breach of important elements of their treaty obligations, the Court though the 1977 Treaty 'cannot be treated as voided by unlawful conduct'.[31]

The Court made a direct reference to the principle *pacta sunt servanda*, saying that 'What is required in the present case by the rule *pacta sunt servanda*, as reflected in Article 26 of Vienna Convention of 1969 on the Law of Treaties, is that the parties find solution within the co-operative context of the Treaty'.[32] The Court observed that the two elements in Article 26—the binding force of treaties and the performance of them in good faith—were of equal importance and that good faith implied that, 'in this case, it is the purpose of the Treaty, and the intentions of the parties in concluding it, which should prevail over its literal application. The principle of good faith obliges parties to apply it in a reasonable way in such a manner that its purpose can be realised'.[33]

These are far-reaching statements and, whilst they may have been particularly suited to the issues in the *Gabčíkovo-Nagymaros* case itself, it is still impossible to determine the extent to which they bear upon the application of the principle *pacta sunt servanda* in the law of treaties in general.

B. TREATIES AND THIRD STATES

The issue of treaties and non-State parties—third States—are addressed in VCLT Articles 34–38. The fundamental rule concerning the relationship between treaties and third States is expressed by the maxim *pacta tertiis nec nocent nec prosunt*, enshrined in Article 34. The Convention then deals with an obligation (Article 35) and a right (Article 36—often referred to as stipulations *in favorem tertii*) arising from a treaty for a third State. As to the obligation, the requirements are so strict that, when fulfilled, they in fact amount to the existence of a collateral agreement between the parties to the treaty and the third State and it is this collateral agreement, rather than the original treaty, which is the legal basis for the third State's obligation.

There are procedural differences in the establishment of an obligation and of a right. The third State must accept an obligation in writing, whereas in a case of the right, the assent of the third State(s) is presumed, unless the treaty provides otherwise or there are indications to the contrary. Any obligation arising for a third State can be revoked or modified only with the consent of the parties to the treaty and of the third State, unless it is established that they agreed otherwise. Any right arising for a third State can be revoked or modified only by the parties if it is established that the right was intended to be revocable or subject to modification without the consent of the third State. Caution is usually recommended when considering whether a treaty has given rise to stipulations *in favorem tertii*. As the PCIJ said:

> It cannot be lightly presumed that stipulations favourable to a third State have been adopted with the object of creating an actual right in its favour. There is however nothing to prevent the will of sovereign States from having this object and this effect. The question of the existence of a right acquired under an instrument drawn between other States is therefore one to be decided in each particular case: it must be ascertained whether the States which have stipulated in favour of the third State meant to create for that State an actual right which the latter has accepted as such.[34]

[31] Ibid, para 133. [32] Ibid, para 142. [33] Idem.

[34] *Free Zones of Upper Savoy and the District of Gex, Judgment, 1932, PCIJ, Ser A/B, No 46*, p 96 at pp 147–148.

Nothing in the VCLT prevents a rule set out in a treaty from becoming binding upon third States as a customary rule of international law if recognized as such (Article 37). However, the VCLT does not deal specifically with the question of whether the objective regimes created by treaties are binding only on States parties to those instruments or whether they are valid as against the entire international community—are valid *erga omnes*. Examples of such treaties would include those providing for the neutrality or demilitarization of a certain territory or area, or establishing freedom of navigation in international waterways such as the Suez Canal, Kiel Canal, and the Turkish Straits.[35]

V. GENERAL PRINCIPLES OF INTERPRETATION

A. GENERAL ISSUES

'There is no part of the law of treaties which the text writer approaches with more trepidation than the question of interpretation' (McNair, 1961). The complex issue of treaty interpretation will be discussed in the light of the work of the ILC during its codification of the law of treaties, the principles of interpretation included in the Vienna Convention, and the jurisprudence of the international and national courts and tribunals, with special regard to the case law of the ICJ. The purpose of interpretation is to establish the meaning of the text that the parties intended it to have 'in relation to circumstances with reference to which the question of interpretation has arisen' (*Oppenheim's International Law*, 1992).

Basing himself on the jurisprudence of the World Court,[36] the ILC's Rapporteur, Fitzmaurice (Fitzmaurice, 1951) drew up the following comprehensive set of principles of interpretation:

Principle I: actuality of textuality—that treaties are to be interpreted as they stand, on the basis of their actual texts.

Principle II: the natural and ordinary meaning—that, subject to principle of contemporaneity (where applicable), particular words and phrases are to be given their normal, natural, and unstrained meaning in the context in which they occur. This principle can only be displaced by direct evidence that the terms used are to be understood in manner different to their natural and ordinary meaning, or if such an interpretation would lead to an unreasonable or absurd result.

Principle III: integration—that treaties are to be interpreted as a whole. This principle is of fundamental importance and means that individual parts, chapters or sections of a treaty are not to be interpreted out of their overall context.

The remaining principles take effect subject to the three principles outlined above. There are:

Principle IV: effectiveness (ut magis valeat quam pereat)—that treaties are to be interpreted with reference to their declared or apparent objects and purposes; and particular

[35] The ILC took the view that Article 36(1) provided sufficient basis for rights to be accorded to all States and Article 38 a sufficient basis for the establishment of treaty rights and obligations *erga omnes*. For criticism see Chinkin, 1993.

[36] *YBILC* (1966), vol II (part two), p 220.

provisions are to be interpreted so as to give them the fullest effect consistent with the normal sense of the words and with the text as a whole in such a way that a reason and meaning can be attributed to every part of the text.

Principle V: subsequent practice—that recourse may be had to subsequent practice of parties relating to the treaty.

Principle VI: contemporaneity—that the terms of a treaty must be interpreted in the light of linguistic usage current at the time when the treaty was concluded.

In general, there are three main schools of interpretation: the subjective (the 'intention' of parties) approach; the objective (the 'textual') approach, and the teleological (or 'object and purpose') approach. These schools of interpretation are not mutually exclusive (Sinclair, 1984) and the VCLT draws on all three. It is the reconciliation of the objective and the subjective approaches that is the most difficult, controversial and, some would say, impossible, task (Koskenniemi, 1989). For the ILC, the starting point was the text rather than the intention of the parties,[37] since it presumed that the text represented a real expression of what the parties did in fact intend. It also appears that the ICJ's preferred method of interpretation is reliance on the text of a treaty.

B. PRACTICE

VCLT Article 31(1) provides:

A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

The ICJ has acknowledged this to constitute international customary law.[38] The underlying principle is that a treaty will be interpreted in good faith. The 'rule' (in the singular) of interpretation is a procedure consisting of three elements: the text, the context, and the object and purpose. The context of a treaty is set out in some detail in Article 31(2) and embraces any instrument of relevance to the conclusion of a treaty, as well as a treaty's preamble and annexes. There is no hierarchy between the various elements of Article 31; rather, they reflect a logical progression, 'nothing more' (Aust, 2007, p 234).

The Court has consistently adhered to the textual interpretation as being the most important. In the *Libya/Chad* case, the Court stated that:

Interpretation must be based above all upon the text of a treaty. As a supplementary measure recourse may be had to means of interpretation such as the preparatory work of the treaty.[39]

Article 31 reflects the principle that a treaty has to be interpreted in good faith that is the embodiment of the principle *pacta sunt servanda*. The determination of that ordinary meaning of term is undertaken in the context of a treaty and in the light of its object and

[37] Idem.

[38] *Territorial Dispute (Libyan Arab Jamahiririya/Chad), Judgment, ICJ Reports 1994*, p 6, para 41; *Oil Platforms (Islamic Republic of Iran* v *United States of America), Preliminary Objections, Judgment, ICJ Reports 1996*, p 803, para 23; *Kasikili/Sedudu Island (Botswana/Namibia), Judgment, ICJ Reports 1999*, p 1045, para 18.

[39] *Territorial Dispute*, idem. The use of supplementary material is considered below.

purpose. A good example is the Advisory Opinion *On the Interpretation of the Convention of 1919 Concerning Employment of Women During the Night*. Article 3 of that Convention ('women without distinction of age shall not be employed during the night in any public or private industrial undertaking, or in any branch thereof, other than an undertaking in which members of the same family are employed') left unclear its application to certain categories of women other than manual workers. The Court said:

The wording of Article 3, considered by itself, gives rise to no difficulty; it is general in its terms and free from ambiguity or obscurity. It prohibits the employment during the night in industrial establishments of women without distinction of age. Taken by itself, it necessarily applies to the categories of women contemplated by the question submitted to the Court. If, therefore, Article 3...is to be interpreted in such a way as not to apply to women holding posts of supervision and management and not ordinarily engaged in manual work, it is necessary to find some valid ground for interpreting the provision otherwise than in accordance with the natural sense of words. The terms of Article 3...are in no respect inconsistent either with the title, or with the Preamble, or with any other provision of the Convention. The title refers to 'employment of women during the night'. The Preamble speaks of 'women's employment during the night'. Article 1 gives a definition of 'an industrial undertaking.' Article 2 states what is meant by the term 'night.' These provisions, therefore, do not affect the scope of Article 3, which provides that 'women shall not be employed during the night either in any public or private industrial undertaking, or in any branch thereof.[40]

This might be compared with the views of the Judge Anzilloti who argued that 'If article 3, according to the natural meaning of its terms, were really perfectly clear, it would be hardly admissible to endeavour to find an interpretation other than that which flows from the natural meaning of its terms'.[41] He thought that only the intention of the parties should have been used to determine the correct interpretation.

Another problem concerns what is to count as subsequent practice for the purposes of interpretation, the use of which is sanctioned as forming a part of the context of the treaty by Article 31(3). In the *Kasikili/Sedudu Island* case the Court adhered to the ILC's view that the subsequent practice of parties to a treaty constitutes an element to be taken into account when determining its meaning,[42] but it took a narrow approach to what comprises subsequent practice and did not take account of unilateral acts of the previous authorities of Botswana on the grounds that these were for internal purposes only and unknown to the Namibian authorities. The Court also considered the relevance of an alleged 'subsequent agreement' between the previous authorities in Namibia and Botswana as only amounting to 'collaboration' over matters concerning the border and not having any effect on the interpretation of the treaty in question.[43] However, the Court was prepared to accord such material some role, noting them as facts which supported the interpretation of the 1890 Treaty in accordance with the ordinary meaning of its terms.[44] This is a usage not explicitly foreseen by the VCLT.

[40] *Interpretation of the Convention of 1919 Concerning Employment of Women During the Night, Advisory Opinion, 1932, PCIJ, Ser A/B, No 50*, p 365 at p 373.

[41] Dissenting Opinion of Anzilloti, ibid, p 383.

[42] *Kasikili/Sedudu Island (Botswana/Namibia), Judgment, ICJ Reports 1999*, p 1075, para 49.

[43] See generally ibid, paras 52–79.

[44] Ibid, para 80.

The issue of the importance of subsequent practice of States arose in connection with the interpretation of the term '*comercio*' (commerce) in the 2009 *Costa Rica* v *Nicaragua* case. The Court said:

> This does not, however signify that, where a term's meaning is no longer the same as it was at the date of conclusion, no account should ever be taken of its meaning at the time when the treaty is to be interpreted for purposes of applying it.
>
> On the one hand, the subsequent practice of the parties, within the meaning of Article 31(3)(*b*) of the Vienna Convention, can result in a departure from the original intent on the basis of a tacit agreement between the parties. On the other hand, there are situations in which the parties' intent upon conclusion of the treaty was, or may be presumed to have been, to give the terms used—or some of them—a meaning or content capable of evolving, not one fixed once and for all, so as to make allowance for, among other things, developments in international law. In such instances it is indeed in order to respect the parties' common intention at the time the treaty was concluded, not to depart from it, that account should be taken of the meaning acquired by the terms in question upon each occasion on which the treaty is to be applied.[45]

C. *TRAVAUX PRÉPARATOIRES*

VCLT Article 32 makes it clear that supplementary means of interpretation—including *travaux préparatiores*, preparatory work—may be used either to confirm the meaning of the treaty or as an aid to interpretation where, following the application of Article 31, the meaning is ambiguous or obscure or leads to a result which is manifestly absurd or unreasonable. Both the *Employment of Women During the Night* Advisory Opinion and the *Kasikili/Sedudu* case, considered above, illustrate the use of supplementary means to confirm an interpretation arrived at on the basis of Article 31. It is the use of preparatory work as a supplementary means of interpretation that gives rise to most difficulties, as is illustrated by the jurisdictional phases of the *Qatar* v *Bahrain* case.

The problem in this case centred on whether Qatar and Bahrain had ever entered into an agreement that would permit one of them to bring their case before the ICJ without the express approval of the other. The ICJ first decided that the fragmentary nature of the preparatory work meant that it could only be used with caution but noted that:

> ... the initial ... draft expressly authorised a seisin by one or other of the parties and that that formulation was not accepted. But the text finally adopted did not provide that the seisin of the Court could only be brought about by the two parties acting in concert, whether jointly or separately. The Court is unable to see why abandonment of a form of words corresponding to the interpretation given by Qatar ... should imply that they must be interpreted in accordance with Bahrain's thesis. As a result, it does not consider the *travaux préparatoires*, in the form in which they have been submitted to it—i.e., limited to the various drafts ...—can provide it with conclusive supplementary elements for the interpretation of the text adopted; whatever may have been the motives of each of the parties, the Court can only confine itself

[45] *Dispute regarding Navigational and Related Rights between Costa Rica and Nicaragua*, Judgment of 13 July 2009, para 64.

> to the actual terms of the Minutes as the expression of their common intention, and to the interpretation of them which it has already given.[46]

The Court concluded that a unilateral application was legitimate. Judge Schwebel criticized this, arguing that the Court's interpretation did not reflect the common intention of the parties. He argued that the Court's view that the preparatory work did not provide conclusive supplementary elements was unconvincing, observing that:

> since deletion of the specification, 'either of the two parties may submit the matter to the International Court of Justice' in favour of the adopted provision 'the two parties may submit the matter ...' surely manifested Bahrain's intention that 'either of the two parties' may *not* submit the matter, the Court's inability to see so plain a point suggests to me an unwillingness to do so.[47]

He considered that 'the requisite common, ascertainable intention of the parties to authorize unilateral reference to the Court is absent. Its absence is—or should be have been—determinative'[48] and concluded that:

> What the text and context of the Doha Minutes leaves unclear is, however, crystal clear when those Minutes are analysed with the assistance of the *travaux préparatoires* ... the preparatory work of itself is not ambiguous; on the contrary, a reasonable evaluation of it sustains only the position of Bahrain.[49]

D. THE OBJECT AND PURPOSE OF A TREATY

Article 31 of the Vienna Convention stipulates that a treaty should be interpreted 'in the light of its object and purpose' but this is a vague and ill-defined term, making it an unreliable tool for interpretation. Indeed, the ILC itself voiced certain doubts as to the usefulness of this criterion, particularly as regards reservations[50] (a topic considered below). A further problem concerns the relationship between the 'object and purpose' of a treaty and the principle of effectiveness which is considered in the following section.

E. THE PRINCIPLE OF EFFECTIVENESS

The principle of effectiveness, enshrined in the maxim *magis valeat quam pereat*, was acknowledged by the ILC, which observed that '[w]hen a treaty is open to two interpretations one of which does and the other does not enable the treaty to have appropriate effects, good faith and the objects and purposes of the treaty demand that the former interpretation should be adopted'.[51]

Although the principle of effectiveness can operate as an element within the 'object and purposes' test, it is not limited to this role and, as Thirlway notes, the ICJ has used it to

[46] *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Jurisdiction and Admissibility, Judgment, ICJ Reports 1995*, p 6, para 41.

[47] Ibid, Dissenting Opinion of Judge Schwebel, p 27 at p 36.

[48] Ibid, at p 37.

[49] Ibid, at pp 38–39. For similar analyses see the Dissenting Opinions of Judges Shahabuddeen, ibid, p 51 and Koroma, ibid, p 67.

[50] First Report on the Law of Treaties, *YBILC* (1962), vol II, pp 65–66.

[51] *YBILC* (1966), vol II (part two), p 219.

ascertain the intention underlying the treaty and as a starting point for a broader discussion. It also operates in the broader context of giving effect to the terms of a text.

The principle of effectiveness has two meanings. The first is that all provisions of the treaty or other instrument must be supposed to have been intended to have significance and to be necessary to express the intended meaning. Thus an interpretation that renders a text ineffective and meaningless is incorrect. The second operates as an aspect of the 'object and purposes' test, and it means that the instrument as a whole and each of its provisions must be taken to have been intended to achieve some end, and that an interpretation that would make the text ineffective to achieve that object is also incorrect. Thirlway observes that this latter approach is similar to the 'object and purpose' criterion, and 'has therefore, like this criterion, to be employed with discretion' (Thirlway, 1992).

F. THE DYNAMIC (EVOLUTIVE) INTERPRETATION OF TREATIES AND THE EUROPEAN COURT OF HUMAN RIGHTS (ECtHR)

One of the most contentious, disputed and discussed issues in treaty interpretation is so-called the dynamic (evolutive) interpretation of treaties, which in particular has been developed in the jurisprudence of the European Court of Human Rights. The basis for such as an interpretative method is predicated upon the principle that the treaty is a living instrument. There are several cases (such as 1975 *Tryer*, 1978 *Golder*, and 1979 *Marckx*) in which the Court decided to override the consent of the Parties in the name of 'the interests served by the protection of the human rights and fundamental freedoms guaranteed by the Convention', which 'extend beyond individual interests of the parties concerned'. This resulted in the establishment by the Parties to the Convention of the 'standards forming part of the public law of Europe'. First of all, the interpretative method of the ECtHR derives from the special legal nature of this Convention and the obligations, which doctrinal basis was enunciated in the 1965 *Austria v Italy*. The Court also stressed the 'essentially objective character' of the 'obligations undertaken by the High Contracting Parties'. The 'objective legal order' 'benefits from the 'collective enforcement'. However, such an interpretative method was a subject of much criticism (eg by Sinclair and Fitzmaurice) as overriding intention and the consent to be bound of the Parties to the Convention and introducing the element of uncertainty for the Parties due to much more extensive interpretation of the provisions of the Convention. There are other international judicial bodies, which to a certain degree adopted such a method, such as eg within the World Trade Organization (WTO).

G. PLURILINGUAL TREATIES

A further problem concerns the interpretation of treaties drawn up in more than one language. The ILC observed that:

> ...the majority of more formal treaties contain an express provision determining the status of the different language versions. If there is no such provision, it seems generally accepted that each of the versions in which the text of the treaty was 'drawn' up is to be considered authentic, and therefore authoritative for the purpose of interpretation. Few plurilingual treaties containing more than one or two articles are without some discrepancy between the texts... the plurality of texts may be a serious additional source of ambiguity or obscurity in the terms of the treaty. On the other hand, when meaning of terms is ambiguous or obscure in one language, but it is clear and convincing as to the intentions of the parties in another, the plurilingual character of the treaty facilitates interpretations of the text the meaning of which is doubtful.[52]

In the *Mavrommatis Palestine Concession* case, the ICJ had to interpret the phrases 'public control' and 'contrôle public' in the French and English authentic languages texts of the Palestine Mandate. The Court said:

> ...Where two versions possessing equal authority exist one of which appears to have a wider bearing than the other, it is bound to adopt the more limited interpretation which can be made to harmonise with both versions and which, as far as it goes, is doubtless in accordance with the common intention of the parties.[53]

The matter is covered by VCLT Article 33, which reflects these general approaches to the problem.

In conclusion it may be said that there are numerous examples of the difficulties concerning the treaty interpretation. Such an example is the interpretation of Article 18 of the 1929 Geneva Convention on the Treatment of Prisoners of War, which provides that prisoners were to salute the officers of the captor country. In 1944, this clause was a subject of an interpretative dispute. In the period between 1939 and 1944, allied prisoners of war in Germany saluted their German captors in a classical manner, by touching their hands to the visors of their caps. Articles 18 of the Convention is silent as to whether the salute be returned, which is a universal military tradition: 'a salute unreturned is like the sound of one hand clapping' (Vagts, 1993, at p 490). After the failed attempt at Hitler's assassination (20 July 1944), regular German army troops were ordered to salute prisoners of war in a Nazi style, which resulted in the protest of the British. Eventually, due to the services of the International Committee of the Red Cross, the issue was resolved and prisoners permitted to the salute prevalent in their own army.[54]

VI. RESERVATIONS TO TREATIES

A. THE GENOCIDE CONVENTION CASE

Reservations to multilateral treaties are one of the most problematic issues in the law of treaties. According to VCLT Article 2(d) 'Reservation means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or

[52] *YBILC* (1966), vol II (part two), pp 224–225.

[53] *Mavrommatis Palestine Concessions, Judgment No 2, 1924, PCIJ, Ser A, No 2*, p 19.

[54] Example from Vagts (1993, at p 490) who comments, 'Thus we find interpretation of the Convention being presented and considered by persons far away from the original negotiating process. Most of them were not lawyers and they had no access to *travaux préparatoires* (which, as so often happens, would not have been helpful). There was no-decision-maker to force a solution upon the parties. Yet it is apparent that the parties in dispute, although coming from different and at the time violently hostile states, did share assumptions about what a "salute" was, and when and how one should be rendered. Indeed, it seems likely the professional and traditional German officers had more in common on this point with their British counterparts than with their Nazi colleagues'.