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INTERPRETATION OF SECONDARY INSTRUMENTS IN INTERNATIONAL LAW

Abstract:
This article explores the legal principles that govern the interpretation of "secondary instruments" in international law. A "secondary instrument" under international law is, for the purposes of this article, a written document adopted by a body empowered by a treaty to take action with respect to the treaty, but which is not itself a treaty. Such instruments find increasing application in international law. The article specifically examines the interpretation of secondary instruments arising in five settings in international practice: the United Nations Security Council, the International Maritime Organization, the International Seabed Authority, the International Whaling Commission, and conferences/meetings of the parties under multilateral treaties. This selection of practice will serve to illustrate principles of interpretation across a range of international institutional settings for the purpose of determining the rights and obligations of state-parties to a treaty regime.

Keywords: conference of the parties, International Maritime Organization, International Seabed Authority, International Whaling Commission, interpretation, multilateral environmental treaty, secondary instrument, Security Council, VCLT

INTRODUCTION: THE PROLIFERATION OF SECONDARY INSTRUMENTS AND THE NEED FOR INTERPRETATION

The number of "secondary instruments" in international law is increasing. What is more, these instruments are growing in importance. They can, among other things, create primary obligations for states as a matter of international law, or can constitute interpretive declarations or indeed subsequent agreements or practice with respect to treaties. For the purposes of the present article, a "secondary instrument" under international law is a written document adopted by a body empowered by a treaty to take action with respect to the treaty, but which is not itself a treaty.

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In this connection, the question arises which principles, if any, govern the interpretation of these secondary instruments in international law. The canonical principles of treaty interpretation, codified to a large extent in Arts. 31, 32 and – as far as treaties authenticated in two or more languages are concerned – 33 of the Vienna Convention on the Law of Treaties (VCLT), may offer a starting point, yet the applicability of these principles to written instruments that have a legal character under international law but are not treaties will depend on a variety of factors. These may include, for instance, the process that leads to the instrument's adoption. Thus in the 2012 Advisory Opinion the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea, for instance, noted that Arts. 31 and 32 VCLT could offer guidance on the interpretation of such an instrument, in part because of the similar process of adoption.[1] Earlier, the International Court of Justice (ICJ) in its 2010 *Kosovo* Advisory Opinion had also noted that while Arts. 31 and 32 VCLT could provide guidance for the interpretation of the Security Council resolution in question, there were important limits to the applicability of those principles.[2] As part of the discussion, the article examines the extent to which secondary instruments are subject to the rules of interpretation codified in the VCLT, or whether they are subject to a different, perhaps looser interpretive approach. It does so by examining international practice across different international institutions.

By way of illustration, in *Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging* the Appeals Chamber of the Special Tribunal for Lebanon, when answering the question whether it should apply international law in its interpretation of the Special Tribunal for Lebanon Statute, which had been established by Security Council resolution 1757(2007), adopted under Chapter VII of the UN Charter, observed: "[t]hose rules of interpretation [that evolved in international custom and were codified or developed in the VCLT] must … be held to be applicable to any internationally binding instrument, whatever its normative source."[3] This view, echoed in other international decisions to some extent,[4] is in tension with certain scholarly contributions.[5]

[1] Seabed Dispute Chamber (ITLOS), *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area* (Advisory Opinion), Case No. 17, 1 February 2011, available at: https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_17/17_adv_op_010211_en.pdf (accessed 20 April 2016), para. 60.

[2] ICJ, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (Advisory Opinion), [2010] ICJ Rep. 403, 442, para. 94.

[3] Special Tribunal for Lebanon (Appeals Chamber), *Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging*, 16 February 2011, STL-11-01/1, para. 26. The Appeals Chamber also took into account the ICJ's approach in *Kosovo Advisory Opinion*, para. 27. The ICJ's approach was more reserved than that of the Appeals Chamber.

[4] *See below*.

[5] *See e.g.* M. Herdegen, *Interpretation in International Law*, in: *Max Planck Encyclopedia of Public International Law*, Oxford University Press, Oxford: 2013: "[t]he interpretation of 'secondary law' created by international organizations on the basis of the constituent treaty, by and large, follows the methodology applying to treaties. … It is, however, subject to specific interpretation rules flowing from the founding agreement. Thus, 'primary' treaty law determines the status of interpretive declarations on 'secondary' norms as well as the relevance of *travaux préparatoires*."

This article will conclude that it is not an accurate statement of the present legal position.

As noted above, the instruments under consideration in this article are not treaties, and different principles may govern their interpretation. This article's purpose is to offer an analysis and statement of those principles. Certain clarifications are necessary as a preliminary matter. The first concerns the meaning of the term "secondary instrument" in international law as defined above. The category of such secondary instruments is surprisingly difficult to delineate. The treaty under which this authority arises is the "primary instrument" to which the secondary instrument relates and from which it derives its validity. The body empowered to adopt such an instrument may vary according to the enabling provision(s) of the treaty, as may the legal status and effect(s) of the secondary instrument. The secondary instrument arises "under international law" because the primary instrument for present purposes is a treaty within the meaning of Art. 2 VCLT. The secondary instrument is one that, like the treaty, exists under, and is governed by, international law.

In practice, the types of instruments of this variety are manifold. In fact, so broad is the range of possible secondary instruments that it may be difficult to generalize about them as a single category, or at least to articulate a single set of principles that purportedly govern their interpretation. This itself would, however, already be a meaningful conclusion about the state of rule-making in international law. Secondary instruments could range from resolutions of the UN Security Council to declarations adopted by a conference or a meeting of the parties to a treaty. Interpretation can become necessary where the instrument has a direct bearing on the scope of the rights and obligations of state-parties to the primary treaty, but also where the instrument constitutes a form of subsequent practice.

The first, and perhaps most important, disclaimer is to note the types of instruments that fall outside the scope of this article, and to identify those on which the discussion will focus. Thus this article will not address the interpretation of the Rules of the International Court of Justice, or the rules of any other international court or tribunal. This is not because the interpretation of these instruments is not important. In fact, it is of supreme importance in the practice of international dispute resolution. Rather, the procedural rules of international courts and tribunals are of such a character as to deserve a full and separate study in their own right. They are arguably sufficiently distinct from the types of secondary instruments in international law within the above meaning to warrant their exclusion from the present discussion. Also, the article does not engage specifically with the interpretation of constitutive instruments of relevant organizations, except to the extent relevant for the interpretation of the secondary instrument adopted under them, but rather focuses on the interpretation of instruments adopted within relevant organizations. Further, the article does not offer a specific discussion of interpretive techniques in the setting of the World Trade Organization or the European Court of Human Rights (ECtHR), which can in a given case have a potential impact on the scope of parties' treaty obligations.[6]

[6] *See e.g.* J. Arato, *Treaty Interpretation and Constitutional Transformation: Informal Change in International Organisations*, 38 Yale Journal of International Law 29 (2013).

Further afield, the article does not engage with the question of how to interpret international transactions between states that have neither the character of a treaty nor of a secondary instrument, such as the question of how to interpret a non-binding memorandum of understanding (MOU) between states.

Secondary instruments find increasing application in international law for the purpose of determining the rights and obligations of state-parties to a treaty regime. The International Maritime Organization's (IMO) recent practice illustrates this development. For example, under Art. 2(2) of the Kyoto Protocol, the state-parties included in Annex I of that instrument shall work through the IMO "to pursue limitation or reduction of greenhouse gases not controlled by the Montreal Protocol from … maritime bunker fuels." The IMO Marine Environment Protection Committee has acted under that authority twice in a significant manner. At its 62nd session, in 2011, the body adopted binding measures for the reduction of greenhouse gases from ships. At its 65th session, in 2013, the body adopted a resolution concerning technical co-operation and the transfer of technology.[7] These types of instruments are gaining importance, especially where, as is the case with respect to the 2011 measures, they generate legal obligations for state-parties.

The IMO is not alone in in this respect. Many multilateral environmental agreements (MEAs) provide for regular conferences or meetings of the parties. On these occasions state-parties typically adopt resolutions or declarations that pertain to the primary instrument. Interpretation of these instruments is necessary to determine whether they have a bearing on the parties' rights and obligations under the treaty, and if so in what capacity and to what extent, or whether they constitute subsequent practice of the parties. Such determinations will always already be the outcome of interpretation. Next, interpretation of these instruments' substantive provisions may be required. Numerous other complex multilateral treaty regimes increasingly see development through the adoption of these types of instruments by the parties. The extent of such legal instruments in international law is so great that it is perhaps appropriate to speak of a proliferation of secondary instruments.

The type of instrument under consideration in this article is not a formal amendment to a treaty. If it were, the rules of treaty interpretation in Arts. 31 and 32 VCLT would apply to the application of the instrument *qua* treaty. The type of instrument under consideration has a distinct legal character and identity under international law, but is not a treaty. The instrument is adopted by a competent body under, and with respect to, a treaty, without thereby altering the treaty *qua* treaty. In practice, however, the distinction between a secondary instrument and a treaty amendment can be difficult to draw where the process of adopting the secondary instrument resembles a multilateral conference of state-parties to the primary instrument.

In light of above considerations, this article examines the interpretation of secondary instruments arising in five practical settings in international practice: the United Nations Security Council, the IMO, the International Seabed Authority (ISA), the In-

[7] MEPC 65/22, available at: http://www.uscg.mil/imo/mepc/docs/MEPC65-report.pdf (accessed 20 April 2016).

ternational Whaling Commission (IWC), and COPs/MOPs under multilateral treaties. This selection will serve to illustrate principles of interpretation across a range of international institutional settings.

Secondary instruments adopted in these settings are often topical for economic or political reasons. An examination of practice in these institutional settings will illustrate the differing legal force of acts adopted in international institutions, and whether this circumstance has a bearing on the appropriate method for interpreting the instrument. For example, Security Council resolutions can present urgent political issues, IMO resolutions can affect the application of the United Nations Convention on the Law of the Sea (UNCLOS), IWC instruments were at issue in the *Whaling in the Antarctic* dispute between Australia and Japan, and COP/MOP decisions can determine the content and application of important multilateral environmental agreements.

Security Council resolutions represent the classical type of secondary acts, which originally triggered much of the scholarly debate concerning the interpretation of acts with this character. In light of the importance of these resolutions, this article seeks to analyze further developments in this area. The IMO is one of the most important international organizations. Its mandate is to regulate the maritime safety of navigation and the protection of the marine environment. The majority of the international commerce takes place by sea. The IMO has developed and managed a range of conventions and has ensured that "existing instruments kept pace with changes in shipping technology. It is now responsible for more than 50 international conventions and agreements and has adopted numerous protocols and amendments."[8] The ISA may be a less obvious choice. However, in light of renewed interests in deep-sea mining and the binding character of some of the ISA's decisions, their interpretation has been a subject of contemporary importance.[9] The IWC, a relatively little known international body, came to the attention of the international community in the wake of the 2014 ICJ judgment in *Whaling in Antarctic (Australia v. Japan: New Zealand intervening)*.[10] In its judgment, the ICJ addressed several issues concerning the interpretation of the IWC's decisions and resolutions.[11] The IWC's legal functions, and the instruments that this

[8] *Adopting a convention, Entry into force, Accession, Amendment, Enforcement, Tacit acceptance procedure*, available at: http://www.imo.org/en/About/Conventions/Pages/Home.aspx (accessed 20 April 2016).

[9] The ISA has issued seven new exploration licenses by state-owned and private companies from India, Brazil, Singapore and Russia. British firm, UK Seabed Resources, has secured exploration rights to an area larger than the entire UK. This means that the total area of seabed now licensed in this new gold rush has reached an immense 1.2 million square kilometers under 26 different permits for minerals prospecting – D. Shukman, *Deep sea mining licences issued*, 22 July 2014, BBC News, available at: www.bbc.co.uk/news/science-environment-28442640 (accessed 20 April 2016).

[10] ICJ, *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)* (Judgment), [2014] ICJ Rep., p. 226.

[11] *See* M. Fitzmaurice, *Whaling and International Law*, Cambridge University Press, Cambridge: 2015; M. Fitzmaurice, *The Whaling Convention and Thorny Issues of Interpretation*, in: M. Fitzmaurice, D. Tamada (eds.), *Whaling in the Antarctic: Significance and Implications of the ICJ Judgment*, Brill/Nijhoff, Leiden: 2016, pp. 55-138.

body adopts, have contributed to the further development of a theory concerning the interpretation of secondary instruments. Finally, the decisions of conferences/meetings of the parties (COPs/MOPs) are among the more interesting recent international legal developments. The decisions adopted by COPs/MOPs under a multilateral treaty such as an MEA are, formally, not legally binding, yet states frequently treat them as binding. Such decisions may informally amend the treaty and define more precisely rights and obligations of state-parties to the treaty.[12] Therefore, the importance of these decisions in defining and transforming the obligations of states should not be underestimated. The choice of institutional settings in this article draws on the interpretation of classical secondary instruments (notably resolutions of the Security Council) as well as on the interpretive analysis of decisions adopted by other bodies with great international significance – such as the IMO and the IWC – and indeed interpretive analyses in relation to the emerging secondary instruments by COPs/MOPs. Note, however, that this selection of institutions is not comprehensive, but rather representative. For example, other institutions such as the International Civil Aviation Union (ICAU) and the World Health Organizations (WHO) enjoy the mandate under their constitutive instruments to adopt certain regulations that are binding for member states, and which can or could require interpretation and application.[13]

On the basis of this survey of instruments from these institutional settings, and the methods of interpretation applied to them, the article will proceed to articulate certain general conclusions on the interpretation of secondary instruments in international law. Even a finding that there is no single set of applicable interpretive principles would be a valuable conclusion. In any case, though, the identification of any applicable rules of interpretation is preferable to letting the interpretation of secondary instruments arising under treaties run a free course.

1. INTERNATIONAL PRACTICE: THE APPLICABLE RULES OF INTERPRETATION FOR SECONDARY INSTRUMENTS

1.1. General Considerations

The general questions associated with the interpretation of secondary instruments adopted by international organizations have generated only a limited number of publications.[14] This article focuses on secondary instruments in international law,

[12] *See on this*: D. Costelloe, M. Fitzmaurice, *Lawmaking by Treaty: Conclusion of treaties and evolution of treaty regimes in practice*, in: C. Brölmann, Y. Radi (eds.), *Research Handbook on Theory and Practice in International Lawmaking*, Edward Elgar, Cheltenham: 2016, pp. 111-133.

[13] *See* J. Klabbers, *Introduction to International Organizations Law* (3rd ed.), Cambridge University Press, Cambridge: 2015, p. 161.

[14] *See e.g.* C. F. Amerasinghe, *Principles of Institutional Law of International Organizations* (2d. ed.), Cambridge University Press, Cambridge: 2005; M. Benzing, *Institutional Organizations or Institutions, Secondary Law*, in: *Max Planck Encyclopedia of Public International Law*, Oxford University Press, Oxford: 2013.

yet one must constantly bear in mind that these instruments cannot be studied independently of the primary treaty under which they are adopted by the competent organ.

The interpretation of a constitutive act of an international organization is a separate category from secondary instruments, as confirmed by Art. 5 VCLT:[15] "[t]he Present Convention applies to any treaty which is the constituent instrument of an international organization and to any treaty adopted within an international organization without prejudice to any relevant rules of the organization."[16]

Equally important in contemporary international practice, the interpretation of secondary instruments adopted under a primary treaty is a relatively unexplored field. Secondary instruments are the legal acts that constitute this body of institutional law. The VCLT is silent on the interpretation of instruments constituting this body of secondary law. This is not surprising, because these instruments/acts are not treaties within the meaning of Art. 2 VCLT and consequently the VCLT, by virtue of Art. 1, does not apply to them. General principles governing the interpretation of constitutive treaties of international organizations may offer a starting point.[17] This is because these general principles of interpretation are well-entrenched and in a certain sense canonical.

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[15] Benzing and Amerasinghe argue that the VCLT is the starting point of the interpretive process. However, according to Brölmann, the VCLT applies to constitutive treaties by default, lending an international organization the power to formulate its own rules to interpret its constitutive treaty. Benzing, *supra* note 14, para. 46; Amerasinghe, *supra* note 14, p. 39; C. Brölmann, *Specialized Rules of Treaty Interpretation: International Organizations*, in: D. Holis (ed.), *The Oxford Guide to Treaties*, Oxford University Press, Oxford: 2012, p. 510; *see also* ICJ, *Reparations for Injuries Suffered in the Service of the United Nations* (Advisory Opinion), [1949] ICJ Rep. 174; ICJ, *Legality of the Use by a State of Nuclear Weapons in Armed Conflict (Request by WHO)* (Advisory Opinion), [1996] ICJ Rep. 226, paras. 66, 74-75; ICJ, *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*, [1954] ICJ Rep. 53; ICJ, *Legal Consequences of for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 1971* (Advisory Opinion), [1971] ICJ Rep. 16. There is no question that the "constitutional interpretation is a rather delicate area of the international law of international organisations." Amarasinghe, *supra* note 14, p. 25. This interpretive approach begs two questions: 1) who is the interpreter of constitutions of international organisations?; and 2) what are the main characteristics of the process of interpretation, including applicable principles? (*ibidem*).

[16] Treaty interpretation in relation to constitutive treaties has particular features that significantly depart from the classical canons of the interpretation as included in the VCLT. As indicated by the ICJ in *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania* (Advisory Opinion), [1950] ICJ Rep. 65, the interpretive method with respect to United Nations competence relies on teleological reasoning, drawing on the object and purpose of the treaty. The Court in that opinion focused directly on the constitutive instrument as it stood at the time of the interpretation, departing from the traditional methods of interpretation. *See* S. Rosenne, *Developments in the Law of Treaties (1945-1986)*, Cambridge University Press, Cambridge: 1989, p. 234. The Court moved from the contractual (the law of treaties) discussion into institutional law, in which the parties to the treaty assumed the capacity of member states (Brölmann, *supra* note 15, p. 517).

[17] Benzing, *supra* note 14, para. 46; *see also* A. Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law*, Oxford University Press, Oxford: 2008, pp. 486-493.

However, there are particular features that can be distinguished from the rules of interpretation relating to constitutive treaties:

> [a] specific feature of the interpretation of secondary law is the paramount importance of contextual interpretation. Legal acts always have to be construed by reference to and in accordance with the constitutive instrument of the organization, a form of constitutional interpretation resulting from the hierarchy of norms. Legal acts should also be construed so that they are in conformity with general international law binding on the international organization, especially rules of *ius cogens*.[18]

Consequently, secondary instruments must be interpreted in a "double" normative context when compared to treaties. They must be interpreted first in light of the primary treaty under which they arise, and, second, like the primary treaty itself, in the normative setting of rules of general international law. The fundamental rule of interpreting constitutive treaties of international organizations, based on the object and purpose of the treaty, "has to be referred to more cautiously … This is the result of the delegated character of secondary rules."[19] International organizations are themselves frequently interpreters of their constitutive treaties and their secondary law.

The authority to adopt the secondary instrument derives from the primary treaty. Special weight is also accorded to the subsequent practice of the organization in contrast to the classical methods of the interpretation which "safeguard the State party's 'sovereign will' such as recourse to *travaux preparatoires*, party intentions, and the subsequent practice of treaty parties – [which] seem to have faded into the background."[20] There is broad agreement to accord the "object and purpose" and subsequent practice in interpreting constitutive instruments (and presumably their secondary acts) "a place, so to speak, of the ordinary meaning."[21] Primary tools in interpreting such instruments include the principle of effectiveness and subsequent practice, with preparatory work playing a secondary role.[22]

The principle of effectiveness is characterized by two special rules. One is that all provisions of a treaty were presumably intended to have some meaning, so that the reading that reduces the meaning of a part of the text to the status of a pleonasm or mere surplusage is unacceptable. This is the so-called "*règle de l'effet utile*". The second rule is that the instrument as a whole, and each of its provisions, presumably was intended to achieve some end, and that an interpretation which will result in making the text ineffective to achieve the object and purpose is suspect – the so-called "*règle de l'efficacité*".[23] Amerasinghe explains that the first of these rules is subsumed under the

[18] Benzing, *supra* note 14, para. 47.
[19] *Ibidem*.
[20] Brölmann, *supra* note 15, p. 523.
[21] Amerasinghe, *supra* note 14, p. 41.
[22] *Ibidem*.
[23] *Ibidem*; G. Fitzmaurice, *The Law and Procedure of the International Court of Justice: Treaty Interpretation and Other Treaty Points*, 33 British Yearbook of International Law 203 (1957). *See* ICJ, *Interpretation of Peace Treaties Advisory Opinion*.

rule of ordinary and natural meaning and that the second rule pertains to effectiveness. This principle of effectiveness is also expressed in the maxim *ut res magis valeat quam pereat.*[24]

Subsequent practice within the meaning of Art. 31(3)(b) of an international institutional organ plays an important role in the interpretation of the constituent instrument of the organization and the organization's secondary acts.[25] However, this is an issue which gives rise to gray areas. The degree of support for certain practice (such as resolutions that may be adopted only by a mere majority of voting states) may cause difficulties in interpretation, since the instrument does not enjoy the support of all members.[26] Another argument is that a minority of states in such a scenario, while initially consenting to a certain treaty obligations, may not be willing to accept the subsequent interpretation of these provisions by a treaty organ, which may differ considerably from the scope of what these states consented to in the first place.[27] Arato, for example, observes that there are differences in the role that subsequent practice plays in the jurisprudence of the ICJ and of the ECtHR. According to the ICJ, the practice of UN organs provides the authoritative guide to the interpretation of the UN Charter "as a proxy for subsequent practice of the parties".[28]

Let us now turn to the discussion of the particular instances of international practice relating to the interpretation of secondary instruments as mentioned in the introduction.

1.2. Security Council Resolutions

The principal question that arises in this connection is whether, or to what extent, the interpretive principles in Arts. 31-33 VCLT apply to the interpretation of Security Council resolutions, or whether different interpretive principles apply, which may or may not loosely draw from the VCLT principles, and if so what these are.

Certain accepted interpretive conventions govern the interpretation of Security Council resolutions. One such convention, for instance, is that the operative paragraphs of a resolution create legal effects but the prefatory paragraphs do not. Further, the basic meaning of words can serve as a starting point for determining the meaning of a given substantive provision in a resolution. However, these are merely conventions

[24] Amerasinghe, *supra* note 14, p. 46.

[25] The subsequent practice of an organ of an international organization was initially a contentious issue. This remained the position until the ICJ's 1962 Advisory Opinion in *Certain Expenses*. It was only in *Namibia* that the Court shed light on the connection between the subsequent practice of states and relevant organs in relation to the constitutive instrument. The Court relied on the practice of state-parties to the Charter, but it accorded an evidentiary value to the practice of the Security Council because it represents the practice of the members of the Council (in particular its permanent members) and this practice was accepted by all member states of the United Nations (ICJ, *Namibia Advisory Opinion* at 22).

[26] Amerasinghe, *supra* note 14, pp. 52-53. *See further* J. Klabbers, *supra* note 13.

[27] *See* Spender and Fitzmaurice in *Certain Expenses of the United Nations (Article 17 paragraph 2 of the Charter)* (Advisory Opinion), [1962] ICJ Rep. 151, paras. 191-193; Ameraisnghe, *supra* note 14, p. 53.

[28] Arato, *supra* note 6.

accepted in practice largely by member states and international courts and tribunals that apply these resolutions. Disagreement can emerge, at the latest, when we reach the finer points of interpretation and application of resolutions.

There exists no single set of interpretive rules governing the interpretation of Security Council resolutions such as the one that exists, largely, for treaties under Arts. 31 and 32 VCLT. For example, it is not necessarily always possible to speak of a Security Council's resolution's "object and purpose". The term may even seem slightly out of place here, especially given the starkly different modes, respectively, of adopting a Security Council resolution and a treaty, quite irrespective of the fact that a Security Council Resolution is not a treaty.[29] From one point of view the absence of a single set of interpretive rules is completely understandable: the interpretation of such an instrument is an institutional matter that depends, or should depend, on voting/adoption procedures. From another point of view, it is surprising that there are no agreed interpretive rules for instruments that can potentially be of great legal consequence. This is particularly the case with respect to resolutions that produce external legal effects, and urgently so with respect to those that have a so-called "law-making" character. Few disagreements illustrate this better than those surrounding the interpretation of resolution 1441 (2002) and resolutions 687 (1991) and 678 (1991) in relation to the 2003 Iraq War.

By no means need this be a bad thing – in fact, it could be a good thing. Codified rules of interpretation could stifle the process of interpretation rather than automatically lead to an uncontroversial agreement on a text's meaning. The ICJ has addressed the interpretation of Security Council resolutions primarily in its advisory jurisprudence. This includes, notably, the Advisory Opinion concerning *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)*. Unlike in the Advisory Opinion in *Kosovo*, the Court did not refer directly to canons of interpretation that form part of the VCLT, but rather confined its analysis to the interpretation of particular parts of Security Council resolution 269 (1969) from the point of view concerning the instrument's legal content and binding force upon states.[30]

The Court in *Namibia* also made it clear that Security Council resolutions must be interpreted against various external, i.e., not text-based factors, including, arguably, other rules of international law. As the ICJ noted:

> [t]he language of a resolution of the Security Council should be carefully analysed before a conclusion can be made as to its binding effect. In view of the nature of the powers under Article 25, the question whether they have been in fact exercised is to be determined in each case, having regard to the terms of the resolution to be interpreted, the discussions leading to it, the Charter provisions invoked and, in general, all circumstances that might assist in determining the legal consequences of the resolution of the Security Council.[31]

[29] *But see* ICJ, *Kosovo Advisory Opinion*, pp. 443 (para. 97), 444 (para. 100) and 451 (para. 118), in which the Court speaks of the object and purpose of Security Council resolution 1244 (1999).

[30] ICJ, *Namibia Advisory Opinion*, paras. 109-117.

[31] *Ibidem*, para. 114.

The ICJ's Advisory Opinion in *Kosovo* offers further guidance on the Court's approach to the interpretation of Security Council resolutions. The Court's position was cautious, and restricted to the circumstances of Security Council Resolution 1244 (1999):

> [t]he Court must recall several factors relevant in the interpretation of resolutions of the Security Council. While the rules on treaty interpretation embodied in Articles 31 and 32 of the Vienna Convention on the Law of Treaties may provide guidance, differences between Security Council resolutions and treaties mean that the interpretation of Security Council resolutions also require [*sic*] that other factors be taken into account. Security Council resolutions are issued by a single, collective body and are drafted through a very different process than that used for the conclusion of a treaty. Security Council resolutions are the product of a voting process as provided for in Article 27 of the Charter, and the final text of such resolutions represents the view of the Security Council as a body. Moreover, Security Council resolutions can be binding on all Member States … irrespective of whether they played any part in their formulation. The interpretation of Security Council resolutions may require the Court to analyse statements by representatives of members of the Security Council made at the time of their adoption, other resolutions of the Security Council on the same issue, as well as the subsequent practice of relevant United Nations organs and of States affected by those given resolutions.[32]

The context of this passage (which falls under the heading "*1. Interpretation of Security Council resolution 1244 (1999)*") makes it clear that the Court was discussing these principles of interpretation in relation to that instrument in question, but the passage itself is broad enough to qualify as a statement of principle on the interpretation of Security Council resolutions in general. Further, it emerges from this passage that Arts. 31 and 32 VCLT can serve as a starting point: they can, in the words of the Court, "provide guidance", a term likewise used by the Seabed Disputes Chamber, as noted above. It is, however, unclear what "guidance" consists of (is it non-binding? does it generate presumptions? does it entitle the interpreter to pick and choose?), what its extent is, and – most importantly – which rules of interpretation apply when the limits of Arts. 31 and 32, to the extent they are even applicable, have been reached.

Again, a Security Council resolution is an act of the Council as a body. The resolution has no parties, nor is it clear that the Council's putative "intention" is relevant, since this act is not a "contract-like" transaction. If Arts. 31 and 32 VCLT *prima facie* govern the interpretation of such a Security Council resolution, modifications must be made to account for these circumstances.

The Court offered a position on this last question. According to this passage, other factors relevant for interpretation of a Council resolution that may have to be taken into account include: (1) the voting process under Art. 27 of the Charter, and the fact that the "final text of such resolutions represents the view of the Security Council as a body"; (2) the fact that "Security Council resolutions can be binding on all States

[32] ICJ, *Kosovo Advisory Opinion*, at 442 (para. 95).

… irrespective of whether they played any part in their formulation"; (3) analysis of "statements by representatives of members of the Security Council made at the time of their adoption"; (4) "other resolutions of the Security Council on the same issue"; and (5) "subsequent practice of relevant United Nations organs and of States affected by those given resolutions."[33] It appears that in *Kosovo* the ICJ sided with an interpretive methodology that endorsed the interpretation of a Security Council resolution's text in good faith on the basis of its ordinary meaning,[34] in context and in light of the instrument's object and purpose,[35] and with regard to applicable rules of general international law.[36]

This approach is not entirely systematic. In fact, it amounts to somewhat of a mix of interpretive principles that may license a "pick-and-choose" approach. Factor (1) is uncontroversial, as is factor (2), depending on context. That said, the Court did not explain how exactly these considerations manifest themselves through interpretation. Factor (3) is left unexplained. Factor (4) seems justified from an interpretive and institutional perspective, and factor (5) seems notoriously broad. Yet it is not clear whether the Court intended this list to be "taken into account" in addition to VCLT rules, or to take priority over them. Second, as under Art. 31(3) VCLT, the practical requirements associated with the phrase "take into account" remain unclear. Likewise, it is unclear whether these considerations should be "taken into account" sequentially or not, and either way how much weight should be accorded to each interpretive consideration.

The Court also made it clear that resolution 1244 (1999) had to be interpreted in conjunction with its annexes, because the resolution itself referred to them, and indeed even taking into account certain preambular provisions. The Court noted

> that resolution 1244 (1999) must be read in conjunction with the general principles set out in annexes 1 and 2 thereto, since in the resolution itself, the Security Council: '1. *Decide[d]* that a political solution to the Kosovo crisis shall be based on the general principles in annex 1 and as further elaborated in the principles and other required elements in annex 2.' … Further, it bears recalling that the tenth preambular paragraph of resolution 1244 (1999) also recalled the sovereignty and the territorial integrity of the Federal Republic of Yugoslavia.[37]

Various judges' declarations and dissenting or separate opinions articulated further interpretive approaches. Vice President Tomka noted in his declaration that the Security Council's silence could not be interpreted as approval of or acquiescence to the declaration of independence of 17 February 2008. He further noted that the interpretation Security Council resolution 1244 (1999) should take into account the instrument's preamble, because the preamble is "an integral part of resolution 1244, is central to

[33] *Ibidem*.
[34] *See ibidem* at 449-450 (paras. 113-115).
[35] *See ibid*em at 442-444 (paras. 95-100).
[36] *See ibidem* at 436-438 (paras. 79-81).
[37] *See ibidem* at 442-443 (para. 95).

ascertaining the context in which the resolution was adopted and the intention of the Security Council when adopting it."[38] Judge Koroma dissented from the Court's Advisory Opinion. He considered the resolution a *lex specialis* that the Court was required to interpret before turning to other mandatory rules of international law, including sovereignty and territorial integrity.[39] He reached his conclusion on the basis of a close, literal reading of the instrument.[40] Judge Bennouna in his dissenting opinion stated that interpreting Security Council resolution 1244 was a "task [that] falls to the organ which adopted it."[41] Judge Skotnikov's dissenting opinion echoed this view, and cited a passage from the PCIJ's *Jaworzina (Polish–Czechoslovakian Frontier)* Advisory Opinion,[42] according to which "it is an essential principle that the right to giving an authoritative interpretation of a legal rule belongs solely to the person or body who has power to modify or suppress it."[43] Judge Skotnikov added an important statement of principle that was particularly resonant in the context of Security Council resolution 1244 (1999), to the effect that "Security Council resolutions are political decisions" and that in determining the compatibility of the unilateral declaration of independence with the resolution without a request by the Security Council, the Court was substituting itself for the Security Council, even if the Court's determination were legally speaking correct (which he said it was not in the present case).[44] Judge Skotnikov also took issue with the majority's treatment of a resolution adopted under Chapter VII of the Charter.[45]

The process of adopting Security Council resolutions, particularly where they produce external legal effects, is a politicized one. It may also be hasty and enjoy the benefit of little or no legal input, and in this sense is not comparable to the negotiation of a treaty or of legislation. Negotiating delegates may have little training in public international law.[46] Thus it seems warranted to attach less legal significance to the precise language of the text. Indeed this language is sometimes left deliberately ambiguous in order to achieve a consensus between the Security Council Members.[47] Presumably, this dimension is what the Court had in mind in *Kosovo* when referring to "statements by representatives of members of the Security Council made at the time of their adoption".[48] The flipside of this, however, is that these statements may have enjoyed as little legal input as the text itself.

[38] *Ibidem* (Judge Tomka Decl., para. 23).
[39] *Ibidem*, para. 10.
[40] *Ibidem* (Judge Koroma, diss., para. 18).
[41] *Ibidem* (Judge Bennouna, diss., para. 21).
[42] PCIJ, *Question of Jaworzina (Polish-Czechoslovakian Frontier)*, PCIJ Ser. B, No. 8, 6 December 1923.
[43] ICJ, *Kosovo Advisory Opinion* (Judge Skotnikov, diss., para. 8), citing *Jaworzina Advisory Opinion*. Judge Skotnikov in further support of this position cites Michael Wood (*see* M.C. Wood, *The Interpretation of Security Council Resolutions*, 2 Max Planck Yearbook of United Nations Law 82 (1998).
[44] ICJ, *Kosovo Advisory Opinion* (Judge Skotnikov, diss., para. 9).
[45] *Ibidem*, para. 16.
[46] Wood, *supra* note 43, p. 82.
[47] *Ibidem*, pp. 80-82.
[48] ICJ, *Kosovo Advisory Opinion*, para. 95.

The focus of the Court's passage in *Kosovo* is clearly institutional, as it ought to be; the relevance of these additional factors in each case derives from the institutional context in which Security Council resolutions are passed, and, in a broader sense, the Charter from which they derive their authority by virtue of Art. 25.

Other international courts and tribunals have also offered statements on the interpretation of Security Council resolutions. Notable among these is a statement by the Appeals Chamber of the Special Tribunal for Lebanon. In *Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging* the Appeals Chamber of the Special Tribunal for Lebanon noted, when answering the question whether it should apply international law in its interpretation of the Special Tribunal for Lebanon Statute, which had been established by Security Council resolution 1757 (2007), adopted under Chapter VII of the Charter: "[t]hose rules of interpretation [that evolved in international custom and were codified or developed in the 1969 Vienna Convention on the law of Treaties] must … be held to be applicable to any internationally binding instrument, whatever its normative source."[49] The passage is less nuanced than the ICJ's passage in *Kosovo* or indeed the Seabed Dispute Chamber's passage in its above-cited Advisory Opinion, and ultimately may be less than accurate. It seeks to extend the rules of interpretation in Arts. 31 and 32 VCLT to *any* internationally binding instrument, including instruments that are not treaties. This assumption does not seem to be warranted in light of international practice and the position of other international courts and tribunals.

The Appeals Chamber proceeded in the same paragraph to add further elements with respect to the interpretation of Security Council resolution 1757 (2007), which echo the ICJ's approach in *Kosovo*:

> [i]n so far as the provisions of this Tribunal's Statute have entered into force on the basis of Security Council Resolution 1757 (2007), the Appeals Chamber will also take into account such statements made by members of the Security Council in relation to the adoption of the relevant resolutions, the *Report of the UN Secretary-General on the Establishment of the Tribunal* of 15 November 2006 (S/2006/893), and the object and purpose of those resolutions (in keeping with the *Kosovo* Opinion of the ICJ), as well as the practice of the Security Council.[50]

The application of elements of Art. 31 VCLT for the interpretation of Security Council resolutions may not be fully warranted, yet it tells us something about courts' and tribunals' approach to such questions of interpretation, which may well be informed by considerations of judicial expediency.

There are also other types of resolutions that may call for interpretation, yet which do not have an obligation-creating character. Certain resolutions may nonetheless be intended to contribute to the development of international norms on certain issues, or

[49] Special Tribunal for Lebanon (Appeals Chamber), *Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging*, para. 26.

[50] *Ibidem.*

purport to do so. A recent example is Security Council Resolution 2122 (2013), concerning the protection of women during armed conflict. While the resolution was not adopted under Chapter VII and uses "soft" language, it nonetheless addresses issues of principle, and recognizes the need for the implementation of an earlier resolution on these questions, resolution 1325 (2000).[51]

Certain legal norms in general international law could also have significance for the interpretation of secondary instruments, including Security Council resolutions. A resolution must be interpreted against two sets of legal norms: the Charter and general international law. The first question is whether the resolution is in conformity with the Charter. To answer this question, it is necessary to interpret the resolution in question against the pertinent provisions of the Charter. First, Art. 24(1) and (2) provides:

> 1. In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.
> 2. In discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations. The specific powers granted to the Security Council for the discharge of these duties are laid down in Chapters VI, VII, VIII and XII.

Art. 1 of the Charter, to which Art. 24(2) refers, sets out the "Purposes" of the United Nations. Art. 2 sets out the "Principles" of the United Nations, according to which "[t]he Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with". Both provisions set limits upon the manner in which the Security Council may carry out its duties under the Charter. Finally, the relevant provisions in Chapters VI, VII, VIII and XII that lay out the Council's powers and duties complete the Charter-based, i.e., primary-treaty-based framework that sets parameters for the interpretation of Security Council resolutions.

Chief candidates among the rules of general international law relevant for the interpretation of Security Council resolutions are peremptory norms of general international law. Judicial dicta support the suggestion that human rights norms, for example, play a particularly significant role in the interpretation of Security Council resolutions. The ECtHR noted in *Al-Jedda v. United Kingdom* that

> in interpreting [the Security Council's] resolutions, there must be a presumption that the Security Council does not intend to impose any obligation on Member States to breach fundamental principles of human rights. In the event of any ambiguity in the terms of a Security Council Resolution, the Court must therefore choose the interpretation which is most in harmony with the requirements of the Convention and which avoids any conflict of obligations.[52]

[51] Security Council Resolution 2122 (2013), para. 1 (referring to Security Council Resolution 1325 (2000)).

[52] ECtHR, *Al-Jedda v. United Kingdom* (App. No. 27021/08), 7 July 2011, para. 102.

The ECtHR here assumed the existence of an interpretive presumption in general international law that the Security Council did not "intend" to "breach fundamental principles of human rights." Thus in the event of linguistic ambiguity, i.e., where there are competing possible interpretations, the ECtHR noted that it should choose the interpretation "most in harmony with the [European Convention on Human Rights] and which avoids any conflict of obligations." The objective is laudable, though this approach can only legitimately find application in borderline cases of genuine ambiguity of meaning. Again, it may be fanciful to impute an *intention* to the Council, at least one that mirrors the "intention" of parties to a treaty.

Similar views were expressed in an individual concurring opinion in *Sayadi and Vinck v. Belgium*.[53] In that case, one member of the UN Human Rights Committee, Sir Nigel Rodley, in his concurring opinion on the merits proposed criteria for determining the existence of a conflict between a Security Council resolution and state-parties' obligations under the International Covenant for Civil and Political Rights. The opinion among other criteria suggested that "there should be a presumption that the Security Council did not intend that actions taken pursuant to its resolutions should violate human rights." The opinion further proposed "a presumption that, in any event, there was no intention that a peremptory norm of international (human rights) law (*ius cogens*) should be violated."[54]

Both *Al-Jedda* and Sir Nigel Rodley's concurring opinion in *Sayadi and Vinck* reflect the particular role that international human rights obligations may play in international practice with respect to the interpretation of Security Council resolutions in borderline cases.

Yet the interpretive significance of these norms for Security Council resolutions is not always as straightforward as may be assumed. For treaties, peremptory norms may be particularly significant for interpretation by virtue of Art. 31(3)(c) VCLT, though even in that setting caution remains key. The provision introduces an auxiliary rather than a free-standing principle of interpretation. This becomes clear from the words "together with the context" in Art. 31(3), which establish the cross-reference to "context" in Art. 31(2). The words "shall be taken into account" in Art. 31(3) further point to an auxiliary rule of interpretation. As the *Marckx* case in the ECtHR demonstrates, the principle lends itself to incorrect application.[55]

Finally, according to Art. 31(3)(c), the rules in question must be "relevant" and "applicable in the relations between the parties", though in the case of obligations arising under peremptory norms these two conditions will invariably be satisfied. By definition, peremptory norms are "applicable in the relations between the parties." It is precisely

[53] UN Human Rights Committee, *Sayadi and Vinck*, CCPR/C/94/D/1472/2006, 29 December 2008.

[54] *Ibidem* (Individual Opinion of Committee Member Sir Nigel Rodley (concurring)).

[55] *See* ECtHR, *Marckx v. Belgium* (App. No. 6833/74), 13 June 1979. More recently, certain investment treaty tribunals have seemingly read the provision as a license to apply rules of customary international law in the interpretation of a treaty's provisions.

the non-derogable character of peremptory norms that can lead an international court or tribunal asked to pronounce upon a question of interpretation to take for granted that an obligation under a peremptory norm is "applicable in the relations between the parties." According to Judge Simma's separate opinion *Oil Platforms*, where a legal norm has a peremptory character it creates an insurmountable presumption by virtue of the principle reflected in Art. 31(3)(c) against an interpretation of a treaty provision at odds with that norm.[56]

The principle of interpretation in Art. 31(3)(c) or its equivalent under customary international law cannot, however, be applied wholesale to the interpretation of Security Council resolutions. First, the VCLT applies to treaties by virtue of Art. 1, and it does not apply instruments that are not treaties. Instruments that are treaties are defined in Art. 2. The definition of a treaty in Art. 2 VCLT incidentally supports the principle of systemic integration in Art. 31(3)(c). Likewise, the rules of treaty interpretation under customary international law unsurprisingly apply to treaties and not to other legal instruments such as Security Council resolutions. Second, Art. 31(3)(c) speaks of relevant rules of international law applicable in the relations between the *parties*. A Security Council resolution has no parties; the decision(s) it contains is/are an act of the Council rather than an agreement between the member states represented on the Council at the given time.

That said, it would seem strange if treaties must be interpreted by taking into account certain relevant rules of general international law, in addition to the treaty's context, yet Security Council resolutions need not be so interpreted, especially where, as in more recent years, some resolutions have had a bearing on certain persons' individual rights. Further, it is not clear whether a resolution could ever be in conflict with a peremptory norm, for example, and still be in accordance with the "Purposes and Principles" of the United Nations reflected in Art. 2 of the Charter. Interpretation offers a way to avoid apparent conflicts with peremptory norms or with Art. 2's Purposes and Principles. Art. 24(2) of the Charter generates an interpretive presumption that a Security Council resolution is in accordance with the purposes and principles of the Charter. Thus, as a general conclusion, a primary treaty's provisions can – and often do – generate the interpretive presumptions that apply to secondary instruments arising under them.

1.3. International Maritime Organization Resolutions

The IMO and its resolutions offer illustrative examples in the present context. The IMO is an extremely important international institution: its regulatory activities enjoy great day-to-day significance in various industries and have an immediate bearing on shipping, which remains by far the most important method for the international transport of goods. The IMO's resolutions are of pivotal importance in regulating these shipping activities, especially in environmental matters.

[56] ICJ, *Oil Platforms (Islamic Republic of Iran v. United States of America)* (Judgment), [2009] ICJ Rep. 33 (Judge Simma, sep. op., para. 9). For commentary, *see* F. Berman, *Treaty 'Interpretation' in a Judicial Context*, 29 Yale Journal of International Law 315 (2004).

Interpretation of an IMO resolution is necessary, in the first instance, in order to determine the legal status of the instrument, and in particular whether it enjoys binding force for member states or not. To determine whether an IMO resolution is binding, it is necessary first to look to the text of the instrument. This text must in first instance, as a default starting point, be interpreted according to certain canonical principles, since, as already noted, there are no codified rules of interpretation for such instruments in the way they exist for treaties under Arts. 31 and 32 VCLT. Interpretation consequently is relevant at two stages: first to determine the legally binding or hortatory character of a resolution, and second to apply the resolution.

IMO resolutions come in two varieties when it comes to the question whether they enjoy binding legal force. First, there are those that have a formative effect for treaties, i.e., that mature into treaties or treaty amendments. These undoubtedly possess a binding character. Second, there are those that are secondary and are not binding, which certain commentators consider as "being quasi-legal non-binding norms with a technical content quite incomparable to the soft law found in general recommendations, guidelines, codes of conduct, principles, standards, norms, best practices or model laws."[57]

Examples of instruments in the first category include the Maritime Safety Committee (MSC's) 2006 amendments to the London Protocol (London Convention) on CO_2 sequestration in sub-seabed geological formations in Annex I to the London Convention.[58] The view has been expressed that IMO resolutions, which are associated with treaties, qualify "as binding norms",[59] and that "[d]espite the lack of formal commitment or legal obligation, there is nevertheless an implied obligation on States not to act contrary to the spirit and terms of such instruments, and this obligation is usually complied with."[60]

It does not, however, seem advisable to analyze each IMO resolution on a case-by-case basis, by taking into account its application by the IMO and its member states. This does not seem to be the best method for determining the legal character of IMO resolutions. Such an approach would add little to the general discussion on the legal character of these instruments, and would not be particularly helpful in formulating broader, general conclusions about the legal character of IMO resolutions and, importantly, the ways in which to interpret them. An additional complication stems from the fact that the IMO uses terminology and its own process, in addition to those that appear in UNCLOS. Birnie notes that "[b]oth use of terms 'rules' and 'regulations' … would generally [be] regarded[ed] as binding *per se* and *ab initio* … IMO and UNCLOS also use terms such as 'standards', 'practices' and

[57] M. George, *The Role of IMO Resolutions in Ocean Law and Policy in the Asia-Pacific*, 13 Asian Yearbook of International Law 127 (2007).

[58] Resolution LP.1(1) 2006.

[59] George, *supra* note 57, p. 138.

[60] J.-U. Schröder, A.A. Hebbar, *International Standard Setting through the IMO*, World Maritime University, Malmö, available at: http://www.balticmaster.org/media/files/general_files_693.pdf (accessed 20 April 2016), p. 12.

'guidelines', which are more fluid but not necessarily lacking in any authority in the legal sense."[61]

The MSC has acknowledged the uncertain legal character of IMO instruments. In 1996, it decided to establish a drafting group to address the problem of identifying which IMO legal acts were mandatory, and which were recommendations.[62] The Working Group's mandate included establishing a uniform wording for referencing IMO instruments in order to assist in IMO deliberations. The Working Group has found that "a variety of expressions had been used across IMO instruments, including "shall comply with"; "in accordance with"; "in compliance with"; and "not inferior to". These expressions had been used with reference to mandatory instruments. The expressions "taking into account"; "having regard to" and "based on" had in principle been used with respect to recommendations. The Working Group prepared a set of guidelines to be taken into consideration for future drafting, and made the following recommendations. It suggested that the best method for rendering IMO instruments mandatory would be to follow the provisions of the SOLAS Convention, Chapters VII and X, for making IBC, IGC and HBC Codes mandatory, by referring expressly to such instruments in the text of the conventions and by prescribing regulations expressly in the text of the convention; and further, by providing expressly that future amendments to conventions must follow the procedure for amending the convention regulations and that such requirements shall be treated as mandatory.[63]

The above analysis indicates that determining the legal character of IMO resolutions is itself an outcome of an interpretive process that requires the reader carefully to examine the terms used in the document's text, as well as other circumstances surrounding its adoption.

Further, IMO practice illustrates that when interpreting and applying a secondary instrument under international law that arises under a treaty but is not a treaty, the procedure leading to the adoption of the act by an international organ plays an important

[61] P. Birnie, *The Status of Environmental 'Soft Law': Trends and Examples with Special Focus on IMO Norms*, in: H. Ringbom (ed.), *Competing Norms in The Law of Marine Environmental Protection*, Wolters Kluwer International, London: 1997, p. 38.

[62] IMO Doc. MSC.66/WP2, 10 May 1996.

[63] Adopting such recommendations would amount to good practice on the part of the Organization, indeed of any organization, because it could do away with much of the ambiguity surrounding the question whether a regulation is legally binding, which otherwise must be determined through interpretation by reference to unsettled criteria. Instruments containing purely technical standards could be referred to in the footnote to the relevant regulation as mandatory requirements, but the text of the regulation itself should clearly express this by stating that parties "should comply with standards developed by the Organization" in order to avoid a complex amendment procedure. For mandatory instruments the use of titles such as "guidelines" or "guidance" should be avoided so as not to generate misunderstanding. The Working Group further suggested that recommendations could be referred to in a footnote, clearly indicating their recommendatory character (*e.g.*, "shall be approved by the Administrator, taking account the recommendation developed by the Organization"). Contradictory expressions such as "shall comply with the recommendations" should be avoided.

role, unlike – *prima facie* – under the law of treaties. Notably, it is important to ascertain to what extent this procedure is similar to the negotiation and adoption of a multilateral treaty text, as the Seabed Disputes Chamber has noted.[64] If so, chances are good that an international tribunal will employ interpretive techniques similar to treaty interpretation, albeit with necessary modifications. IMO resolutions are adopted by the Assembly, the Council, the MSC, the Marine Environment Protection Committee (MEPC) and the Committee on the London Convention.

Resolutions adopted by technical organizations or bodies may arguably have a different legal character from those adopted by political organizations, because of the expertise of the body adopting them. States may as a result be more willing to accord to them some form of legal status. However, IMO practice again indicates that states in fact follow codes and guidelines more willingly if they are incorporated in a binding instrument such as a treaty, even if only by reference.[65] The deceptively simple and basic task[66] of distinguishing which acts of international organizations are binding and which are not is a complex issue in light of the IMO's role as a standard-setting organization. Indeed, this is arguably the case with respect to any standard-setting organization, including the ICAU, International Telecommunications Union (ITU), World Meteorological Organization (WMO) and WHO.

As far as subsequent practice and institutional practice with respect to interpretation is concerned, IMO organs are themselves responsible for interpreting these instruments. There is little direct judicial practice determining the status of IMO resolutions, or the meaning to be assigned to their text in borderline cases. Nevertheless, the IMO's organs offer some guidance in this respect. For instance, the MSC's Working Group interpreted the wording in the IMO-sponsored Convention on the meaning of binding and non-binding norms. There are also other examples, such as the request to clarify whether in order for an "interpretative resolution" by a COP to qualify as a "subsequent agreement" it is necessary for such a resolution to have been adopted by consensus. This question arose during the 3rd meeting of International Working Group on Ocean Fertilization (Montreal, 31 May–3 June 2011) in the following form:

> [t]he Working Group agreed to recommend [that] the IMO Legal Affairs and External Relations Division should be requested to advise the governing bodies in October 2011 about the procedural requirements in relation to a decision on the interpretative resolution and, in particular, whether or not consensus would be needed for such a decision.[67]

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[64] *See below*.

[65] *See* J. Harrison, *Making of the Law of Sea: A Study in the Development of International Law*, Cambridge University Press, Cambridge: 2011, p. 197.

[66] Klabbers, *supra* note 13.

[67] LC33/4, para. 4 15.2 cited in International Law Commission Study Group on Treaties over Time, G. Nolte, *Subsequent Agreements and Subsequent Practice of States Outside of Judicial or Quasi-judicial Proceedings: Third Report for the ILC Study Group on Treaties over Time*, in: G. Nolte (ed.), *Treaties and Subsequent Practice*, Oxford University Press, Oxford: 2013, pp. 373-374. On the interpretive functions of conferences/meetings of parties (COP/MOP) to a treaty, *see below*.

The IMO Sub-Division of Legal Affairs responded in lengthy fashion. Paragraphs 7 and 8 of this document are of particular importance.[68] Paragraph 7 noted that "[w]e are not aware of interpretative resolutions adopted at IMO which are worded in such a way to constitute subsequent agreement and could constitute a precedent". Paragraph 8 referred to the Oil Pollution Fund: "Years ago, the IOPC Fund adopted a resolution of this kind, however, some of these resolutions have not been recognized by national courts as having the same binding effect as a treaty, or amendment thereto".

Nolte has observed that a subsequent agreement in the sense of Art. 31(3)(a) VCLT cannot be binding as a treaty since it shall only "be taken into account" for the purpose of interpreting the treaty itself. Therefore, although it can amount to an "authentic interpretation" of part(s) of the treaty text, is not binding *per se*. The rules of treaty interpretation are not applicable to such an agreement, because the instrument under consideration is not a treaty.

1.4. International Seabed Authority Regulations

Unlike IMO resolutions, the legal character of which can remain uncertain, ISA regulations are directly binding upon state-parties. No consent on the part of states is required. No opt-out procedure is available with respect to them. The question then arises whether ISA regulations should be interpreted according to different interpretive principles than, for example, IMO resolutions.

Such an approach would be misguided: the degree of an international legal instrument's binding character has no necessary effect for the applicable rules of interpretation. The determination of these respective instruments' legal character, i.e., whether they are binding or not binding, is *prima facie* a different question from the interpretation of their substance.

One prominent peculiarity with respect to the interpretation of the acts adopted by the ISA is the existence of the Seabed Disputes Chamber (SDC). The SDC dominates the debate on interpretation with respect to ISA regulations, and for good reason, because it is an international tribunal with the mandate to adjudicate disputes arising under contracts governed by the regulations. According to Brölmann, judicial organs of this variety should be treated as "bodies that institutionally belong to a particular organization (e.g., the ICJ serves as the UN's principal judicial organ) or functional sphere …"[69] In the case of a dispute concerning the Area, this organ is the SDC of the International Tribunal for the Law of the Sea. This Chamber is established in accordance with Part XI and Annex VI of the Convention for the purpose of adjudicating disputes arising under the deep seabed mining regime.[70] The Chamber consists of eleven members selected by the judges of the Tribunal from among themselves. It should reflect the world's principal legal systems.[71]

[68] *Ibidem*, p. 174.
[69] Brölmann, *supra* note 15, p. 522.
[70] Art. 186 and Annex VI, Art. 14 UNCLOS; *see also* Annex VI, Art. 35(2).
[71] Art. 186 and Annex VI, Art. 35(2) UNCLOS.

The SDC is exclusively composed of members of the Tribunal, yet in practice it functions as an autonomous international tribunal with its own President, its own rules of procedure, and its own jurisdictional provisions. Formally, though, it remains part of ITLOS. According to Art. 187(a) UNCLOS, the Chamber's judicial function is to hear disputes arising between states concerning the interpretation and application of Part XI. The parties before the Chamber can be states, the Authority, and private actors involved in deep seabed operations (Annex VI, Art. 30 UNCLOS).[72] ISA Regulations, as interpreted and applied by the SDC, have the potential to create some of the most intricate questions of interpretation in international law, by blurring the lines between types of international instruments.[73]

The Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area, the Regulations on Prospecting and Exploration for Polymetallic Sulphides in the Area and the Regulations on Prospecting and Exploration for Cobalt-rich Ferromanganese Cruses in the Area all contain standard clauses for exploration contracts. At present, there are 24 such contractors. Several of these contractors are states.[74]

The "Standard Clauses for Exploration Contract", which are annexed to the respective regulations, incorporate the respective regulations by reference into the substantive law governing the contract.[75] Thus where a dispute concerning the Regulations arises between a contractor and the ISA under the contract, the dispute is, at least technically speaking, a contractual one, and the Regulations would have to be interpreted and applied *qua* contractual terms, since by virtue of their incorporation into the contract, this latter instrument becomes the normative source of the Regulations and they are binding on the contractor by virtue of the contract.

There is, however, a problem, if the model contract provisions are incorporated into actual contracts. According to Section 27.1 of the respective standard clauses, "this contract shall be governed by the terms of this contract, the rules, regulations and procedures of the Authority, Part XI of the Convention, the Agreement and any other rules of international law not incompatible with the Convention." The contract is thus governed entirely by international law, rather than by any domestic law. This is unusual, and begs the question which rules of contract interpretation apply to such an

[72] The jurisdiction of the SDC also extends to disputes arising between states and the Authority and to disputes between the Authority and contractors or prospective contractors. Arts. 187(b), 188(1)(a), 188(1)(b) and 188(2)(a) UNCLOS provide for other forms of dispute resolution. *See further* Art. 188(2)(b) UNCLOS.

[73] For a previous blurring of the lines and confirmation of the lines, *see* ICJ, *Anglo-Iranian Oil Co. case (U.K. v. Iran)* (Jurisdiction), [1952] ICJ Rep. 93.

[74] *See* https://www.isa.org.jm/deep-seabed-minerals-contractors (accessed 20 April 2016).

[75] Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area (Standard clauses for exploration contract, Section 13 ("Undertakings")), ISBA/19/C/17; Regulations on prospecting and exploration for polymetallic sulphides in the Area (Standard clauses for exploration contract, Section 13 ("Undertakings")), ISBA/16/A/12/Rev.1; Regulations on Prospecting and Exploration for Cobalt-rich Ferromanganese Crusts in the Area (Standard Clauses for Exploration Contract, Section 13 ("Undertakings")), ISBA/18/A/11.

instrument. It is a peculiar type of contract, being governed entirely by international law. Moreover, the SDC enjoys exclusive jurisdiction, under Section 25 of the model clauses, over disputes under the contract.

Surely where the contractor is a private entity it is unwarranted simply to assume that the rules of treaty interpretation apply, though the SDC may well consider that they are a "starting point", "provide guidance", or something of the like. There is, as of yet, no SDC jurisprudence on these questions, and it will require the development of such jurisprudence to articulate which rules of interpretation apply to these contracts.

Things may look different where the contractor is a state. In that case, the "contract" in question is concluded between an international organization and a state, is governed by international law, and is subject to the exclusive jurisdiction of an international tribunal. In that case the rules of treaty interpretation may well apply in the event of a dispute arising under the contract, for the very simple reason that such a "contract" is a treaty, legally speaking.

The above-mentioned regulations expressly provide that "[d]isputes concerning the interpretation or application of these Regulations shall be settled in accordance with Part XI, section 5, of the Convention".[76] Again, interpretation assumes particular significance in this institutional setting. The existence of an autonomous ITLOS chamber devoted specifically to legal questions concerning the Area under UNCLOS lends a judicial character to the application of the ISA's instruments by the SDC, at least where the chamber is called upon to interpret or apply such instruments, as it was in its first Advisory Opinion.

The most important limitation to the Chamber's jurisdiction follows from Art. 189 UNCLOS.[77] According to Harrison "[t]he most pertinent effect of the provision is to limit the jurisdiction of the Seabed Disputes Chamber by preventing the Chamber from deciding whether any rules, regulations or procedures adopted by the Authority are in conformity with the Convention and from declaring any such instruments invalid."[78]

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[76] Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area (as amended 22 July 2013), Regulation 40, ISBA/19/C/17; Regulations on prospecting and exploration for polymetallic sulphides in the Area, Regulation 42; Regulations on Prospecting and Exploration for Cobalt-rich Ferromanganese Crusts in the Area, Regulation 42.

[77] "The Seabed Disputes Chamber shall have no jurisdiction with regard to the exercise by the Authority of its discretionary powers in accordance with this Part; in no case shall it substitute its discretion for that of the Authority. Without prejudice to article 191, in exercising its jurisdiction pursuant to article 187, the Seabed Disputes Chamber shall not pronounce itself on the question of whether any rules, regulations and procedures of the Authority are in conformity with this Convention, nor declare invalid any such rules, regulations and procedures. Its jurisdiction in this regard shall be confined to deciding claims that the application of any rules, regulations and procedures of the Authority in individual cases would be in conflict with the contractual obligations of the parties to the dispute or their obligations under this Convention, claims concerning excess of jurisdiction or misuse of power, and to claims for damages to be paid or other remedy to be given to the party concerned for the failure of the other party to comply with its contractual obligations or its obligations under this Convention."

[78] Harrison, *supra* note 65, p. 30.

The Seabed Disputes Chamber can also render advisory opinions at the request of the Assembly or the Council, and these opinions are not binding.[79] On 1 February 2011, the Seabed Dispute Chamber rendered an Advisory Opinion on *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, upon the request by the ISA Council.[80] The pertinent question for present purposes concerns the rules of interpretation that the Chamber relied on in its reading of the ISA's Nodules Regulations and the Sulphides Regulations.

The Chamber explained its starting point in the following manner:

> [a]mong the rules of international law that the Chamber is bound to apply, those concerning the interpretation of treaties play a particularly important role. The applicable rules are set out in Part III, Section 3 entitled 'Interpretation of Treaties' and comprising articles 31 to 33 of the 1969 Vienna Convention on the Law of Treaties (hereinafter 'the Vienna Convention').[81]

The Chamber further noted:

> [i]n light of the foregoing, the rules of the Vienna Convention on the interpretation of treaties apply to the interpretation of provisions of the Convention and the 1994 Agreement. The Chamber is also required to interpret instruments that are not treaties and, in particular, the Regulations adopted by the Authority, namely, the Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area of 2000 (hereinafter 'the Nodules Regulations'), and the Regulations on Prospecting and Exploration for Polymetallic Sulphides in the Area of 2010 (hereinafter 'the Sulphides Regulations').[82]

The Chamber then noted, in a statement of principle:

> [t]he fact that these instruments are binding texts negotiated by States and adopted through a procedure similar to that used in multilateral conferences permits the Chamber to consider that the interpretation rules set out in the Vienna Convention may, by analogy, provide guidance as to their interpretation. In the specific case before the Chamber, the analogy is strengthened because of the close connection between these texts and the Convention.[83]

Notice that, just as the ICJ did when discussing the interpretation of Security Council resolution 1244 (1999) in its *Kosovo* Advisory Opinion, the Chamber here

[79] Art. 19(1) UNCLOS.

[80] On this *see* D. Freestone, *Advisory Opinion of the Seabed Disputes Chamber of International Tribunal for the Law of the Sea on "Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area"*, 15(7) Insights; T. Poisel, *Deep Seabed Mining: Implications of Seabed Disputes Chamber's Advisory Opinion*, 19 Australian International Law Journal 213 (2012); D.K. Anton, R.A. Makgill, C.R. Payne, *Advisory Opinion on Responsibility and Liability for International Seabed Mining (ITLOS Case No. 17): International Environmental Law in the Seabed Disputes Chamber*, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1793216 (accessed 20 April 2016).

[81] Seabed Disputes Chamber (ITLOS), *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area Advisory Opinion*, para. 57.

[82] *Ibidem*, paras. 68-69.

[83] *Ibidem*, para. 60.

took the starting position that the VCLT's rules on treaty interpretation could "provide guidance".[84]

The SDC also relied on Art. 33 VCLT, which concerns the interpretation of multilingual instruments. It observed: "[i]n interpreting the provisions of the Convention, it should be borne in mind that it is a multilingual treaty: the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic (article 320 of the Convention)."[85] The Chamber also noted that "six languages are also official languages of the Council and that the Regulations of the Authority, as well as the decision of the Council containing the questions submitted to the Chamber, were adopted in those languages with the original in English".[86] It concluded that there was, however, "no difference of meaning between the authentic texts of the relevant provisions of the Convention. A comparison between the terms used in these provisions of the Convention is nonetheless useful in clarifying their meaning."[87]

The Chamber relied on Art. 33 when interpreting the meaning of the key words, such as "responsibility", in six languages. It concluded that "[t]his analysis of the terms used in the provisions of the Convention provides a basis for determining their meaning as used in the three Questions."[88] The role of official languages, and of competing interpretations between equally authentic language texts, brings certain much-overlooked questions into sharper perspective. It may, however, more often be the case, both in the realm of treaties and of secondary instruments in international law, that other-language versions sooner corroborate a particular meaning than that they present competing interpretations.

This Advisory Opinion indicates that the generalization of principles applicable to the interpretation of acts of international organizations should be avoided. There is no single set of interpretive principles applicable across the board to treaties and to acts of international organizations in international law and practice. Reference to, and reliance on, Arts. 31-33 VCLT as the interpretive basis for secondary instruments may as much be driven by judicial expedience, or in contentious proceedings by the parties' pleadings, as by a considered doctrinal conviction that the same rules apply. There is no firm, conclusive reason why the principles in Arts. 31-33 should necessarily be applicable to instruments that are not treaties. They were never tailored to apply to secondary instruments. At the same time, it is understandable that international courts and tribunals feel more secure in pointing to codified principles of interpretation, some of which admittedly enjoy a canonical status, than in drawing on less precise interpretive rules that rely on a range of considerations external to the instrument's text. There is, consequently, some tension between the judicial and the scholarly approaches.

[84] *Ibidem*, para. 60.
[85] *Ibidem*, para. 61.
[86] *Ibidem*.
[87] *Ibidem*, para. 63.
[88] *Ibidem*, para. 68.

The discrepancy between academic opinions is puzzling, and cautions against an overly-ready reliance on Arts. 31-33 VCLT for the interpretation of secondary instruments, with the SDC's ready reliance on the VCLT's provisions on interpretation when applying the Regulations. Again, judicial expedience may in practice be the driver behind this ready reliance on the Vienna Convention rules on interpretation. More persuasive, however, particularly from the judicial perspective, is the question of legitimacy and predictability. Arts. 31-33 provide a codified set of interpretive principles, and a safe source of legal rules for a decision-maker to refer to and for parties to rely on.

1.5. International Whaling Commission Resolutions

The International Convention for the Regulation of Whaling (ICRW) was signed on 2 December 1946 and entered into force on 10 November 1948. The substantive provisions regulating the conservation of whale stocks or the management of the whaling industry are included in the Schedule, which "forms an integral part" of the Convention.[89] The Schedule is subject to amendments, which are adopted by the IWC, established under Art. III(1) ICRW, as a regulatory body. It is "composed of one member from each Contracting Government" and plays a significant role in the regulation of whaling under the Convention. The adoption by the Commission of amendments to the Schedule requires a three-quarter majority of votes cast.[90] The adoption of amendments is based on the opt-out procedure. Under this procedure an amendment becomes binding on a state-party unless that state presents an objection, in which case the amendment does not become effective for that state until the objection is withdrawn.[91] The Commission has amended the Schedule several times. As the Preamble states, the Convention was concluded in order to "to provide for the proper conservation of whale stocks and thus make possible the orderly development of the whaling industry…" Art. V(2) lists possible subjects for amendment:

> fixing (a) protected and unprotected species … (c) open and closed waters, including the designation of sanctuary areas … (e) time, methods, and intensity of whaling (including

[89] Art. I(1), International Convention for the Regulation of Whaling (adopted 2 December 1946, entered into force 10 November 1948), 161 UNTS 72 (amended by the Protocol to the International Convention for the Regulation of Whaling).

[90] *Ibidem*, Art. III(2).

[91] "Each of such amendments shall become effective with respect to the Contracting Governments ninety days following notification of the amendment by the Commission to each of the Contracting Governments, except that (a) if any Government presents to the Commission objection to any amendment prior to the expiration of this ninety-day period, the amendment shall not become effective with respect to any of the Governments for an additional ninety days; (b) thereupon, any other Contracting Government may present objection to the amendment at any time prior to the expiration of the additional ninety-day period, or before the expiration of thirty days from the date of receipt of the last objection received during such additional ninety-day period, whichever date shall be the later; and (c) thereafter, the amendment shall become effective with respect to all Contracting Governments which have not presented objection but shall not become effective with respect to any Government which has so objected until such date as the objection is withdrawn" (Art. V(3)).

the maximum catch of whales to be taken in any one season), (f) types and specifications of gear and apparatus and appliances which may be used.

Amendments to the Schedule "shall be such as are necessary to carry out the objectives and purposes of this Convention and to provide for the conservation, development, and optimum utilization of the whale resources" and "shall be based on scientific findings". Furthermore, Art. VI provides that "[t]he Commission may from time to time make recommendations to any or all Contracting Governments on any matters which relate to whales or whaling and to the objectives and purposes of this Convention".

The IWC can adopt non-binding resolutions and decisions which under the opting-out procedure under the ICRW amend that treaty's Schedule. These resolutions and decisions are documents which call for textual interpretation in the setting of the Convention.

In *Whaling in the Antarctic*, the ICJ offered dicta concerning the interpretation both of IWC resolutions and decisions. Specifically, the case among other things turned on the question whether permits granted under the Japanese Whale Research Program under Special Permit in the Antarctic (JARPA II) could be considered to exist for the purpose of "scientific research" within the meaning of Art. VIII(1) of the Convention. The Court observed that although IWC recommendations, which take the form of resolutions, are not binding, they may, where they are adopted by consensus or by a unanimous vote, become relevant for the interpretation of the Convention or of its Schedule.[92] The significance of the voting procedure for the adoption of each type of act, recommendation or decision, becomes apparent with respect to the interpretation and legal significance of each type of instrument in relation to the Convention. The Court thus noted the following with respect to IWC decisions: "[t]he adoption by the Commission of amendments to the Schedule requires a three-fourths majority of votes cast (Art. III(2))."

An amendment becomes binding on a state-party to the ICRW unless the state presents an objection, in which case the amendment does not become effective for that state until the objection is withdrawn. The functions conferred on the Commission, and the fact that in practice it has amended the Schedule several times, have rendered the Convention an "evolving" instrument. The Court in *Whaling in the Antarctic* analyzed the legal character of IWC resolutions in relation to the question whether Japan's use of lethal means in its whaling program could enjoy any legal justification, and in relation to the question whether this activity fell within the scope of "scientific research" under Art. VIII(1) ICRW. Art. VIII(1) ICRW provides that "[n]otwithstanding provisions contained in the Convention, any Contracting Government may grant to any of its nationals a special permit authorizing that national to kill, take and treat whales for purposes of scientific research".

One of the questions the Court faced was how to interpret the term "for the purposes of scientific research", which remains undefined in the Convention. The interpre-

[92] ICJ, *Whaling in the Antarctic*, para. 46.

tive role of IWC resolutions, and the method of their adoption in this case, are factors that illustrate the role of subsequent agreements and subsequent practice, as well as the manner in which secondary instruments adopted under treaties can become significant for the reading of the treaty text. Importantly, the case highlights uncertainties associated with referring to subsequent, extra-conventional materials and documents reflecting such practice in relation to the treaty in order to support a particular reading of the treaty text. The question whether such instruments can be interpreted as a "subsequent agreement", or as "subsequent practice", both within the meaning of Art. 31(3)(a) and (b) VCLT, can consequently become acute, and decisive for the outcome of the case. In order to determine whether these instruments fall within Art. 31(3)(a) or (b), it will often be necessary to consider the voting procedure leading to the instrument's adoption.

In its pleadings, Australia relied on IWC Resolution 1986-2 and on Annex P.[93] Both of these instruments had been adopted by consensus. Australia also pointed to IWC Resolution 1995-9, which had not been adopted by consensus, and which recommends that the killing of whales "should only be permitted in exceptional circumstances where the questions address critically important issues which cannot be answered by the analysis of existing data and/or use of non-lethal research techniques."[94] Australia claimed:

> that IWC resolutions must inform the Court's interpretation of Article VIII because they comprise 'subsequent agreement between the parties regarding the interpretation of the treaty' and 'subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation', within the meaning of subparagraphs (a) and (b), respectively, of paragraph 3 of Article 31 of the Vienna Convention on the Law of Treaties.[95]

The Court noted with respect to these instruments and their significance for the Court's interpretation of Art. VIII of the Convention:

> Article VIII expressly contemplates the use of lethal methods, and the Court is of the view that Australia and New Zealand overstate the legal significance of the recommendatory resolutions and Guidelines on which they rely. First, many IWC resolutions were adopted without the support of all States parties to the Convention and, in particular, without the concurrence of Japan. Thus, such instruments cannot be regarded as subsequent agreement to an interpretation of Article VIII, nor as subsequent practice establishing an agreement of the parties regarding the interpretation of the treaty within the meaning of subparagraphs (a) and (b), respectively, of paragraph (3) of Article 31 of the Vienna Convention on the Law of Treaties. Secondly, as a matter of substance, the relevant resolutions and Guidelines that have been approved by consensus call upon States parties to take into account whether research objectives can practically and scientifically be achieved by using non-lethal research methods, but they do not establish a requirement that lethal methods be used only when other methods are not available.[96]

[93] *Ibidem*, para. 78.
[94] *Ibidem*.
[95] *Ibidem*, para. 79.
[96] *Ibidem*, para. 83.

The Court here offers an interesting statement of principle on the scope of Art. 31(3)(a) and (b) VCLT. The dictum no doubt will inform future attempts to characterize a legal instrument as "subsequent agreement" or "subsequent practice" and to enlist the document's aid to support a particular interpretation of a treaty text. As Arato explains, the Court in this case effectively decided that:

> those resolutions adopted by consensus did not sufficiently establish Australia and New Zealand's restrictive interpretation of the scope of permissible lethal means in scientific research. While others, like Resolution 1995-9, may have seemed more to the point, they could not be accepted here as authoritative guides to the interpretation of the Convention.[97]

The Court left the basis for its interpretive technique largely unarticulated, save for its reference to the voting procedure for determining whether the instruments counted as a "subsequent agreement" or as "subsequent practice" under Art. 31(3)(a) and (b) VCLT, respectively. That is not a shortcoming: for example, when the Court noted that the instruments in question "do not establish a requirement that lethal method be used only when other methods are not available", and that the resolutions "did not sufficiently establish Australia and New Zealand's restrictive interpretation of the scope of permissible lethal means in scientific research", one may safely assume that the Court took the respective instruments' text as a starting position, i.e., that it looked at the documents at face value and drew appropriate textual conclusions within the scope of the contested issues of law dividing the litigating parties.

To be sure, consideration of the voting procedure, a factor relevant to the interpretation of all secondary instruments in international law, either in order to determine their content and rights and obligations under them as the case may be, or indeed to determine their *status*, e.g., as subsequent practice, is an external, extra-textual consideration. Reference to the primary treaty is always necessary. However, reference to voting procedures for the adoption of secondary instruments can be an indispensable consideration. How else, for instance, would one ascertain whether a text constitutes a "subsequent *agreement*" within the meaning of Art. 31(3)(a) if not by consulting rules of procedure governing the organ's voting process(es)? Procedural rules can become determinative of such an instrument's status and legal significance in relation to a primary treaty, in a way that procedural considerations are not and likely will not be determinative for the interpretation of a primary treaty text itself.

The generally accepted position is that, when adopted unanimously or by consensus, "resolutions of a supervisory treaty body might be considered subsequent agreements or practice relevant to the interpretation of the underlying convention, resolutions adopted by disputed majority will not count under the general rule of interpretation."[98] Arato, however, finds the Court's decision in *Whaling in the Antarctic* on this point

[97] J. Arato, *Subsequent Practice in the Whaling Case, and What the ICJ Implies about Treaty Interpretation in International Organizations*, EJIL Talk! available at: http://bit.ly/1ThhcNm (accessed 20 April 2016). *See also* Arato, *supra* note 6.

[98] *See* Arato, *supra* note 97.

disappointing in light of its advisory jurisprudence, in particular *Certain Expenses* and *Legal Consequences of the Construction of a Wall*.[99] In those cases, the ICJ "interpreted provisions of the UN Charter in light of what it took to be the consistent 'practice of the organization.'"[100] He further notes that the Court in those cases treated UN General Assembly resolutions "as a proxy for the subsequent practice of the membership and thus as authentic criteria for the interpretation of the U.N. Charter".[101] Further, in both cases, several of the fundamental resolutions were adopted on the basis of a majority vote, with many dissents.[102] According to Arato, there exists a very significant distinction between the institutional practice at issue in the *Certain Expenses* and *Legal Consequences of the Construction of a Wall* Advisory Opinion, and the IWC instruments under consideration in *Whaling in the Antarctic*. Further, it is possible that "in the Court's view these cases entail an important difference in kind: between an organization characterized by international legal personality (the U.N.), and a treaty body with certain functions bearing no autonomous personality on the international stage (the IWC)."[103] If this is the legal position, the degree of legal personality is partially determinative of a secondary instrument's legal status with respect to a treaty, as well as for procedural aspects of rule-making in the setting of international organizations *vis-à-vis* treaty bodies that enjoy only a limited degree, if any, of international legal personality.

A further interpretive issue arises from the Court's dictum in paragraph 45 in *Whaling in the Antarctic* that "[t]he functions conferred on the Commission have made the Convention an evolving instrument."[104] This short statement brings to mind the concept of evolutionary treaty interpretation.[105] In *Dispute Concerning Navigational*

[99] ICJ, *Certain expenses of the United Nations (Article 17, paragraph 2, of the Charter)*; ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion), [2004] ICJ Rep. 136.

[100] Arato, *supra* note 97.

[101] *Ibidem*.

[102] *Ibidem*. The author notes that "[i]n *Wall*, the Court went so far as to rely on such (disputed) 'practice of the organization' to hew dramatically from the Charter's plain text, thereby recognizing what some consider an informal modification of the U.N. Charter."

[103] *Ibidem*. Two other explanations possible are "that the opinion represents a change of course – that the ICJ simply shifted gears, adopting a more transparent and sovereigntist approach to treaty interpretation", and the "the suspicious gloss". This latter explanation "would treat the advisory jurisprudence as opportunistic, adopting a less voluntaristic approach in the context of the UNGA because it is an organ of the U.N. On this reading, the ICJ seems to treat its own organization as a special case – based perhaps on a commitment to the flexibility and dynamism of the U.N. system of which it forms a part, even if at the expense of its members' sovereign prerogatives."

[104] ICJ, *Whaling in the Antarctic*, para. 45.

[105] *See* on the evolutionary interpretation: M. Fitzmaurice, *Dynamic (Evolutive) Interpretation of Treaties*, The Hague Yearbook of International Law 2008 (part I) and 2009 (part II); M. Fitzmaurice, *Interpretation of Human Rights Treaties*, in: D. Shelton (ed.), *Oxford Handbook of International Human Rights*, Oxford University Press, Oxford: 2013, pp. 739-771; J. Arato, *Subsequent Practice and Evolutive Interpretation: Techniques Interpretation over Time and Their Diverse Consequences*, 9(3) Law & Practice of International Courts and Tribunals 443 (2010); G. Letsas, *A Theory of Interpretation of the European Convention on Human Rights*, Oxford University Press, Oxford: 2007; G. Letsas, *Strasbourg's Interpretive Ethic: Lessons for the International*

and Related Rights (Costa Rica v. Nicaragua), the ICJ stated that "[t]here are situations in which the parties' intent upon conclusion of the treaty was, or may be presumed to have been, to give a term used – or some of them – a meaning or content capable of evolving, not one fixed once and for all …"[106]

Any approach based on the treaty's object and purpose would be very difficult to apply in relation to IWC resolutions. The issue whether the purposes of the ICRW still include the "orderly development of the whaling industry", or just the environmental objectives, remains unresolved. Klabbers notes with respect to the object and purpose of a treaty that "Much of the point of the notion would be lost if various different objects and purposes could be identified, as this would result in different yardsticks under the same treaty."[107] Perhaps the Court was contemplating a very limited, purely functional and technical evolution of ICRW standards by the IWC. When pondering the statement in paragraph 45 of the judgment, one must naturally bear in mind the restrictive interpretation that the Court ascribed to "subsequent practice" and "subsequent agreement" within the meaning of Art. 31(3)(a) and (b) VCLT in *Whaling in the Antarctic*.

1.6. COP/MOP Resolutions

A conference, or meeting, of the state-parties under a multilateral treaty has a peculiar character. A COP or MOP enjoys international legal personality to an even lesser degree than the IWC, much less does it have the character of an international organization. Unlike the IWC, the COP/MOP may not even enjoy a "regulatory" power under the treaty, for instance the power to amend the treaty through consensus procedures. COPs/MOPs may, however, enjoy the power to issue "authentic" interpretations of the primary treaty through a subsequent agreement. In this manner, instruments adopted by COPs/MOPs can have great interpretive significance under Art. 31(3)(b).

A COP/MOP is a meeting, usually at regular intervals, of representatives of the state-parties to the treaty. The instruments adopted by a COP or a MOP, which usually take the form of a resolution, do not have the character of an act of an international organization, nor are they a treaty by themselves. In this sense they are different from the ISA's Regulations, for example, or indeed any standard-setting organization's legal instruments. Further, the resolution of a COP/MOP, even if adopted by "consensus", is *not* a treaty; though it may still, if not objected to by any party, constitute an "agreement" within the meaning of Art. 31(3)(a) VCLT. To determine whether the resolution amounts to such an "agreement", it will be necessary to have regard to voting

Lawyer, 21 European Journal of International Law 1 (2010); G. Letsas, *The ECHR as a Living Instrument: its Meaning and Legitimacy*, in: G. Ulfstein, A. Follesdal, B. Peters (eds.), *Constituting Europe: The European Court of Human Rights in a National, European and Global Context*, Cambridge University Press, Cambridge: 2013; E. Bjorge, *Evolutionary Interpretation of Treaties*, Oxford University Press, Oxford: 2015.

[106] ICJ, *Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, [2009] ICJ Rep. 213, 239-240, para. 58.

[107] J. Klabbers, *Treaties, Object and Purpose*, in: *Max Planck Encyclopedia of Public International Law*, Oxford University Press, Oxford: 2013, para. 6.

procedures. Such a resolution can, in different circumstances, also modify or amend the provisions of the primary treaty and consequently produce potentially significant legal effects and alter the primary treaty.

The issue concerning consensus has arisen in relation to the question whether interpretive resolutions of certain organs of multilateral agreements (mostly within the environmental law framework) can be treated as a "subsequent agreement" only where adopted by consensus, within the meaning of Art. 31(3)(a) VCLT.[108] The simple approach to the meaning of consensus, i.e., that "it is generally understood that consensus represents general agreement without meaning unanimity"[109] was developed mainly within the UN General Assembly (and also adopted in different fora, notably in COPs). Examples of such problems have been apparent on certain occasions (e.g., at the 6th meeting of the COP to the Convention on Biological Diversity (CBD) and at the meeting of the Climate Change Conference held in Cancun in 2010.[110]

The opinion of the UN Legal Counsel and the practice of most COPs that consensus means "the absence of opposition" appears both to reflect a very diversified practice. Nolte observes that questions remain regarding the procedural aspects of the expression "opposition" or "objection"; in particular, when and in what form and point of time such objections should be made known in order to obstruct a decision otherwise to be adopted by consensus. According to Nolte, expectations and practices may be developing within certain treaty regimes, such as in international environmental law, that "an expression of opposition" should be confirmed in such form where the question arises.[111]

A further question relevant to interpretation concerns the legally binding force of COP/MOP decisions. Again, there are in practice various possibilities, depending on the provisions of the primary instrument and its enabling provisions. For example, in the case of adjustments under the Montreal Protocol, the main procedure is consensus.[112] Failing consensus, a decision by the majority is considered binding upon the minority. This procedure has never been used, yet it remains theoretically available. Decisions taken under this procedure are binding, not merely in a "soft" or "*de facto*" manner. It appears that they become part of the treaty and binding as a matter of treaty law.

For example, the 1979 Bonn Convention regulates endangered migratory species particularly strictly in Appendix I. However, it does not provide a definition of "endangered", because Art. I(1)(e) only provides that a migratory species is "endangered"

[108] Nolte, *supra* note 67, p. 375.

[109] *Ibidem.*

[110] *Ibidem*, pp. 376-377.

[111] *Ibidem*, p. 377. *See* example of Australia's formal objection to a COP decision under the Convention on Biological Diversity. The question arises whether consensus can exist despite opposition by one or more states. The UN Legal Counsel responded to a request by the Executive Secretary of the Convention on Biological Diversity "that by definition … where there is formal objection, there is no consensus." *See ibidem*, citing Ref UNEP/SCBD 30219R (17 June 2002).

[112] Art. 2(9)(c) of the Montreal Protocol on Substances that Deplete the Ozone Layer (adopted 16 September 1987, entered into force 1 January 1989), 1522 UNTS 3 (however, where consensus cannot be achieved, a two-thirds majority can adopt an adjustment to the treaty).

when it is "in danger of extinction throughout all or a significant portion of its range". The Bonn Convention COP in 1997 adopted Resolution 5.3 to clarify the term "endangered", which is to be interpreted as meaning a species "facing a very high risk of extinction in the wild", and so that the parties would be guided in this regard by findings of the IUCN Council or by an assessment by the CMS Convention's Scientific Council. For example, the 17th meeting of the CMS Convention's Scientific Council held in November 2011 endorsed proposals to list both the Far Eastern Curlew and the Bristle-thighed Curlew in Appendix I. Having noted such endorsements, the 10th meeting of the CMS COP, held after the said Scientific Council's meeting, duly approved Appendix I status for both species.

Further, the Executive Body of LRTAP, the name for that treaty regime's COP, provided interpretations of ambiguous wording in a legally binding agreement. The 1985 Sulphur Dioxide Protocol[113] provides that parties "shall reduce their national annual sulphur emissions or their transboundary fluxes by at least 30 per cent as soon as possible and at the latest by 1993, using 1980 levels as the basis of calculation of reductions." Four years after the protocol's adoption, the parties in the Executive Body reached a "common understanding" that they would interpret the obligation to "reduce their national annual sulphur emissions or their transboundary fluxes by at least 30 per cent as soon as possible and at the latest by 1993", as meaning "reductions to that extent should be reached in that timeframe and the levels maintained or further reduced after being reached."[114]

Some COP/MOP decisions remain very controversial, and these bodies are at times regarded as usurping powers of state-parties to MEAs. One example is a decision of the COP of the Basel Convention on the Transboundary Movement of Hazardous Wastes. The 1995 "Ban Amendment" provides for the prohibition by each Party included in the proposed new Annex VII[115] of all trans-boundary movements to states not included in Annex VII of hazardous wastes covered by the Convention that are intended for final disposal. It also provides for the prohibition of all trans-boundary movements to states not included in Annex VII of hazardous wastes covered by Art. 1(1)(a) of the Convention destined for reuse, recycling or recovery operations. Several states denied the legally binding character of this decision because the COP was not empowered to alter substantive obligations "merely by utilizing its explicit general power to take action to achieve the Convention's objectives".[116] The controversy was solved by adopting the ban by way of amendment to the Convention.[117]

[113] Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution on the Reduction of Sulphur Emissions or their Transboundary Fluxes by at least 30 Per Cent.

[114] ECE/EB.AIR/20, para. 22. *See further* ECE/EB.AIR/24, para. 18 and ECE/EB.AIR/33, para. 14.

[115] This includes the parties and other states that are members of the OECD, the EC, as well as Liechtenstein.

[116] G. Ulfstein, *Treaty Bodies and Regimes*, in D. Hollis (ed.), *The Oxford Guide to Treaties*, Oxford University Press, Oxford: 2012, pp. 437-439.

[117] Doc. UNEP/CHW.3/35. As of 8 July 2016 the total number of ratifications was 87. The ban is not yet in force. *See* http://www.basel.int/Countries/StatusofRatifications/BanAmendment/tabid/1344/Default.aspx (accessed 8 July 2016).

In sum, a COP/MOP resolution is an international legal instrument, but typically itself does not have the character of a treaty. In fact, the breadth of possible instruments shows that it can be difficult to generalize about the legal character of COP/MOP resolutions. These instruments are, however, adopted under a treaty and exist in relation to it under international law. The present working definition of instruments that are not treaties consequently applies. The interpretation of COP/MOP resolutions can be instructive in the formulation of the principles governing the interpretation of these types of instruments under international law. Where a COP/MOP resolution is adopted by consensus and amends a treaty in pursuance of that treaty's enabling provision, it is warranted to apply the rules of treaty interpretation reflected in Arts. 31-33 VCLT. In other cases, e.g., where the resolution takes the form of an authentic interpretation, it will itself offer interpretive guidance, and a reading of that instrument will likely not give rise to "hard cases" in which different approaches to interpretation could produce differing results. In these cases, the application of canonical principles of interpretation, which take the ordinary meaning given to the document's text as read in its context as a starting point, will likely serve as a sufficient interpretive basis. Beyond the text, in order to determine the instrument's status for the purposes of treaty interpretation, it would seem permissible – or indeed necessary – to take into account voting procedures and accepted practices of the treaty body with respect to treating such resolutions as subsequent agreements or subsequent practice.

2. CONCLUSIONS

An inevitable conclusion that follows from the above discussion is that under present customary international law there exists no single set of rules neatly governing the interpretation of all "secondary" legal instruments in international law. This is primarily (1) because, while it is plausible to speak of such instruments as a single category of legal instruments under international law in contradistinction to treaties, they may share little else in common; (2) the means for determining the meaning of the given text can be heavily procedure-, institution- and context-dependent; (3) the character (e.g. political, technical) of the instrument at issue has an unmistakable bearing on the approach to determining the appropriate textual meaning; (4) the status of the instrument in relation to the primary treaty may differ.

The interpretation of such a "secondary" instrument is too context- and procedure-specific to lend itself to an across-the-board set of interpretive principles. In fact, despite the efforts of this contribution to fit the notion of a "secondary instrument" under international law in one category, there exists no single definition of the term, let alone an authoritative one as exists with respect to treaties under Art. 2 VCLT. It can be anything from a Security Council resolution to a COP resolution, adopted under a very different procedure. There are, rather, various different types of instruments in international law that can create legal rights and obligations and other legal

effects for states but that are not treaties, though they derive this legal character from a primary instrument.

There is a further problem associated with the acceptance of a single set of interpretive principles for all such instruments. A single set of interpretive principles that by its nature leaves little room for looking to adoption procedures and political and technical contexts as an aid to interpretation may unduly restrict the interpretive exercise or even lead to conclusions at odds with the "intention" of the international body that adopted the instrument, or with the primary treaty's object and purpose or technical goals, as the case may be. Again, because these instruments by definition exist one level "below" treaties, so to speak, and indeed typically depend on an enabling treaty, it is difficult to generalize across the board with respect to them.

Third, any single set of interpretive principles would not and could not be nuanced enough to do justice to the different character of each respective instrument. Security Council resolutions, which are *sui generis*, can be highly political, particularly where they generate "external" legal effects and are adopted under Chapter VII. The regulations of the ISA are, by way of counterexample, highly technical instruments. Each must be interpreted for what it is. Further, a single set of interpretive principles cannot fully account for the fact that some legal instruments that are not treaties can constitute subsequent agreements or subsequent practice within the meaning of Art. 31 VCLT with respect to a pre-existing treaty under which they are adopted, and that others are free-standing instruments.

It is best for the specific principles of interpretation to develop by each treaty body or international organization, or in the practice of courts and tribunals as the case may be. It would amount to good practice for international organizations or treaty bodies to adopt guidelines for the interpretation of regulations and other secondary instruments with legal significance.

Nonetheless, these types of secondary instruments share sufficiently general characteristics to allow for the articulation of certain very general principles of interpretation. The following is a suggested, tentative list of interpretive principles, based on the above survey of international practice.

3. TENTATIVE LIST OF INTERPRETIVE PRINCIPLES

1. A secondary instrument of international law is a written instrument adopted under the authority of a treaty and governed by international law, but which is not itself a treaty.

2. A secondary instrument shall be interpreted in good faith, on the basis of:

(a) its text, in accordance with the ordinary meaning to be given to the terms of the instrument;

(b) the enabling provision(s) of the treaty under the authority of which it was adopted, any other relevant provisions of the treaty, and the object and purpose of the treaty as a whole;

(c) the voting procedure leading to the adoption of the instrument;
(d) relevant practice of the body that adopted the instrument;
(e) relevant statements or opinions by states' representatives at the time of adoption of the instrument;
(f) any other relevant rules of international law binding upon the parties to the treaty or the international organization under the authority of which the instrument was adopted.

3. The institutional setting and practice of the adopting body may be taken into account for the purpose of determining whether an instrument is binding upon the parties to the treaty, or whether it constitutes a subsequent agreement or subsequent practice with respect to the interpretation of the treaty.

4. In the case of an instrument authenticated in two or more languages, the instrument shall be equally authoritative in each language, unless the treaty or the instrument itself provides that one language shall prevail in the event of a conflict.