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Art of Interpretation of Norms in Contemporary Public International Law: Appraisal of Methods and Approaches

Abstract: The article explores contemporary issues in the interpretation of public international law rules: treaties, customary rules and other formal sources. As it is generally required in both legal practice and science, the practitioners of public international law also need to interpret international legal rules when trying to find its correct meaning and scope of application if there is the lack of clarity. The article has shown that there is a variety of methods that are applied by the subjects of interpretation with a view of determining the right and just meaning of the rules in question. During the last century, the art of interpretation has partially advanced as the Vienna Convention on the Law of Treaties has established the rules applicable to the interpretation of inter-State treaties. However, the customary rules or specific legal regimes still apply to interpreting other treaties and other formal sources of public international law, which do not fall within the scope of application of the Vienna Convention. Unlike municipal legal orders, there is no a centralised authority at the international plane which is authorised to interpret international law. Therefore, it is possible to speak about a multitude of subjects that interpret international law, whilst the most relevant seem to be authentic interpretation of the treaties or other acts. A particular layer in the interpretation of the rules of public international law is related to the need to ensure their effectiveness, thus enabling that the subject international relations be maintained or that the international structures keep performing their duties.

Key words: Public International Law, Interpretation of International Law, Treaties, Customary law, General Principles of International Law.

Duško Glodić
Prof. dr Duško Glodić, dusko.z.glodic@apeiron-edu.eu College of Legal Studies, Pan-European University Apeiron, Banja Luka

1. INTRODUCTORY REMARKS

Applying international public law requires the jurists to use the art of interpretation of the relevant rules. Actually, applying the rules and interpreting them are two sides of the same coin for the majority of legal practitioners. For quite a long period, there were no written guidelines for interpreting the treaties and other rules of public international law. Inter-

preting international legal norms was conducted according to the skills and knowledge which were gradually developed and consolidated, mostly based on the experience of municipal legal orders. The international law practitioners, tribunals and other relevant actors in international legal life, were relying on the art of interpretation of law as established in the domestic legal practice through interpreting national legislation and contracts.[1] This is also due to the fact that interpreting legal norms is rather an intellectual activity than a strict and formal procedure predefined by rules.[2] None the less, it should be noted that even though customary international law has established some rules on interpretation, it has never created a systematic set of guidelines on the process of interpretation.[3]

As for interpreting the treaties concluded between the States, the rules were formally established by the Vienna Convention on the Law of Treaties of 1969 (hereinafter: Vienna Convention), which means that some consolidation of rules on the treaty interpretation materialised only in the second half of the twentieth century.[4] However, the formal sources of international law, besides the treaties concluded between the States, are also treaties concluded between the States and international organisations or between the international organisations,[5] customary rules, general principles of law accepted by civilised nations, as well as resolutions of international organisations, which may also necessitate adequate interpretation when being applied. Therefore, practicalities of the art of interpretation of various rules of international law go well beyond the provisions of the Vienna Convention.

Given both practical and theoretical significance of interpretation as a professional art in international law, this article tries to appraise the existing methods of interpretation and explores the interpretative frameworks and guiding rules, on the one hand, and the manner in which the coherent meaning of international law rules is ensured through its interpretation, on the other hand.

2. INTERPRETATIVE FRAMEWORK(S) AND GUIDING RULES

The rules of international law may require determining a more precise meaning applicable to the concrete situation, particularly if they are elaborated in a vague and general manner.[6] Unlike municipal law, which is a developed legal system containing rules on all the important aspects of its effects and validity, public international law remains without

[1] Cassese, A. (2005). *International Law*. Oxford: Oxford University Press, 178; Jennings, R., Watts, A. (1992). *Oppenheim's International Law*, *Volume I*. Harlow: Longman, 1269.

[2] Kreća, M. (2010). *Međunarodno javno pravo*. Beograd: Pravni fakultet Univerziteta u Beogradu, 447.

[3] Jennings, R., Watts, A. (1992). *Oppenheim's International Law*, *Volume I.* Harlow: Longman, 1269.

[4] Vienna Convention of the Law of Treaties of 23 May 1969, *United Nations Treaties Series*, 1155, I-18232. The matter of interpretation is particularly regulated by Articles 31-33 of the Vienna Convention.

[5] Article 3 of the Vienna Convention lays down that "The fact that the present Convention does not apply to international agreements concluded between States and other subjects of international law or between such other subjects of international law, or to international agreements not in written form, shall not affect … the application to them of any of the rules set forth in the present Convention to which they would be subject under international law independently of the Convention."

[6] Dailler, P., Forteau, M., Pellet, A. (2009). *Droit international public*. Paris: LGDJ, 276.

comparable rules on its validity and effects within municipal legal systems.[7] Although the international legal order still remains decentralised, following the entry into force of the Vienna Convention, the subject matter has been regulated and consolidated as far as the interpretation of inter-State treaty provisions is concerned. The Convention has defined most of the principles and issues related to the treaty interpretation, such as textual, systemic and teleological methods.[8] Nevertheless, this matter is even more complex as there is a plethora of actors interpreting international law and divergence of sources, on the one hand, while there are different formal and substantive characteristics of formal sources of international law, on the other hand.

2.1. Plethora of actors of interpretation and sources of public international law

The general perception in legal literature is that the States remain the key subjects for creating and implementing public international law.[9] As such, the States usually make public their understanding and interpretation of the treaty through diplomatic channels and other official means of communication.[10] As sovereign entities in international relations, they usually tend to protect their interests and not to go beyond their legal commitments.[11] Therefore, determining the adequate and accurate meaning of any international commitment lays in the heart of the inter-State legal relations. In addition to States, there are international organisations and other international bodies, such as international courts and arbitration tribunals, that can often have a say when some international legal norms are to be interpreted. One should be also mindful of the works made by the publicists and their contribution to understanding international legal norms, although deprived of any formal authority.

In the context of treaty interpretation, the parties to a treaty are the primary entities that are authorised and expected to interpret the treaty and thus make so called authentic interpretation. Moreover, the treaty itself can contain rules defining the manner in which and by whom it shall be interpreted, allowing for the international tribunals, permanent ones or ad hoc arbitrations, to exercise the power of interpreting.[12] Namely, being authors of the treaties' provisions, the parties are allowed to issue the authentic interpretation

[7] Betlem, G., Nollkaemper, A. (2003). Giving Effect to Public International Law and European Community Law before Domestic Courts. A Comparative Analysis of the Practice of Consistent Interpretation. *European Journal of International Law*, 14 (3), 573.

[8] Cassese (2005), 178-179.

[9] Betlem, G., Nollkaemper, A. (2003), 570. As for the role of the States in the contemporary international society, Bederman suggests a more balanced approach: "*The near monopoly that states once exercised over the constitution of international society may also finally be broken. Very few publicists and commentators today speak of an international community in which nation-states (or pretenders to that status) are the only participants in the international lawmaking process. Substantial and spirited debate … has been waged over the extent of the role of such actors as international institutions, transnational businesses, nongovernmental organizations, and individuals in making international law rules.*" Bederman, D. J. (2002). *The Spirit of International Law*. Athens: University of Georgia Press, 54-55.

[10] Dailler, Forteau, Pellet (2009), 278.

[11] *Ibid.*, 283.

[12] Brownlie, I. (2001). *Principles of Public International Law*. Oxford: Oxford University Press, 631-632.

which is usually mandatory for all other related bodies. The virtue of the authentic interpretation is based on the fact that the parties the best understand their intentions. This is particularly important at the international level whereby no centralised interpreting authority exists.[13] It is somehow widely understood that the authentic interpretation of a treaty's provision should override any other interpretation rule.[14] The International Court of Justice has found that "*Interpretations placed upon legal instruments by the parties to them, though not conclusive as to their meaning, have considerable probative value when they contain recognition by a party of its own obligations under an instrument*."[15] On the contrary, any third party, such as a court, international panels, etc, can authoritatively interpret a treaty as long as it was allowed by the treaty itself.[16] The same logic can be applied to other sources and their authors can make authentic interpretations.

As already underlined, unlike in the municipal legal orders, there is no international judicial power nor there is any form of centralisation of judicial authorities at the international plane. International legal order is characterised by existence of a number of judicial fora, but without a formalised structure and hierarchy.[17] The statutes of international tribunals, treaties and supplementary documents may envisage that any dispute between the parties to the treaty shall be resolved by an international tribunal or arbitrage.[18] A dispute arising out of the treaty interpretation usually leads to judicial or arbitrage procedures in-

[13] Degan, V. Đ. (2000). *Međunarodno pravo*. Rijeka: Pravni fakultet Sveučilišta u Rijeci, 150. The notion of authentic interpretation was confirmed by the international courts. The Permanent Court of International Justice established: "*Without success it has been maintained against this reasoning that the letter ... from the Conference of Ambassadors ... is the most authoritative and most reliable interpretation of the intention expressed at that time, and that such an interpretation, being drawn from the most reliable source, must be respected by all, in accordance with the traditional principle: ejus est interpretare legem cujus condere. ... it is an established principle that the right of giving an authoritative interpretation of a legal rules belongs solely to the person or body whi has power to modify or suppress it*." PCIJ, *Question of Jaworzina (Polish – Czechoslovakian Frontier),* 6 December 1923, Series B, No. 8, 37. Dailler, Forteau, Pellet (2009), 277.

[14] Jennings, Watts (1992), 1268.

[15] *International status of Soulh-West Africa,* Advisory Opinion of 11 July 1950, ICJ Reports 1950, 135-136. Also see: Dailler, Forteau, Pellet (2009), 279.

[16] Dailler, Forteau, Pellet (2009), 277. The International Court of Justice expressed its view on the interpretation by the third party: "*Cameroon, while accepting that the Report of the Marking Out of the International Boundaries in the Lake Chad is riot binding on Nigeria, nonetheless asks the Court to find that the proposals of the LCBC as regards the tripoint and the mouth of the Ebeji "constitut[e] an authoritative interpretation of the Milner-Simon Declaration and the Thomson-Marchand Declaration, as confirmed by the Evchange of Letters of 9 January 1931". The Court cannot accept this request. At no time was the LCBC asked to act by the successors to those instruments as their agent in reaching an authoritative interpretation of them. Moreover, the very fact that the outcome of the technical demarcation work was agreed in March 1994 to require adoption under national laws indicates that it was in no position to engage in "authoritative interpretation" sua sponte*." *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria; Equatorial Guinea intervening*), Judgment, ICJ Reports 2002, para. 56.

[17] Dupuy, P.M. (2006). Fragmentation du droit international ou des perceptions qu'on en a ?. *EUI Working Papers,* Law, 2006/14, 5.

[18] Dailler, Forteau, Pellet (2009), 280-281.

tended to resolve the dispute pursuant to agreement by the parties to the treaty.[19] This possibility is not, however, leading to a systematic and general recourse to the *problématique* of interpretation. Thus, the States, international organisations and other relevant entities basically preserve their institutional autonomy when interpreting public international law, but still within their legal commitments. However, whilst still maintaining this principle of procedural and institutional autonomy, for the sake of ensuring effectiveness and uniform application of international rules, some international regimes within the inter-State structures, have defined some frameworks for exercise of this autonomy when implementing international commitments. The most developed frameworks of this type have been created by the Court of Justice of the European Union.[20]

Even though tribunals' decisions are authoritative and may play important role for interpreting international rules, they are not formal precedents. Despite the lack of formal duty to do so, the international judges tend to follow their own jurisprudence and the practitioners may detect certain tendency in the court's interpretation on which they can rely in the current and future cases.[21] In this way, the judicial decisions made an important contribution to developing international law, but they are less important than the treaties and customs. They lack their autonomous significance, but an increase in number of such decisions, their availability through the modern publishing tools, made them influential to the process of legal reasoning.[22]

Furthermore, political or other organs of international organisations can also appear as the interpreting authorities of international legal norms. Such powers are usually enshrined in their constituent instruments. Despite the defined institutional framework of an organisation, the scholars are not unanimous on the existence of authentic value of such interpretation provided by the political or other organs of the international organisations.[23] Normally this matter should be resolved by the constituent treaties of the international organisations, but there is no general solution on how the constituent instrument and resolutions adopted by the organs of the international organisations are to be interpreted. The usual practice is that the relevant international institutions, after taking into account advices provided by their legal counsels, may establish interpretation of the constituent instruments and other legal acts of the international organisations. The universal organisations can request the advisory opinion of the International Court of Justice.[24] In this regard, an inevitable factor is the diplomatic interplay between the member States of a given organisation whose representatives make decisions within the intergovernmental political bodies.

Finally, we should not forget that the publicists – international law scholars can be found within the plethora of actors that try to interpret the international rules. Although without any formal authority, they play important role in interpreting and commenting in-

[19] Jennings, Watts (1992), 1268-1269.

[20] See: Simon, D. (2001). *Le système juridique communautaire*, 3ème Edition, Paris: Presses Universitaires de France, 426-428.

[21] Bederman (2002), 63-64.

[22] Rosenne, S. (2004). *The Perplexities of Modern International Law*, Leiden/Boston: Martinus Nijhoff Publishers, 46.

[23] Dailler, Forteau, Pellet (2009), 282.

[24] Amerasinghe, C. F. (2005). *Principles of the Institutional Law of International Organizations.* Cambridge: Cambridge University Press, 26-32.

ternational law rules.[25] Some authors underline that the publicists are not always objective and impartial, thus their comments can be undermined and questioned.[26] However, when performing the role of legal advisors, the publicists may directly produce documents that are used on the international plane, by the organisations and States, such as legal opinions, studies and commentaries prepared at the request of the international institutions. These documents are usually used by the subjects that requested their production and may influence the legal life within the international community.[27] Moreover, the doctrinal interpretation plays significant role in teaching, understanding and explaining public international law.[28] In this way, the doctrine shapes minds and skills of legal practitioners.

In addition to the subjects that interpret international law at the international level, this activity also happens within a State itself. The interpretation within a municipal legal order may be given by different types of bodies – judicial, administrative and legislative authorities. It should be noted that the concrete procedural and substantial aspects related to interpretation in this context are subject to the specific rules of any country, but one may expect that the treaties will be interpreted pursuant to the relevant rules and principles enshrined in public international law.[29] Practically, if the question of interpreting a norm of international law was posed before a national court, it would, according to the traditional practice of a number of States, request the foreign affairs department to provide them with the preliminary interpretation of the treaty.[30] Thus, interpreting rules of public international law *in foro domestico* is usually result of cooperation of the judicial system and the ministry responsible for international relations. Similar cooperation would also happen within the administrative bodies if the courts are not involved.

Given the international environment in which the international rules are created, one should be also mindful of linguistic aspect of international law interpretation. Notably, the fact that many different languages are used in international relations and that the treaties and other sources of international law may be drafted in different linguistic versions, requires the interpreter to pay due respect to the adequate understanding and translation of the texts. It is considered that a translated version of a legal document can never be as strict and precise as the original text.[31]

2.2. Formal and substantive characteristics of international legal rules as factors of interpretation

The practice leads to a conclusion on the necessity to make differentiation between various types of international rules, such as constituent instruments of international organisations and ordinary treaties. This consequently has some repercussions to the treaty interpretation, used methods and obtained results of the interpretation exercise.[32] In ad-

[25] Dupuy (2006), 6.
[26] Bederman (2002), 67-68.
[27] Rosenne (2004), 51-52.
[28] Kreća (2010), 449.
[29] See further: Đurić, V. (2007). *Ustav i međunarodni ugovori*. Beograd: Institut za uporedno pravo, 392-398.
[30] Dailler, Forteau, Pellet (2009), 278.
[31] Focsaneanu, L. (1970). Les langues comme moyen d'expression du droit international. *Annuaire français de droit international*, 16 (1970), 263.
[32] Jennings, Watts (1992), 1268.

dition to the rule of *lex superior*, which may be used in the context of interpreting the constituent instrument, certain attention should be paid to the practice of international organisations. There are two main features that appear from the practice of international organisations, i.e. practice of their decision-making bodies in relation to interpretation and application of their rules: the member States that are outvoted in the bodies of an international organisation may invoke that they are not considered as bound by the rules of the organisation, on the one hand, and the political interactions involve necessarily the game of politics when interpreting the constituent instruments and applying them.[33] From a methodological point of view, the teleological approach is the most often used when interpreting the constituent instruments of international organisations. Their interpreters try to find the purpose and object of the constituent instrument and to find the meaning which enables addressing the goals of the organisation.[34]

Another layer of the observed issue is also multitude of international law regimes that exist at the international plane, such as human rights law, free trade law, environmental law, investment law, etc. A concrete legal issue may fall under different regimes and not only to be tackled under the rules and principles defined within a single regime.[35] The contemporary international law tends to resolve a number of transnational problems that exist within the international community through creation of legal norms and international institutional frameworks.[36] From a substantial point of view, some international rules may be used to resolve issues that appear at both national and international plane. Some rules, such as human rights, may be used to complement national legal norms in the context of protection of human rights, on the one hand, and they may provide for guidelines to international courts in interpreting some other areas of international law, on the other hand. The latter instances may be illustrated with the use of international environmental law in interpreting non-environmental provisions of a treaty.[37]

For the sake of illustrating the practice, Cassese underlines the influence of domestic interpretation principles to international law interpretation principles. This author notes that "*In modern times, international courts have increasingly applied 'implied powers doctrine' when interpreting a particular category of treaties, that is, the constitutive instruments of international organisations. This doctrine was first suggested by the US Supreme Court when interpreting the US Constitution with a view to broadening the powers of the federal authorities with respect to those of member States... It was taken up at the international level by the PCIJ and then the ICJ to broaden powers of the ILO and UN respectively vis-à-vis member States. ... This doctrine, based on the so-called federal analogy (namely, the equation of relations between member States of a federal State and the federal authorities, to the relations between member States of international organisations and organs of these organisations) is controversial. In particular, opponents argue that this doctrine ends up granting excessively broad powers to organs of international organisations, especially when it is relied upon to derive implied powers*

[33] See: Brownlie (2001), 635.

[34] Bederman (2002), 72.

[35] Van Aaken, A. (2009). Defragmentation of Public International Law Through Interpretation: A Methodological Proposal. *Indiana Journal of Global Legal Studies*, 16(2), 484-485.

[36] *Ibid.*, 488.

[37] *Ibid*., 493-494.

from general and loosely worded goals of the organisations."[38]

Furthermore, there is also a certain difference between treaties and customary rules as the main formal sources of international law. Namely, it is quite easy to find the rules governing interpretation and dispute settlement in the case of the treaties, whilst it is less so case with the customary rules. Some interpreting regime may be established if the parties which are in a dispute related to the application of a concrete customary rule had agreed on the competence of dispute settlement mechanism.[39] When interpreting a customary rule, the first step is proving its existence and content. Namely, when there is interpretation of presumed customary rule at the stake, the first step is ensuring that this rule exist. The scholars usually point out to the two decisions of the International Court of Justice. The Asylum case in which the Court rejected the claim of the existence of a diplomatic asylum as a regional custom, whilst it confirmed the right of passage as customary rule in another case.[40]

Finally, particular attention should be also paid to *jus cogens* and peremptory norms which dictate the 'red lines' for international law rules. This set of general principles and rules is related not only to the form but also to the substance of other norms of international law.[41] These rules cannot be derogated by the treaty making activities or through adoption of rules of the international organisations.[42]

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[38] Cassese (2005), 179-180.

[39] Rosenne (2004), 30-31.

[40] Bederman (2002), 73-74. In the first situation, the Court established that it: "*cannot therefore find that the Colombian Government has proved the existence of such a custom. But even if it could be supposed that such a custom existed between certain Latin-American States only, it could not be invoked against Peru which, far from having by its attitude adhered to it, has, on the contrary, repudiated it by refraining from ratifying the Montevideo Conventions of 1933 and 1939, which were the first to include a rule concerning the qualification of the offence in matters of diplomatic asylum*." (*Colombian-Peruvian asylum case, Judgment of 20 November 1950, ICJ Reports 1950, pp. 277-278)*. On the contrary, in the second case the Court found "*with regard to Portugal's claim of a right of passage as formulated by it on the basis of local custom, it is objected on behalf of India that no local custom could be established between only two States. It is difficult to see why the number of States between which a local custom may be established on the basis of long practice must necessarily be larger than two. The Court sees no reason why long continued practice between two States accepted by them as regulating their relations should not form the basis of mutual rights and obligations between the two States*." (*Case concerning Right of Passage over Indian Territory (Merits),* Judgment of 12 April 196; ICJ Reports 1960, 39)

[41] Dupuy (2006), 11. Fitzmaurice explained the general principles in the following manner: "*By a principle, or general principle, as opposed to a rule, even a general rule, of law is meant chiefly something which is not itself a rule, but which underlines a rule, and explains or provided a reason for it. A rule answers the question 'what': a principle in effect answers the question 'why'.*" Quoted from: Reinhold, S. (2013). "Good Faith in International Law," *UCL Journal of Law and Jurisprudence*, Vol. 2, Issue 1, 41.

[42] Distefano, G., Mavroidis, P.C. (2011). L'interprétation systémique : le liant de l'ordre international. In : Guillod, O. *et al.* (eds.). *Pour un droit équitable, engagé et chalreux, Mélanges en l'honneur de Pierre Zessner*. Bâle : Helbing Lichthenhahn, 746.

3. FROM INTERPRETATIVE RULES TO COHERENT MEANING OF INTERNATIONAL LEGAL RULES

Although it may be possible to dig out different meanings from the same text[43], interpretation should enable finding the most adequate meaning and scope of a rule that is applicable to a concrete case. This intellectual exercise is intended to detect the right sense and content of a legal norm.[44] The issue of interpretation methods and effects of international legal rules will be discussed in more details below.

3.1. Interpretation methods as tools for application of international rules

Interpreting legal norms requires possession of certain skills and relies on using adequate legal techniques. The techniques of public international law can be understood as "*the way that international lawyers use the sources, methods, and approaches of international legal obligation to determine the relevant community of expectation in international affairs. International legal technique is, therefore, the style of reasoning used by advocates and decision makers in making arguments and reaching conclusions about the content of international legal norms.*"[45] In other words, interpretating international law is enabled through certain mental operations based on predefined methods and techniques. The methodological toolbox for interpretation of the international law sources has been gradually developed through the practice, tested by the international judicial authorities and finally codified by the provisions of the Vienna Convention, at least as far as the inter-State treaties are concerned. Although these methods are focussed to the treaties, they may with certain adaptation be used in interpreting other formal sources of public international law.[46] It is still questionable if these are to be considered as strict rules or rather as intellectual guidelines on how to detect the right meaning of a legal norm.

When exploring the issue from a historical perspective, the negotiators of the Vienna Convention were representing different schools of the art of interpretation. One group of the drafters was representing the subjective interpretation, which was aiming at discovering the intention of the parties to a treaty, whilst another group was preaching the objective approach to interpretation and this approach would require identifying the meaning based on the wording of the provision in question.[47] Yet, different views may be found among the scholars. Bederman is of opinion that "*treaty interpretation is supposed to be neutral and objective ... should be no different from the construction of other legal writings, and the schools or techniques of treaty interpretation largely replicate those for statutes, contracts, wills, and constitutions.*"[48] Such an understanding does not accord a particular importance to interpretation, but it rather situates it within the established legal theory

[43] Rosenne (2004), 29.

[44] Dailler, Forteau, Pellet (2009), 276.

[45] Bederman (2002), 70.

[46] Krivokapić, B. (2017). *Međunarodno javno pravo*. Beograd: Poslovni i pravni fakultet, Institut za uporedno pravo, 237-239.

[47] Cassese (2005), 178. Van Aaken notes that a dominant understanding in the literature is that the civil law practitioners favour the object and purpose as a teleological method, whilst the common law lawyers argue in favour of the textual approach and ordinary meaning of the provisions. Van Aaken (2009), 494.

[48] Bederman (2002), 70.

and practice. In the similar vein, Shaw considers that the Convention has combined all the dominant schools on interpretation in the provisions of its Articles 31 to 33.[49] Brownlie considers that the Vienna Convention does not defines rigid lines between the general rule of interpretation and supplementary means of interpretation. Thus, this author finds that the general and supplementary guidelines should be applied in an interactive manner.[50] Moreover, it has been repeated by some scholars that the choice of an interpretation method can greatly influence the outcome of the interpretation exercise. Degan underlines that different methods can be used for interpreting different types of treaties. For instance, functional and teleological method is convenient for interpreting the constituent instruments of international organisations, while the textual approach is more adequate when the treaties – laws are being considered.[51] Jennings underlines that international practice allows the use of principles and maxims that can support the interpretation activities, but their appropriateness is to be judged in each concrete case.[52]

Brownlie is of the opinion that the relevant practice demonstrates that the textual approach is somehow predominant and that this was confirmed by the Vienna Convention.[53] Accordingly, "*the text of the treaty is normally the only authentic and the most recent expression of what the parties intended, and consequently interpretation may be thought of as essentially a textual matter.*"[54] On a slightly different note, Shaw indicates that "*any true interpretation of a treaty in international law will have to take into account all aspects of the agreement, from the words employed to the intention of the parties and the aims of the particular document. It is not possible to exclude completely any of these components.*"[55] However, relying on the intentions of the parties and the use of *travaux préparatoires* is rather an exception and is permitted only in the circumstances where wording of a treaty remains ambiguous or obscure and when textual approach results in

[49] Shaw (2003), 839.

[50] Brownlie (2001), 633.

[51] Degan (2000), 149-150. On a more specific note, the International Court of Justice has made a more sensible approach regarding the constituent instruments by establishing that: "*Such treaties can raise specific problems of interpretation owing, inter alia, to their character which is conventional and at the same time institutional; the very nature of the organization created, the objectives which have been assigned to it by its founders, the imperatives associated with the effective performance of its functions, as well as its own practice, are all elements which may deserve special attention when the time comes to interpret these constituent treaties.*" (ICJ, *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion, ICJ Reports 1996, para. 19).

[52] Jennings, Watts (1992), 1270.

[53] Brownlie (2001), 632.

[54] Jennings, Watts (1992), 1271.

[55] Shaw (2003), 839. At this place, Shaw elaborates on the three methodological approaches proponed by different groups of scholars: „The first centres on the actual text of the agreement and emphasises the analysis of the words used. The second looks to the intention of the parties adopting the agreement as the solution to ambiguous provisions and can be termed the subjective approach in contradistinction to the objective approach of the previous school. The third approach adopts a wider perspective than the other two and emphasises the object and purpose of the treaty as the most important backcloth against which the meaning of any particular treaty provision should be measured." Shaw, ibid.

absurd and unreasonable meaning.[56] One should be also mindful of the time factor in interpreting the international rules. There might be a question whether to take into account the dynamic nature of international relations and possible influence over the meaning of international rules or to be stuck to the moment when the rules emerged or were created.[57]

Nonetheless, regardless a number of different methodological approaches to the art of interpretation and academic debates on the most '*correct*' attitude, one is compelled to conclude that, in light of the Vienna Convention, the ordinary meaning of the terms[58] used in the treaty lays at the basis of contemporary practice of interpretation. However, the ordinary meaning is not an absolute category, it is possible to rely on a special meaning, but this should be proved by the parties that invoke such a special meaning.[59] There is also possibility for a spill over effect from one treaty to another in the case when "*the terms of the treaty in their ordinary meaning can be informed by the usage of the same term in other treaties*."[60] When interpreting a treaty, some other sources could be also considered, such as general principles of law recognised by the civilised nations and other general principles that are applicable in the relations between the parties.[61] In addition to the ordinary meaning, context and subsequent practice are also used when interpreting a treaty.[62] This means that the parties to a treaty should take into account the related legal norms while drafting the provisions of the new one. Namely, the new treaty may be used for further developing the existing rules, derogating them or simply putting more clarity in their terms. This suggests the use of systemic interpretation.[63] True intention of the parties to a treaty may be determined on the basis of the object and purpose of the agreement

[56] Bederman (2002), 71.

[57] Distefano, Mavroidis (2011), 747.

[58] The International Court of Justice recalls that, in accordance with customary international law, reflected in Article 31 of the 1969 Vienna Convention on the Law of Treaties, a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose. Interpretation must be based above all upon the text of the treaty. As a supplementary measure recourse may be had to means of interpretation such as the preparatory work of the treaty and the circumstances of its conclusion. (*Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994, para. 41)*

[59] Article 31.1. of the Vienna Convention on the Law of Treaties defines that 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. As Brownlie outlines (see: Brownlies, (2001), 634), the Permanent Court of International Justice has already highlighted importance of ordinary meaning of terms. Namely, this Court concluded in the *Case of Polish Postal Service in Danzig* that: "*The postal service which Poland is entitled to establish in the port of Danzig must be interpreted in its ordinary sense so as to include the normal functions of a postal service as regards the collection and distribution of postal mater outside the post-office. Indeed, any limitations or restrictions in this respect would be of so exceptional a character that they cannot, in the absence of express reservations, be read into the text of treaty stipulations.*" PCIJ, *Polish Postal Service in Danzig*, Publications of the PCIJ, Series B – No 11, 16 May 1925, p. 37.

[60] Van Aaken (2009), 492.

[61] *Ibid.*, 500.

[62] Brownlie (2001), 635.

[63] Distefano, Mavroidis (2011), 745-746. For more detailed presentation of the international practice where systemic interpretation was used see: *Ibid.*, 749-754.

concluded between them.[64]

Thus, one may conclude that the issue of interpretation cannot be adequately regulated by a strict set of rules and is more open for flexible approach, within the established intellectual tools and prevailing practice in the concrete case, which have to be adjusted to each concrete case, but still maintained within the logical boundaries of this intellectual effort.

3.2. Effects of international legal rules and their interpretation: from consistent interpretation to *effet utile* of international rules

As it has been demonstrated above, the art of interpreting international law rules is not based on a single method. It is rather consisting of smart combination of different approaches from the textual to the goal oriented – teleological interpretation. The users of an international rule should detect the meaning based not only on the wording, but also on the scheme of the instrument they are invoking.[65] In this context, one should note that the international legal order is characterised by a high level of pragmatism and the necessity to fulfil its functions.[66] This pragmatic approach may be used also when interpreting rules of international public law.

This need for subtle and flexible manoeuvring may be illustrated by the following lines by elaborating on the use of harmonious interpretation, *effet utile* and consistent interpretation in international practice. Harmonious interpretation is used in the context of teleological interpretation, for example when a treaty that regulates another subject matter, for instance investments protection, can be interpreted in the light of goals of ensuring human rights protection, or environmental protection, provided that the object and purpose of the treaties indicate the need to attain these goals.[67] The International Court of Justice has also upheld the reference to the goals of a treaty in its jurisprudence.[68]

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[64] Jennings, Watts (1992), 1271.

[65] Bederman (2002), 72-73.

[66] *Ibid.*, 171-174.

[67] Van Aaken (2009), 495. This author offers a potential conflict resolution between the norms of international law in the domain of human rights by arguing that "*this means that the judge has to first consider whether human rights law informs the interpretation of the non-human rights treaty under Article 31(1) of the Vienna Convention. Second, the judge has to consider whether human rights law is applicable between the parties under Article 31(3)(c). This can be the case if the human rights norm in question has acquired the status of customary international law or if both states to the dispute are parties to the human rights treaty in question. The judge then has to balance the principle of the treaty to be interpreted, which is presumably in conflict with the* human rights principle in question." *Ibid*, 506.

[68] For instance, in the advisory opinion on the interpretation of the Agreement on Seat of the World Health Organisation, which was concluded between Egypt and this international organisation, the ICJ found: "*In their view, therefore, the travaux préparatoires confirm that the formula in Section 37 was designed to cover revision of the location of the Regional Office's seat at Alexandria, including the possibility of its transfer outside Egypt. They further argue that this interpretation is one required by the object and purpose of Section 37 which, they say, was clearly meant to preclude either of the parties to the Agreement from suddenly and precipitately terminating the legal régime it created. The proponents of this view of Section 37 also take the position that, even if it were to be rejected and the Agreement interpreted as also including a general right of denunciation, Egypt would still be entitled to notice under the general rules of international*

Finding the true meaning of a treaty provision or another rule of international law is often construed as a need of finding out an effective sense of the provision in question. In this context, *effet utile* is used as a methodological approach for detecting the deeper and not explicitly written intention of the authors of a legal norm. However, there is a conscience and duty to respect the principle of good faith when interpreting legal rules.[69] In this sense, the Permanent Court of International Justice concluded "*in case of doubt, the clauses of a special agreement by which a dispute is referred to the Court must, if it does not involve doing violence to their terms, be construed in a manner enabling the clauses themselves to have appropriate effects*."[70] Some scholars conclude that the principle of effectiveness was often used when interpreting the constituent instruments of international organisations which proved that the object and purpose of such an instrument played the crucial role in interpreting this type of treaties. Namely, the constituent instruments are expected to provide the institutional set up for creating and achieving policy goals of the international organisation in question. Thus, these instruments are perceived as dynamic documents which develop over time.[71] For the practical usage, *effet utile* is a practical approach which is used with a view of ensuring an efficient interpretation. In other words, the interpreting authority has to find an effective meaning of the international rule that is being interpreted and to find the sense that enables effective application. However, this approach has its limits and it should not lead to interpreting the concrete provision in the way that it would be contrary to the other provisions and rules that it is connected with.[72] The essence of this principle is that interpretation should not result in the lack of meaning of the provision in question. However, this principle does not allow for extremely flexible interpretation which would go beyond the remits of the treaty in question. The effective meaning of a provision should be found within the purpose and objectives of the interpreted document.[73]

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law." *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, ICJ Reports 1980*, para. 41.

69 Reinhold, S. (2013), 61-62. There is a number of decisions of international tribunals confirming the doctrine of effectiveness. For instance, when interpreting the constituent instrument of the International Labour Organisation, the PCIJ found the following: "*It is not conceivable that they intended to prevent the Organization from drawing up and proposing measures essential to the accomplishment of that end. The Organization, however, would be so prevented if it were incompetent to propose for the protection of wage-earners a regulative measure to the efficacious working of which it was found to be essential to include to some extent work done by employers. If such a limitation of the powers of the International Labour Organization, clearly inconsistent with the aim and the scope of Part XIII, had been intended, it would have been expressed in the Treaty itself… But, so far as concerns the specific question of competence now pending, it may suffice to observe that the Court, in determining the nature and scope of a measure, must look to its practical effect rather than to the predominant motive that may be conjectured to have inspired it.*" PCIJ, *Competence of the International Labour Organisation to Regulate, Incidentally, the Personal Work of the Employer*, Collection of Advisory Opinions, Series B, No. 13, 23 July 1926, pp. 18-19.

70 PCIJ, *Case of the Free Zone of Upper Savoy and the District of Gex*, Order of 19 August 1929, Series A, No. 22, p. 13.

71 Amerasinghe (2005), 59-60.

72 Dailler, Forteau, Pellet (2009), 288-289.

73 Jennings, Watts (1992), 1280-1281.

Another dimension of coherent effects of international law rules is ensured through the principle of consistent interpretation. This principle means that the rule of national law is understood and interpreted in the light of international legal rules. The principle of consistent interpretation differs from the doctrine of direct effect, which is rarely applied in the context of international law, but is one of the leading doctrines in the jurisprudence of the Court of Justice of the EU. Direct effect simply means that a national court or any other body may directly apply an international law rule as an independent and authoritative legal norm if it is not transposed into national legal order.[74] Although the consistent interpretation of national law is not directly enshrined in any rule of international law, there is somehow understanding in many countries that duly accepted international obligations are considered as 'higher law' by the national authorities that apply corresponding national rules.[75] The principle of consistent interpretation has been firmly and explicitly established in EU legal order, particularly when there is need to ensure indirect effect of directives. Simon explains that "*le principe selon lequel le juge national est tenu d'interpréter le droit national existant de manière à permettre l'application effective des normes communautaires a été concrétisé dans un premier temps dans le contexte de l'application des directives. La Cour a en effet clairement établi qu'il incombe aux juridictions nationales d'interpréter leur droit national à la lumière du texte et de la finalité de la directive*."[76]

Given the length of this paper, the above examples were used to indicate that the practical life of international legal rules and their interpretation, particularly when interacting with the municipal legal orders, cannot be rigidly confined within strict conventional rules and guidelines.

4. CONCLUDING REMARKS

Despite relevance of other sources, the theory and practice of interpretation remain mainly focussed on interpreting treaty provisions and to a lesser extent to other formal sources of international law, such as customs. The art of interpretation is developed by different subjects, such as parties to the treaties, but also by national institutions, international organisations, tribunals and international courts. One may conclude that the Vienna Convention, which defines some contours for inter-State treaties' interpretation, prefers the textual approach, while the practice also relies on other schools and techniques, such as systematic and teleological methods.

The paper demonstrates that different international legal sources may be prone to predominant use of certain more specific interpretation methods and doctrines. *Effet utile*

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[74] Betlem, Nollkaemper (2003), 571-572. By making parallel with EU law, these authors explain that "*the principle of consistent interpretation is primarily applied when the rule of international law in question has not been transposed in national law. However, the principle is not limited to that situation. In EC law, the principle applies both where the directive in question has or has not been properly transposed. … Where the legislature has timely and correctly transposed the rule – the normal situation – a court is unlikely to encounter the boundaries of acceptable interpretation; in the absence of such transposition – the problem situation – and where there is some discrepancy between the wording of the rule and the implementing legislation, the application of supra-national law does call for certain judicial creativity.*" Ibid, 576.

[75] Betlem, Nollkaemper (2003), 574.

[76] Simon (2001), 438-439.

remains highly significant in the context of interpretation of systemic treaties, such as constituent instruments, whilst the parties tend to prefer the textual methods when interpreting some conventions, *i.e.* treaties-laws. Therefore, we may conclude that the art of interpretation is rather an intellectual operation, albeit regulated by some rules, *guidelines and established practices, but still dynamic and greatly determined by the subjects performing* legal interpretation within the international community as a highly decentralised system.

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Vještina tumačenja normi u savremenom međunarodnom javnom pravu: ocjena metoda i pristupa

Rezime: Članak istražuje savremena pitanja tumačenja normi međunarodnog javnog prava: ugovora, običajnih pravila i drugih formalnih izvora. Kako se to generalno zahtijeva i u pravnoj praksi i u nauci, praktičari međunarodnog javnog prava takođe treba da tumače međunarodnopravna pravila kada pokušavaju pronaći njihovo ispravno značenje i obim primjene u slučajevima kada njihovo značenje nije u potpunosti jasno. Članak je pokazao da postoji niz metoda koje primjenjuju subjekti tumačenja u cilju utvrđivanja ispravnog značenja dotičnih pravila. Tokom prošlog vijeka, vještina tumačenja je djelimično napredovala pošto je Bečka konvencija o pravu međunarodnih ugovora uspostavila pravila koja se primjenjuju na tumačenje međudržavnih ugovora. Međutim, običajna pravila ili posebni pravni režimi i dalje se primjenjuju na tumačenje drugih ugovora i drugih formalnih izvora međunarodnog javnog prava, koji ne spadaju u domašaj primjene Bečke konvencije. Za razliku od unutrašnjeg pravnog poretka, ne postoji centralni autoritet na međunarodnom planu koji je ovlašćen da tumači međunarodno pravo. Dakle, moguće je govoriti o mnoštvu subjekata koji tumače međunarodno pravo, a najrelevantnijim se čini autentično tumačenje ugovora ili drugih akata. Poseban fokus u tumačenju pravila međunarodnog javnog prava odnosi se na potrebu da se obezbijedi njihova efektivnost, čime se omogućava da se predmetni međunarodni odnosi održe ili da međunarodne strukture nastave da obavljaju svoje funkcije.

Ključne riječi: međunarodno javno pravo, tumačenje međunarodnog prava, međunarodni ugovori, običajno pravo, opšti principi međunarodnog prava.