in fact have been unnecessary. The Treaty provision at issue contained the open-ended clause "necessary" that required interpretation. Absent the possibility of using a documented party intent to elucidate it, the Court could simply have turned to what "general international law" said on the content of that standard. The rationale for this was stated by the ICJ in the *North Sea Continental Shelf* cases (1969). General customary law

> by its very nature must have equal validity for all members of the international community, and cannot therefore be the subject of any right of unilateral exclusion.[644]

460. To assume that a tribunal may not be entitled to apply general international law in the interpretation of a treaty is to hold that once States conclude a bilateral treaty, they create a vacuum that consists precisely of this type of exclusion. As we have seen in section C above, no support may be found from international practice for such a contention. On the contrary, an enormous amount of materials support the applicability of general international law in order to interpret any particular legal relationship, whether also addressed by a bilateral treaty, a local custom, or a series of informal exchanges amounting to binding rules through acquiescence or estoppel.

4. Special questions

461. Three special questions relate to the application of article 31 (3) (c). One concerns the extent of the reference therein. What are the "rules of international law applicable in the relations between the parties" to which the provision refers? The second problem concerns the normative weight of the reference. What does it mean that those rules "shall be taken into account, together with the context"? The third is the question of inter-temporality: what is the critical date for the rules to be taken into account - the date of the conclusion of the treaty or the law in force at the moment of its application?

---

[644] *North Sea Continental Shelf cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands) I.C.J. Reports 1969* pp. 38-39, para. 63.

(a) The rules to be "taken into account"

462. That international tribunals have, until recently, rarely made any specific use of article 31 (3) (c) is not to say that they would not have referred to law external to the treaty to be applied. By their very nature, customary law and general principles of law (and general principles of *international* law) exist as *lex generalis* in relation to any particular agreements. They are fully applicable and often applied alongside particular treaties. Reference to article 31 (3) (c) has normally concerned the possibility and extent of recourse to rules that exist at the same level of generality and binding force as the treaty to be interpreted (usually other treaties) but where they might seem to conflict with it or put forward considerations that otherwise seem unorthodox in the context.

(i) Customary law and general principles

463. As explained in section C above, although there is no official hierarchy between the sources of international law, there is, nonetheless, an informal hierarchy that results from the procedure through which lawyers approach applicable law, proceeding from the *lex specialis* to the *lege generali*, or from the more specific to the more general - that is to say usually from the treaty text to customary law and general principles of law. Max Huber once put this illuminatingly in terms of a progression of legal reasoning through concentric circles, each one constituting a field of reference of potential assistance in treaty interpretation:

> Il faut donc chercher la volonté des parties dans le texte conventionnel, d'abord dans les clauses relatives à la contestation, ensuite dans l'ensemble de la convention, ensuite dans le droit international général, et enfin dans les principes généraux de droit reconnus par les nations civilisées. C'est par cet encirclement concentrique que le juge arrivera dans beaucoup de cas à établir la volonté presumptive des parties 'conformément aux exigencies fondamentales de la plenitude du droit et de la justice internationale'. Ainsi que le rapporteur formule admirablement la tâche du juge.[645]

464. Article 31 (3) (c) is only part of the larger interpretation process, in which the interpreter must first consider the plain meaning of the words in a treaty, if any, proceeding therefrom to the context and to considerations relating to object and purpose, subsequent practice and, eventually,

[645] *Annuaire* … 1952-I, pp. 200-1.

travaux preparatoires. This is not meant as an actual description of a psychological process. The practice of interpretation cannot be captured in such neatly rational terms.[646] As Waldock himself noted, in a characteristically careful fashion: "interpretation of documents is to some extent an art, and not an exact science".[647] But it is an apt account of competent public reasoning by lawyers and tribunals. In the *Oil Platforms* case, for example, the Court started with an analysis of the text of article XX (1) (d) of the 1955 Treaty of Amity and proceeded from there to the intention of the parties that, again, pointed to the need to consider the state of the general law on the use of force. The starting-point is the treaty itself, with interpretation proceeding from the more concrete and obvious (dictionary, context), to the less tangible and less obvious (object and purpose, analogous treaties etc.) in order to give the text a justifiable meaning.

465. To examine the interpretative process not as a psychological (thought-) process but as an exercise in competent legal argument inevitably portrays it as an effort at "systemic integration" - namely integration in the system of principles and presumptions that underlie the idea of an inter-State legal order and provide its argumentative materials. Among them, mention should be made of two presumptions, one positive, the other negative:

(a) According to the *positive presumption*, parties are taken "to refer to general principles of international law for all questions which [the treaty] does not itself resolve in express terms or in a different way";[648]

(b) According to the *negative presumption*, in entering into treaty obligations, the parties intend not to act inconsistently with generally recognized principles of international law or with previous treaty obligations towards third States.[649]

---

[646] One of the best analyses of the interpretative process in an international law context remains Max Sorensen, *Les sources du droit international. Etude sur la jurisprudence de la Cour permanente de justice internationale* (Copenhagen: Munksgaard, 1946) especially pp. 210-236.

[647] Waldock, Third Report, *Yearbook … 1964* vol. II, p. 54, para 6.

[648] *Georges Pinson* case (France/United Mexican States) Award of 13 April 1928, UNRIAA, vol. V, p. 422.

[649] *Case concerning the Right of Passage over Indian Territory (Portugal v. India) (Preliminary Objections) I.C.J. Reports 1957* p. 142; Sir Robert Jennings and Sir Arthur Watts (eds.), Oppenheim's … supra note 37, p. 1275.

466. In accordance with these presumptions, an especially significant role for customary international law and general principles of law opens. As a WTO Panel recently put it:

> … the relationship of the WTO Agreements to customary international law is broader than [the reference in article 3.2 [re: customary rules of interpretation]. Customary international law applies generally to the economic relations between WTO Members. Such international law applies to the extent that the WTO treaty agreements do not 'contract out' from it. To put it another way, to the extent that there is no conflict or inconsistency, or an expression in a covered WTO agreement that implies differently, we are of the view that the customary rules of international law apply to the WTO treaties and to the process of treaty formation under the WTO.[650]

467. Most of the cases considered above have involved the assertion and application of principles of customary international law. This has been typically done where the treaty rule is unclear or open-textured and its meaning is determined by reference to a developed body of international law (as in the issue of double nationality dealt with by the Iran-US Claims Tribunal in *Esphahanian* v. *Bank Tejarat* or in the construction of article XX of the GATT discussed in the connection with *Shrimp-Turtle*), or the terms used in the treaty have a recognized meaning in customary international law, to which the parties can therefore be taken to have intended to refer. This was found to be the case, for example, in the construction of the terms "fair and equitable treatment" and "full protection and security," interpreted by the NAFTA Free Trade Commission in *Pope & Talbot Inc v. Canada*.[651]

468. Here it is really immaterial whether or not a tribunal expressly chooses to invoke article 31 (3) (c). These general rules and principles are applicable as a function of their mere "generality" and their validity is based on nothing grander than their having passed what Thomas Franck calls the "but of course test" - a more or less unstable "common sense

---

[650] *Korea - Measures Affecting Government Procurement* (1 May 2000) WT/DS163/R, p. 183, para. 7.96.

[651] *Pope & Talbot Inc v. Canada* (31 May 2002) NAFTA Arbitral Tribunal, ILM vol. 41 (2002) p. 1347, citing the Interpretation of the NAFTA Free Trade Commission.

of the international community (Governments, judges, scholars)".[652] No special reference was needed by the Permanent Court of International Justice, for example, when in the *Chorzów Factory* case, it made the point that:

> … it is a principle of international law, and even a general principle of law that any breach of an engagement involves an obligation to make reparation.[653]

469. The same concerns many principles identified by the ICJ, such as freedom of maritime communication,[654] "good faith",[655] "estoppel",[656] *ex injuria non jus oritur*,[657] and so on. Further examples include the criteria of statehood (*Loizidou*); the law of State responsibility (which has influenced both the reach of human rights obligations[658] and the law of economic counter-measures in the WTO); the law of State immunity; the use of force; and the principle of good faith.[659] The general principles of law recognized by civilized nations perform a rather similar task in locating the treaty provision within a principled framework (as was done in determining the scope of the fair trial right in *Golder*). Pauwelyn lists among procedural principles regularly used by the Appellate Body of the WTO those of "burden of proof, standing, due process, good faith, representation before panels, the retroactive force of treaties or error in treaty formation".[660] These are not "enacted" by positive acts of States

---

[652] Thomas M. Franck, "Non-Treaty Law-making: When, What and How?" in Rüdiger Wolfrum & Volker Röben, *Development of International Law in Treaty-making*, supra note 10, p. 423.

[653] *Case concerning the Factory at Chorzów (Merits) P.C.I.J. Series A*, No. 17 (1928) p. 29.

[654] *Corfu Channel* case *(the United Kingdom v. Albania) (Merits) I.C.J. Reports 1949* p. 22.

[655] *Nuclear Tests* case (*Australia v. France*) *I.C.J. Reports 1974* p. 268, para. 46.

[656] *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand) (Merits) I.C.J. Reports 1962* pp. 31-32.

[657] *Legal Consequences for States of the Continued Presence of South Africa in Namibia notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971* p. 299.

[658] See e.g. *Loizidou v. Turkey* (Preliminary Objections) Judgment of 23 March 1995, ECHR Series A (1995) No. 310, para. 57-64. See also the reliance on the public international law rules of jurisdiction in *Banković v. Belgium and others*, Decision of 12 December 2001, Admissibility, ECHR 2001-XII, pp. 351-352, paras. 59-60.

[659] See Pauwelyn, Conflict of Norms … supra note 21, p. 271.

[660] Joost Pauwelyn, "The World Trade Organization" in Charo Huesa and Karel Wellens, *L'influence des sources sur, …* supra note 14, pp. 225-226 and notes therein.

(although they may well be traceable back to State will) but parts of the general frame of international law or - what amounts to the same - aspects of the legal craft of justifying decisions to legal disputes.[661]

(ii) Other applicable conventional international law

470. As pointed out above, article 31 (3) (c) goes beyond the truism that "general international law" is applied generally and foresees the eventuality that another rule of *conventional* international law is applicable in the relations between the parties. The main problem is this: is it necessary that *all* the parties to the treaty being interpreted are also parties to the treaty relied upon as the other source of international law for interpretation purposes?

471. The problem is particularly acute where the treaty under interpretation is a multilateral treaty of very general acceptation (such as the WTO covered agreements). As we saw, the Panel in *EC-Biotech Products* concluded that only agreements to which *all* WTO members were parties could be taken into account under article 31 (3) (c) in the interpretation of WTO agreements.[662] Bearing in mind the unlikeliness of a precise congruence in the membership of most important multilateral conventions, it would become unlikely that *any* use of conventional international law could be made in the interpretation of such conventions. This would have the ironic effect that the more the membership of a multilateral treaty such as the WTO covered agreements expanded, the more those treaties would be cut off from the rest of international law.[663] In practice, the result would be the isolation of multilateral agreements as "islands" permitting no references *inter se* in their application. It would also prohibit any use of regional or other particular implementation agreements - including *inter se* agreements - that may have been concluded under a framework treaty, as interpretative aids to the latter. This would seem

---

[661] See further Martti Koskenniemi, "General Principles. Reflections on Constructivist Thinking in International Law", in Martti Koskenniemi (ed.), *Sources of International Law,* supra note 24, pp. 359-399.

[662] *EC - Measures Affecting the Approval and Marketing of Biotech Products* (7 February 2006) WT/DS291-293/INTERIM, pp. 299-300, paras. 7.68-7.70.

[663] Marceau, "WTO Dispute Settlement and Human Rights", supra note 42, p. 781.

contrary to the legislative ethos behind most of multilateral treaty-making and, presumably, with the intent of most treaty-makers. Now of course some of this might be mitigated by requiring a finding that, insofar as the treaty were not in force between all members to the treaty under interpretation, the rule contained in it was treated as customary international law.[664] This approach would maintain the "generality" of at least some multilateral treaties. But it would have an inappropriately restrictive effect in two situations:

(a) It could preclude reference to treaties which have very wide acceptance in the international community (including by the disputing States) but which are nevertheless not universally ratified and which are not accepted in all respects as stating customary international law (such as UNCLOS);

(b) It could also preclude reference to treaties which represent the most important elaboration of the content of international law on a specialist subject matter, on the basis that they have not been ratified by all the parties to the treaty under interpretation.

472. A better solution is to permit reference to another treaty provided that the *parties in dispute* are also parties to that other treaty. Although this creates the possibility of eventually divergent interpretations (depending on which States parties are also parties to the dispute), that would simply reflect the need to respect (inherently divergent) party will as elucidated by reference to those other treaties as well as the bilateralist character of most treaties underpinned by the practices regarding reservations, *inter se* modification and successive treaties, for example.[665] The risk of divergence - a commonplace in treaty law - would be mitigated by making the distinction between "reciprocal" or "synallagmatic" treaties (in which case mere "divergence" in interpretation creates no problem) and "integral" or "interdependent" treaties

[664] See, e.g., the emphasis placed in *Shrimp-Turtle* on the fact that, although the United States had not ratified the UNCLOS, it had accepted during the course of argument that the relevant provisions for the most part reflected international customary law, *United States - Import Prohibition of Certain Shrimp and Shrimp Products* (12 October 1998) WT/DS58/AB/R, DSR 1998:VII,p. 2814, para. 171, note 174.

[665] It cannot be too much emphasized that this risk of "divergence" is no greater than on *any* interpretation of a multilateral treaty by reference to party will.

(or treaties concluded *erga omnes partes*) where the use of that other treaty in interpretation should not be allowed to threaten the coherence of the treaty to be interpreted.[666] This would also respond to the precise concern of the WTO Panel in *EC-Biotech Products* about consistency in treaty interpretation.[667] In addition, it might also be useful to take into account the extent to which that other treaty relied upon can be said to have been "implicitly" accepted or at least tolerated by the other parties "in the sense that it can reasonably be considered to express the common intentions or understanding of all members as to the meaning of the … term concerned".[668] This approach has in fact been adopted in some of the decisions of the WTO Appellate Body.[669] It gives effect to the sense in which certain multilateral treaty notions or concepts, though perhaps not found in treaties with identical membership, are adopted nevertheless widely enough so as to give a good sense of a "common understanding" or a "state of the art" in a particular technical field without necessarily reflecting formal customary law.

(b) The weight of the obligations to be taken into account

473. The above considerations have also answered the question of the *weight* to be given to the law - the rights and obligations - that is to be taken account of under article 31 (3) (c). The importance of those rights and obligations does not reside in their overriding character. As we have seen, this function is reserved by international law to *jus cogens*. An approach which gave excessive weight to the normative environment over particular treaties would - like a generalized presumption about the precedence of *lex generalis* over *lex specialis* - stifle treaty-making: the need to react to new circumstances and to give effect to interests or needs that for one reason or

---

[666] For a recent exploration of this idea in the context of the WTO Covered Agreements, see Pauwelyn, *Conflict of Norms* … supra note 21, pp. 440-486 and Joost Pauwelyn, "A Typology of Multilateral Treaty Obligations: Are WTO Obligations Bilateral or Collective in Nature?", EJIL vol. 14 (2003) p. 907.

[667] *EC - Measures Affecting the Approval and Marketing of Biotech Products* (7 February 2006) WT/DS291-293/INTERIM, p. 300, para. 7.70.

[668] Pauwelyn, *Conflict of Norms* … supra note 21, pp. 257-263 supports this approach in the case of the WTO Covered Agreements.

[669] See, e.g., the sources relied upon by the Appellate Body in *United States - Import Prohibition of Certain Shrimp and Shrimp Products* (12 October 1998) WT/DS58/AB/R, DSR 1998:VII, p. 2795-2796, para. 130.

another have been underrepresented in traditional law. Rather, the significance of the need to "take into account" lies in its performance of a systemic function in the international legal order, linking specialized parts to each other and to universal principles.[670]

474. The question of the normative weight to be given to particular rights and obligations at the moment they appear to clash with other rights and obligations can only be argued on a case-by-case basis. There is little to be added in this regard to what Judges Higgins, Buergenthal and Kooijmans observed, in considering the balance to be struck between the conflicting dictates of the rule or State immunity on the one hand and liability for international crimes on the other:

> International law seeks the accommodation of this value [the prevention of unwarranted outside interference in the domestic affairs of States] with the fight against impunity, and not the triumph of one norm over another.[671]

(c) Inter-temporality and general developments in international law

475. The third general issue - and the one that raised most of the discussion in the Commission itself - is the question of inter-temporal law, or in other words, the question of what should be the right moment in time (critical date) for the assessment of the rules that should be "taken into account" under article 31 (3) (c)? The traditional rule,[672] and the one proposed to the Commission by Waldock consisted of two parts: one affirming "contemporaneity", the other allowing the changes in the law to be taken into account. According to the former aspect, a

---

[670] For an early elaboration, see especially Hersch Lauterpacht, *Private Law Sources and Analogies of International Law* (Longman's: London, 1927) (highlighting the role of principles of private law in the construction of international legal relationships).

[671] *Case concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium) I.C.J. Reports 2002* (Joint separate opinion of Judges Higgins, Kooijmans and Buergenthal) pp. 86-87, para. 79.

[672] That rule was stated by Judge Huber in the context of territorial claims and its two parts are as follows: "… a juridical fact must be appreciated in the light of the law contemporary with it, and not the law in force at the time when a dispute arises" ("contemporaneity") and "The same principle which subjects the act creative of a right to the law in force at the time the right arises, demands that the existence of the right, in other words, its continued manifestations, shall follow the conditions required by the evolution of law". *Island of Palmas* case (*the Netherlands/United States of America*) Award of 4 April 1928, UNRIAA, vol. II, pp. 845 and 839.

treaty was to be interpreted "in the light of the law in force at the time when the treaty was drawn up".[673] The latter aspect required, however, that "the application of a treaty shall be governed by the rules of international law in force at the time when the treaty is applied".[674]

476. The rationale of the two parts of the principle is clear, and difficult to contest. On the one hand, when States create a legal relationship, they undoubtedly do this bearing in mind the normative environment as it existed at the moment when the relationship was formed. Or in other words, deference to the law in force at the time when a treaty is concluded takes best account of the intent of the parties. Nevertheless, no legal relationship can remain unaffected by time. This is confirmed already by the need to take into account the subsequent practice of the parties. In a similar way, the views of the parties about the meaning and application of the treaty develop in accordance with the passing of time, the accumulation of experience and new information and novel circumstances.

477. The doctrine of inter-temporal law is essentially a reminder of these two rationales, one pointing to the past as a guide for finding party intent, the other pointing to the present for the exactly same reason. As pointed out by Jiménez de Aréchaga in the Commission in 1964:

> The intention of the parties should be controlling, and there seemed to be two possibilities so far as that intention was concerned: either they had meant to incorporate in the treaty some legal concept that would remain unchanged, or, if they had no such intention, the legal concepts might be subject to change and would then have to be interpreted not only in the context of the instrument, but also within the framework of the entire legal order to which they belong. The free operation of the will of the parties should not be prevented by crystallizing every concept as it had been at the time when the treaty was drawn up.[675]

---

[673] Draft article 56 (1), Waldock, Third report, *Yearbook … 1964* vol. II, p. 8.

[674] Draft article 56 (2), ibid., p. 9.

[675] Mr. Jiménez de Aréchaga, 728th meeting (21 May 1964) *Yearbook ... 1964* vol. I, p. 34, para. 10 suggests a rather qualified version of the doctrine: "Provided that, where it can be established that it was the intention of the parties that the meaning or scope of a term or expression used in the treaty should follow the development of the law, the treaty must be interpreted so as to give effect to that intention." Thirlway, "The Law and Procedure of the International Court of Justice 1960-1989", Part III, supra note 582, p. 57. See also: Hugh Thirlway, "The Law and Procedure of the International Court of Justice 1960-1989", Part I, supra note 97, pp. 135-143 and Rosalyn Higgins, "Time and the Law: International Perspectives on an Old Problem", ICLQ vol.46 (1997) pp. 515-9.

478. Because it seems pointless to try to set any general and abstract preference between the past and the present,[676] it is best, once again, to merely single out some considerations that may be relevant when deciding whether to apply article 31 (3) (c) so as to "take account" of those "other obligations" as they existed when the treaty was concluded or as they exist when it is being applied. The starting-point must be, again, the fact that deciding this issue is a matter of interpreting the treaty itself. Does the language used give any indication? The starting-point of the argument might plausibly be the "principle of contemporaneity" - with regard to the normative environment as it existed at the moment when the obligation entered into force for a relevant party.[677] When might the treaty language itself, in its context, provide for the taking account of future developments? Examples of when this might be a reasonable assumption include at least:

(a) Use of a term in the treaty which is "not static but evolutionary".[678] This is the case where the parties by their choice of language intend to key into that evolving meaning without adopting their own idiosyncratic definition (for example, use of terms such as "expropriation" or "continental shelf" in the relevant treaty).[679] This may also be the case where, by reading that language against its object and purpose, it appears that the parties have committed themselves to a programme of progressive development;[680]

---

[676] This was, after all, the very reason for the failure of the Commission to come up with an article on this question.

[677] This expresses the "primary necessity of interpreting an instrument in accordance with the intentions of the parties at the time of its conclusion", *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970),* Advisory Opinion, *I.C.J. Reports 1971* p. 31.

[678] Jennings & Watts, *Oppenheim's …* supra note 37, p. 1282. The standard example is the use of the notion of "sacred trust of civilization" as part of the League's mandates regime. See *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970),* Advisory Opinion, *I.C.J. Reports 1971* p. 31, para. 53.

[679] Thus in the *Aegean Sea Continental Shelf* case, the ICJ applied the presumption according to which a generic term is "intended to follow the evolution of the law and to correspond with the meaning attached to the expression by the law in force at any given time", *I.C.J. Reports 1978* p. 32.

[680] This was the situation in the *Gabčikovo-Nagymaros* case in the ICJ. "[T]he Court wishes to point out that newly developed norms of environmental law are relevant for the implementation of the Treaty and that the parties could, by agreement, incorporate them … [in] … the Treaty. These articles do not contain specific obligations of performance but require the parties, in carrying out their obligations to ensure that the quality of water in the Danube is not impaired and that nature is protected, to take new environmental norms into consideration when agreeing upon the means to be specified in the Joint Contractual Plan. By inserting these evolving provisions in

(b) The description of obligations in very general terms, thus operating a kind of *renvoi* to the state of the law at the time of its application. Thus, the general exceptions in the GATT article XX, discussed in *Shrimp-Turtle*, in permitting measures "necessary to protect human, animal or plant life or health" or "relating to the conservation of exhaustible natural resources", are intended to adjust to the situation as it develops over time.[681] For example, the measures necessary to protect shrimp evolve depending upon the extent to which the survival of the shrimp population is threatened. Although the broad meaning of article XX may remain the same, its actual content will change over time. In that context, reference to "other rules of international law", such as multilateral environment treaties, becomes a form of secondary evidence supporting the enquiry into science and community values and expectations, which the ordinary meaning of the words, and their object and purpose, invites.

(d) Conclusion

479. Article 31 (3) (c) VCLT and the "principle of systemic integration" for which it gives expression summarize the results of the previous sections. They call upon a dispute-settlement body - or a lawyer seeking to find out "what the law is" - to situate the rules that are being invoked by those concerned in the context of other rules and principles that might have bearing upon a case. In this process the more concrete or immediately available sources are read against each other and against the general law "in the background". What such reading rules "against each other" might mean cannot be stated in the abstract. But what the outcome of that specific reading is may, from the perspective of article 31 (3) (c) in fact be less important than that whatever the outcome, its justification refers back to the wider legal environment, indeed the "system" of international law as a whole.

---

the Treaty, the parties recognized the potential necessity to adapt the Project. Consequently, the Treaty is not static, and is open to adapt to emerging norms of international law". *Case concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia) I.C.J. Reports 1997* pp. 76-80, paras. 132-147. See also the Separate Opinion of Judge Weeramantry, *Case concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia), I.C.J. Reports 1997* (separate opinion of Judge Weeramantry) pp. 113-115.

[681] From the perspective embodied in the preamble of the WTO Agreement, we note that the generic term "natural resources" in Article XX (g) is not "static" in its content or reference but is rather "by definition, evolutionary". *United States - Import Prohibition of Certain Shrimp and Shrimp Products* (12 October 1998) WT/DS58/AB/R, DSR 1998:VII, p. 2795-2796, para. 130.

480. The way in which “other law” is “taken into account” is quite crucial to the parties and to the outcome of any single case. The principle of systemic integration, however, looks beyond the individual case. By making sure that the outcome is linked to the legal environment, and that adjoining rules are considered - perhaps applied, perhaps invalidated, perhaps momentarily set aside - any decision also articulates the legal-institutional environment in view of substantive preferences, distributionary choices and political objectives. This articulation is quite important in a decentralized and spontaneous institutional world whose priorities and objectives are often poorly expressed. It is also important for the critical and constructive development of international institutions, especially institutions with law-applying tasks. To hold those institutions as fully isolated from each other and as only paying attention to their own objectives and preferences is to think of law only as an instrument for attaining regime-objectives. But law is also about protecting rights and enforcing obligations, above all rights and obligations that have a backing in something like a general, public interest. Without the principle of “systemic integration” it would be impossible to give expression to and to keep alive, any sense of the common good of humankind, not reducible to the good of any particular institution or “regime”.

G. GENERAL CONCLUSIONS

1. The nature of fragmentation

481. One aspect of globalization is the emergence of technically specialized cooperation networks with a global scope: trade, environment, human rights, diplomacy, communications, medicine, crime prevention, energy production, security, indigenous cooperation and so on - spheres of life and expert cooperation that transgress national boundaries and are difficult to regulate through traditional international law. National laws seem insufficient owing to the transnational nature of the networks while international law only inadequately takes account of their specialized objectives and needs.

482. As a result, the networks tend to develop their own rules and rule-systems. This takes place sometimes informally, through the adoption by leading actors of forms of behaviour or standardized solutions that create expectations or are copied by others. Sometimes coordination is achieved through the harmonization of national or regional laws and regulations, for example, through increasing standardization of contract forms or liability rules. But frequently specialized