TREATY, CUSTOM AND TIME: INTERPRETATION/APPLICATION?*

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“Yet in speaking of application it was necessary to speak of interpretation.”¹
“He did not think it was possible to draw a distinction between the interpretation of a treaty and its application, as the Special Rapporteur had attempted to do: for once a treaty had been correctly interpreted, it had to be applied according to that interpretation.”²
“… it was hard to draw the dividing line between interpretation and application.”³

I. Introduction

Article 31(3)(c) of the 1969 Vienna Convention on the Law of Treaties directs that in interpreting a treaty “there shall be taken into account, together with the context … any relevant rules of international law applicable in the relations between the parties”. Six years ago I wrote an article entitled ‘Treaty, Custom and the Cross-fertilization of International Law’, which tried to identify and assess international judicial and arbitral practice on this issue.⁴ The article was based on a reasonably thorough trawl of the case law and commentary, and concluded that Article 31(3)(c) appeared “to have been expressly relied upon only very occasionally in judicial practice”, and had “attracted little academic comment”⁵.

Put simply, there appeared to be “a general reluctance to refer to Article 31(3)(c)”⁶. The ICJ had not looked at the issue, aside from Judge Weeramantry’s

* This Chapter was based on the presentation made by the author during the ‘First Annual Conference on International Law: Interpretation under the VCLT” organized by Queen Mary and Eversheds in 2006, and is current as of that date.

¹ Comments of Mr. Yasseen at the 729th ILC Meeting on the Third Report on the Law of Treaties by Sir Humphrey Waldock, on the proposed Article 56 (The inter-temporal law); Comments of Mustafa Kamil Yasseen (A/CN.4.SR.729), reproduced in YILC (1964): Vol.I at 37, para. 35.
² Comments of Mr. Verdross at the 728th ILC Meeting on the Third Report on the Law of Treaties by Sir Humphrey Waldock, on the proposed Article 56 (The inter-temporal law); Comments of Alfred Verdross (A/CN.4.SR.728), reproduced in YILC (1964): Vol.I at 33, para. 6.
³ Comments of Mr. Jimenez de Arechaga at the 728th ILC Meeting on the Third Report on the Law of Treaties by Sir Humphrey Waldock, on the proposed Article 56 (The inter-temporal law); Comments of Jimenez de Arechaga (A/CN.4.SR.728), reproduced in YILC (1964): Vol.I, at 34, para. 11.
⁵ Id., at 95.
⁶ Id.
observations in his separate opinion in the Gabcikovo-Nagymoros case, that the ability of Article 31(3)(c) to address relationships between treaty and custom “scarcely covers this aspect with the degree of clarity requisite to so important a matter”.

It was not yet at the forefront of the ILC’s agenda. In concluding that research effort, I proposed that Article 31(3)(c) be focused on as “an available tool”, with the recognition that

[short of the International Law Commission providing greater clarity on its utilization—an unlikely prospect in the short term—it will be for judicial and quasi-judicial bodies to take the lead.]

No doubt for unrelated reasons, greater attention has been paid to the provision in recent years. International courts and tribunals have begun to focus on its requirements, occasionally invoking Article 31(3)(c), the ILC has referred to it as part of its study on the fragmentation of international law; and scholars and practitioners have also discussed it. A significant development – and perhaps even a tipping point – was the ICJ’s judgment on the merits in the Oil Platforms case. As noted by one commentator, the ICJ’s judgment in Oil Platforms “has shone a searchlight onto one of the most neglected corners of the interpretation section of the Vienna Convention, namely Article 31(3)(c).”

The searchlight has identified a number of difficulties. In particular, despite the apparent quasi-unanimity on the principal legal issues before the Court in Oil Platforms (14–2, and 15–1, respectively), the eleven separate opinions, declarations and dissents reflect a crucial difference of approach with respect to the relationship between interpretation and application under Article 31(3)(c). This is not surprising, since the scope of Article 31(3)(c) has long

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8 Sands, supra note 4, at 105.
9 The Iran–United States Claims Tribunal, the European Court of Human Rights, Arbitral Tribunals established pursuant to multilateral agreements, and the WTO Appellate Body.
13 McLachlan, supra note 11, at 279.