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The interpretation of multilingual tax treaties

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CHAPTER 2 – INTRODUCTION TO THE VIENNA CONVENTION ON THE LAW OF TREATIES

1. Brief historical background of the Vienna Convention on the Law of Treaties and the International Law Commission[391]

The idea of developing international law through its codification by means of both the restatement of existing rules and the formulation of new rules dates back the end of the eighteenth century. In one of his masterpieces, *Principles of International Law*[392] (on which he mainly worked between 1786 and 1789), Bentham envisaged the possibility of drafting an international law code, based on the application of his principle of utility to the relations between nations. However, in planning the structure and content of such a code, he made little reference to the existing law of nations, so that the project resembled more an integrated collection of new rules than a codification and systematization of existing customary international law.

From that moment on, the trend towards the codification of international law has been constantly growing, especially due to the initiative of private institutions such as the Institut de Droit International, the International Law Association and the Harvard Research in International Law.[393] Intergovernmental efforts to promote codification and development of international law date back to the beginning of the nineteenth century and, more specifically, to the Congress of Vienna (1814-1815), where legal provisions relating, *inter alia*, to the abolition of the slave trade and the rank of diplomatic agents were adopted by the signatory Powers of the 1814 Treaty of Paris.[394]

A major step in this intergovernmental activity is represented by the resolution taken by the Assembly of the League of Nations on 22 September 1924, which envisaged the creation of a standing organ (the Committee of Experts for the Progressive Codification of International Law) with the task of (i) preparing a list of subject matters whose regulation by means of international agreements was the most desirable and realizable;

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[391] For complete references to the history of the International Law Commission and the Vienna Convention on the Law of Treaties see *The Work of the International Law Commission*, United Nations, Office of Legal Affairs (2004) and S. Rosenne, *The Law of Treaties – A Guide to the legislative history of the Vienna Convention* (New York: Oceana Publications, 1970), respectively. See also F. Engelen, *Interpretation of Tax Treaties under International Law* (Amsterdam: IBFD Publications, 2004), in particular Chapters 3 and 4.

[392] J. Bentham, P*rinciples of International Law* (Bowring edition, 1843) is available on the website of the University of Texas at Austin: http://www.laits.utexas.edu/poltheory/bentham/pil/index.html

[393] In this respect, see document A/AC.10/25, "Note on the private codification of public international law" available on the website of the United Nations: http://www.un.org/law

[394] Treaty signed on 30 May 1814 by France, on the one side, and the Allies (i.e. Austria, Great Britain, Prussia, Russia, Sweden and Portugal), on the other side.

(ii) examining and reporting on the comments made by governments on such a list and (iii) making proposals on the procedures to be followed in preparing the conferences for the regulation of these subject matters.[395] The Committee of Experts for the Progressive Codification of International Law was, therefore, an organ with both a proposing and an advisory scope and represented the major means of the first intergovernmental attempt to codify and develop entire fields of international law with a worldwide reach. However, the only tangible result of the League of Nation's initiative was the drafting of four international instruments, all concerning different issues relating to nationality, by the Codification Conference held in The Hague from 13 March through 12 April 1930; this Conference had worked on an initial proposal by the Committee of Experts for the Progressive Codification of International Law, then developed by a five persons Preparatory Committee.[396] On 25 September 1931, the League of Nations Assembly adopted a resolution on the procedure of codification, which strengthened the influence of governments at every stage of the process of codifying international instruments.[397] Such a resolution appears particularly relevant since some of its most significant features and recommendations were subsequently incorporated in the Statute of the International Law Commission of the United Nations, in particular the requirement of a greater involvement of governments in all the different stages of the codification process, the call for a close collaboration in such a process of international and national scientific institutes and the need to entrust an expert committee with the preparation of draft instruments.

After the Second World War, the role played by the League of Nations was picked up by the United Nations. As well documented by the transcripts of the United Nations Conference on International Organization,[398] the governments participating in the Conference were neither strongly oriented toward leaving any legislative power to the United Nations for issuing binding instruments of international law, nor to accepting any such instruments that could have been voted by the majority of the member States. On the contrary, widespread agreement existed on the opportunity to give the United Nations the task of studying problematic subject matters in the field of international law and recommending possible solutions to the member States.[399] This approach resulted in the inclusion of Article 13(1) in the United Nations Charter, according to which the "General Assembly shall initiate studies and make recommendations for the purpose of

[395] See the Official Journal of the League of Nations, Special Supplement, no. 21, p. 10.
[396] On 12 April 1930, the Conference adopted the following instruments: (i) Convention on certain questions relating to the conflict of nationality laws (see League of Nations, Treaty Series, vol. 179, p. 89); (ii) Protocol relating to military obligations in certain cases of double nationality (see League of Nations, Treaty Series, vol. 178, p. 227); (iii) Protocol relating to a certain case of statelessness (see League of Nations, Treaty Series, vol. 179, p. 115); (iv) Special Protocol concerning statelessness (see League of Nations, document C.27.M.16.1931.V). The first three instruments have been in force since 1937.
[397] See the Official Journal of the League of Nations, Special Supplement, no. 92, p. 9.
[398] The conference held from 25 April to 26 June 1945 in San Francisco and resulted in the creation of the United Nations Charter.
[399] See United Nations, *Documents of the United Nations Conference on International Organization*, held from 25 April to 26 June 1945 in San Francisco, vol. 3, documents 1 and 2; vol. 8, document 1151; and vol. 9, documents 203, 416, 507, 536, 571, 792, 795 and 848.

(…) encouraging the progressive development of international law and its codification". In light of this obligation, the General Assembly[400] decided to create a Committee on the Progressive Development of International Law and its Codification, which, in turn, had to study and recommend the methods by which the United Nations and, more specifically, the General Assembly should have encouraged the progressive development of international law and its codification.[401] The Committee on the Progressive Development of International Law and its Codification concluded its work by adopting a report recommending the establishment of an international law commission and proposing some provisions for drafting its statute.[402]

Following that proposal, the General Assembly, on 21 November 1947, adopted resolution 174(II) by means of which the International Law Commission (hereafter "ILC") was established. According to Article 1 of the ILC's Statute, the object of the ILC is "the promotion of the progressive development of international law[403] and its codification". In that respect, Article 15 of the same Statute defines "for convenience" (i) progressive development as "the preparation of draft conventions on subjects which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of States" and (ii) codification as "the more precise formulation and systematization of rules of international law in fields where there already has been extensive State practice, precedent and doctrine".

As a matter of fact, the Commission's work on a certain topic generally involves aspects of both the progressive development and the codification of international law.[404] The 34 members of the ILC are chosen among persons of recognized competence in international law and serve in their individual capacity.[405] In addition, no two members of the ILC may be nationals of the same State.[406] With reference to the structure of the ILC, a figure of capital importance for the functioning thereof is that of the Special Rapporteur. This is a member of the ILC who is appointed by the latter at the early stage of the consideration of a topic and who continues to perform his specific functions until the ILC has completed its work on such a topic, provided that he remains a member of the ILC until that moment. The Special Rapporteur performs many crucial tasks, among whichs worth highlighting is (i) the preparation of reports on the topic that are submitted

[400] Hereafter, unless otherwise specified, any reference to the General Assembly is intended as made to the General Assembly of the United Nations.
[401] See the Resolution 94 (I) adopted by the General Assembly of the United Nations on 11 December 1946.
[402] See the Official Records of the General Assembly, Second Session, Sixth Committee, Annex 1.
[403] According to the second paragraph of Article 1 of the its Statute, the ILC "shall concern itself primarily with public international law, but is not precluded from entering the field of private international law". As a matter of fact, since its institution the ILC has predominantly worked in the field of public international law and criminal international law.
[404] See, among other ones, paragraph 102 of the Report of the Working Group on review of the multilateral treaty-making process (Document A/CN.4/325), in YBILC 1979-II (part I), p. 210.
[405] See Article 2(1) of the ILC's Statute and the historical backgroung thereof in United Nations, *The Work of the International Law Commission* (UN Office of Legal Affairs, 2004), pp. 5 *et seq*. and the extracts thereof available on their website: http://www.un.org/law/ilc/. There were originally 15 members. The current number has been established by the General Assembly by its resolution no. 36/39 adopted on 18 November 1981.
[406] See Article 2(2) of the ILC's Statute.

to the plenary ILC, (ii) the participation in and contribution to the work of the ILC's Drafting Committee[407] on the topic and (iii) the elaboration of commentaries to draft articles. In substance, his main functions consist in drawing the borders of the topic discussion, developing its content for the purpose of the analysis to be performed by the ILC and making proposals for draft articles of an international instrument on the topic.[408]

The ILC, whose first election took place on 3 November 1948, opened the first of its annual sessions on 12 April 1949. During that session, the ILC drew up a provisional list of 14 topics suitable for future codification. The "Law of Treaties" was one of the topics included in the list. However, until the end of the fifties, notwithstanding the work carried on by the Special Rapporteurs[409] and the reports produced thereby, the ILC had barely discussed the topic. Things changed at the beginning of the following decade.

Between 1962 and 1966, the ILC had done significant work on the topic on the basis of the six reports submitted by Sir Humphrey Waldock, who acted as Special Rapporteur.[410] In 1966, the ILC delivered a draft convention to the General Assembly (hereafter, the "1966 Draft"), accompanied by a commentary thereon and a recommendation, according to which the General Assembly was to organized an international conference for the purpose of studying the draft and concluding a convention on the topic.[411] In 1966 and 1967, the General Assembly issued two resolutions addressed to member States by means of which it convened the United Nations Conference on the Law of Treaties (hereafter the "Conference").[412] The

[407] The Drafting Committee is a working sub-group of the ILC whose members vary from session to session and, since 1992, from topic to topic at any given session. The Drafting Committee plays an important role in harmonizing the various viewpoints and working out generally acceptable solutions. The Drafting Committee is entrusted with the task of harmonizing the different viewpoints of the ILC's members both from a purely drafting perspective and from a more substantive perspective, especially when the plenary ILC has been unable to resolve certain issues or an unduly protracted discussion is anticipated. This activity generally leads to the drafting of a specific text on the topic, or part thereof (e.g. draft articles or commentaries), which is presented as proposal to the plenary ILC. The latter may subject such text to amendments or alternative formulations and then refer it back to the Drafting Committee for further consideration. See YBILC 1958-II, p. 108, para. 65; YBILC 1979-II (part I), pp.197-198, paras. 45 *et seq*.; YBILC 1987-II (part II), p. 55, paras. 237 *et seq*.; YBILC 1992-II (part II), p. 54, para. 371; YBILC 1996-II (part II), p. 85, para. 148 (j) and pp. 93-94, paras. 212 *et seq*.

[408] See, among other documents, YBILC 1982-II (part II), pp. 123-124, para. 271; YBILC 1996-II (part II), p. 91, paras. 188 *et seq*.

[409] The Special Rapporteurs who dealt with the "Law of Treaties" in this period were Brierly, Lauterpacht and Fitzmaurice.

[410] At its thirteenth session, in 1961, the ILC elected Sir Humphrey Waldock to succeed Sir Gerald Fitzmaurice as Special Rapporteur on the Law of Treaties, since the latter had to retire from the ILC on his election as judge of the International Court of Justice. At the same time, the ILC took three main decisions as to its work on the law of treaties, according to which: (i) the aim of the work on that subject was to prepare draft articles on the law of treaties intended to serve as the basis for a convention; (ii) the Special Rapporteur had been requested to re-examine the work previously done in this field by the ILC and the previous Special Rapporteurs; (iii) the Special Rapporteur had to begin with the issues concerning the conclusion of treaties and then proceed with the remainder of the subject, if possible covering the entire subject in two years. See Official Records of the General Assembly, Sixteenth Session, Supplement no. 9 (A/4843), para. 39.

[411] The procedure followed by the ILC founds its legal basis in Article 23(1-d) of the ILC's statute.

[412] General Assembly Resolution 2166(XXI) of 5 December 1966 (see Official Records of the General Assembly of the United Nations, Twenty-first Session, Supplement No. 16, UN Doc. A-6316, p.95) and

Conference was held in Vienna between 26 March and 24 May 1968 and between 9 April and 22 May 1969. The VCLT was adopted by the Conference on 22 May 1969 and opened for signature on 23 May 1969.[413] It entered into force on 27 January 1980 for the 35 States that deposited their instruments of accession or ratification with the Secretary-General of the United Nations on or before 28 December 1980.[414] As of 26 September 2011, the VCLT has entered into force for 111 States.[415]

2. Scope of the VCLT

The VCLT applies (only) to treaties concluded between States.[416] For the purpose of the application of the VCLT, the term "treaty" must be understood as "an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation".[417] It is important to note that an international agreement is to be considered a "treaty" for the purpose of the VCLT only where the parties intended to create a legal relationship from which international rights and obligations arise. This is made clear by the Commentary on Article 2 of the 1966 Draft, according to which the element of intention is implicit in the phrase "governed by international law".[418] Where such an intention is present, written agreements[419] between States[420] constitute "treaties" for the purpose of the VCLT even if informally concluded

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General Assembly Resolution 2287(XXII) of 6 December 1967 (see Official Records of the General Assembly of the United Nations, Twenty-second Session, Supplement No. 16, UN Doc. A-6716, p.80).

[413] The VCLT was concluded in the following authentic languages: English, French, Spanish, Russian and Chinese. For the purpose of its signature, it was deposited with the Secretary-General of the United Nations. Interestingly, the VCLT was open for signature not only by States who were members of the United Nations, but also by any of the specialized agencies, the International Atomic Energy Agency and parties to the Statute of the International Court of Justice, and any other State invited by the General Assembly to become a party to the Convention.

[414] See Article 84(1) VCLT to this extent.

[415] See United Nations Treaty Collection Database, available at http://treaties.un.org.

[416] Article 1 VCLT.

[417] Article 2(1-a) VCLT. On the definition of "treaty" for the purpose of the VCLT, see R. Jennings and A. Watts (eds.), *Oppenheim's International Law. Volume I. Peace* (London: Longman, 1992), pp. 1199-1203.

[418] See YBILC 1966- II, p. 189, para. 6.

[419] It is important to emphasize that, even if oral agreements are excluded, as such, from the definition of "treaties" relevant for the application of the VCLT, this does not mean that they have no legal status as international obligations among States, as clarified by Article 3 VCLT. In this respect, the Commentary to the 1966 Draft recognizes that oral international agreements may "possess legal force and that certain of the substantive rues set out in the draft articles may have relevance also in regard to such agreements" (YBILC, 1966- II, p. 190, para. 3). In addition, Article 3 VCLT also makes clear that the rules of the VCLT that represent customary international law apply to oral international agreements. To that extent, see also UNCLT-1st, p. 146, paras. 5-6.

[420] Treaties between one or more States and one or more international organizations are regulated by the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations of 21 March 1986. However, according to Article 3(c) VCLT, the VCLT applies to the relations between States that are regulated by international agreements to which other subjects of international law are also parties. For the purpose and scope of such provision of Article 3 VCLT, see also

as "memoranda of understandings", "exchange of note", or similar instruments.[421] In that case, the rules enshrined in the VCLT, in particular the provisions on treaty interpretation, apply to the treaties notwithstanding their specific nature and object.[422]

With regard to the temporal scope of the VCLT, the general rule is established by Article 4 VCLT, according to which the convention does not have retroactive effect.[423] This rule appears coherent with that provided for in Article 28 VCLT, stating that the provisions of a treaty do not bind a party in relation to any act or fact that took place or any situation that ceased to exist before the date of entry into force of the treaty with respect to that party, unless a different intention appears from the treaty itself or is otherwise established.

However, such a general rule does contain a relevant exception, provided for in the very same Article 4 VCLT: the ban of retroactive effect does not apply with reference to all rules enshrined in the VCLT that would have been applicable under international law independently from the entry into force of the VCLT. In that respect, this exception makes clear that rules of customary international law that predate the (entry into force of the) VCLT continue to apply as if the latter had never come into force.[424]

In light of the above analysis and for the purpose of the present study, it is critical to ascertain whether the rules on treaty interpretation, provided for in Articles 31 through 33 VCLT, may be considered to be codification of customary law. The answer to such a question constitutes guidance in determining whether the rules on interpretation mentioned in the VCLT are applicable to treaties concluded by States not party to the VCLT, and to treaties concluded before the entry into force of the VCLT.

Throughout the debate on treaty interpretation and up to the formulation of Articles 27-29 of the 1966 Draft, the ILC was careful not to go beyond the realm of declaratory codification and not to formulate innovative rules or, in any case, provisions for which

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UNCLT-1st, p. 147, para. 7. Finally, pursuant to Article 5, VCLT also applies to treaties between States through which international organizations are constituted and to treaties adopted within international organizations, without prejudice to any applicable rule of the organization.

[421] See YBILC 1966- II, p. 188, para. 2.

[422] To this extent, see YBILC 1966- II, p. 219, para. 6. For a specific instance, see ICJ, 12 November 1991, *Arbitral Award of 31 July 1989 (Guinea-Bassau v. Senegal)*, judgment, para. 48.

[423] On the topic of the temporal application of the VCLT see, among others, I. Sinclair, *The Vienna Convention on the Law of Treaties* (Manchester: Manchester University Press, 1984), pp. 7-9; S. Rosenne, "The Temporal application of the Vienna Convention on the Law of Treaties", 4 *Cornell International Law Journal* (1970), 1 *et seq.*, at 5-12; F. Engelen, *Interpretation of Tax Treaties under International Law* (Amsterdam: IBFD Publications, 2004), pp. 48-54. Article 4 VCLT was not included in the 1966 Draft and was added to the final version of the VCLT following a proposal submitted by five States during the second session of the Conference.

[424] See also the Preamble to the VCLT, where it is affirmed that "the rules of customary international law will continue to govern questions not regulated by the provisions of the present Convention". The same holds true for rules of international law from sources other than custom that predate the entry into force of the VCLT.

there was no basis in existing usage.[425] The final text of the VCLT testifies to such an approach, having many instances of this kind, such as: the primary reference to the text of the treaty as expression of the intention of the parties; the absence of detailed rules of interpretation, in favor of broad and general principles; the refusal to include automatic rules of interpretation that could prove unsatisfactory in certain circumstances, leading to faulty conclusions; the relevant role played by the object and purpose of the treaty; the provision that all authentic texts have equal authority, lacking a different agreement of the parties thereon; the absence of any guidance concerning the moment when the agreed rule giving priority to one authentic text over another should be activated, due to the lack of unequivocal guidance from previous jurisprudence on such an issue.[426]

This would make a good argument in favor of the possibility that the principles enshrined in Articles 31-33 VCLT, or at least most of them, could be considered rules of customary international law.

The point is of primary relevance, since a conclusion in the affirmative would lead to the undisputed application of such rules both in respect of treaties concluded before the entry into force of the VCLT and in respect of treaties concluded by States that are not party to the VCLT.

According to Rosenne, regardless of what may have been customary international law before the VCLT, the meticulous preparation of its provision by the ILC, the careful study and reactions by governments and the proceedings of the Vienna Conference constitute a significant process of definition and consolidation of the customary international law of treaties that became crystallized through the adoption of the VCLT.[427] Since the relevant conditions were generally fulfilled,[428] that author concluded that most of the rules of the VCLT could have become customary law and, as such, binding as well for those States that did not become party to the VCLT. Rosenne also noted that the original purpose of the ILC's activity (i.e. finding out and clarifying just the general principles of law applicable to treaties) and the abandonment by the ILC of the distinction between the activity of "codification" and that of "progressive development" of international law, as provided for in the ILC's statute, pointed towards the characterization of the VCLT provisions as "rules of international law", with the meaning this expression assumes under Article 4 VCLT (i.e., mainly, customary

[425] Similarly, M. Tabory, *Multilingualism In International Law and Institutions* (Alphen aan den Rijn: Sijthoff & Noordhoff, 1980), p. 175.
[426] See M. Tabory, *Multilingualism In International Law and Institutions* (Alphen aan den Rijn: Sijthoff & Noordhoff, 1980), p. 175.
[427] S. Rosenne, "The Temporal application of the Vienna Convention on the Law of Treaties", 4 *Cornell International Law Journal* (1970), 1 *et seq.*, at 20. Apparently against the possibility that the provisions of Articles 31 and 32 VCLT represented a codification of customary law was the representative of Sweden at the Committee of the Whole of the Vienna Conference, who, in his capacity as such, emphasized that "codification would obviously not have sufficed" and the that work of the ILC "involved the progressive development of a part of the law of treaties which was as yet obscure" (UNCLT-1st, p. 178, para. 18). Similarly, see S. E. Nahlik, "La conférence de Vienne sur le droit des traités: une vue d'ensemble", in 15 *Annuaire français de droit international* (1969), 24 *et seq.*, at 40.
[428] See the conditions discussed in S. Rosenne, "The Temporal application of the Vienna Convention on the Law of Treaties", 4 *Cornell International Law Journal* (1970), 1 *et seq.*, at 20 *et seq*.

international law).[429] In that respect, Rosenne concluded that such a role assumed by the provisions of the VCLT, except the provisions of Article 66 thereof, should be recognized *erga omnes,* at least with regard to all treaties concluded since 22 May 1969.[430]

Tabory elaborated on the thesis of Rosenne and affirmed that most of the principles of interpretation enshrined in the VCLT, including those relevant for the interpretation of multilingual treaties, constituted pre-existing rules of customary law.[431] Their generality, the lack of specific technical rules to be applied and of a rigid order in the rules for resolving divergences among the various authentic texts (which have been often criticized) represented a flexible and generally accepted framework, within which it was left to the interpreter to find the best solution with regard to both the specific principles and maxims to be applied in the actual case and the meaning to be attached to terms and expressions selected by the parties to convey a certain agreed message. According to Tabory, in fact, no mechanical rule was provided for in the VCLT since "(t)reaties being arrangements negotiated and drafted by human beings, expressed in words which are by nature perhaps ambiguous and in languages which are inherently different, they will necessarily be open to interpretation by a combination of human discretion, understanding, expertise and judgment, which go beyond any mechanical rules".[432] The nature of the rules of interpretation enshrined in the VCLT made easier to consider them either as codification of pre-existing customary rules, or as customary rules crystallized by means of the very same VCLT.

On the other hand, Sur pointed out that the actual impact of the VCLT provisions dealing with the interpretation of treaties depended on whether many States had become parties to the VCLT and on the subsequent practice based on the application of that convention.[433] In this respect, he noted that before the conclusion of the VCLT, the case law of international courts and tribunals dealing with treaty interpretation appeared controversial and lacking of a solid theoretical basis, while the constructions developed by scholars appeared fragile and not well-rooted. Based on this analysis, he concluded that, at least until the beginning of the seventies, the interpretation of treaties was characterized to a great extent by uncertainty.[434]

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[429] See S. Rosenne, "The Temporal application of the Vienna Convention on the Law of Treaties", 4 *Cornell International Law Journal* (1970), 1 *et seq.*, at 21 *et seq.*

[430] Date of adoption of the VCLT. See S. Rosenne, "The Temporal application of the Vienna Convention on the Law of Treaties", 4 *Cornell International Law Journal* (1970), 1 *et seq.*, at 23-24.

[431] See M. Tabory, *Multilingualism In International Law and Institutions* (Alphen aan den Rijn: Sijthoff & Noordhoff, 1980), p. 218.

[432] M. Tabory, *Multilingualism In International Law and Institutions* (Alphen aan den Rijn: Sijthoff & Noordhoff, 1980), p. 218.

[433] S. Sur, *L'interprétation en droit international public* (Paris: Librairie générale de droit et de jurisprudence, 1974), pp. 284 and 285.

[434] S. Sur, *L'interprétation en droit international public* (Paris: Librairie générale de droit et de jurisprudence, 1974), pp. 266-267.

From the above, it is clear that, although the rules on treaty interpretation provided for in the VCLT are potentially of a norm-creating character[435] and, as such, they can form the basis of generally-accepted rules of international law, the actual recognition thereof as rules of customary international law depends to a large extent on the judicial practice following the conclusion of the VCLT.

According to Torres Bernárdez,[436] former *ad hoc* judge of the ICJ, until the nineties of the last century, the ICJ had never explicitly recognized the declaratory nature of Articles 31-33 VCLT. While other international courts and tribunals, only a few years after the conclusion of the VCLT, took the position that such articles merely codified principles of customary international law,[437] the ICJ waited until 1991 to do the same. In the case *Arbitral Award of 31 July 1989*, the ICJ concluded that Articles 31 and 32 VCLT might, in many respects, be considered a "codification of existing customary international law".[438] Since then, the Court has consistently upheld the conclusion reached in such a judgment[439] and, in the *Kasikili/Sedudu Island* case, it even found the rule enshrined in Article 31 VCLT applicable for the purpose of interpreting a treaty concluded in 1890.[440] As Torres Bernardez put it, according to the recent jurisprudence of the ICJ, the VCLT "rules on interpretation of treaties *as they stand*" are fully recognized as "existing customary law".[441]

With specific regard to Article 33 VCLT, Torres Bernárdez recognized, on the one hand, that until 1998 (the year of publication of his article on the subject) the ICJ had never affirmed the customary law nature thereof; on the other hand, however, he took the view that the absence of an express characterization in that sense of Article 33 VCLT was probably the mere consequence of the circumstances of the cases actually

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[435] See S. Rosenne, "The Temporal application of the Vienna Convention on the Law of Treaties", 4 *Cornell International Law Journal* (1970), 1 *et seq.*, at 22.

[436] See S. Torres Bernárdez, "Interpretation of treaties by the International Court of Justice following the adoption of the 1969 Vienna Convention on the Law of Treaties", in G. Hafner et al. (eds.), *Liber Amicorum Professor Seidl-Hohenvelder – in honour of his 80th birthday* (The Hague: Kluwer Law International, 1998), 721 *et seq.*

[437] See the case law mentioned by in I. Sinclair, *The Vienna Convention on the Law of Treaties* (Manchester: Manchester University Press, 1984), p. 19 and, with specific reference to Article 33 VCLT, Arbitral Tribunal for the Agreement on German External Debts, 16 May 1980, *The Kingdom of Belgium et al. v. the Federal Republic of Germany* (*Young Loan*), 59 *International Law Reports* (1980), 494 *et seq.*, at 529, para. 16.

[438] ICJ, 21 November 1991, Arbitral Award of 31 July 1989 (Guinea-Bassau v. Senegal), judgment, para. 48.

[439] See, among other decisions, ICJ, 11 September 1992, *Land, Island and Maritime Frontier Dispute (El Salvador v. Honduras)*, judgment, para. 380; ICJ, 3 February 1994, *Territorial Dispute (Libyan Arab Jamahiriya v. Chad)*, judgment, para. 41; ICJ, 15 February 1995, *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, judgment, para. 33. For an exhaustive list of the International Court of Justice's case law dealing with this issue, see S. Torres Bernárdez, "Interpretation of treaties by the International Court of Justice following the adoption of the 1969 Vienna Convention on the Law of Treaties", in G. Hafner et al. (eds.), *Liber Amicorum Professor Seidl-Hohenvelder – in honour of his 80th birthday* (The Hague: Kluwer Law International, 1998), 721 *et seq.,* at 735 *et seq*.; F. Engelen, *Interpretation of Tax Treaties under International Law* (Amsterdam: IBFD Publications, 2004), pp. 55-56.

[440] See ICJ, 13 December 1999, *Kasikili/Sedudu Island (Botswana v. Namibia)*, judgment, para. 18.

[441] S. Torres Bernárdez, "Interpretation of treaties by the International Court of Justice following the adoption of the 1969 Vienna Convention on the Law of Treaties", in G. Hafner et al. (eds.), *Liber Amicorum Professor Seidl-Hohenvelder – in honour of his 80th birthday* (The Hague: Kluwer Law International, 1998), 721 *et seq.*, at 737.

considered by the Court, rather than evidence of the refusal by the Court to consider the principles enshrined in that article as part of customary international law.[442] In fact, in the recent *LaGrand* case,[443] the ICJ stated that, in cases of a divergence between the equally authentic texts of a treaty and where the latter does not indicate how to proceed, it is appropriate to refer to Article 33(4) VCLT, which "in the view of the Court again reflects customary international law".[444] In this respect, it is interesting to note that (i) the specific issue faced by the ICJ[445] concerned the interpretation of Article 41 of the Court's Statute, which, being an annex and integral part of the UN Charter, predates the adoption of the VCLT and (ii) the case related to a conflict between Germany and the United States of America, the latter not being a party to the VCLT at the time of the facts, nor at the time of the legal proceedings and of the judgment.

In light of the previous analysis, it seems reasonable to infer that the ICJ considers Articles 31-33 VCLT to reflect customary international law and, thus, regards them as applicable in order to interpret both treaties concluded before the adoption of the VCLT and treaties concluded by States that are not party to that convention.[446]

[442] See S. Torres Bernárdez, "Interpretation of treaties by the International Court of Justice following the adoption of the 1969 Vienna Convention on the Law of Treaties", in G. Hafner et al. (eds.), *Liber Amicorum Professor Seidl-Hohenvelder – in honour of his 80th birthday* (The Hague: Kluwer Law International, 1998), 721 *et seq.*, at 737.

[443] ICJ, 27 June 2001, LaGrand (Germany v. United States of America), judgment.

[444] See ICJ, 27 June 2001, *LaGrand (Germany v. United States of America)*, judgment, para. 101. For a previous explicit reference by the ICJ to the relevance of Article 33 VCLT, although without an express recognition thereof as customary international law, see ICJ, 13 December 1999, *Kasikili/Sedudu Island (Botswana v. Namibia)*, judgment, para. 25.

[445] ICJ, 27 June 2001, *LaGrand (Germany v. United States of America)*, judgment, paras. 92 *et seq.,* concerning Germany's third submission.

[446] According to Linderfalk, "customary law also contains a set of rules to be used for [interpretation] purpose. These rules of international custom are identical to the rules laid down in the Vienna Convention – nowadays, a fact on which not only states, but also authors, as well as international courts and tribunals, seem to be in agreement. Articles 31-33 of the Vienna Convention on the Law of Treaties should therefore be seen as evidence […] also of the rules that apply according to customary international law between states in general" (see U. Linderfalk, *On the Interpretation of Treaties. The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties* (Dordrecht: Springer-Verlag, 2007), p. 7, notes omitted).