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10 Treaty Interpretation by Relying upon Other International Legal Norms

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Professor Bruhács pointed out that the limited hierarchy in the structure of current international law is unable to balance the fragmentation of this legal order.[1] The importance of this problem is indicated by the fact that the UN International Law Commission set up a study group to examine the fragmentation of international law.[2] The actual structure of international law has, of course, numerous components that strengthen its systemic nature. In addition to the norms of *ius cogens*,[3] such components include, *inter alia*, an ever more observable phenomenon in international case law, *i.e.* when international courts, for the purpose of interpreting treaty provisions, rely on other pieces of international legislation, and connect and seek concurrence between two or more pieces of legislation, even if they may be applicable on different fields of law. Needless to say, this practice raises numerous questions and problems. This chapter attempts to provide an overview of certain aspects of this matter.[4]

10.1 The Use of International Legal Norms as Support for Treaty Interpretation

A fundamental problem any person seeking to interpret a legal norm has to face is finding a basis on which any meaning may be associated with the legal text at hand. Selecting the

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1 J. Bruhács, 'A nemzetközi jog a XXI. szd. kezdetén', *Magyar Tudomány* 7, 2007, p. 1578.

2 Official Records of the General Assembly, Fifty-fifth Session (2003), Supplement No. 10 (A/55/10) paras 407-435; Fifty-sixth Session (2004), Supplement No. 10 (A/56/10) paras 296-358.; Fifty-seventh Session (2005), Supplement No. 10 (A/57/10) paras 439-492, and *see* the detailed report of the Study Group: Fragmentation of international law: Difficulties arising from the diversification and expansion of international law. Report of the Study Group of the International Law Commission, A/CN.4/L.682. (hereinafter: UN Study Group).

3 Bruhács 2007, p. 1578.

4 This article focuses on the use of pieces of international legislation specifically. The issue of relying on 'soft law' norms to interpret international treaties may be examined separately and has already been covered elsewhere, *see* L. Blutman, 'Nemzetközi soft law: hagyjuk dolgozni Occam borotváját', *Közjogi Szemle*, 1, 2008, p. 28.

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supports for legal interpretation and finding the appropriate grounds is of key importance in the course of interpreting international treaties. Such supports may include other pieces of international legislation, which – under certain conditions – may be relied on by international courts in the course of interpreting international treaties. International courts may have numerous reasons and grounds for applying another norm of international law to interpret a given treaty provision. (Such reasons and grounds may even intertwine in a given case.)[5]

Occasionally, a state measure may not be considered and evaluated without another legal norm with reference to, or on the basis of, which the state measure to be legally evaluated was implemented.[6]

International courts may have to face situations, where the most objective, and consequently, the most reliable and defendable support for interpreting a hardly definable general term or provision is another norm.[7]

In some cases, courts merely seek to ensure harmony between the treaty to be interpreted and other fields (or the entirety) of international law, thereby seeking to avoid the

5 The UN Study Group examining the problems of the fragmentation of international law specified three cases, on the basis of somewhat different criteria, where, in practice, international courts rely on an international legal norm in order to interpret a treaty provision: (1) whenever a treaty provision is unclear (2) or open-textured, or (3) when the terms used in the treaty have a recognized meaning in customary international law. Official Records of the General Assembly, Fifty-seventh Session (2005), Supplement No. 10 (A/57/10) para. 470, similarly C. McLachlan, 'The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention', 54 *ICLQ* 2005, p. 313 or D. French, 'Treaty Interpretation and the Incorporation of Extraneous Legal Rules', 55 *ICLQ* 2006, pp. 303-304.

6 In *Csoszánszki*, the European Court of Human Rights (ECtHR) had to decide whether, under Art. 5 ECHR (Convention for the Protection of Human Rights and Fundamental Freedoms – Rome, 1950, 213 U.N.T.S. 221) it qualified as the arbitrary deprivation of liberty when the administration of the punishment of a Hungarian citizen serving his prison sentence in Sweden was transferred to Hungary – against the will of the sentenced person – and the date of parole was consequently postponed for over one year due to different Hungarian regulations. As Sweden transferred the sentenced person on the basis of the Convention of the Transfer of Sentenced Persons (Strasbourg, 1983, 1496 U.N.T.S. 92) and the additional protocol thereto (Strasbourg, 1997, 2138 U.N.T.S. 244), it was inevitable for the Court to examine the provisions of these documents when interpreting the meaning of 'arbitrary' for the purpose of Art. 5 ECHR and with a view to the subject matter at hand. *Csoszánszki v. Sweden* (Appl. No. 22318/02), Admissibility Decision of 27 June 2006.; for the same problem, *see Szabó v. Sweden (*Appl. No. 28578/03), Admissibility Decision of 27 June 2006; source (of all the ECHR cases discussed here): <http://hudoc.echr.coe.int/> (last accessed 11 February 2013).

7 In *Glass*, the Court had to decide whether medical treatment applied against the objection by the statutory representative of a patient violated the right to private life, and in case of an affirmative decision, if it can be excused under Art. 8(2) ECHR. The Court used the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine (Oviedo, 1997, 2137 U.N.T.S. 171), to decide the question, which, of course, contained more detailed rules for considering the facts of the case than those laid down in Art. 8 ECHR on the general protection of private life. *Glass v. the United Kingdom* (Appl. No. 61827/00), Judgment of 9 March 2004, Reports of Judgments and Decisions (ECHR Reports) 2004-II.

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emergence of any unnecessary contradiction between various pieces of international law due to the developed interpretation.[8]

On the ground of general doctrines and considerations – through deduction – the courts may also rely on other sources of law in the course of interpreting international treaties. According to Lauterpacht's classic proposition, an international treaty is more than the mere will of the parties, as such treaties become parts of international law; thus, international treaties must be in conformity with the principles and rules of international law.[9] The arbitral award granted in the *George Pinson* case referred to this consideration as follows: "Every international convention must be regarded as tacitly referring to general international law in any question it does not solve itself expressly and in a different way."[10] In *Elettronica Sicula*, the Court explained that, for the purposes of interpreting international agreements, the parties should be presumed to have tacitly entered into the agreement in accord with, and with due regard to, the rules of customary international law (the local remedies rule in this case), in the absence of any words making clear an intention not to do so.[11]

On the other hand, for example, Jenks assumes the existence of a general presumption against any interpretation of a treaty that would lead to any conflict between international treaties. This presumption can be inferred from the combination of the principles of

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8 In *Saadi*, the Court had to interpret, for the first time, the following phrase of Art. 5(1)(f) ECHR with a view to the detention of an asylum seeker: "the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country […]". In the given case, the Court based its interpretation on Art. 31 of the Convention relating to the Status of Refugees (Geneva, 1951, 189 U.N.T.S. 137), on the guidelines of the United Nations High Commissioner for Refugees (UNHCR's Revised Guidelines of 10 February 1999, Guideline 3), and on Conclusion No. 44 of the Executive Committe of the United Nations High Commissioner for Refugees Programme (Executive Committe of the UNHCR's Programme: Conclusion of 13 October 1986 relating to the detention of asylum seekers, No. 44 (XXXVII) – 1986), thereby avoiding the need to deduce the requirements of lawful detention of asylum seekers from Art. 5 laying down the general requirements concerning the deprivation of liberty (and also the possibility for its judgment to contradict the general norms of international law on refugees). *Saadi v. the United Kingdom* [GC] (Appl. No.13229/03), Judgment of 29 January 2008, ECHR Reports 2008, paras 33-35, 37, 65. A number of cases must be mentioned where the Court examined the conditions under which the fundamental right to access to court as deduced from Art. 6(1) ECHR in *Golder* may be limited on the ground of state immunity. *See e.g., McElhinney v. Ireland (*Appl. No. 31253/96), Judgment of 21 November 2001, ECHR Reports 2001-XI, para. 36; *Al Adsani v. the United Kingdom* (Appl. No. 35763/97), Judgment of 21 November 2001, ECHR Reports 2001-XI, para. 55; *Fogarty v. the United Kingdom* (Appl. No. 37112/97) Judgment of 21 November 2001, ECHR 2001-XI, para. 36; *see also,* McLachlan 2005, p. 305.

9 H. Lauterpacht, 'Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties', 26 *British Yearbook of International Law*, 1949, p. 76, for the statement concerning interpretation in the absence of mutual intent of the parties, *see* pp. 75-82.

10 *Aff. George Pinson*, Commission franco-méxicaine, Dec. No. 1, 19 October 1928, UN Reports of International Arbitral Awards (UNRIAA) Vol V. 327, at 422, para. 50.4. (in French); for similar considerations, *see The 'Kronpris Gustav Adolf' Case*, Award of 18 July 1932, UNRIAA Vol. II, p. 1239, at pp. 1246-1247, point III/III/2, and Lord McNair, *The Law of Treaties*, Oxford, Oxford University Press 2003 (reprinted), pp. 466- 467.

11 *Elettronica Sicula S.p. A. (ELSI)* (*United States of America v. Italy)*, Judgment of 20 July 1989, 1989 ICJ Rep. 15, at 42, para. 50.

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rationality, good faith, and the presumption of the consistency of international law.[12] There are obvious theoretical and practical difficulties to tackle in proving the existence of, and applying, such a presumption. Nevertheless, references to this presumption have appeared in international legal practice.[13]

When interpreting an international treaty, international courts may be specifically instructed by the treaty under interpretation,[14] or the treaty supporting the interpretation,[15] or even by a third international treaty to rely on a specific norm of international law as support for interpretation. The most famous example for the latter case is Article 31(3)(c) of the 1969 Vienna Convention on the Law of Treaties,[16] according to which, for the purposes of interpreting international treaties, "[t]here shall be taken into account, together with the context: (…) any relevant rules of international law applicable in the relations between the parties". Though McLachlan believes this provision to be merely a legislative statement of the general considerations set forth in the previous paragraph,[17] it is worthy of being taken account, as the application of this provision is subject to more specific conditions.

The use of international legal norms for the interpretation of international treaties raises significant problems, which may be most easily approached by analysing the above-mentioned provision laid down in Article 31(3)(c) of the 1969 Vienna Convention. It is certainly justified to start from this provision, as the general rules of treaty interpretation provided by the Vienna Convention (Arts. 31 to 33) are also part of customary international law.[18] In the case concerning the *Territorial Dispute (Libya/Chad)*, the International Court of Justice (hereinafter 'ICJ') considered that, as to the interpretation of treaties, Article 31 of the 1969 Vienna Convention reflects the rules of customary international law (at least with regard to the requirement of good faith).[19] The ICJ shared the same view in

12 W.C. Jenks, 'The Conflict of Law-Making Treaties', 30 *BYBIL* 1953, p. 427; in more detail J. Pauwelyn, *Conflict of Norms in Public International Law – How WTO Law Relates to Other Rules of International Law*, Cambridge University Press, Cambridge, 2003, pp. 240-243.

13 *See e.g., Indonesia – Certain Measures Affecting the Automobile Industry* (Panel Report) WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R (adopted 23 July 1998), DSR 1998:VI, 2201, at 2581, para. 14.28.; source (of all the WTO cases discussed here): <www.wto.org/> (last accessed 11 February 2013).

14 For example, according to Art. 17.6(ii) of the Agreement on Implementation of Art. VI of the General Agreement on Tariffs and Trade 1994 (in Annex 1A to the Agreement Establishing the World Trade Organization 1994, 1868 U.N.T.S. 201), the relevant provisions of the agreement shall be interpreted in accordance with customary rules of interpretation of public international law.

15 *E.g.,* Art. 20(1)(b) of the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions (Paris, 2005, 2440 U.N.T.S. 311) provides that, when interpreting and applying other treaties to which the Parties are parties, Parties shall take into account the relevant provisions of this Convention.

16 1155 U.N.T.S. 331.

17 McLachlan 2005, p. 280.

18 *See* Fragmentation of international law, para. 427.

19 *Territorial Dispute (Libyan Arab Jamahiriya and Chad)* Judgment of 3 February 1994, 1994 ICJ Rep. 6, at 21-22, para. 41.

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LaGrand concerning Article 33 of the Convention (interpretation of treaties authenticated in two or more languages),[20] and was followed by the European Court of Human Rights (hereinafter 'ECHR') in *Stoll*.[21] The WTO Appellate Body recognised the customary law nature of the rules of interpretation laid down in Article 31(1) of the Vienna Convention in *United States – Gasoline*.[22] Doing so was necessary, as – according to the second sentence of Article 3(2) of Annex 2 (understanding on rules and procedures governing the settlement of disputes 1869 U.N.T.S 401) to the agreement establishing the World Trade Organization (Marrakesh, 1994) – the Appellate Body may interpret the provisions of international agreements "in accordance with customary rules of interpretation of public international law". Thus, the rules of interpretation laid down in the Vienna Convention may not be applied in dispute resolution procedures directly, unless they are parts of customary law.

10.2 Article 31(3)(c) of the Vienna Convention

The recent and general uptake of this provision of the Vienna Convention may be attributable to two important events.[23] First, a minor debate broken out in the legal doctrine, when this provision was applied by the ICJ in *Oil Platforms*.[24] Second, the relevant provision was analysed by the UN Study Group assuming that the provision could be a counterbalance on the basis of which the fragmentation of the international legal system could be reduced through interpretation.[25]

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20 *LaGrand (Germany v. United States of America)* Judgment of 27 June 2001, 2001 ICJ Rep. 466, at 502, para. 101.

21 *Stoll v. Switzerland* (Appl. No. 69698/01) [GC] Judgment of 10 December 2007, ECHR Reports 2007-V, para. 59.

22 *United States – Standards for Reformulated and Conventional Gasoline* (Appellate Body Report) WT/DS2/AB/R (adopted 20 May 1996), DSR 1996:I, 3, point III/B/1; *see also e.g., United States – Import Prohibition of Certain Shrimp and Shrimp Products* (Appellate Body Report) WT/DS58/AB/R (adopted 6 November 1998), DSR 1998:VII, 2755, para. 114; *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products* (Appellate Body Report) WT/DS50/AB/R (adopted 16 January 1998), DSR 1998:I, 9, point V; *European Communities – Customs Classifications of Certain Computer Equipment* (Appellate Body Report), WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R (adopted 22 June 1998), DSR 1998:V, 1851, paras 83-86.

23 *See e.g.,* McLachlan 2005, pp. 279-320.; French 2006, pp. 300-307.

24 *Oil Platforms (Islamic Republic of Iran v. United States of America),* Merits, Judgment of 6 November 2003, 2003 ICJ Rep. 161, *see also,* McLachlan 2005, pp. 279-280.

25 Official Records of the General Assembly, Fifty-sixth Session (2004), Supplement No. 10 (A/56/10) paras 296-358; especially paras 345-351; Fifty-seventh Session (2005), Supplement No. 10 (A/57/10) paras 439-492; especially paras 467-479. and Fragmentation of international law, *supra*, paras 410-480. From this perspective, the interpretation of international treaties through other pieces of international legislation also opens the door to other fundamental problems of contemporary international law as a set of norms. Such interpretation may support the systemic concept of international law and may attempt to create internal harmony and reduce the extent of fragmentation, also preventing international law from breaking down into self-regulatory and independent sub-systems – the interaction of which is uncertain and unpredictable – at the hands of international organizations and international bodies applying the law (*e.g.,* the regional systems of the protection of human rights, WTO law, ICSID law, etc.).

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For us, the relevant problem in *Oil Platforms* was that whether the rules of general international law on the prohibition of use of force may be taken into consideration when interpreting a bilateral treaty[26] serving as ground for assessing certain acts of the United States (*i.e*. attacking Iranian oil production facilities in 1987 and 1988).[27] According to the provision to be interpreted (Art. XX, para. 1 (d)), the treaty shall not preclude the application of measures (among others) "necessary to fulfil the obligations of a High Contracting Party for the maintenance or restoration of international peace and security, or necessary to protect its essential security interests". The Court had jurisdiction to consider the lawfulness or unlawfulness of the relevant actions only on the basis of the above treaty.[28] The Court concluded that the examined acts of the United States – in the light of the rules of international law on the use of force – cannot be justified on the basis of Article XX, paragraph 1(d), as they were not necessary to protect essential security interests of the state party. The Court relied on Article 31(3)(c) of the 1969 Vienna Convention to take into the account the rules of international law on the use of force when considering the case.[29] This situation reveals an important problem, *i.e.* what are the exact limits to jurisdiction, that may arise in the course of interpreting international treaties with the support of other pieces of international legislation. Unlike in the course of applying the law by authorities or courts within a state, international courts act on a consensual basis, and the parties may certainly limit the applicable law, which should be used to consider and evaluate any and all facts arising in a lawsuit. Thus, the question arises, whether the Court, for the purposes of interpreting a phrase ("necessary measure to protect essential security interests") of the provision to be applied and interpreted, may rely on norms it has otherwise no jurisdiction to apply.[30]

In this respect, the finding that Article XX, paragraph 1(d) of the 1955 Treaty could not be intended to operate wholly independently of the relevant rules of international law was of fundamental importance among the arguments of the Court.[31] In his separate opinion,

26 1955 Treaty of Amity, Economic Relations, and Consular Rights between the United States and Iran, 284 U.N.T.S. 93.

27 Iran, among others, claimed the violation of Art. X, para. (1) of the treaty (freedom of commerce and navigation), instead of Art. XX, the text of which lays down various exemptions. *Oil Platforms* (Preliminary Objection), Judgment of 12 December 1996, 1996 ICJ Rep. 803, at 811, para. 20. In the end, the Court held that Art. X, para. (1) was not violated. *Oil Platforms* (Merits), *supra*, at 180-183, paras 36-42.

28 Jurisdiction was based on Art. XXI, para. 2 of the 1955 Treaty, laying down rules for the judicial settlement of disputes relating to the Treaty.

29 *Oil Platforms* (Merits), *supra*, at 182, para. 41. For an overview of the judgment, *see* McLachlan 2005, pp. 306-309; Sands 2006, pp. 287-291.

30 Of course, the Court was well aware of this problem; *see Oil Platforms* (Merits), *supra*, at 178 and 181, paras 31 and 39.

31 *Oil Platforms* (Merits), *supra*, at 182, para. 41, *see also,* Al-Khasawneh (Diss. Op.) at 269, para. 9, Elaraby (Diss. Op.) at 303-305, paras 3.2-3.3. and the declaration of Judge Koroma, at 223-224. In this respect, Judge Rigaux correctly points out the dilemma surrounding the involvement of general international law in the interpretation of Art. XX, para. 1 (d); Rigaux (Sep. Op.) at 377-378, para. 17.

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Judge Simma agreed with the majority opinion on this finding and elaborated the issue in more detail, concluding that it is a natural consequence of the freedom of interpretation that other norms of international law may be relied on for the purposes of interpretation.[32] The most vehement criticism of this approach was offered by Judge Buergenthal. In his view, the jurisdiction of the Court limits the scope of norms that may be used for interpretation, as only norms falling within the competence of the Court may be used for such purposes. Article 31(3)(c) of the 1969 Vienna Convention cannot overwrite the limits on jurisdiction, as doing so would violate the fundamental principles of consensual adjudication.[33] Apparently, this position was not shared by any other judge, as – among others – even Judge Higgins and Judge Owada had fundamentally different reasons for opposing to the application of the rules of general international law on the use of force.

While Judge Higgins did not explicitly deny that rules falling beyond the jurisdiction of the Court could be theoretically used for interpretation purposes under the above-mentioned provision of the Vienna Convention, she certainly disputed that the Court, in this case and respect, had in fact interpreted Article XX, paragraph 1(d). The Court has, however, not interpreted Article XX, paragraph 1(d), by reference to the rules on treaty interpretation. It has rather invoked the concept of treaty interpretation to displace the applicable law. It has replaced the terms of Article XX, paragraph 1(d), with those of international law on the use of force and all sight of the text of Article XX, paragraph 1(d), is lost.[34]

Judge Higgins pointed out an essential aspect of the problem: in such cases, one must always bear in mind the difference between the interpretation and application of the law. She believed that the Court blurred this very difference, as it applied the rules of international law on the use of force directly to legally consider the facts of the case, instead of seeking to reveal the meaning of the provision of the Treaty under interpretation.[35] The same objection was also raised by Judge Owada against the majority position.[36]

32 *Oil Platforms* (Merits), Simma (Sep. Op.) at 329-330, paras 9-10.

33 *Oil Platforms* (Merits), Buergenthal (Sep. Op.) at 278-279 and 281, paras 22, 28.

34 *Oil Platforms* (Merits), Higgins (Sep. Op.) at 238, para. 49.

35 Judge Higgins also emphasised the followings: "But the reality is that the Court does not attempt to interpret Art. XX, para. 1 (d). It is not until para. 73 that there is any legal reference at all to the text of that provision. The intervening 15 pages have been spent on the international law of armed attack and self-defence and its application, as the Court sees it, to the events surrounding the United States attacks on the oil platforms." *Ibid.,* at 238, para. 47. Similarly, Judge Kooijmans, *see Oil Platforms* (Merits), *supra*, Kooijmans (Sep. Op.) at 254, para. 24. Judge Owada also criticised that the Court did not examined the issue of self-defence individually, but only through Art. XX, para. 1 (d). *Oil Platforms* (Merits), *supra*, Owada (Sep. Op.) at 315, para. 31.

36 The differentiation is elaborated by Judge Owada in his separate opinion as follows: "It is true in my view that, as a general proposition, the measures taken under Art. XX, para. 1(d), when they involve the use of force, have to be compatible with the requirements of international law concerning the use of force. However, this does not mean that the problem involved in the 'measures necessary to protect essential security interests' of a High Contracting Party under Art. XX, para. 1 (d), is synonymous with the problem involved in the right of self-defence under international law." *Ibid.* at 315, para. 32, comprehensively, *see* at 315-318, paras 31-36.

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10.3 Limited Jurisdiction: Interpretation or Application of the Law?

The differentiation emphasised by Judge Higgins cannot be separated from the issue of jurisdiction. The difference between the interpretation and application of the law gains essential importance, when an international court – for some reason – has limited jurisdiction over the application of a legal provision possibly supporting the interpretation of the applicable legal rule.[37] The difference is of lesser importance for practical purposes, if a court also has jurisdiction to apply this supporting piece of international legal legislation to the facts of a given case.

With this difference in mind, the text of Article 31(3)(c) of the Vienna Convention appears, at first, to include a significant contradiction. If "any relevant rules of international law *applicable* in the relations between the parties" (emphasis added) are to be taken into account for the purpose of interpreting an applicable norm of international law in a given case, then the rule that may be used under the convention for purposes of interpreting another international rule must be also applicable between the parties. It seems to indicate that the norm used to support the interpretation must be suitable in itself for being applied directly to the facts of the case, even without the intermediate use of the norm to be interpreted. In other words, this provision of the convention means that when a norm to be used for considering the facts of a case needs to be interpreted, those rules of international law that could be also applied in the given case, *i.e.* that could be applied to assess the facts of the case, must be taken into account for the purpose of interpretation. This merely – and quite trivially – means that in a case, where there are multiple pieces of international legislation that could or should be applied, the various provisions must be interpreted with reference and regard to each other.[38]

However, in light of Article 31(3)(c) of the Vienna Convention the supporting legal norm plays a supplementary role with regard to the norm to be interpreted, but is also required to be applicable between the parties. The latter requirement does not exactly indicate the supplementary role of this norm. Accepting this interpretation of Article 31(3)(c), the arguments presented by Judge Buergenthal may even hold water, as any and all pieces of legislation excluded by the jurisdiction clause from the case cannot meet the applicability

37 Though in a somewhat different context, the Court of Justice of the European Union under Art. 267 TFEU (ex Art. 234 TEC) has jurisdiction to *interpret* European Union law in preliminary rulings, but it does not have power to *apply* EU law. This situation raised numerous problems concerning the differentiation between the interpretation and application of the law. Apparently, the Court has set aside the illusion of pure legal interpretation, and developed the notion of giving a 'useful answer'; *see e.g.*, Case 109/83, *Eurico Srl v. Commission* [1984] ECR 3581, para. 12, Case C-83/91, *Wienand Meilicke v. ADV/ORGA F. A. Meyer AG* [1992] ECR 4871, paras 26, 32. In more detail, *see* L. Blutman, *EU-jog a tárgyalóteremben – az előzetes döntéshozatal*, Budapest, KJK-KERSZÖV 2003, pp. 131-142.

38 *See* Fragmentation of international law, paras 414-419. on parallel, applicable international treaties.

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requirement laid down in Article 31(3)(c), and, consequently, cannot be used for the purposes of interpretation.

On the other hand, however, Article 31(3)(c) provides limited information on the requirements concerning applicability,[39] and may be understood as requiring that the legal norm to be used as support for interpretation must be applicable between the parties *in general*, as it creates rights and obligations for the parties, but is not required to be applicable in the given case (*e.g.* due to lack of jurisdiction). In this case, such legal norms may be used for the interpretation of other international legal norms that can be applied on the basis of jurisdiction, even in the absence of any jurisdiction to apply the supporting legal norms. This approach that makes sense of the sheer existence of Article 31(3)(c) supports the arguments of Judge Higgins and Judge Owada, which rely on the differentiation between the application and interpretation of the law (as the differentiation makes sense here), but may question the arguments of Judge Buergenthal, as the jurisdiction related limitations would not be applicable for interpretation purposes. This approach to Article 31(3)(c) of the Vienna Convention, which must have been shared by the majority of the Court in *Oil Platforms*, represents a major challenge against the foundations of the consensus based international administration of justice Judge Buergenthal tried to protect in his separate opinion.

However, as indicated by Sands, one must never forget that significant obstacles need to be overcome when trying to distinguish the process of applying the law from the process of interpreting the law.[40] When, exactly, is a legal norm used to evaluate the facts of a case, and when is it merely relied on to determine the meaning of another legal norm used to assess the facts of a case? This is a hard question, as the international legal norm used for the interpretation of another norm – however indirectly and through the norm to be interpreted – does affect the consideration of the facts of the case. It does so by giving reasons for the acting court to prefer a given interpretation to all other alternatives. Furthermore, the rule to be interpreted is interpreted with regard to the specific facts of a case, and, consequently, the specific facts may not be ignored when relying on the norm supporting the interpretation efforts. Thus, the implementation of the theoretical distinction is far from being a simple task.

The problem is closely related to the relationship between the rule under interpretation and the rule supporting the interpretation. The difference between the content of the norm used for interpretation and of the norm to be interpreted may be fundamental enough to have an actual impact on the presumed meaning of the latter, and the two norms may be

39 Official Records of the General Assembly, Fifty-seventh Session (2005), Supplement No. 10 (A/57/10) para. 469.

40 P. Sands, 'Treaty, Custom and the Cross-fertilization of International Law', *Yale Human Rights and Development Law Journal* 1, 1998, pp. 102-103.

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even in conflict, at least in terms of the given case.[41] In such cases, the norm used to support the interpretation begins to prevail *instead* of the rule under interpretation.[42] However, it cannot be decided in general, when the conformity of two rules ceases to exist, or when the conflict becomes irresolvable.

The ECHR in its famous *Golder* case deduced a right of access to the courts from Article 6 ECHR by relying on the norms of general international law.[43] Should this deduction, *i.e.* asserting a right not mentioned in the text of the ECHR, be regarded as the creation of a new right or simply the interpretation of Article 6 ECHR through invoking the norms of general international law? May the existence of the new right be inferred from the provisions of the ECHR, in the light of the norms of general international law, or the Court created a new right, *in addition* (and with reference) to the ECHR by invoking other pieces of international legislation? Such questions are typical and have been raised since the emergence of the law, and cannot be solved *in abstracto*, apparently.

Thus, the problem of interpreting the provisions of an international treaty through other norms of international law opens the door to a more general issue: namely, the problems associated with the interaction between and simultaneous enforcement of multiple legal rules. However, the problems arising from the impossible task of separating the application from the interpretation of the law in the case of administering justice with limited jurisdiction intertwine with general problems of legal theory associated with the separation of legislation and legal interpretation, for which the *Golder* case is an excellent example. Unfortunately, the merits of these rather general problems may not be discussed in the present paper.

10.4 The Requirements for Using Other Pieces of International Legislation for Interpretation

Not any piece of international legislation may be used to interpret an international legal rule. The limitation laid down in Article 31(3)(c) of the 1969 Vienna Convention, according to which "any relevant rules of international law applicable in the relations between the parties" may be taken into account, may be used in general, even if a court relies on a norm of international law for interpretation purposes without making any specific reference thereto. The following paragraphs contain some statements of rather general nature

41 It seems, however, that the formalization of the problem would hardy yield any result. French uses a three-pillar system to analyse the interactions between two norms of international law (clarification of meaning – change of meaning – enforcement of opposite meaning), which may be necessary to describe the problem, but does not offer any solution. French 2006, pp. 282-283 and p. 313.

42 *Oil Platforms* (Merits), Higgins (Sep. Op.) at 238, para. 49.

43 *Golder v. the United Kingdom*, Judgment of 21 February 1975, ECHR Series A, No. 18, paras 28-36.

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on the requirements of using pieces of international legislation for interpretation purposes. However, no detailed analysis of such statements – with one exception – is offered in this paper.

Apparently, no major debate has ever surfaced concerning the meaning of 'rules', indicating that such rules may include any and all sources of international law.[44] Of course, the use of a provision of an international treaty or of a customary rule for interpretation purposes raises different problems.[45] For example, when using treaty rules of relative effect, it may be a problem (and limitation), if the contracting parties are not the same in the treaty to be interpreted and the treaty to be used as support for interpretation (*see* Section 10.5). Another issue is the temporal sequence of the rule to be interpreted and the rule used as support for interpretation, which topic was analysed by French in detail.[46] The Vienna Convention does not provide any requirement in this respect, so – theoretically – even rules established after the adoption of the treaty to be interpreted may be used for interpretation. This issue leads to a general fundamental question concerning the interpretation of international treaties, *i.e.* whether only norms already established at the time of adopting the treaty to be interpreted, or even subsequent rules may be used for interpretation.[47]

One might face unique problems when trying to interpret an international treaty through reliance on a *ius cogens* norm, instead of a simple rule of customary law. In *Oil Platforms*, for example, Judge Simma covered this problem (assuming that the rules on the use of force are *ius cogens*) and explored certain features of such situations.[48]

The possible conflicts, interactions, and relationships between rules may appear in various forms in international law. In this paper – and under Article 31(3)(c) of the 1969 Vienna Convention – the *interpretation* of a rule through another rule is discussed.[49] It is not clear quite often, whether or not the court relied on a specific and explicitly mentioned norm

44 Fragmentation of international law, *supra*, paras 462-472, Official Records of the General Assembly Fifty-sixth Session (2004), Supplement No. 10 (A/56/10) paras 345, 350.; McLachlan 2005, pp. 290-291. The use of any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions (Art. 31(3)(a) of the Vienna Convention) falls here logically, but it is narrower, more specialised, and does not raise many problems. However, interesting problems may arise in relation to distinguishing between points (a) and (c), which are not discussed here in more detail. *See e.g.,* A. Aust, *Modern Treaty Law and Practice*, Cambridge University Press, Cambridge, 2007, pp. 238-241.

45 For numerous examples for the application of general rules of customary law, *see* Fragmentation of international law, paras 463-469.

46 French 2006, pp. 295-300.

47 *See also,* Fragmentation of international law, *supra*, paras 429-433, 475-478 or A. Szalai, 'A szokásjog szerepe a nemzetközi jogban', *Tudományos Diákköri Szemle,* 2006, SZTE ÁJTK Szeged, 2006, pp. 266-271.

48 *Oil Platforms* (Merits), Simma (Sep. Op.) at 327-331, paras 6, 9-11. *See also*, French 2006, pp. 290-291, A Orakhelashvili, 'The Impact of Peremptory Norms on the Interpretation and Application of United Nations Security Council Resolutions', 16 *European Journal of International Law*, 2005, pp. 59-88.

49 This is why Art. 30 (Application of successive treaties relating to the same subject matter) of the 1969 Vienna Convention is irrelevant, despite of the fact that it applies to the logical relationship between two norms. One must see, however, that it is not about interpretation, but about general application.

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for interpretation purposes in a given case. International courts often mention various provisions of different treaties among the legislation taken into account, but the reasoning does not reveal whether or not, or exactly how, the court indeed relied on these pieces of legislation. Consequently, despite any reference to various pieces of the legislative background, it is occasionally impossible to determine if such norms were actually used for interpretation purposes.[50]

Apparently, the relevance of a rule used as support for interpretation ('relevant rules') is not a material limitation for the courts. Relevance is established whenever the court finds any kind of relationship between the rule to be interpreted and the rule to be used for interpretation purposes. It is hardly conceivable that the relevance of a rule used as support for interpretation may be challenged subsequently, if the court actually used it one way or another to establish the meaning of another rule. So far, I have not found any objective criterion of relevance that may actually limit the judicial practice. In *Oil Platforms*, Judge Higgins made a less convincing attempt to question the material relevance of the rules on the use of force, but she did not build any significant conclusion on that attempt.[51]

As with many issues relating to judicial practice, the interesting question sometimes is not why a court did something, but why it did not do something. Specifically, why did not courts take into account, in certain cases, other rules of international law in the course of interpretation? An aspect of this question is that, according to the Vienna Convention, the interpreter of a treaty would be required to take into account other relevant rules as well. However, this obligation might become illusory due to the uncertainties surrounding the requirements of such interpretations. The above-mentioned requirement of relevance (*i.e.* that the rule used for interpretation purposes must be 'relevant' to the rule to be interpreted) is vague and can only be determined on an *ad hoc* basis. This condition cannot be controlled conceptually, and any interpretation based on another international legal norm could be easily averted due to the soft requirement.

In *Balmer-Schafroth* heard by the ECHR, Judge Pettiti and six other judges demanded in a dissenting opinion that the rules of international law on environmental protection be taken into account when interpreting the ECHR to determine whether or not the applicants have a right to judicial review under Article 6(1) in the course of the licensing of a

50 In *Stec*, *e.g.,* the European Court of Human Rights referred to the Social Charter in detail, as relevant law, but it is not clear from the reasoning how exactly this treaty contributed to a decision on whether or not the social benefits at hand fell under the scope of Art. 1 of Protocol 1 to the ECHR (right to peaceful enjoyment of possessions). *Stec and others v. the United Kingdom* [GC] (Appl. Nos. 65731/01 and 65900/01), Admissibility Decision of 6 July 2005, ECHR Reports 2005-X, paras 25, 34 and 52.

51 The essence of her argument is that the parties, concluding an economic and commercial treaty, had hardly any intention to incorporate the entire substance of international law on the use of force. Such rules fall outside the context of the treaty, and are irrelevant for the purpose of interpreting the treaty. *Oil Platforms* (Merits), Higgins (Sep. Op.) at 237, para. 45-46.

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nuclear power plant – but the majority did not comply with this demand.[52] (In the lack of objective criteria, similarly powerful arguments may be used against the minority opinion to show why the invoked rules of international law are *not* relevant to the interpretation.) As pointed out by Sands, legal uncertainty is an important counter-argument against the use of international legal norms for interpretation purposes.[53] There may be numerous factors of uncertainty when the contents of two norms are brought in contact. The outcome of the interpretation with regard to the specific facts of a case to be decided may be especially uncertain in using general, unwritten customary rules or other rules with otherwise uncertain contents. The possible use of the precautionary principle for such purposes is an excellent example of such uncertainty. It is doubtful that the precautionary principle could be considered as a norm of customary law, but its content is also uncertain when applied to a commercially restrictive state measure (*see, European Communities – Hormones*),[54] to a national legal rule restricting guarantees for legal remedy (*see, Balmer-Schafroth*),[55] or to a future state measure giving rise to the suspicion of prospective natural harm (*see*, *Southern Bluefin Tuna Cases*).[56]
Legal uncertainty is further increased when a court uses an international legal norm to interpret a treaty provision. By interpreting this provision it also shapes the contents of the norm used as support for interpretation. In the course of this two-way process, the court may assign a meaning to the supporting norm which has not been applied before by any other body.

10.5 The Scope of Parties to the Used Pieces of Legislation

A special problem arises, when a court, in order to interpret a treaty provision of relative effect, relies on another relative rule, typically a provision of another treaty. It seems to be clear, that the parties to the court proceeding must be parties to both the treaty to be interpreted and to the treaty supporting the interpretation. Problems may arise, if the parties to the dispute are parties to both treaties, but the state parties to the two treaties do not overlap.[57] In such cases, an entity, which is not party to the dispute, but is party to

52 *Balmer-Schafroth and others v. Switzerland* [GC] (Appl. No. 22110/93), Judgment of 26 August 1997, ECHR Reports 1997-IV, Pettiti (Diss. Op. , joined by six other judges) and Foighel (Diss. Op.).

53 Sands 1998, p. 101.

54 *EC Measures Concerning Meat and Meat Products (Hormones) (*Appellate Body Report) WT/DS26/AB/R, WT/DS48/AB/R (adopted 13 February 1998), DSR 1998:I, 135, especially point VI; *see also,* Sands 1998, pp. 86-87.

55 *Balmer-Schafroth, supra, see* especially para. 40, and Pettiti (Diss. Op. , joined by other six judges).

56 *Southern Bluefin Tuna Cases (New Zealand v. Japan; Australia v. Japan),* International Tribunal for the Law of the Sea (Request for provisional measures), Order of 27 August 1999, paras 67-80. <www.itlos.org/> (accessed 11 February 2013).

57 For the possible solutions to this situation, *see* McLachlan 2005, pp. 314-315.

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the treaty under interpretation, may raise legitimate objections, if a court interpreted the treaty it is party to with a view to another treaty it is not a party to. For this reason, many observers tend to understand the provision laid down in Article 31(3)(c) of the Vienna Convention so that an international treaty may not be used as support for the interpretation of another international treaty, unless – in addition to the parties to the dispute – *all* parties to the treaty to be interpreted are also parties to the supporting treaty. A GATT panel followed this approach in *United States* (*Tuna II*) and refused to take into account the invoked – mostly environmental protection related – treaties for the interpretation of Article XX(g) of the GATT because they "were not concluded among the contracting parties to the General Agreement."[58] This approach was also confirmed by recent WTO practice, for example, in *EC – Biotech*.[59]

Of course, it cannot be clearly inferred from the provision itself in the Vienna Convention if the concept of 'parties' refers to all parties to the treaty to be interpreted, or to the parties to the given dispute only.[60] The solution applied in WTO practice would significantly reduce the scope of treaties suitable for being used as support for interpretation, since it rarely occurs that all parties, without exception, to a treaty to be interpreted are also parties to the treaty to be used as support.

For this reason, Mansfield, a rapporteur of the UN Study Group, seeks to extend the interpretation opportunities afforded under Article 31(3)(c) of the Vienna Convention. Mansfield concluded that it is sufficient that the *parties to the dispute* are also parties to both the treaty to be interpreted and the treaty supporting the interpretation. In such cases, however, the risk of the emergence of divergent interpretations of the same treaty provision increases, as the parties to a subsequent dispute may be different, and the previously applied treaty may not be applicable to their case.[61] Nevertheless, this solution is chosen occasionally by the ECHR. In interpreting the ECHR, the Court sometimes relies on other

58 *United States – Restrictions on Imports of Tuna* (GATT Panel Report) DS29/R, 16 June 1994 (unadopted), para. 5.19, thereby adopting the argument of the European (Economic) Community and the Netherlands, according to which, "[…]since not all GATT members were parties to the environmental treaties cited by the United States, such practice could not meet the terms of Article 31:3(c) which applied only to 'rules of international law applicable in relations *between the parties*'". para. 3.38; source: <www.worldtradelaw.net/reports/gattpanels/> (accessed 11 February 2013). Also with respect to this case *see* Official Records of the General Assembly, Fifty-seventh Session,Supplement No. 10 (A/57/10), 2005, para. 472 or Sands, 1998, pp. 96-97.

59 *E.g., European Communities – Measures Affecting the Approval and Marketing of Biotech Products* (Panel Reports) WT/DS291/R, WT/DS292/R, WT/DS293/R, Add.1 to Add.9, and Corr.1 (adopted 21 November 2006) DSR 2006:III-VIII, 847, paras 7.68, 7.70-7.72. For further reference to the case, *see* Fragmentation of international law, *supra*, paras 448, 471-472.

60 However, on the basis of Art. 2(1)(g) of the Vienna Convention ('party' means a state which has consented to be bound by the treaty and for which the treaty is in force), the concept of 'parties' means all parties to the convention, instead of referring to the parties to the dispute only.

61 Official Records of the General Assembly, Fifty-seventh Session (2005), Supplement No. 10 (A/57/10) para. 472. A somewhat similar classification is introduced by McLachlan 2005, p. 314.

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treaties to which not all parties to the ECHR are parties. In the *Glass* case mentioned previously, for example, not all parties to the ECHR were parties to the 1997 Oviedo Convention that was used for interpretation purposes.

However, the ECHR went even further obviously ignoring the *pacta tertiis* principle. It has already happened that the Court relied on, as support for the interpretation of the ECHR, a treaty to which a party to the dispute at hand was not a party to. This judicial practice may invalidate any speculations concerning the scope of parties under Article 31(3)(c) of the Vienna Convention. The breakthrough came in *Marckx*, quite a long time ago. The Court interpreted Article 8 ECHR (right to respect for private and family life) with a view to the disadvantageous legal status of children born out of wedlock relying on two treaties to which Belgium, the respondent state (and numerous other member states of the Council of Europe) was not party.[62] However, according to the Court, "[…] this state of affairs cannot be relied on in opposition to the evolution noted above. Both the relevant Conventions are in force and there is no reason to attribute the currently small number of contracting states to a refusal to admit equality between 'illegitimate' and 'legitimate' children on the point under consideration. In fact, the existence of these two treaties denotes that there is a clear measure of common ground in this area amongst modern societies".[63]

The arguments presented in *Marckx* on this matter are rather short and incomplete. It is not explained, for example, why the small number of contracting states does not indicate instead that the states were not prepared to adopt at least one or some of the provisions of the treaty.[64]

It appears that – after *Marckx* – the Court, for a long time, had not relied on any international treaty the respondent state was not a party to interpret the provisions of the ECHR.

62 Brussels Convention of 12 September 1962 on the Establishment of Maternal Affiliation of Natural Children (signed, but not yet ratified by Belgium at the time); Convention of 15 October 1975 on the Legal Status of Children born out of Wedlock (neither signed, nor ratified by Belgium at the time). *Marckx v. Belgium (*Appl. No. 6833/74), Judgment of 13 June 1979, Series A No. 31, para. 41.

63 *Ibid.* The solution reached in *Marckx* is somewhat similar to a recent proposal attributed to Pauwelyn (and also reflected in the materials of the UN Study Group) in relation to the dispute resolution proceedings of the WTO. According to this proposal, not all parties to the treaty to be interpreted need to be parties to the treaty used as support for interpretation; it would suffice if such parties tacitly agreed thereto. (However, it is clear that the parties to the dispute need to be parties to the treaty used as support for interpretation.) J. Pauwelyn, *Conflict of Norms in Public International Law – How WTO Law Relates to Other Rules of International Law*, Cambridge University Press, Cambridge, 2003, pp. 257-263. Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 10 (A/57/10), 2005, para. 472.

64 It is notable that numerous dissenting opinions or partially dissenting opinions were submitted by the judges, but only Judge Vilhjálmsson reflected shortly to the problem of using the two treaties. His observation is essentially similar to the objections raised later by Judge *Higgins* in *Oil Platforms*. He acknowledges that the Convention on the Legal Status of Children born out of Wedlock indicates the changing attitude of the states, but emphasises that the problem raised in the case must be solved by interpreting Art. 8 of the ECHR and relevant Belgian law. *Marckx*, Vilhjálmsson (partly Diss. Op.). This comment can be understood in two ways: either the convention should not have been taken into account at all, or should have been used for interpretation purposes, instead of applying it directly to the facts of the case.

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The *Taşkin*[65] and *Tüm Haber Sen*[66] judgments changed the situation, but the Court faced the problem at a theoretical level in the *Demir* case only.[67] Referring to *Marckx* the Court made it clear that, for the purpose of interpreting the ECHR, it takes into account international instruments showing a continuous evolution and common ground in modern societies, the interpretation of such instruments, and the practice of European states reflecting their common values. The Court clearly stated that, in defining the meaning of terms and provisions of the ECHR, it may rely on international treaties the respondent state is not a party to. The Court observed: […] in this connection that in searching for common ground among the norms of international law it has never distinguished between sources of law according to whether or not they have been signed or ratified by the respondent state.[68]
Obviously, the European system of the protection of human rights is a specific and regional set of norms, and the unique principles applicable to the interpretation of the ECHR may be different, or even partially in conflict, with the interpretation principles applied in universal international law.[69] In the *United States – Shrimp* case, for example, the WTO Appellate Body took into account Article 56 of the United Nations Convention on the Law of the Sea[70] to reveal the meaning of the generic term 'natural resources' only because the United States not having signed the convention acknowledged that the convention reflected international customary law.[71]

65 *Taşkin and others v. Turkey* (Appl. No. 46117/99) Judgment of 10 November 2004, ECHR Reports 2004-X, paras 99, 118-119. In this case, the Third Section used the 1998 Aarhus Convention (to which Turkey was not a party) to interpret Art. 8 ECHR in relation to access to information and public participation in decision-making. Though the Court does not mention explicitly the Convention in its arguments, in *Demir* it refers to this judgment as that where the justification had been partially built on this convention, *see*, *Demir and Baykara v. Turkey* [GC] (Appl. No. 34503/97), Judgment of 12 November 2008, ECHR Reports 2008, para. 83.

66 *Tüm Haber Sen and Çinar v. Turkey* (Appl. no. 28602/95), Judgment of 21 February 2006, ECHR Reports 2006-II, paras 24, 39. In this case the Chamber (Second Section) used Art. 5 of the Social Charter (Torino, 1961) to interpret Art. 11 of the ECHR (freedom of assembly and association), although Turkey has not agreed to be bound by this provision of the Charter.

67 *Demir [GC], supra*. The Grand Chamber of the Court – similarly to *Tüm Haber Sen* – used Arts. 5 and 6 of the Social Charter to interpret Art. 11 ECHR (freedom of assembly and association), *see* paras 45, 49-50, 103-105, 149, even though Turkey was not obligated by these provisions of the Charter. The Chamber (Second Section) did not focus on this matter, *see Demir and Baykara* (Appl. No. 34503/97) Judgment of 21 November 2006, ECHR Reports 2006, para. 35.

68 *Demir* [GC], *supra*, paras 78, 85-86.

69 The convention – unlike classic international treaties – established a network of objective obligations subject to collective enforcement in contrast to traditional international obligations based on reciprocity, *see Ireland v. the United Kingdom* (Appl. No. 5310/71) Judgment of 18 January 1978, Ser A. No. 25, para. 239; *Loizidou v. Turkey* (Appl. no. 15318/89) (Preliminary Objections) Judgment of 23 March 1995, Series A. No. 310, para. 70; *Mamatkulov and Askarov v. Turkey* [GC] (Appl. Nos. 46827/99 and 46951/99), Judgment of 4 February 2005, ECHR Reports 2005-I, para. 100.

70 Montego Bay, 1982, 1833 U.N.T.S. 3.

71 *United States – Shrimp, supra,* para. 130, n. 110. The other parties to the dispute had already ratified the convention by that time.

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It is notable that, in *Qatar/Bahrein*, the International Court of Justice took into account treaties signed but unratified by the parties to the dispute: "[…] signed but unratified treaties may constitute an accurate expression of the parties at the time of signature."[72] Consequently, these treaties may theoretically used for the interpretation of another treaty.[73] However, the events followed a different course in *OSPAR*, for example, where the already effective convention done at Aarhus in 1998[74] (already signed but yet to be ratified by the parties to the dispute by that time) could have been taken into account to interpret the OSPAR Convention with a view to the information rights in environmental matters. The Court refused to take into account the 1998 Convention, even as evidence of the evolving international practice or as a convention reflecting the common understanding of the parties.[75] This happened despite of the fact that even the findings of the International Court of Justice in *Qatar/Bahrein* were invoked.[76] The scope of the parties imposes significant limits on the range of treaties that could be relied upon for interpretation purposes, but the emergence of a relatively more uniform practice in this respect cannot be expected in the near future.

72 *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (*Merits) Judgment of 16 March 2001, 2001 ICJ Rep. 40, at 68, para. 89.

73 Nevertheless, the Court decided not to apply the respective treaty (1913 Anglo-Ottoman Convention), *ibid.*, at 68, paras 88-91.

74 Convention on Access to Information, Public Participation in Decision-Making, and Access to Justice in Environmental Matters (Aarhus, 1998) 2161 U.N.T.S. 447.

75 *Access to Information Under Article 9 of the OSPAR Convention. (Ireland v. the United Kingdom).* Permanent Court of Arbitration, Final Award of 2 July 2003, paras 97-105; 137-138. *See also,* Griffith (Diss. Op.) paras 7-19. <http://pca-cpa.org> (accessed 11 February 2013).

76 *Ibid.* Griffith (Diss. Op.), para. 15.