Between the Lines of the Vienna Convention?

Canons and Other Principles of Interpretation in Public International Law

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CHAPTER 1

Canons of Interpretation under the Vienna Convention

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In the words of Lord McNair, '[t]here is no part of the law of treaties which the text-writer approaches with more trepidation than the question of interpretation'.[1] Not only is interpretation an unavoidable part of the process of applying the rule of law in all legal orders, but in international law more than in any other, the process of interpretation is of the utmost importance:

> Most cases submitted to international adjudication involve the interpretation of treaties, and the jurisprudence of international tribunals is rich in reference to principles and maxims of interpretation. […] Treaty interpretation is, of course, equally part of the everyday work of Foreign Ministries.[2]

§1.01 CANONS OF INTERPRETATION: DISTANT ORIGINS

The problem of treaty interpretation has been part of international law for as long as treaties have been concluded between entities as subjects of international law.[3] The first echoes of modern interpretation issues are traceable to the Greco-Roman era, when links between the formation of treaties and the requirement to implement them in good faith prompted the elaboration of some canons of treaty interpretation; it also

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1. Lord McNair, *The Law of Treaties* 364 (Clarendon Press 1961).
2. Report of the International Law Commission to the General Assembly, *Commentary to Article 28 of the Draft Articles on the Law of Treaties*, ¶ 3 (1966).
3. The introductory comment to the Harvard Draft Convention on the Law of Treaties notes as one of the earliest examples of pre-classical treaties that of 1272 B.C. between Ramses II, King of Egypt, and Khetesar King of the Hittites, *Introductory Comment*, 29 Am. J. Int'l L. 666, 666 (1935).

marked a dichotomy between strict adherence to the text of a treaty and emphasis on intent of the parties.[4] Efforts to identify detailed interpretation rules were revitalized in the seventeenth century with Grotius, Pufendorf, and Vattel, who introduced in the field of international law:

> notions such as 'ordinary meaning', 'context', 'intention', 'special meaning', 'preparatory work' and 'surrounding circumstances'. These maxims were then picked up, tested and applied by the relevant arbitral tribunals leading to an ever increasing corpus of international jurisprudence on the subject of treaty interpretation. This process, culminated in the general acknowledgement of certain customary principles of interpretation, and their eventual reflection in Articles 31–33 of the VCLT.[5]

While most canons of treaty interpretation originate from those used in domestic law, themselves rooted in Roman law (which explains why they are frequently expressed in Latin formulas),[6] they present special characteristics stemming from the very nature of the latter: a highly decentralized legal order in which the author of the norm is, in the vast majority of cases, also its addressee, guarantor and … interpreter.

§1.02 THE VCLT: A MOVE AWAY FROM THE CANONS OF INTERPRETATION?

Admittedly, the function of the interpreters 'is to state the law'.[7] However, when stating and applying the law, they 'necessarily [have] to specify its scope and sometimes note its general trend'.[8] And one cannot be duped by rigid notions of State sovereignty: the interpreter (especially the judge) may need, if not to create the law *de novo*, at least to (re)formulate it. This creative power is exacerbated when a rule has to adapt to the evolving needs of the international society. Allowing such 'breathing' of the rules is perhaps the essential (and unspoken) function of interpretation and is

4. Richard Gardiner, *Treaty Interpretation* 60 (2nd ed., Oxford 2015). *See also generally* David Bederman, *Classical Canons: Rhetoric, Classicism and Treaty Interpretation* (Ashgate 2001).
5. Panos Merkouris, *Introduction: Interpretation Is a Science, Is an Art, Is a Science*, in *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years on* 5 (Fitzmaurice & Okowa eds, Martinus Nijhoff Publishers 2010).
6. *See* Chapter 5: *Expressio Unius Est Exclusio Alterius*; Chapter 6: *Ex Abundante Cautela*; Chapter 7: *Ejusdem generis*; Chapter 8: *Lex specialis derogat legi generali/Generalia specialibus non derogant*; Chapter 9: *Per argumentum a fortiori*; Chapter 10: *In pari materia*; Chapter 11: *Contra Proferentem*; Chapter 12: *In Dubio Mitius*. This list is, however, not exhaustive. *See*, e.g., interpretation *per analogiam*, *lex posterior priori derogat* or the principle *in favorem debitoris*.
7. *Northern Cameroons (Cameroon v. United Kingdom)*, Judgment (2 Dec. 1963), ICJ Reports 1963, p. 33. In the same vein, the ICJ declared that '[i]t is the duty of the Court to interpret the Treaties, not to revise them' (*Interpretation of Peace Treaties with Bulgaria, Hungary and Roma*nia *(Second Phase)*, Advisory Opinion (18 Jul. 1950), ICJ Reports 1950, p. 229, also quoted in *Rights of Nationals of the United States of America in Morocco (France v. United States of America)*, Judgment (27 Aug. 1952), ICJ Reports 1952, p. 198, and in *South West Africa cases (Ethiopia v. South Africa; Liberia v. South Africa)*, Judgment (18 Jul. 1966), ICJ Reports 1966, p. 48, ¶ 91).
8. *Legality of the Threat or Use of Nuclear Weapons case*, Advisory Opinion (8 Jul. 1996), ICJ Reports 1996, p. 236, ¶ 18.

particularly important in international law, where it fills the absence of a specialized and centralized legislator.[9]

Therefore, it is no mystery why, in order to ensure certainty of the law, one of the first topics assigned to the International Law Commission (ILC) for progressive development and codification was the law of treaties, and, as underlined by its Chairman at the time, 'certainty of the law of treaties [depends] mainly on certainty of the rules of interpretation'.[10]

The drafting of the Articles on this crucial subject has, however, not been without controversy, since 'the utility and even the existence of rules of international law governing the interpretation of treaties' have been questioned.[11] The Special Rapporteur Sir Humphrey Waldock notably maintained that the issue of interpretation:

> could lead the Commission into great difficulties because the approach of jurists to it was so varied. There were two different kinds of rules; general ones, such as the rule that the treaty must be read as a whole, and strictly technical ones. Some rules of a practical nature could be usefully summarized but he would view with apprehension any attempt to delve too deeply into the theoretical issues.[12]

The warning has been heard: 'the Commission confined itself to trying to isolate and codify the comparatively few *general* principles which appear to constitute *general* rules for the interpretation of treaties'.[13] Hence:

> the Vienna Convention represents a move away from the canons of interpretation previously common in treaty interpretation and which erroneously persist in various international decisions today. For example, the Vienna Convention does not mention the canon that treaties are to be construed narrowly, a canon that presumes States can not have intended to restrict their range of action. Rather than cataloging such canons (which at best may be said to reflect a *general pattern*), the Vienna Convention directs the interpreter to focus upon the *specific case* which may, or may not, be representative of such general pattern. To say a canon reflects a widespread practice does not mean it reflects a universal one.[14]

For the same reasons, the Harvard Draft Convention on the Law of Treaties also did not seek to codify or supplement the canons of interpretation. As explained in its commentary:

> the function of interpretation is to discover and effectuate the purpose which a treaty is intended to serve, and […] this is to be accomplished, not automatically by the mechanical and unvarying application of stereotyped formulae or 'canons' to any and every text, but instead by giving considered attention to a number of

9. Alain Pellet, *L'adaptation du droit international aux besoins changeants de la société internationale*, 329 *Recueil des cours* 9–47 (2007). *See in particular* pp. 19–21, 43–44.
10. *Summary Records of the 726th Meeting (19 May 1964)*, 1 Y.B. Int'l L. Comm'n 23, ¶ 34 (1964).
11. Report of the International Law Commission to the General Assembly, *Commentary to Article 28 of the Draft Articles on the Law of Treaties*, ¶ 1 (1966).
12. *Summary Records of the 726th Meeting (19 May 1964)*, 1 Y.B. Int'l L. Comm'n 20, ¶ 36 (1964).
13. Report of the International Law Commission to the General Assembly, *Commentary to Article 28 of the Draft Articles on the Law of Treaties*, ¶ 5 (1966) (emphasis added).
14. *Aguas del Tunari S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/03, Decision on Respondent's Objections to Jurisdiction (21 Oct. 2005) (Caron, Alvarez, Alberro-Semerena), ¶ 91 (emphasis original, footnotes omitted).

> factors which may reasonably be regarded as likely to yield reliable evidence of what that purpose is and how it may best be effectuated under prevailing circumstances.
>
> […] No canons of interpretation can be of absolute and universal utility in performing such a task, and it seems desirable that any idea that they can be should be dispelled.[15]

In this regard, the texts prepared by the ILC and left virtually unchanged by the Vienna Conference constitute 'one of the most remarkable achievements of the Vienna Convention'.[16]

§1.03 A COMPLEX YET INCOMPLETE 'GENERAL RULE'

Accordingly, Article 31 of the VCLT purposely limits itself to enunciating the '*General rule* of interpretation'. The use of the singular was deliberate and telling: 'the Commission desired to emphasize that the process of interpretation is a unity and that the provisions of the article form a single, closely integrated rule'.[17] It noted that '[a]ll the various elements, as they were present in any given case, would be thrown into the crucible, and their interaction would give the legally relevant interpretation'.[18] As the International Criminal Court summarized:

> the Vienna Convention sets forth one general rule of interpretation […] and one alone.
>
> Article 31(1) […] prescribes that the various ingredients – the ordinary meaning, the context [19], and the object and purpose – be considered together in good faith.[20] The General Rule, which therefore refers to a holistic approach, does not establish any hierarchical or chronological order in which those various ingredients are to be examined and then applied.[21] On the contrary, it enumerates various

15. *Article 19. Interpretation of Treaties*, 29 Am. J. Int'l L. 937, 938 (Supp. 1935).
16. French original: '*une des réussites les plus remarquables de la Convention de Vienne*' (Paul Reuter, *Introduction au droit des traités* 85 (PUF 2d ed. 1985)).
17. Report of the International Law Commission to the General Assembly, *Commentary to Article 28 of the Draft Articles on the Law of Treaties* 219–220, ¶ 8 (1966).
18. *Ibid*.
19. It must be noted that the notion of context is very broadly envisaged. Indeed, Art. 31(2) provides that the context for the purposes of interpretation comprises not only the text of the treaty (including the preamble and annexes) but also any instrument related to the treaty and accepted as such by all the parties.
20. Olivier Dörr, *Article 31*, in *Vienna Convention on the Law of Treaties: A Commentary* 523, 541, n. 89 (O. Dörr & K. Schmalenbach eds, Springer 2012); Jean-Marc Sorel & Valerie Bore-Eveno, *Article 31*, in *The Vienna Conventions on the Law of Treaties: A Commentary* 817–818 (O. Corten & P. Klein eds, Oxford 2011).
21. Dörr, *Article 31*, *supra* n.20, at n.90, p. 541; Sorel & Eveno, *supra* n.20, at pp. 807–808, 816; Mark E. Villiger, *The Rules on Interpretation: Misgivings, Misunderstandings, Miscarriage? The 'Crucible' Intended by the International Law Commission*, in *The Law of Treaties Beyond the Vienna Convention* 113–114 (E. Cannizzaro ed., Oxford UP 2011). *See also Corfu Channel Case (United Kingdom v. Albania)*, Judgment (9 Apr. 1949) ICJ Reports 1949, p. 4, pp. 23–24; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Preliminary Objections, Judgment (1 Apr. 2011) ICJ Reports 2011, p. 70, ¶ 133–134.

> elements which must be simultaneously taken into account in a single process of interpretation. In other words, the ordinary meaning, the context, and the object and purpose must be considered together, not individually.[22][23]

This clearly illustrates that, while not describing the 'canons' for interpreting treaties, the 'general rule' is complex. The primary means of interpretation listed in Article 31 are supplemented by the 'supplementary means' referred to in Article 32, and must be read together with Article 33, which is intended to solve the issues raised by the 'interpretation of treaties authenticated in two or more languages'. These Articles are considered to reflect general rules of customary international law,[24] and international courts and tribunals thus apply them even when the parties in dispute have not ratified the VCLT. They are also useful – and binding – guidelines, which apply, *mutatis mutandis*, to all written instruments establishing international legal

22. *See*, e.g., *Prosecutor v. Slobodan Milošević*, ICTY Case No. IT-02-54-T, Reasons for Decision on Assignment of Defence Counsel (22 Sep. 2004), n.91, ¶ 31.
23. *The Prosecutor v. Germain Katanga*, ICC Trial Chamber II, Case No. ICC-01/04-01/07, Judgment pursuant to Article 74 of the Statute (7 Mar. 2014), ¶¶ 44–45. *See also*, *The Rhine Chlorides Arbitration concerning the Auditing of Accounts (The Netherlands/France)*, PCA Case No. 2000-02, Award (12 March 2004) (Skubiszewski, Koojimans, Guillaume), ¶ 62: 'the general rule of interpretation codified in Article 31 of the Vienna Convention […] should be viewed as forming an integral whole, the constituent elements of which cannot be separated […] All the elements of the general rule of interpretation provide the basis for establishing the common will and intention of the parties by objective and rational means'. As a reminder: the principle of good faith controls the law of treaties as a whole. *See* especially the third preambular paragraph and Art. 26. *See also* Arts 46(2), 69(2)(b).
24. *See*, e.g., *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, Judgment (3 Feb. 1994), ICJ Reports 1994, p. 21, ¶ 41; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, Judgment on Jurisdiction and Admissibility (16 Mar. 2001), ICJ Reports 2001, p. 18, ¶ 33; *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, Judgment (17 Dec. 2002), ICJ Reports 2002, p. 645, ¶ 37; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion (9 Jul. 2004), ICJ Reports 2004, p. 174, ¶ 94; *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, Judgment (13 Jul. 2009), ICJ Reports 2009, p. 237, ¶ 47; *Maritime Dispute (Peru v. Chile)*, Judgment (27 Jan. 2014), ICJ Reports 2014, p. 28, ¶ 57. *See also* Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline* WTO Doc. WT/DS2/AB/R, p. 17 (29 Apr. 1996); *Romak S.A. v. Republic of Uzbekistan*, PCA Case No. AA280, Final Award (26 Nov. 2009) (Mantilla-Serrano, Rubins, Molfessis), ¶ 169; *Responsibilities and Obligations of States Sponsoring Persons and Entities with respect to Activities in the Area*, Seabed Disputes Chamber of ITLOS, Advisory Opinion (1 Feb. 2011), ¶ 57; *Dispute concerning delimitation of the maritime boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, ITLOS, Judgment (14 Mar. 2012), ¶ 372; *Kılıç İnşaat İthalat Ihracat Sanayi ve Ticaret Anonim Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/1, Decision on Art. VII.2 of the Turkey-Turkmenistan Bilateral Investment Treaty (7 May 2012) (Rowley, Park, Sands), ¶ 6.4; *The Prosecutor v. Germain Katanga*, ICC Trial Chamber II, Case No. ICC-01/04-01/07, Judgment pursuant to Art. 74 of the Statute (7 Mar. 2014), ¶ 43; *Railway Land Arbitration (Malaysia v. Singapore)*, PCA Case No. 2012-01, Final Award (30 Oct. 2014) (Matravers, Gleeson, Simma), ¶ 42.

norms, whether unilateral acts of States,[25] resolutions of international organizations,[26] or gentlemen's agreements and other kind of 'soft' legal instruments.[27]

However, the 'general rule' expressed in Article 31, complex as it may be, does not always alone suffice to guide the interpreter when the meaning and the scope of an international legal rule are debatable, and it does not prevent the need to have recourse to … something else. But the designation of this 'something else' is not without difficulty:

- Some may use the expression 'canons of construction' but it is very much common law-oriented and has no real equivalent in French, which would use the expression '*canons*' (although rather rarely and somewhat dated) or, more commonly, '*règles*' '*d'interprétation*' (rules of interpretation).[28] As noted by Prof. Gardiner, it is not clear 'whether there is any useful distinction to be drawn between "interpretation" and "construction." In treaty drafting and usage by interpreters, the terms are used with seeming lack of differentiation'.[29] Nor is there an 'authoritative definition of "canons" of interpretation or construction, "presumptions", or of "maxims" in the specific context of treaty interpretation. Their usage sometimes makes them overlap, and their content and value is indeterminate. The ILC in its preparatory work on the Vienna rules mostly avoided use of these terms'.[30]
- The terminology of the VCLT is, however, not clearer, and these expressions are difficult to distinguish from the equally wide notion of 'means of interpretation' used in Article 32 VCLT concerning the 'supplementary means of interpretation' – which implies *a contrario* that Article 31 relates to the 'primary means'. True, the 'elements of interpretation' of Article 31 have 'an authentic and binding character in themselves',[31] justifying their qualification

25. *See* International Law Commission, *Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations*, 7th principle and ¶ 3 of its commentary (2006).
26. *See*, e.g., *Responsibilities and Obligations of States Sponsoring Persons and Entities with respect to Activities in the Area*, Seabed Disputes Chamber of ITLOS, Advisory Opinion (1 Feb. 2011), ¶ 60; *See also*, with regard to Security Council resolutions, *Accordance with international law of the unilateral declaration of independence in respect of Kosovo*, Advisory Opinion (22 Jul. 2010), ICJ Reports 2010, p. 442, ¶ 94.
27. *See* Daniel Thürer, *Soft Law*, in *Max Planck Encyclopedia of Public International Law* (2009), MN 33; or Anthony Aust, *Alternatives to Treaty-Making: MOUs as Political Commitments*, in *The Oxford Guide to Treaties* 62 (D. Hollis ed., Oxford 2012).
28. The same seems to be true in German, Italian or Spanish.
29. Gardiner, *supra* n.4, at 30. The writer notes that 'in the Charter of the United Nations the terms are used without apparent difference in meaning, where Article 80(1) has "nothing in this Chapter shall be construed …", while Article 80(2) states "Paragraph 1 of this Article shall not be interpreted as …", the French text using "*interprétée*" and "*interprété*" respectively'. This might be different in domestic laws: *see ibid.*, p. 458, or, concerning constitutional interpretation, Solum, according to whom the interpretation-construction distinction 'marks the difference between linguistic meaning and legal effect' (Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 Const. Comment. 95 (2010)).
30. Gardiner, *supra* n.4, at 405.
31. United Nations Conference on the Law of Treaties, *First Session (26 March–24 May 1968)* UN Doc. A/CONF.39/C.1/SR.33, p. 184, ¶ 68. *See also* Herbert W. Briggs, *The Travaux Préparatoires of the Vienna Convention on the Law of Treaties*, 65 Am. J. Int'l L. 710–711 (1971).

as a 'rule' and not 'means' – which 'suggests something less prescriptive'.[32] But:

> The Commission was fully conscious … of the undesirability – if not impossibility – of confining the process of interpretation within rigid rules, and the provisions of [the draft Articles] … do not appear to constitute a code of rules incompatible with the required degree of flexibility … any 'principles' found by the Commission to be 'rules' should, so far as seems advisable, be formulated as such. In a sense all 'rules' of interpretation have the character of 'guidelines' since their application in a particular case depends so much on the appreciation of the context and the circumstances of the point to be interpreted.[33]

Hence, the qualification of these 'elements' as 'rules' should not conceal the wide margin of appreciation left to the interpreter when applying them.

For the sake of clarity, I use in this chapter the expression 'means of interpretation' to name all the rules or standards applying in matter of treaty interpretation, whether mentioned or not in the VCLT, and 'canons of interpretation' to name the means not expressly envisaged in the Convention, reserving the word 'maxims' to those frequently referred to in their Latin form.

What remains indisputable is that, despite its comprehensive title ('Interpretation of treaties'), Section 3 of Part II of the VCLT does not cover the whole field of treaty interpretation. This section is non-exhaustive and open-ended. It leaves ample room for other means of interpretation compatible with its general guidelines, and remains open to the interpreter's wide – but not unlimited – discretion to rely on treaty interpretation materials developed before and after the Convention.[34]

Some canons of interpretation are actually encompassed by the VCLT. This is the case in particular of the principle of effectiveness (*effet utile*)[35] – which is not expressly mentioned in the Convention – but was said by the ILC to be included in Article 31(1):

> The Commission […] took the view that, in so far as the maxim *ut res magis valeat quam pereat* reflects a true general rule of interpretation, it is embodied in article [31(1)] which requires that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in the context of the treaty and in the light of its object and purpose. When a treaty is open to two interpretations one of which does and the other does not enable the treaty to have appropriate effects, good faith and the objects and purposes of the treaty demand that the former interpretation should be adopted. Properly limited and applied, the maxim does not call for an 'extensive' or 'liberal' interpretation in the sense of an interpretation going beyond what is expressed or necessarily to be implied in the

32. Gardiner *supra* n.4, at 39.
33. Humphrey Waldock, *Sixth Report on the Law of Treaties*, 2 Y.B. Int'l L. Comm'n 51, 94, ¶ 1.
34. Dörr, *Article 31*, *supra* n.20, at 538, MN 33; Gardiner, *supra* n.4, at 57; Chang-fa Lo, *Treaty Interpretation under the Vienna Convention on the Law of Treaties: A New Round of Codification* 242–243 (Springer 2017).
35. *See* Chapter 4.

> terms of the treaty. Accordingly, it did not seem to the Commission that there was any need to include a separate provision on this point.[36]

Hence, 'the principle of effectiveness is in reality no more than a particular application of the object and purpose test and the good faith rule and, therefore, an integral part of the general rule of interpretation' laid down in Article 31.[37]

§1.04 CANONS OF INTERPRETATION: 'RELEVANT RULES OF INTERNATIONAL LAW' OR 'SUPPLEMENTARY RULES OF INTERPRETATION'?

It could further be argued that, indirectly, Article 31(3)(c) refers to the canons of interpretation by directing the interpreter to take into account 'any relevant rules of international law applicable in the relations between the parties'. Indeed, it can be sustained that (i) these extraneous rules include customs or general principles of law[38] and (ii) many canons of treaty interpretation could certainly constitute at least the latter since they generally originate in principles applied in domestic laws. It must be noted, however, as the ILC did, that while 'statements can be found in the decisions of international tribunals to support the use of almost every principle or maxim of which use is made in national systems of law in the interpretation of statutes and contracts',[39] jurists express reservations as to the obligatory character of certain of them.[40] And the ILC rightly concluded: 'They are, for the most part, principles of logic and good sense valuable only as guides to assist in appreciating the meaning which the parties may have intended to attach to the expressions that they employed in a document'.[41]

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36. Report of the International Law Commission to the General Assembly, *Commentary to Article 28 of the Draft Articles on the Law of Treaties* 219, ¶ 6 (1966). *See also The Prosecutor v. Germain Katanga*, ICC Trial Chamber II, Case No. ICC-01/04-01/07, Judgment pursuant to Article 74 of the Statute (7 Mar. 2014), ¶ 46 (footnote omitted): 'The principle of effectiveness of a provision […] forms an integral part of the General Rule as that Rule mandates good faith in interpretation'.
37. Dörr, *Article 31*, *supra* n.20, at 540, MN 35. According to Dörr, the same would be true for the principle that exceptions to a rule have to be interpreted narrowly (*ibid.*, MN 36). However, as noted by the WTO Appellate Body: '[M]erely characterizing a treaty provision as an "exception" does not by itself justify a "stricter" or "narrower" interpretation of that provision than would be warranted by examination of the ordinary meaning of the actual treaty words, viewed in context and in the light of the treaty's object and purpose, or, in other words, by applying the normal rules of treaty interpretation'. (Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WTO Doc. WT/DS26/AB/R, ¶ 104 (16 Jan. 1998)).
38. Appellate Body Report, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WTO Doc. WT/DS379/AB/R, ¶ 308 (11 Mar. 2011): 'the reference to "rules of international law" corresponds to the sources of international law in Article 38(1) of the Statute of the International Court of Justice and thus includes customary rules of international law as well as general principles of law', *referring to* Mark Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* 433 (Martinus Nijhoff 2009).
39. Report of the International Law Commission to the General Assembly, *Commentary to Article 28 of the Draft Articles on the Law of Treaties* 218, ¶ 3 (1966).
40. *Ibid.*, ¶¶ 1, 4. Dörr, for instance, affirms that the principle *in dubio mitius* does not constitute a rule of customary international law (Dörr, *Article 31*, *supra* n.20, at 539).
41. *Ibid.*

Respected scholars have otherwise seen maxims, notably *in dubio mitius*, *expressio unius est exclusio alterius*, *generalia specialibus non derogant*, *ut res magis valeat quam pereat*,[42] as 'supplementary means of interpretation'[43] within the meaning of Article 32, which provides that '[r]ecourse may be had to supplementary means of interpretation, *including* the preparatory work of the treaty and the circumstances of its conclusion'. This formulation implies that these two 'supplementary means' are not exhaustive.

The fact that Article 32 neither includes a specific and exhaustive list of supplementary means, nor criteria to identify what these means could be, seems to leave wide discretion to the interpreter to determine the relevant canons in a given case. However, under the said Article, recourse may be had to supplementary means only for specific purposes:

- 'to confirm the meaning resulting from the application of Article 31';
- 'to determine the meaning when the interpretation according to Article 31 leaves the meaning ambiguous or obscure'; or
- in essence, to replace and revert the interpretation based on Article 31 if such interpretation 'leads to a result which is manifestly absurd or unreasonable'.

Canons can have a confirming or determining purpose since they are to assist the interpretation based on the provisions of the VCLT, but they cannot be applied to reverse or undermine such interpretation.[44] They are only subsidiary, as was recognized long before the adoption of the VCLT. With regard to the canon *in dubio mitius*, for instance, the Permanent Court pointed out that: 'it will be only when, in spite of all pertinent considerations, the intention of the Parties still remains doubtful, that that interpretation should be adopted which is most favourable to the freedom of States'.[45]

Qualifying canons of interpretation as supplementary means can be controversial, but has the advantage of avoiding the issue of their customary status:

> Since such principles are merely supplementary, as long as any one of these 'principles' (or Latin maxims) is useful to support the reasoning of interpretation, an interpreter should be permitted to use it under the requirements provided in Article 32 of the VCLT.[46]

42. However, the latter can be more directly related to the object and purpose of the treaty. *See* Report of the International Law Commission to the General Assembly, *Commentary to Article 28 of the Draft Articles on the Law of Treaties* 219, ¶ 6 (1966) and Dörr, *Article 31*, *supra* n.20, at 540, MN 35, quoted above.
43. *Oppenheim's International Law: Volume 1 Peace* 1277–1282 (9th ed., Jennings & Watts eds, Oxford 2008). *See also* Anthony Aust, *Modern Treaty Law and Practice* 220–222 (Cambridge University Press 2013); Lo, *supra* n.34, at 240–242. *See contra* Olivier Dörr, *Article 32*, in *Vienna Convention on the Law of Treaties: A Commentary* 580, MN 24 (O. Dörr & K. Schmalenbach eds, Springer 2012) (footnote omitted): 'in the context of the Vienna rules, "means of interpretation" appears to refer to material or substantive matters to be taken into consideration, rather than to general interpretative principles or techniques. […] Art 32 […] cannot be assumed to refer to principles outside the general rule of interpretation'.
44. Lo, *supra* n.34, at 242.
45. *Territorial Jurisdiction of the International Commission of the River Oder*, Judgment (10 Sept. 1929), PCIJ Series A No. 23, p. 26.
46. Lo, *supra* n.34, at 242.

In practice, however, international courts and tribunals 'have shown considerable restraint [in expressly resorting to Article 32]. They have mostly favoured recourse to preparatory work and, more generally, have used supplementary means to confirm the interpretation of a provision, and only exceptionally to determine its meaning'.[47] As a consequence, canons of interpretation 'are *directly applied or argued to be directly applicable* in treaty interpretation without first resorting to Articles 31 and 32'.[48] Therefore, some authors simply consider that canons of interpretation 'are better seen as useful adjuncts to the apparatus for identifying which ordinary meaning is to be given a term rather than supplementary means'.[49]

§1.05 CANONS OF INTERPRETATION AS FLEXIBLE 'STANDARDS' CONDITIONAL ON THE GENERAL RULE

However, whether one retains one or another explanation, two general observations must be made.

In the first place, the canons of interpretation are characterized (and commend themselves) by their flexibility:

> Their suitability for use in any given case hinges on a variety of considerations which have first to be appreciated by the interpreter of the document; the particular arrangement of the words and sentences, their relation to each other and to other parts of the document, the general nature and subject-matter of the document, the circumstances in which it was drawn up, etc. Even when a possible occasion for their application may appear to exist, their application is not automatic but depends on the conviction of the interpreter that it is appropriate in the particular circumstances of the case. In other words, recourse to many of these principles is discretionary rather than obligatory and the interpretation of documents is to some extent an art, not an exact science.[50]

In this respect, the canons of interpretation appear to be 'standards' rather than customary rules. They are in a lower normative category and constitute in a way 'attenuated customs' which can be characterized as soft norms. In that sense, their implementation is optional, unlike the Vienna rule of interpretation. Canons of interpretation can be viewed as a tool-box with a set of norms from which the interpreter will select those canons that can clarify the meaning of treaty provisions. This is by no means exceptional: after all, the international legal order is the field of predilection of 'relative normativity';[51] it abounds of non-binding rules the application of which is left to the appreciation of the interpreter.

47. Yves Le Bouthillier, *Article 32*, in *The Vienna Conventions on the Law of Treaties: A Commentary* 863, MN 47 (O. Corten & P. Klein eds, Oxford UP 2011).
48. Lo, *supra* n.34, at 241 (emphasis original).
49. Gardiner, *supra* n.4, at 404.
50. Report of the International Law Commission to the General Assembly, *Commentary to Article 28 of the Draft Articles on the Law of Treaties* 218, ¶ 4 (1966).
51. Prosper Weil, *Towards Relative Normativity in International Law*, 77 Am. J. Int'l L. 413–442 (1983); Alain Pellet, *Les techniques interprétatives de la norme internationale*, 2 Revue générale de droit international public 293 (2011).

Second, and most importantly, recourse to canons of interpretation is subordinated to the priority application of the 'primary means' enunciated therein. As has been aptly noted by the ICC, 'the ultimate meaning […] must always be underpinned by the […] method of interpretation [codified under Article 31(1)], which means that [the interpreter] must construe, in good faith, the terms used in accordance with their ordinary meaning, considered in their context and in the light of the purpose and object of the [treaty]'.[52]

It should be noted that some maxims are not only canons of 'interpretation', but also 'application' principles providing for techniques of conflict resolution. The relationship of these maxims with other provisions of the VCLT is less straightforward. An issue arises for instance when the principles *generalia specialibus non derogant*[53] or *lex posterior priori derogat* are confronted with Article 30 regarding the application of successive treaties. If the States concerned are parties to the Convention, the principle can be applied only if the treaties in question do not relate to the same subject-matter, since such treaties fall within the purview of Article 30. Otherwise, Article 30 can:

> to some extent be seen as a codification of customary principles of hierarchy of norms, such as *lex specialis* and *lex posterior* (paras 2 and 3) or an implication of the *pacta tertiis* rule (para. 4). […] I]t would be sound to assume that the customary status of the provisions under Article 30 depends on the modalities of the customary status of the general maxims to which they give effect and the limits on those maxims, not least as dictated by their mutual interaction, as a matter of general international law.[54]

Here again the use of such principles and their combination are highly dependent upon the particular circumstances of each case. In this regard, the ILC specified that:

> The relationship between the *lex specialis* maxim and other norms of interpretation or conflict solution cannot be determined in a general way. Which consideration should be predominant – i.e. whether it is the speciality or the time of emergence of the norm – should be decided contextually.[55]

Finally, the relationship between canons of interpretation and the 1969 system is not a one-way street. If canons of interpretation are used to support Article 31 and fill its gaps, the interpretation of the Convention itself may also come to the rescue of canons of interpretation. For instance, a particularly difficult problem is determining the date on which the interpretation should take place. If reference is made in the VCLT to the date of conclusion of the treaty, the strong emphasis placed on practice and subsequent agreements also invites the interpreter to consider the date on which the

52. *The Prosecutor v. Germain Katanga*, ICC Trial Chamber II, Case No. ICC-01/04-01/07, Judgment pursuant to Article 74 of the Statute (7 Mar. 2014), ¶ 47.
53. *See* Chapter 8 *infra*.
54. Alexander Orakhelashvili, *Article 30*, in *The Vienna Conventions on the Law of Treaties: A Commentary* 774, MN 22 (O. Corten & P. Klein eds, Oxford UP 2011).
55. International Law Commission, *Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law*, ¶ 6 (2006).

interpretation is formulated. Interpreters thus generally turn to the principle of contemporaneity, which is discussed in Chapter 16 in this book.

Thus, and this holds true for all the canons of interpretation, interpreters 'facing a potential conflict have to make judgment calls as to whether they believe an issue is governed by the VCLT. If it is not, then they must assess which general principles best apply and how the rules may affect potential negotiations to resolve the conflict'.[56]

While their relationship to the supplementary means of interpretation mentioned in Article 32 VCLT may be debated, the canons of interpretation thus appear as indispensable companions of the general rule expressed in Article 31. They offer to interpreters, and in particular to courts and tribunals, facing uncertainties concerning the exact meaning of a treaty provision (or, for that matter of a unilateral commitment), a basis to find a meaning best serving the aims of its author(s) according to the circumstances and, if need be, taking into account their evolving needs.

56. Christopher Borgen, *Resolving Treaty Conflicts*, 37 Geo. Wash. Int'l L. Rev. 573, 605 (2005).