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Interpretive Divergence

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Interpretive Divergence

NEHA JAIN*

Should principles of legal interpretation differ according to the nature or purpose of a legal instrument? In the domestic context, most discussions of interpretation proceed on the assumption that for each type of legal instrument — such as constitutions, statutes, contracts, and wills — there is a different set of interpretive rules, standards, and canons. In international law, interpretive principles for its most high-profile legal instrument, the international treaty, conventionally advocate a uniform approach to construction: regardless of the form, character, and subject matter of the treaty, interpretation should be treaty-blind. This Article challenges this long-standing view and argues that in light of the complex and multi-faceted character of the modern treaty, international courts and scholars should embrace a divergent approach to treaty interpretation. The Article illustrates the pitfalls of the stubborn adherence to, and invocation of, the uniform approach through an analysis of its application by international criminal courts. International criminal law treaties such as the Rome Statute of the International Criminal Court are hybrid entities that are simultaneously a criminal code, a compact between states committed to anti-impunity, and a human rights instrument. Drawing on the domestic analogy, this Article posits that with the fragmentation of international law and the proliferation in specialized treaty regimes, modern treaties such as the Rome Statute are best conceived as a shorthand legal device for instruments that can be as varied as contracts, constitutions, and statutes. Going even further, the constituent parts of a single treaty may perform vastly different functions and cement different kinds of legal relationships between multiple entities. The uniform approach to interpretation fails to do justice to this varied character of treaty devices. The Article highlights the promise of a divergent approach to treaty interpretation by exposing the real-world consequences of adopting different interpretive methodologies for the constituent parts of modern treaties such as the Rome Statute. It distinguishes between the statutory, contractual, human rights-oriented, and institutional provisions of

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the Rome Statute and demonstrates the results that follow from the application of a richer interpretive framework to the construction of the modern international treaty.

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I. INTRODUCTION

Should principles of legal interpretation differ according to the nature or purpose of a legal instrument? In the domestic context, most debates on interpretation proceed on the assumption that for each type of legal instrument — such as constitutions, statutes, contracts, and wills — there is a different set of interpretive rules, standards, and canons.¹ If, however, the form of the legal instrument merely serves as a shorthand device for legal texts that serve radically different purposes, should they nevertheless be subject to the same interpretive principles? The international treaty is a striking example of a legal instrument that can be brought to life in a number of different ways, cement legal relationships between vastly

1. See, e.g., Richard R. Powell, *Construction of Written Instruments*, 14 IND. L.J. 199, 204–09 (1939); cf. A. Arthur Schiller, *Roman Interpretation and Anglo-American Interpretation and Construction*, 27 VA. L. REV. 733, 747 (1941) (classical jurists, however, did not distinguish between different legal instruments for the purposes of rules of interpretation); Stefan Vogenauer, *Interpretation of Statutes, History of*, in THE MAX PLANCK ENCYCLOPEDIA OF EUROPEAN PRIVATE LAW 986, 987 (J. Basedow et al., 2012).

different entities, and perform a wide variety of functions. Yet, the dominant approach to treaty interpretation, embodied in the Vienna Convention on the Law of Treaties (VCLT),² advocates a uniform approach to construction. That is, the same principles of interpretation should apply regardless of the nature, form, or character of the treaty.³ In other words, principles of interpretation, at least on the surface, should be treaty-blind.

This Article challenges this orthodox posture towards treaty interpretation from a hitherto insufficiently unexplored angle: the hybrid character of modern international treaties.⁴ In order to do so, it highlights the real-world consequences of jettisoning the uniform approach to treaty interpretation through a case study of the Rome Statute of the International Criminal Court (Rome Statute).⁵ The Rome Statute is the quintessential modern treaty that seeks to give effect to, and strike a balance between, some of the most important values in international law: state sovereignty and consent, international peace and security, justice that includes criminal justice, accountability for mass atrocity, and fundamental rights of the accused as well as the victims.⁶ Most recently, the International Criminal Court (ICC) announced its adoption of the uniform approach to treaty interpretation and has purported to follow the VCLT

2. Vienna Convention on the Law of Treaties art. 31, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT].

3. See Isabelle Van Damme, *Treaty Interpretation by the WTO Appellate Body*, 21 EUR. J. INT'L L. 605, 643 (2010) (outlining the posture of the VCLT); cf. Rudolf Bernhardt, *Thoughts on the Interpretation of Human Rights Treaties*, in PROTECTING HUMAN RIGHTS: THE EUROPEAN DIMENSION 65 (1988) (arguing that the uniform approach is true only at a highly abstract level).

4. A few scholars have gestured towards this model of interpretation, though none have developed a comprehensive argument for it. In the context of the Rome Statute, see sophisticated work by Leena Grover and Leila Sadat. LEENA GROVER, INTERPRETING CRIMES IN THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 3, 82–83 (2014); Leila Nadya Sadat & Jarrod M. Jolly, *Seven Canons of ICC Treaty Interpretation: Making Sense of Article 25's Rorschach Blot*, 27 LEIDEN J. INT'L L. 755, 758–59 (2014). For similar suggestions with respect to other treaties, see, for example, Maarten Bos, *Theory and Practice of Treaty Interpretation*, 27 NILR 135, 156 (1980); Philip Kunig, *United Nations Charter, Interpretation of*, in THE MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW VOL. X 272, 273 (Rüdiger Wolfrum ed., 2012) (distinguishing between the contractual and normative parts of the UN Charter); George Letsas, *Intentionalism and the Interpretation of the ECHR*, in TREATY INTERPRETATION AND THE VIENNA CONVENTION ON THE LAW OF TREATIES: 30 YEARS ON 257 (Malgosia Fitzmaurice, Olufemi Elias & Panos Merkouris eds., 2010).

5. For excellent analyses of interpretive principles for the “criminal code” of the Rome Statute, see GROVER, *supra* note 4; Sadat & Jolly, *supra* note 4.

6. On the hybrid identity of international criminal law, see ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 18–19 (1st ed. 2003); Leena Grover, *A Call to Arms: Fundamental Dilemmas Confronting the Interpretation of Crimes in the Rome Statute of the International Criminal Court*, 21 EUR. J. INT'L L. 543, 550–51 (2010); Darryl Robinson, *The Identity Crisis of International Criminal Law*, 21 LEIDEN J. INT'L L. 925, 927–29 (2008).

principles in its decision-making.⁷ However, this approach is scarcely adequate for an instrument that is, for all intents and purposes, a cross between an international contract between states, a constitution that establishes an international community committed to anti-impunity, and a criminal law statute under which an individual may be prosecuted and convicted. Indeed, prominent international criminal law scholars have been at the forefront of advocating for a varied approach to interpreting the dense patchwork of provisions that characterize different parts of the Rome Statute, arguing that it embodies both a constitution as well as a criminal law statute.⁸ However, a comprehensive picture of what this interpretive methodology might look like, or how it would relate to interpretive challenges faced by international courts construing other treaties, has yet to be developed.

Using the illustrative case of the Rome Statute, this Article argues that, in the modern era, the dominant character of a treaty is often an admixture of constitutional, contractual, statutory, and administrative components. Different parts of the same treaty may have significantly different functions. Thus, certain treaty clauses may seek to establish a compact between contracting parties and demarcate mutual rights and obligations. Others may lay down communitarian obligations that are meant to be binding regardless of the element of reciprocity between States. Yet others may establish relationships between States and other non-State entities such as individual persons. The uniform approach to treaty interpretation does a disservice to the nuanced, complex, and varied nature of these different kinds of relationships established by modern treaty instruments. At best, due to its capaciousness, the orthodox view enables adjudicative bodies to pay lip service to the standard rules on treaty construction even as they invent new and modern principles that are suited to the specific treaty or treaty provision(s) they are tasked with interpreting. At worst, the assumption that the same interpretive logic should apply to all treaties and each constituent part of the treaty risks violating fundamental policies and principles that underlie a particular treaty or provision.⁹

7. Prosecutor v. Katanga, ICC-01/04-01/07-3436, Judgement Pursuant to Article 74 of the Statute, ¶¶ 43–45 (Mar. 7, 2014), available at https://www.icc-cpi.int/CourtRecords/CR2015_18046.PDF.

8. See the pioneering work by Leila Sadat. Leila N. Sadat, *The Legacy of the ICTY: The International Criminal Court*, 37 NEW ENG. L. REV. 1073, 1077–78 (2002); see also GROVER, *supra* note 4; Sadat & Jolly, *supra* note 4.

9. See Joseph Weiler, Prolegomena to a Meso-Theory of Treaty Interpretation at the Turn of the Century, 6–7 (Feb. 14, 2008) (unpublished draft presentation, International Legal Theory Colloquium: Interpretation and Judgment in International Law, Institute for International Law and Justice, New York University School of Law) (on file with The Virginia Journal of International Law).

While academics and international tribunals have begun to challenge the orthodox approach to treaty interpretation, they have failed to take the multifaceted nature and role of modern treaties seriously. The uniform approach to interpretation may have been adequate for a simpler, gentler international law regime that was limited in its scope and function, with far fewer treaties.¹⁰ Moreover, these treaties only concerned states as their subjects,¹¹ and relied primarily on diplomacy and informal negotiations for the consensual resolutions of international disputes.¹² The contemporary world that treaties inhabit could not be more different. The ever-expanding authority of international law reaches increasingly diverse areas of legal life ranging from human rights, to international trade, to nuclear disarmament. As international law's most sophisticated instrument, the increasingly over-worked treaty touches on every aspect of international relations from the mundane, such as the ability to drive legally in a foreign country,¹³ to the momentous: the fight against global terrorism.¹⁴ Modern treaties are expected to regulate increasingly splintered and intricate legal regimes, order and maintain relationships between State and non-State

10. On the expanding scope of international law and the proliferation of complex regimes regulated by treaties, see Jose E. Alvarez, *The New Treaty Makers*, 25 B.C. INT'L & COMP. L. REV. 213, 216–17 (2002).

11. The interests of non-state entities are increasingly being recognized under various treaty mechanisms. See, e.g., Karen J. Alter, *Private Litigants and the New International Courts*, 39 COMP. POL. SCI. 22, 25 (2006) (documenting “new-style” international courts with compulsory jurisdiction and rights of access for private actors); Cesare P.R. Romano, *The Proliferation of International Judicial Bodies: The Pieces of the Puzzle*, 31 N.Y.U. J. INT'L L. & POL. 709, 739–748 (1999) (discussing rights of standing of non-state entities in international law).

12. Several scholars have discussed the displacement of informal dispute resolution mechanisms by the rapid rise in the development of adjudicative and compliance mechanisms in international law. See Laurence R. Helfer & Anne-Marie Slaughter, *Why States Create International Tribunals: A Response to Professors Posner and Yoo*, 93 CALIF. L. REV. 899, 915–17 (2005) (charting the increasing case load of independent international tribunals); Romano, *supra* note 11, at 728–29 (noting the rush toward the creation of international tribunals in the 1990s).

13. See Geneva Convention on Road Traffic, Sept. 19, 1949, 125 U.N.T.S. 22.

14. See International Convention for the Suppression of Acts of Nuclear Terrorism, Apr. 13, 2005, 2445 U.N.T.S. 89; International Convention for the Suppression of the Financing of Terrorism, Dec. 9, 1999, 2178 U.N.T.S. 197; International Convention for the Suppression of Terrorist Bombings, Dec. 15, 1997, 2149 U.N.T.S. 256; Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, Mar. 10, 1988, 1678 U.N.T.S. 201; Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Mar. 10, 1988, 1678 U.N.T.S. 201; International Convention against the Taking of Hostages, Dec. 17, 1979, 1316 U.N.T.S. 205; Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Dec. 14, 1973, 1035 U.N.T.S. 167; Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, 974 U.N.T.S. 177; Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 860 U.N.T.S. 105; Convention on Offences and Certain Other Acts Committed on Board Aircraft, Sept. 14, 1963, 704 U.N.T.S. 219.

entities,¹⁵ and even defer to the legal certainty and authority of an adjudicative mechanism in the event of a dispute.¹⁶

Current critiques of the uniform approach typically focus on a particular type of treaty¹⁷ or the jurisprudence of an isolated tribunal,¹⁸ and rarely situate this analysis within larger trends in the interpretive practices being adopted at other international courts or scholarly literature that focuses on other treaties. There is also little attempt to demonstrate what the consequences of a non-uniform approach would be, that is, whether different interpretive rules and practices for different treaties or, going even further, constituent parts of treaties will herald significantly different results.

This Article attempts to remedy these deficiencies by bringing into conversation the nascent and dispersed literature on regime-specific interpretation in international law to propose a divergent model of treaty interpretation. Using the Rome Statute as a model, it shows how different possibilities of interpretation — constitutional, statutory, contractual, and human rights-focused — applied to the constituent parts of the Rome Statute gesture towards significantly different decisions in the kinds of

15. There is a growing literature on the role of non-state actors in the creation and implementation of treaties. *See, e.g.*, Alvarez, *supra* note 10, at 218–232 (discussing the influence of international organizations in treaty-making); Duncan B. Hollis, *Why State Consent Still Matters — Non-State Actors, Treaties, and the Changing Sources of International Law*, 23 BERKELEY J. INT'L L. 137 (2005) (emphasizing the role of sub-state, supranational, and “extra-state” actors in the conclusion and application of treaties).

16. *See* Karen J. Alter, *The Evolving International Judiciary*, 7 ANN. REV. L. & SOC. SCI. 387, 388 (2011) (noting the three-fold increase in the number of international courts between 1985 and 2010); Helfer & Slaughter, *supra* note 12, at 914–15 (identifying increase in state ratification of treaties that require dispute resolution by international courts and the willingness of states to recognize their jurisdiction even when it is optional).

17. One set of arguments is centered around the question of uniformity versus diversity in interpretive principles depending on the subject matter of the treaty: if treaties regulate an increasingly diverse set of subjects ranging from human rights obligations to investment arbitration, should they be subject to the same rules of interpretation? *See* Anthea Roberts, *Subsequent Agreements and Practice: The Battle over Interpretive Power*, in TREATIES AND SUBSEQUENT PRACTICE 95, 102 (G. Nolte ed., 2013); Matthew Craven, *Legal Differentiation and the Concept of the Human Rights Treaty in International Law*, 11 EUR. J. INT'L L. 489, 492, 494 (2000) (singling out human rights treaties); Klaus Vogel, *Double Tax Treaties and Their Interpretation*, 4 BERKELEY J. INT'L L. 1, 15, 30–37, 33 (1986) (stating that the VLCT's rules do not accommodate the special features of tax treaties). Other scholars posit the existence of an ultimate moral value, which will differ according to the subject matter of the treaty, and in light of which the treaty must be construed. George Letsas, *Strasbourg's Interpretive Ethic: Lessons for the International Lawyer*, 21 EUR. J. INT'L L. 509, 512 (2010).

18. Another approach focuses on the institution tasked with interpretation and queries whether different actors such as executives, legislatures, international tribunals, and national courts should follow similar interpretive practices. *See* Helmut P. Aust et al., *Unity or Uniformity? Domestic Courts and Treaty Interpretation*, 27 LEIDEN J. INT'L L. 75, 81 (2014). Yet another line of inquiry suggests that the VCLT embodies “principles” rather than “rules” of interpretation, thus constraining exegetical authority only at the margins. *See* Michael Waibel, *Uniformity Versus Specialisation: A Uniform Regime for Treaty Interpretation?*, in RESEARCH HANDBOOK ON THE LAW OF TREATIES 375 (Christian Tams et al. eds., 2014).

cases adjudicated by international criminal courts. Thus, in cases where the ICC is interpreting the “criminal” provisions of the Rome Statute, textual interpretation would favor a narrower scope for the definitions of crimes such as genocide and crimes against humanity.¹⁹ Conversely, evolutive interpretation influenced by human rights treaties will counsel an expansive construction of those parts of the Rome Statute concerned with the exercise of prosecutorial discretion, enabling the court to balance the competing considerations of peace and justice in the mandate of the ICC.²⁰ This analysis of the Rome Statute against the backdrop of a developing trend towards the divergent approach across different kinds of treaties and international courts signals the potential for a radical change in the way treaty interpretation has been conceived, particularly after the adoption of the VCLT’s principles of construction.

This Article proceeds as follows: Part I examines the underlying assumptions behind, and reasons for, the persistence of the uniform approach to treaty interpretation in international law. It then focuses on the illustrative case of attempts by international criminal tribunals to apply this interpretive methodology to their constitutive instruments, and analyzes how the VCLT’s authority is invoked by the tribunals to justify and legitimize an elastic and unpredictable interpretive methodology. Part II argues that the VCLT’s interpretive framework and the uniform approach it endorses should be discarded in favor of a divergent approach. It demonstrates that with the proliferation of specialized treaty regimes, each with their own adjudicative mechanisms, support for and the application of the uniform approach has been eroding in international law. Part III takes the emerging recognition of the divergent approach to specialized treaties even further and argues that modern treaties such as the Rome Statute are hybrid instruments, the constituent parts of which should be subject to different interpretive methodologies. Drawing upon debates on statutory construction in domestic law, it proposes a moderate textual methodology for the interpretation of the “criminal code” at the core of the Rome Statute. In contrast, human rights- and transitional justice-oriented provisions in the Rome Statute are better suited to an evolutive interpretation in order to give effect to the norms enshrined in the objects and purposes of the Rome Statute.

II. THE ORTHODOX APPROACH TO TREATY INTERPRETATION

On the face of it, the uniform approach to treaty interpretation advocates a treaty-blind approach to principles of construction that had

19. *See infra* Section IV.C.

20. *See infra* Section IV.D.

few detractors for much of its history. This Part outlines the reasons for the appeal and longevity of the uniform approach and then focuses on international criminal law instruments as a specific case study to demonstrate its concrete application. Unlike other specialized regimes, such as international trade law and international human rights law, international criminal law has barely touched on issues of treaty interpretation, either in the academic literature or in jurisprudence.²¹ This Part analyzes the jurisprudence of the international criminal tribunals to demonstrate the conflicting positions on treaty interpretation endorsed by the courts. While a few scholars have lamented the lack of a coherent interpretive methodology by the ad hoc tribunals,²² there has been little attempt to situate the tribunals' chaotic approach within the broader debate on the desirability of specialized canons of construction.

A. Treaty-Blind Principles of Interpretation

The uniform approach to treaty interpretation owes much to a pragmatic, rule-based orientation towards the interpretation of legal texts.²³ The VCLT, which formalized this approach and is widely considered to represent customary international law,²⁴ does not make any distinction between different kinds of treaties for purposes of interpretation. Article 31, titled "General Rule of Interpretation," simply states:

1. 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.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
 - (a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the

21. For exceptional efforts, see GROVER, *supra* note 4; Sadat & Jolly, *supra* note 4.

22. Joseph Powderly, *Judicial Interpretation at the Ad Hoc Tribunals: Method from Chaos?*, in JUDICIAL CREATIVITY AT THE INTERNATIONAL CRIMINAL TRIBUNALS 17 (Shane Darcy & Joseph Powderly eds., 2010) (discussing the interpretive posture of the ICTY and ICTR); William A. Schabas, *Interpreting the Statutes of the Ad Hoc Tribunals*, in MAN'S INHUMANITY TO MAN: ESSAYS ON INTERNATIONAL LAW IN HONOUR OF ANTONIO CASSESE 847 (Lal Chand Vohrah et al. eds., 2003).

23. See, e.g., DAVID BEDERMAN, CLASSICAL CANONS: RHETORIC, CLASSICISM, AND TREATY INTERPRETATION 202 (2001).

24. RICHARD K. GARDINER, TREATY INTERPRETATION 12 (2008). The VCLT is not, however, universally admired. One of the main early challenges to its framework came from the New Haven School. For an exposition of the main differences, see generally Richard A. Falk, *On Treaty Interpretation and the New Haven Approach: Achievements and Prospects*, 8 VA. J. INT'L L. 323 (1968) (highlighting the New Haven's school emphasis on judicial discretion and contextualism in treaty interpretation as compared to the textualist-canonist approach in traditional treaty interpretation).

treaty; (b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:
 - (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
 - (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
 - (c) any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended.²⁵

These paragraphs, taken together, embody the Convention's endorsement of a "crucible approach," whereby no single interpretive principle or element dominates. Rather, all the elements — text, object, context — are "thrown into the crucible, and their interaction . . . give[s] the legally relevant interpretation."²⁶ The deliberate attempt in the VCLT to avoid giving primacy to any particular interpretive element has spawned a vast literature on what should be the main guiding principle in treaty interpretation.²⁷ Various schools of thought can be discerned: textual, which accords primacy to the treaty text; subjective, where the drafters' intent takes center stage; and teleological, which takes the object and purpose of the treaty as the main point of departure.²⁸ Notwithstanding the dominance of text, intent, or purpose in each of these approaches to interpretation, there is invariably some overlap between them.²⁹ For instance, since the subjective approach is mainly concerned with the will of

25. VCLT, *supra* note 2, art. 31.

26. *Reports of the International Law Commission on the Second Part of its Seventeenth Session and on its Eighteenth Session*, 2 Y.B. INT'L L. COMM. 169, 219–20 (1966).

27. See Charles Fairman, *The Interpretation of Treaties*, 20 TRANSACTIONS GROTIUS SOC'Y 123, 134–35 (1935) (arguing that the crucible approach avoids hierarchy in application).

28. See Gerald Fitzmaurice, *The Law and Procedures of the International Court of Justice: Treaty Interpretation and Certain Other Treaty Points*, 28 BRIT. Y.B. INT'L L. 1, 7–10 (1951); Gerald Fitzmaurice, *The Law and Procedures of the International Court of Justice 1951–54: Treaty Interpretation and Other Treaty Points*, 33 BRIT. Y.B. INT'L L. 203, 204–99 (1957); Joost Pauwelyn & Manfred Elsig, *The Politics of Treaty Interpretation: Variations and Explanations Across International Tribunals*, in INTERDISCIPLINARY PERSPECTIVES ON INTERNATIONAL LAW AND INTERNATIONAL RELATIONS: THE STATE OF THE ART 445, 450–51 (Jeffrey L. Dunoff & Mark A. Pollock eds., 2012).

29. Francis G. Jacobs, *Varieties of Approaches to Treaty Interpretation: With Special Reference to the Draft Convention on the Law of Treaties Before the Vienna Diplomatic Conference*, 18 INT'L & COMP. L. Q. 318, 319 (1969).

the parties, it seeks to discover their actual intention as found in the negotiations leading up to the conclusion of the treaty and manifested in the treaty text. Despite its emphasis on the actual words of the treaty, the textual approach may also rely on some of the same interpretive materials as evidence if the treaty terms are ambiguous or if their meaning is unreasonable. Similarly, in ascertaining the object and purpose of the treaty as a whole, the teleological approach relies on the purpose as expressed in the text of the treaty, especially its preamble. In addition, it may refer to the negotiating history and the circumstances of the conclusion of the treaty.³⁰

Since the VCLT rules are sufficiently abstract and general, they provide the lowest common denominator amongst these schools of interpretation and sanction considerable flexibility in interpretation where the interpreter is constrained only at the margins in picking and choosing between interpretive principles.³¹ For instance, the VCLT's support for the text of the treaty as the starting point for the interpretive process arguably prohibits the interpreter from shunning the treaty text too readily in favor of over-reliance on the treaty's object and purpose.³² However, this very elasticity also encourages a situation where the interpreter can invoke the authority of the VCLT to legitimize the application of almost any method of construction. The manner in which international criminal tribunals have applied the VCLT demonstrates the chaos and arbitrariness that can result from the pliable nature of the VCLT formulation.

B. Principles, Canons, and Rules of Construction at the Ad Hoc Tribunals

Much of the current debate on treaty interpretation in international criminal law is based on the jurisprudence of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and, to a lesser extent, the International Criminal Tribunal for Rwanda (ICTR). This reliance is rather ironic, given that it would be difficult to label the constitutive instruments of these tribunals as "treaties."³³ Both tribunals were established by United Nations Security Council Resolutions that were based on reports from the UN Secretary-General,³⁴ rather than through a treaty mechanism such as

30. *Id.* at 319.

31. See Waibel, *supra* note 18, at 6; see also GARDINER, *supra* note 24, at 9.

32. See Waibel, *supra* note 18, at 6; see also GARDINER, *supra* note 24, at 8 (stating that the VCLT embraces "qualified textuality"); Jacobs, *supra* note 29, at 338.

33. Charles Lister, *What's in a Name? Labels and the Statute of the International Criminal Tribunal for the Former Yugoslavia*, 18 LEIDEN J. INT'L L. 77, 78 (2005).

34. S.C. Res. 827 (May 25, 1993) [hereinafter ICTY Statute]; S.C. Res. 955 (Nov. 8, 1994) [hereinafter ICTR Statute].

the Rome Statute of the International Criminal Court (ICC).³⁵ The unique character of these instruments was recognized in an early decision of the ICTY Appeals Chamber that declared the ICTY Statute “legally a very different instrument from an international treaty.”³⁶ However, without adducing any reason, the Chamber went on to accept the applicability of principles of treaty interpretation recognized by the International Court of Justice (ICJ) to interpret the Statute.³⁷

The ICTY and the ICTR have consistently affirmed the relevance of the rules of treaty interpretation to the construction of their constitutive documents. While they have explicitly referenced the VCLT in a number of cases,³⁸ the tribunals have generally refrained from putting forward any justification for this reliance. On the rare occasion that judges have pronounced on the matter, the ostensible rationale is that the interpretive rules in the VCLT are reflective of customary rules of interpretation, which are generally accepted in domestic jurisdictions.³⁹ Further, the ICTY and ICTR Statutes, and the rules formulated thereunder, are international instruments and rely on the UN Charter, which is a treaty.⁴⁰ Thus, they are in the nature of derivative instruments that can be interpreted using the rules of treaty interpretation.⁴¹

Several decisions and judgments of the ad hoc tribunals have adopted the VCLT approach to treaty interpretation. However, the elasticity of the VCLT framework has led to incoherence, as different judgments and judges have emphasized one or more of the textual, subjective, and teleological schools of construction.⁴² Given the sparse and loosely worded nature of the ICTY and ICTR Statutes, the textual approach has

35. See Lister, *supra* note 33, at 79.

36. Prosecutor v. Tadić, Case No. IT-94-1-A, Judgement, ¶ 282 (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999).

37. *Id.*

38. See, e.g., Prosecutor v. Delalić, Case No. IT-96-21-T, ¶ 1161 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998); Prosecutor v. Bagosora, Case No. ICTR-98-37-A, Decision on the Admissibility of the Prosecutor's Appeal from the Decision of a Confirming Judge Dismissing an Indictment Against Théoneste Bagosora, ¶¶ 28–29 (Int'l Crim. Trib. for Rwanda June 8, 1998); Prosecutor v. Erdemović, Case No. IT-96-22-A, Joint Separate Opinion of Judge McDonald and Judge Vohrah, ¶ 3 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 7, 1997).

39. Kanyabashi v. Prosecutor, Case No. ICTR-96-15-A, Joint and Separate Opinion of Judge McDonald and Judge Vohrah, ¶ 15 (Int'l Crim. Trib. for Rwanda June 3, 1999); *Kanyabashi*, Case No. ICTR-96-15-A, Dissenting Opinion of Judge Shahabuddeen, ¶ 21; *Kanyabashi*, Case No. ICTR-96-15-A, Joint Separate and Concurring Opinion of Judge Wang and Judge Nieto-Navia, ¶ 11; see also Nsengiyumva v. Prosecutor, Case No. ICTR-96-12-A, Joint and Separate Opinion of Judge McDonald and Judge Vohrah, ¶ 14 (Int'l Crim. Trib. for Rwanda June 3, 1999).

40. See Nsengiyumva, *supra* note 39, Joint and Separate of Judge McDonald and Judge Vohrah, ¶ 14.

41. Schabas, *supra* note 22, at 852.

42. For an excellent survey of the different approaches to interpretation adopted by the ad hoc tribunals, see GROVER, *supra* note 4, at 48–68; Schabas, *supra* note 22.

only occasionally proven to be useful. Some cases have endorsed a “literal” interpretation that seeks to accord to words their plain or ordinary meaning. Thus, judges have relied on dictionary definitions to construe terms such as “serious” (for the purposes of interpreting “serious injury” punishable as a grave breach of the Geneva Conventions under Article 2(c) of the ICTY Statute)⁴³ and “jurisdiction” (to determine the subject matter jurisdiction of the ICTY).⁴⁴ At other times, they have simply claimed to adopt the plain or ordinary meaning of a term in the ICTY Statute without further specifying how it was determined.⁴⁵

In most cases though, the courts have not stopped at a “literal” inquiry and instead given the terms a contextual meaning in an effort to give effect to the language of the VCLT, which specifically provides that the ordinary meaning of treaty terms must be considered in their context. The tribunals’ version of what this context includes is, however, different from the VCLT’s understanding.⁴⁶ The latter defines context as the treaty text, including its preamble and annexes, and subsequent related treaty agreements and other instruments endorsed by the treaty parties.⁴⁷ The ICTY and the ICTR have certainly construed terms by considering the statute as a whole,⁴⁸ or cross-referencing terms and concepts in other parts of the statute,⁴⁹ or paying special attention to neighboring provisions.⁵⁰ However, references to the preambles or the Security Council resolutions establishing the tribunals are rare.⁵¹ Instead, the tribunals have defined context broadly to include the general context of the adoption of the Statutes,⁵² including the character of the conflicts that preceded their establishment.⁵³

43. *Delalić*, Case No. IT-96-21-T, ¶ 1161.

44. *Prosecutor v. Tadić*, Case No. IT-94-1-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 10 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

45. *See, e.g.*, *Prosecutor v. Aleksovski*, Case No. IT-95-14/1-T, Judgement, ¶ 75 (Int’l Crim. Trib. for the Former Yugoslavia June 25, 1999) (interpreting the term “superior”); *Aleksovski*, Case No. IT-95-14/1-T, Dissenting Opinion of Judge Rodrigues, Presiding Judge of the Trial Chamber, ¶ 46.

46. Schabas, *supra* note 22, at 858–59; *see also* GROVER, *supra* note 4, at 52.

47. VCLT, *supra* note 2, art. 32(2)(a).

48. *See, e.g.*, *Tadić*, Case No. IT-94-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 90.

49. *See, e.g.*, *Blagojević v. Prosecutor*, Case No. ICTY-02-60-A, Judgement, ¶ 280 (Int’l Crim. Trib. for the Former Yugoslavia May 7, 2007); *Prosecutor v. Orić*, Case No. ICTY-03-68-T, Judgement, ¶ 302 (Int’l Crim. Trib. for the Former Yugoslavia June 30, 2006).

50. *See, e.g.*, *Prosecutor v. Barayagwiza*, Case No. ICTR-97-19-AR72, Decision, ¶¶ 46–48 (Int’l Crim. Trib. for Rwanda Mar. 31, 2000).

51. Schabas, *supra* note 22, at 858–59 (citing *Tadić*, Case No. IT-94-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 90 as an exceptional case of reference to the Preamble of the ICTY Statute).

52. *See, e.g.*, *Tadić*, Case No. IT-94-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶¶ 87–88.

53. *Id.* ¶ 73.

The teleological or purposive school of treaty construction has played a prominent role in tribunal jurisprudence leading to an expansive construction of treaty terms based on the object and purpose of the ICTR and ICTY Statutes. The object and purpose of any legal instrument is a notoriously vague concept, and various objects and purposes of the Statutes have been identified: punishing all crimes against humanity;⁵⁴ putting an end to widespread violations of international humanitarian law;⁵⁵ ensuring a fair trial of the accused;⁵⁶ and doing justice, promoting deterrence, and restoring peace.⁵⁷ There is little constraint on what the tribunals take to be the object or objects of their constitutive instruments or how broadly they choose to define them. Not surprisingly, this has led to accusations of substantial lawmaking by the judiciary in a manner that is potentially prejudicial to the rights of the accused.

The consequences of adopting such an expansive approach can be seen in the case of *Prosecutor v. Furundžija*, where the ICTY Trial Chamber interpreted the crime of rape in the ICTY Statute to include the conduct of forcible oral penetration on the basis that it was a severe and degrading attack on human dignity, which was fundamental to international humanitarian law and human rights law.⁵⁸ The object and purpose was thus not merely confined to the purpose of the ICTY Statute in particular but the normative underpinning of international human rights and humanitarian law in general. In a similar vein, in *Prosecutor v. Erdemović*, Judges McDonald and Vohrah looked at the purpose of international criminal law and international humanitarian law to decide whether the defense of duress should be available to a charge of crimes against humanity or war crimes that involve the killing of innocent people.⁵⁹ In view of the overriding goal of international criminal law to protect the lives of innocent people and the importance of placing legal limits on the conduct of commanders and soldiers, the judges rejected duress as a complete defense.⁶⁰

54. *Prosecutor v. Tadić*, Case No. IT-94-1-A, Judgement, ¶ 285 (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999).

55. *Blagojević*, Case No. ICTY-02-60-A, Judgement, ¶ 281 (May 7, 2007).

56. *Kanyabashi v. Prosecutor*, Case No. ICTR-96-15-A, Joint and Separate Opinion of Judge McDonald and Judge Vohrah, ¶ 16 (Int'l Crim. Trib. for Rwanda June 3, 1999).

57. Rep. of the Int'l Trib. for the Prosecution of Persons Responsible for Serious Violations of Int'l Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, ¶¶ 12–14, U.N. Doc. A/49/342, S/1994/1007 (Aug. 29, 1994).

58. *Prosecutor v. Furundžija*, Case No. IT-95-17/1-T, Judgement, ¶ 183 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998).

59. *Prosecutor v. Erdemović*, Case No. IT-96-22-A, Joint Separate Opinion of Judge McDonald and Judge Vohrah, ¶ 19 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 7, 1997).

60. *Id.* ¶¶ 75–89.

The tribunals have also endorsed the subjective school of construction where judges have relied extensively on the travaux préparatoires to determine the intent of the drafters. This interpretive approach extends not only to the constitutive documents of the tribunals but also to other international treaties that are relevant to the subject matter jurisdiction of the tribunals.⁶¹ For instance, in *Prosecutor v. Akayesu*, faced with the problem of classifying the Tutsi in Rwanda as one of the protected groups under the definition of genocide, the ICTR referred to the travaux préparatoires of the Genocide Convention to claim that the drafters clearly intended to protect any stable and permanent group.⁶² However, commentators note that the jurisprudence of the ad hoc tribunals, in particular the Appeals Chamber of the ICTY, has not necessarily been consistent on the importance of the travaux préparatoires or of the drafters' intent to the interpretive exercise.⁶³ The travaux préparatoires featured prominently in some of the early decisions of the ICTY, such as the *Tadić Jurisdiction Decision*, where the Appeals Chamber had to determine whether the ICTY Statute was confined in its application to crimes committed during international armed conflicts or whether it could be extended to those crimes occurring in internal armed conflicts. Although the Chamber classified its method as "teleological" rather than subjective,⁶⁴ it drew heavily on preparatory material indicative of the intent of the drafters to interpret the ambit of the statute. This included the intent of the Security Council in constituting the ICTY, as evidenced in the Report of the Secretary General;⁶⁵ Security Council debates during the adoption of the Resolution establishing the tribunal;⁶⁶ and previous Security Council Resolutions dealing with the situation in Bosnia and Herzegovina.⁶⁷ In other decisions, such as the *Tadić* appeal on the merits, when considering the scope of crimes against humanity in Article 5 of the ICTY Statute, the Chamber declined to refer to the Report of the Secretary-General and the speeches of Security Council members during the adoption of the Statute on the ground that there was no ambiguity in the language of Article 5 of the Statute.⁶⁸

61. GROVER, *supra* note 4, at 56.

62. *Prosecutor v. Akayesu*, Case No. ICTR-96-4, Judgement, ¶ 516 (Int'l Crim. Trib. for Rwanda Sept. 2, 1998).

63. Schabas, *supra* note 22, at 868–69.

64. *Prosecutor v. Tadić*, Case No. IT-94-1-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 72 (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999).

65. *Id.* ¶¶ 75, 79, 82, 86, 87, 138, 143.

66. *Id.* ¶ 88.

67. *Id.* ¶¶ 72, 74, 78; *see also* Schabas, *supra* note 22, at 868.

68. *Prosecutor v. Tadić*, Case No. IT-94-1-A, Judgement, ¶¶ 295–304 (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999). -

In addition to the main VLCT-based schools of interpretation, the ICTR and ICTY have, at times, endorsed the concept of “evolutive interpretation,” i.e., interpreting their statutes to keep pace with evolving norms of society, criminal law, and the administration of justice.⁶⁹ Thus, in interpreting the ambit of rape as a crime against humanity, the ICTR noted the trend in municipal law towards broadening the definition of rape and adopted a conceptual definition of the crime focusing on “the aggression that is expressed in a sexual matter under conditions of coercion,”⁷⁰ which would “better accommodate evolving norms of criminal justice.”⁷¹ The tribunals also take into account legal developments, both in municipal laws as well as international humanitarian law and human rights law, in defining the scope and content of treaty terms.⁷²

The principle of legality and the rule of strict construction of statutory terms in order to resolve doubts in favor of the accused appear to be the only “homegrown” interpretive canons developed by the ad hoc tribunals, although their concrete application has been rare.⁷³ Parallels to the *in dubio pro reo* rule can be found in the contractual rule of *contra proferentem*,⁷⁴ under which any ambiguity is to be resolved against the party that drafted that contract.⁷⁵ While the principle of *contra proferentem* has been applied by analogy to the law of treaties, it has not been particularly influential in the practice of international courts⁷⁶ and is generally considered inapposite in the context of multilateral treaties.⁷⁷ A few decisions of the ICTY and the ICTR have declared that any doubt or ambiguity should be resolved in favor of the accused⁷⁸ as a general principle of law and in accordance with

69. GROVER, *supra* note 4, at 57; *see also, e.g.*, Prosecutor v. Tadić, Case No. IT-94-1-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶¶ 4–6 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995) (interpreting the term “jurisdiction” broadly in accordance with the “modern vision of the administration of justice”).

70. Prosecutor v. Musema, Case No. ICTR-96-13-A, Judgement and Sentence, ¶ 226 (Int’l Crim. Trib. for Rwanda Jan. 27, 2000).

71. *Id.* ¶ 228.

72. Prosecutor v. Kunarać, Case No. ICTY-96-23 & ICTY-96-23/1-A, Judgement, ¶ 67 (Int’l Crim. Trib. for Yugoslavia June 12, 2002) (interpreting war crimes under the Statute in the context of developments in the laws of war); Prosecutor v. Delalić, Case No. IT-96-21-T, ¶¶ 265–66 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998) (interpreting the definition of “protected persons” using a human-rights-oriented approach to the Fourth Geneva Convention).

73. *See* Schabas, *supra* note 22, at 853–55 (on the sparse references to strict construction); GROVER, *supra* note 4, at 59 (claiming that the tribunals merely pay lip-service to strict construction).

74. *Delalić*, Case No. IT-96-21-T, ¶ 413.

75. Hersch Lauterpacht, *Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties*, 26 BRIT. Y.B. INT’L L. 48, 63 (1949); *see also* Bos, *supra* note 4, at 154.

76. Lauterpacht, *supra* note 75, at 63.

77. C.H. Schreuer, *The Interpretation of Treaties by Domestic Courts*, 45 BRIT. Y.B. INT’L L. 255, 299 (1971).

78. Prosecutor v. Musema, Case No. ICTR-96-13-A, Judgement and Sentence, ¶ 155 (Int’l Crim. Trib. for Rwanda Jan. 27, 2000); Prosecutor v. Rutaganda, Case No. ICTR-96-3-T, Judgement, ¶ 50 (Int’l Crim. Trib. for Rwanda Dec. 6, 1999); Prosecutor v. Akayesu, Case No. ICTR-96-4,

the presumption of innocence.⁷⁹ However, since there is likely to be little scope for much ambiguity if the tribunals adopt an expansive version of context, purpose, or subjective intent to interpret the text, it is only the unusual case where strict construction will make a substantial difference to the interpretive outcome.⁸⁰ Indeed, the ad hoc tribunals have typically applied the principle in conjunction with other interpretive principles, as evidenced by the decision of the ICTR Appeals Chamber in *Prosecutor v. Nahimana*.⁸¹ Here, the tribunal referred primarily to the intent of the drafters of the ICTR Statute to hold that the temporal jurisdiction of the ICTR was limited to situations where all the elements required for the guilt of the accused were present in 1994, including the actus reus and mens rea requirements for establishing the mode of liability.⁸² This conclusion was further strengthened by the principle of strict construction.⁸³

The principle of legality is also a motivating factor in the tribunals' attempts to construe any ambiguity in the ICTY and ICTR Statutes in a manner that accords with customary international law. In the early ICTY jurisprudence, the presumption in favor of customary international law followed from the tribunal's subjective approach to treaty construction: the intent of the drafters, as made explicit in the Report of the Secretary-General establishing the tribunal, was clearly to confine the subject matter jurisdiction of the ICTY to conduct that is undoubtedly criminal under customary international law.⁸⁴ Subsequently, several decisions have made reference to the *nullum crimen sine lege* (no crime without law) principle as a reason for privileging an interpretation that adheres to customary law.⁸⁵

Judgement, ¶ 319 (Int'l Crim. Trib. for Rwanda Sept. 2, 1998); *Delalić*, Case No. IT-96-21-T, ¶¶ 408–13; *Prosecutor v. Tadić*, Case No. ICTY-94-1-A, Decision on Appellant's Motion for the Extension of the Time-Limit and Admission of Additional Evidence, ¶ 73 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 15, 1998).

79. *Akayesu*, Case No. ICTR-96-4, ¶ 501; cf. *Prosecutor v. Limaj*, Case No. ICTY-03-66-A, Judgment, Partially Dissenting and Separate Opinion and Declaration of Judge Schomburg, ¶ 15 (Int'l Crim. Trib. for the Former Yugoslavia Sept. 27, 2007) (rejecting the application of the rule in *in dubio pro reo* to the interpretation of the ICTY Statute and Rules on the basis that it applies only to findings of fact).

80. GROVER, *supra* note 4, at 60.

81. *Prosecutor v. Nahimana*, Case No. ICTR-99-52-A, Judgement, ¶ 226 (Int'l Crim. Trib. for Rwanda Nov. 28, 2007).

82. *Id.* ¶¶ 311–13.

83. *Id.* ¶ 313.

84. *Prosecutor v. Tadić*, Case No. IT-94-1-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 143 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995) (citing UN Secretary-General, *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, ¶ 34, U.N. Doc. S/25704 (May 3, 1993)); see also *Tadić*, Case No. IT-94-1-A, ¶ 287 (stating that it must be presumed that the Security Council, while establishing the ICTY, did not intend to depart from general rules of international law).

85. See, e.g., *Prosecutor v. Jelisić*, Case No. IT-95-10, Judgement, ¶ 61 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 14, 1999) (construing the scope of the crime of genocide); *Prosecutor v. Kordić*, Case No. IT-95-14/2, Decision on the Joint Defence Motion to Dismiss the Amended

There is, however, a potential conflict between interpretation in accordance with customary international law and the requirement of *in dubio pro reo*. It is precisely this tension that led to opposite conclusions by different Chambers of the ICTR on the interpretation of murder as a crime against humanity under Article 3(a) of the ICTR Statute. While the English version of the Statute criminalizes “murder,” the French version uses the term “*assassinat*.” In *Akayesu*, the ICTR Appeals Chamber held that an interpretation in accordance with customary international law would dictate the adoption of the definition of murder as a crime against humanity.⁸⁶ However, in *Kayishema*,⁸⁷ Trial Chamber II disagreed with this construction, noting that the crime of *assassinat* in most civil law jurisdictions imposed a higher mens rea of premeditation than the common law conception of “murder,” which could also be satisfied by intention or recklessness.⁸⁸ Thus, even if customary international law recognized the criminalization of murder as a crime against humanity, the plain meaning of the Statute, the intent of the drafters, and the principle of *in dubio pro reo* required the adoption of *assassinat* and the higher mens rea of premeditation.⁸⁹ The ICTR Appeals Chamber’s decision in *Prosecutor v. Musema* also highlights the contrasting outcomes yielded by an adherence to customary international law versus the principle of legality. In this case, even though the French version of the ICTR Statute requires a “widespread *and* systematic” attack for conduct to constitute a crime against humanity, the Chamber gave preference to the English formulation of “widespread *or* systematic” on the basis of its conformity with customary international law.⁹⁰ No justification was given for why the French interpretation, which is more favorable to the accused, was not adopted.

C. Treaty Interpretation by the International Criminal Court

In contrast to the Statutes of the ad hoc tribunals, the Rome Statute is unquestionably an international treaty and, as such, the case for the applicability of customary international rules of treaty interpretation

Indictment for Lack of Jurisdiction Based on the Limited Jurisdictional Reach of Arts. 2 and 3, ¶¶ 19–20 (Int’l Crim. Trib. for the Former Yugoslavia Mar. 2, 1999) (interpreting the subject matter jurisdiction of the ICTY under Art. 3 of the Statute).

86. *Prosecutor v. Akayesu*, Case No. ICTR-96-4, Judgement, ¶ 588 (Int’l Crim. Trib. For Rwanda Sept. 2, 1998).

87. *Prosecutor v. Kayishema*, Case No. ICTR-95-1-T, Judgement (Int’l Crim. Trib. For Rwanda May 21, 1999).

88. *Id.* ¶¶ 137–38, 138 n.76.

89. *Id.* ¶¶ 138–39.

90. *Prosecutor v. Musema*, Case No. ICTR-96-13-A, Judgement and Sentence, ¶ 202–03 (Int’l Crim. Trib. For Rwanda Jan. 27, 2000).

embodied in the VCLT is much stronger. At the same time, the text of the Statute itself contains interpretive canons that are not featured in the VCLT. Article 21 of the Statute on “Applicable Law” establishes the following hierarchy of sources: “1 . . . (a) the Statute, Elements of Crimes[,] . . . and . . . Rules of Procedure and Evidence; (b) . . . treaties and . . . principles and rules of international law . . . ; [and] (c) failing that, general principles of law derived” from laws of domestic legal systems, including those of the State that would normally have jurisdiction, as long as they are consistent with the Statute and international law.⁹¹ The Article also recognizes the precedential value of the decisions of the ICC.⁹² Lastly, Article 21 requires that any interpretation of law under the Statute “must be consistent with internationally recognized human rights.”⁹³ Article 22 of the Statute enshrines the principle of legality, including the prohibition against *ex post facto* criminalization, strict construction of crime definitions and restriction on extensions by analogy, and the rule of *in dubio pro reo*.⁹⁴

While the ICC has delivered only two judgments thus far, questions of interpretation have inevitably surfaced in these and in the various decisions of the court, though neither have given rise to extensive analysis. The ICC’s judgment in *Prosecutor v. Katanga* represents the most detailed treatment yet of the court’s stance on treaty interpretation.⁹⁵ In this case, the ICC Trial Chamber II unequivocally affirmed the application of the VCLT interpretive principles to the Rome Statute and endorsed the crucible approach where text, context, object, and purpose are all considered together to arrive at the meaning of treaty terms.⁹⁶ Additionally, it confirmed the relevance of the principle of effectiveness, according to which an interpretation that renders a term void or ineffective is avoided.⁹⁷ In accordance with Article 31 of the VCLT, the Chamber recognized the utility of “rules of international law applicable between the parties,” in particular the founding texts of the Rome Statute, “customary humanitarian law,” general principles of law, and the jurisprudence of the *ad hoc* tribunals and other courts.⁹⁸ The Chamber also noted that the Rome Statute’s travaux préparatoires and the circumstances concerning its

91. Rome Statute of the International Criminal Court art. 21(1), July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

92. *Id.* art. 21(2).

93. *Id.* art. 21(3).

94. *Id.* art. 22.

95. *Prosecutor v. Katanga*, ICC-01/04-01/07-3436, Judgement Pursuant to Article 74 of the Statute (Mar. 7, 2014).

96. *Id.* ¶¶ 43–45.

97. *Id.* ¶¶ 46.

98. *Id.* ¶ 47.

conclusion were relevant as supplementary sources of interpretation under Article 32 of the VCLT.⁹⁹

The Chamber then outlined limitations to its interpretive discretion based upon the principle of legality in the Rome Statute. Thus, under Article 21, the court was not permitted to construe the Statute in a manner that contradicted internationally recognized human rights, while it was obliged to follow the rule of strict construction and interpret any ambiguity in favor of the accused.¹⁰⁰ The Chamber, however, assigned a residual character to the latter, arguing that the principle of *in dubio pro reo* came into play only if the general rule and supplementary means of interpretation under the VCLT had failed to clarify the meaning of a provision.¹⁰¹ Similarly, the court could not use the Rome Statute's object and purpose — putting an end to impunity for perpetrators of crimes within the court's jurisdiction — to create new law or ignore the ordinary meaning of a treaty term. However, it would fully consider the object and purpose in order to arrive at a definitive meaning of treaty provisions.¹⁰²

The *Katanga* Trial Chamber's judgment walks a fine line between the general interpretive approach of the VCLT and attempting to accommodate the special nature of its criminal law content, which must be sensitive to the concerns of legality. However, in the Chamber's formulation, criminal law interpretive canons, which are moreover specifically provided in the Rome Statute, are relegated to a secondary status vis-à-vis the VCLT. If one considers the Chamber's endorsement of nearly every method, including teleological, for interpretation of treaty terms and the acceptance of extraneous legal rules and preparatory material for the resolution of doubts, it is difficult to see what place, if any, is left for the operation of the principle of legality.¹⁰³

This is a far from uncontroversial position in international criminal law. While some scholars have challenged the application of the VCLT principles to the "criminal law" part of the Rome Statute and argued that the principle of legality should be paramount,¹⁰⁴ others have sought to reconcile it with the VCLT framework by urging textual primacy, rather

99. *Id.* ¶ 49.

100. *Id.* ¶¶ 50–51.

101. *Id.* ¶ 53.

102. *Id.* ¶¶ 54–56.

103. Cf. Alicia Gil & Elena Maculan, *Current Trends in the Definition of 'Perpetrator' by the International Criminal Court: From the Decision on the Confirmation of Charges in the Lubanga Case to the Katanga Judgment*, 28 LEIDEN J. INT'L L. 349, 370 (2015) (arguing that the judgment rejects, at least in principle, "any teleological interpretation that may cause an expansion of criminal accountability contrary to the principles of strict construction and *in dubio pro reo*").

104. Dov Jacobs, *Positivism and International Criminal Law: The Principle of Legality as a Rule of Conflict of Theories*, in INTERNATIONAL LEGAL POSITIVISM IN A POST-MODERN WORLD 1, 36–37 (Jörg Kammerhofer & Jean D'Aspremont eds., 2014).

than a subjective or teleological approach.¹⁰⁵ Thus, Leena Grover argues that in the event a textual approach yields multiple possible interpretations, strict construction should override the methods of purposive and effective interpretation.¹⁰⁶

This “textual” stance, however, appears merely to constitute a starting point for the ICC, as demonstrated by Trial Chamber I’s judgment in *Prosecutor v. Lubanga*.¹⁰⁷ Here, the court was tasked with construing the scope of the war crime of “conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities.”¹⁰⁸ The Chamber affirmed the applicability of the VCLT rules to the Rome Statute, in particular the reading of treaty terms in their context and in light of the Rome Statute’s object and purpose.¹⁰⁹ Additionally, it referred to the duty of the court to interpret and apply the law under the Statute in accordance with internationally recognized human rights.¹¹⁰ The Chamber cited the prohibition against the recruitment and use of children under the age of fifteen in hostilities in Additional Protocol II of the 1949 Geneva Conventions and the Convention on the Rights of the Child,¹¹¹ noting that their primary objective was the protection of children from the physical and psychological risks associated with armed conflict.¹¹² Further, given the identical wording and objective of the prohibition on the use of child soldiers in the Statute of the Special Court for Sierra Leone (SCSL),¹¹³ the Chamber stated that the SCSL’s jurisprudence might assist in the interpretation of the similar prohibition in the Rome Statute.¹¹⁴

The Chamber looked to the Oxford English Dictionary to adopt the “ordinary” meaning of the terms “enlisting” and “conscripting,” stating

105. GROVER, *supra* note 4, at 111; *see also* Sadat & Jolly, *supra* note 4, at 759 (arguing that while the Rome Statute does not specify any interpretative approach, the general thrust of Articles 21 and 22 indicates a preference for textual interpretation).

106. GROVER, *supra* note 4, at 202; *cf.* Sadat & Jolly, *supra* note 4, at 763 (acknowledging the tension between the purposive method and the principle of legality but cautioning against elevating the rule of strict construction over concerns of substantive justice).

107. *Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06, Judgment Pursuant to Article 74 of the Statute (Mar. 14, 2012).

108. Rome Statute, *supra* note 92, art. 8(2)(e)(vii).

109. *Lubanga*, Case No. ICC-01/04-01/06, ¶ 601.

110. *Id.* ¶ 602.

111. *Id.* ¶ 604 (citing Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts art. 4(3)(c), June 8, 1977, U.N. Doc. A/32/144; Annex I and Convention on the Rights of the Child art. 38, Nov. 20, 1989, 1577 U.N.T.S. 3).

112. *Id.* ¶ 605.

113. UN Secretary-General, *Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone*, ¶¶ 15-18, U.N. Doc. S/2000/915 (Oct. 4, 2000).

114. *Lubanga*, Case No. ICC-01/04-01/06, ¶ 603.

that the latter required an element of compulsion.¹¹⁵ It nonetheless proceeded to refer to the evidence of expert witnesses, the jurisprudence of the SCSL, and the Rome Statute's object of protecting vulnerable children to conclude that the distinction between voluntary and forced recruitment was largely illusory in the case of children enlisted in armed conflict.¹¹⁶ These were, therefore, continuous offenses committed as soon as a child joined an armed group, whether or not this enrollment was under compulsion.¹¹⁷

The Chamber then turned to the concept of "using [children] to participate actively in hostilities" and, recognizing the ambiguity in the wording of the Rome Statute, relied on the Elements of Crimes to clarify that a child could be "used" in a manner that constituted a war crime without having been conscripted or enlisted.¹¹⁸ In order to define the scope of "active participation in hostilities," it relied on the Elements of Crimes and the travaux préparatoires, noting that the Preparatory Committee only meant to exclude activities that were "clearly unrelated to hostilities."¹¹⁹ This construction was also supported by the jurisprudence of the SCSL interpreting an identical provision of the SCSL Statute¹²⁰ and the statements of the UN Special Rapporteur on Children and Armed Conflict¹²¹ that confirmed that "active participation in hostilities" was not confined to conduct that involved children directly in combat. The Chamber thus held that indirect participation by children in hostilities would be considered active participation if it exposed them to danger as potential targets in conflict.¹²²

The *Lubanga* judgment adopts a liberal textualist approach that involves relying upon several interpretive aids that do not traditionally fall within the VCLT framework. Not only is there an emphasis on the preparatory material, with a view to ascertaining the drafters' intent; a contextual interpretation that makes significant references to other treaties, and to the opinions of expert witnesses dealing with the protection of vulnerable children in situations of armed conflict, goes beyond a simple attempt to read the treaty terms in "their context" as envisaged under the VCLT.

More controversially, the judgment displays a marked deference to the case law of the SCSL. The exact status of the jurisprudence of the ad hoc

115. *Id.* ¶ 608.

116. *Id.* ¶¶ 610–17.

117. *Id.* ¶ 618.

118. *Id.* ¶ 620.

119. *Id.* ¶¶ 621–22.

120. *Id.* ¶¶ 624–25.

121. *Id.* ¶ 626.

122. *Id.* ¶ 628.

tribunals remains a point of contention between the judges of the ICC. Indeed, the uncertainty on the extent to which ICC judges should endeavor to embed the Rome Statute within the broader framework of international criminal law has resulted in dramatically different interpretive postures in cases such as the *Kenya Article 15* decision.¹²³ In this case, Pre-Trial Chamber II had to determine the meaning of the contextual requirement of crimes against humanity that an attack against any civilian population must be pursuant to a “State or organization policy.”¹²⁴ Noting that the Rome Statute did not define the terms “policy” and “State or organizational,” the majority relied on the following sources to interpret the ambit of “policy”: the ICC’s previous decisions; the preparatory work of the International Law Commission (ILC), which drafted the 1996 Draft Code of Crimes against the Peace and Security of Mankind, the precursor to the Rome statute; and the jurisprudence of the ad hoc tribunals.¹²⁵ The majority adopted the list of factors that affected the determination of whether there was a policy in place that were set out in the ICTY Trial Chamber’s judgment in the case of *Blaskić*,¹²⁶ despite the abandonment of the policy requirement for crimes against humanity in later judgments of the ICTY.¹²⁷

The Chamber adopted a mixed subjective and teleological approach to interpret the term “organizational” and whether it was limited to organizations that are State-like.¹²⁸ It referred to the ILC Commentary on the Draft Code of Crimes against the Peace and Security of Mankind, which made clear that the drafters did not intend to exclude non-State actors from its ambit and quoted noted publicists in support of the proposition that the main factor should be whether “a group has the capability to perform acts which infringe on basic human values.”¹²⁹ The Chamber drew upon a number of writings by publicists and provisions of

123. Situation in the Republic of Kenya, Case No. ICC-01/09, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya (Mar. 31, 2010), available at <http://www.icc-cpi.int/iccdocs/doc/doc854562.pdf>.

124. Rome Statute, *supra* note 91, art. 7(2)(a).

125. *Situation in the Republic of Kenya*, Case No. ICC-01/09, Decision Pursuant to Article 15, ¶¶ 84–86.

126. Prosecutor v. Blaskić, Case No. IT-95-14-T, Judgement (Int’l Crim. Trib. for the Former Yugoslavia Mar. 3, 2000).

127. *Situation in the Republic of Kenya*, Case No. ICC-01/09, Decision Pursuant to Article 15, ¶¶ 86–87.

128. See Claus Kress, *On the Outer Limits of Crimes Against Humanity: The Concept of Organization Within the Policy Requirement: Some Reflections on the March 2010 ICC Kenya Decision*, 23 LEIDEN J. INT’L L. 855, 859–60 (2010) (characterizing the majority’s approach as teleological and debating its merits).

129. *Situation in the Republic of Kenya*, Case No. ICC-01/09, Decision Pursuant to Article 15, ¶¶ 90, 91–92; see also Kress, *supra* note 128, at 861 (labeling this as “uncritically ‘victim-focused teleological reasoning’ in the international criminal law context”) (citing Darryl Robinson, *The Identity Crisis of International Criminal Law*, 21 LEIDEN J. INT’L L. 925, 933–946 (2008)).

the 1949 Geneva Conventions to derive factors that would determine whether the group qualifies as an “organization” under Article 7(2)(a).¹³⁰

This interpretation was contested vehemently by Judge Hans-Peter Kaul, who also affirmed the applicability of the VCLT rules¹³¹ but then departed from them in significant ways to give a much more circumscribed meaning to “organization.” Judge Kaul began with the plain meaning of “organization,” looking at the dictionary definition of the term and its placement alongside “State” to surmise that it included private, non-State entities. What kinds of non-State entities,¹³² however, did this encompass? Judge Kaul did not find the previous decisions of the court, the jurisprudence of other international and national tribunals, or academic writings particularly instructive in this regard. However, given the juxtaposition of the words “State” and “organization” in Article 7(2)(a), whatever the nature of the latter, it must partake of some of the elements of statehood.¹³³

Judge Kaul did not conclude his observations here, turning next to a “contextual” interpretation. Citing the Preamble, he noted that the objective and purpose of the Rome Statute was to ensure the effective prosecution and punishment of the most serious crimes of concern to the international community. This indicated a gravity threshold, below which crimes other than crimes against humanity should be punished at the domestic level. Read alongside the provision of strict construction in Article 22 of the Statute, it required the court to avoid trivializing the qualitative requirement of “State or organizational policy,” which served to delimit the scope of crimes against humanity.¹³⁴

The interpretive methodology that played the most important role in Judge Kaul’s analysis was, however, his final reference to the object and purpose of Article 7(2)(a), which he termed a teleological interpretation.¹³⁵ Judge Kaul interpreted the contextual requirement of an “organization” for crimes against humanity in light of the object of these crimes and what serves to distinguish them from ordinary crimes that should fall within the sole competence of domestic courts.¹³⁶ For this purpose, he referred to the historical background that gave rise to the concept of crimes against humanity, which consisted primarily of “mass crimes committed by

130. *Situation in the Republic of Kenya*, Case No. ICC-01/09, Decision Pursuant to Article 15, ¶ 93.

131. *Id.*, Dissenting Opinion of Judge Kaul, ¶ 34

132. *Id.* ¶ 45.

133. *Id.* ¶ 51.

134. *Id.* ¶¶ 54–55.

135. *Cf.* Kress, *supra* note 128, at 863 (characterizing Judge Kaul’s methodology as “historical-teleological”).

136. *Situation in the Republic of Kenya*, Case No. ICC-01/09, Dissenting Opinion of Judge Kaul, ¶ 56.

sovereign states against the civilian population, sometimes the state's own subjects, according to a plan or policy, involving large segments of the state apparatus."¹³⁷ Given this history, it was only logical that the drafters of the Rome Statute limited the category of crimes against humanity to those that were committed pursuant to a "State or organizational policy."¹³⁸ Further, since State leaders have the primary responsibility to uphold the rule of law within the State, it was only the abdication of this duty that would necessitate intervention by the international community in order to contain the threat to peace and security.¹³⁹ The ostensible impingement upon the sovereignty interests of States was justified in light of the attack on fundamental values of humankind that were moreover unlikely to be punished at the level of the State that was complicit in them.¹⁴⁰

Judge Kaul also struck a cautionary note on the weight that should be placed on the jurisprudence of the ad hoc tribunals in interpreting the Rome Statute. He emphasized that the ICC is tasked with interpreting its own constitutive document — the Rome Statute — that provides the applicable law before the court.¹⁴¹ Since the Rome Statute gives no binding or precedential force to the jurisprudence of other tribunals, their sole value lies in the extent to which they otherwise mirror "principles and rules of international law" that must in turn be verified independently by the judges of the ICC.¹⁴²

III. THE ARGUMENT FOR DIVERGENCE IN TREATY INTERPRETATION

Despite the sheer variety of interpretational methods at play in the construction of international criminal instruments, courts and scholars have been loath to suggest that the VCLT does not constitute the Archimedean point for interpretation at the international criminal tribunals or, even more provocatively, that there is no good reason why it should do so. This Part argues that the VCLT framework for treaty interpretation and the uniform approach that it endorses should be jettisoned in favor of a divergent approach to treaty interpretation more generally, and to international criminal law treaties in particular. First, it demonstrates that notwithstanding repeated affirmations of the uniform approach in scholarship as well as jurisprudence, the proliferation in vastly different

137. *Id.* ¶ 59.

138. *Id.* ¶ 63.

139. *Id.*

140. *Id.* ¶ 64.

141. *Id.* ¶¶ 28–29.

142. *Id.* ¶ 30.

kinds of international treaties and the judicialization of international disputes has resulted in its slow erosion. The challenge to the uniform approach, both implicit and direct, has come from three quarters: the reality of treaty proliferation and diversification, the emphasis on interpretive communities, and the jurisprudence of specialized international courts. This account differs from existing accounts of differential treaty interpretation, which focus exclusively on one international treaty or area of international law, such as human rights or international trade, by demonstrating an increasingly vocal trend towards regime-specific interpretive principles.¹⁴³

Following from this analysis, Part III claims that a multiplicity of methods of interpretation for international criminal law treaties is not only warranted but necessary. However, the justification for this divergent approach lies in the hybrid character of these treaties. Thus, similar to treaties dealing with human rights, investment arbitration, international trade, or international taxation, international criminal law treaties have a unique core. This core should influence the interpretive canons, principles, and rules applicable to those parts of the treaty that are akin to a criminal law statute, that is, the provisions dealing with the definitions of offenses and defenses, investigation and trial proceedings, and applicable penalties. Other aspects of the treaties, such as composition and establishment of the tribunal or the obligations of states with respect to cooperation, may fall within a different interpretive regime.

A. Treaty Explosion and the Fragmentation of International Law

As the legalization of international relations has proceeded, the debate over the “correct” approach to the VCLT’s interpretive framework has been accompanied by a creeping disquiet about its adequacy for the sheer scale and range of treaties that have emerged in the past few decades.¹⁴⁴ Over the course of the past few decades, international law has not only expanded its reach but has also diversified. With the proliferation of specialized international law regimes, each with their own adjudicative and administrative institutions, the normative unity of international law is increasingly seen as under threat. In its study of this phenomenon of “fragmentation,”¹⁴⁵ the International Law Commission was among the

143. *Cf.* Weiler, *supra* note 9, at 16–18 (gesturing towards changes in the world order that have an impact on theorizing treaty interpretation, including the emergence of a communitarian paradigm in international law).

144. One of the main early challenges to the entire framework of the VCLT came from the New Haven School. For an exposition of the main differences, see Falk, *supra* note 24.

145. Int’l L. Comm’n, Rep. of the Study Group on the Fragmentation of International Law, U.N. Doc. A/CN.4/L.682 (2006). On fragmentation as a concern in public international law, see

first actors to query whether a pluralist international law regime, which includes highly specialized areas such as environment, trade, human rights, crime, investment, and tax, can “sustain a single canon of treaty interpretation to fit all fragmented areas.”¹⁴⁶

The claim that not all international law treaties are cut from the same cloth is, paradoxically, deeply rooted in the history of treaties and simultaneously a modern anxiety. Although the earliest commentaries on the law of treaties did not distinguish between different kinds of treaties, the duality of the treaty as part statute and part contract was readily acknowledged.¹⁴⁷ Arnold McNair, writing in the early twentieth century, carried the statutory/contractual distinction further and argued that treaties differed so widely in function and legal character that they should be classified into two main categories: contractual treaties and law-making or legislative treaties.¹⁴⁸ According to McNair, the former category included older treaties of “peace, alliance, friendship, neutrality, guarantee, commerce,” which were of the nature of a compact or bargain between States.¹⁴⁹ Modern multi-lateral treaties, in contrast, created identically binding rules on the contracting parties and resulted in international unions, regimes, and codes.¹⁵⁰ For McNair, the idea that these two kinds of treaties should be subject to different rules, including interpretive rules, was inescapable.¹⁵¹ Several decades elapsed, however, during which McNair seemed to be one of the few voices crying into the wilderness.¹⁵²

generally Martti Koskenniemi & Paivi Leino, *Fragmentation of International Law? Postmodern Anxieties*, 15 LEIDEN J. INT'L L. 553 (2002); Anne-Charlotte Martineau, *The Rhetoric of Fragmentation: Fear and Faith in International Law*, 22 LEIDEN J. INT'L L. 1 (2009); Pemmaraju Sreenivasa Rao, *Multiple International Judicial Forums: A Reflection of the Growing Strength of International Law or its Fragmentation?*, 25 MICH. J. INT'L L. 929 (2004).

146. Malgosia Fitzmaurice, *Book Review*, 104 AM. J. INT'L L. 329, 329 (2010) (reviewing RICHARD GARDINER, *TREATY INTERPRETATION* (2008) and ULF LINDERFALK, *ON THE INTERPRETATION OF TREATIES: THE MODERN INTERNATIONAL LAW AS EXPRESSED IN THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES* (2008)); see also Int'l L. Comm'n., Rep. on the Work of its Sixty-Fifth Session, U.N. Doc A/68/10, at 19–20 (2013) (leaving open the question of whether the “nature” of the treaty should give rise to prioritizing different means of interpretation).

147. See BEDERMAN, *supra* note 23, at 188 (arguing that classical international scholars such as Grotius, Pufendorf, Vattel, and Phillimore had been conscious of the character of the treaty as part contract and part legislation).

148. McNair also introduced a sub-species of law-making treaties which were international treaties establishing permanent international organizations with a non-political purpose. Arnold McNair, *The Functions and Differing Legal Character of Treaties*, 11 BRIT. Y.B. INT'L L. 100, 105, 116 (1930).

149. *Id.* at 105.

150. *Id.* at 105–06.

151. *Id.* at 106; cf. EIRIK BJORGE, *THE EVOLUTIONARY INTERPRETATION OF TREATIES* 27–28 (2014) (questioning this interpretation of McNair).

152. See also Quincy Wright, *The Interpretation of Multilateral Treaties*, 23 AM. J. INT'L L. 94, 99 (1929) (citing a range of Anglo-American and Continental scholars, including Oppenheim, Triepel, and Scelle, who had earlier recognized a similar typology, but who did not necessarily agree on the consequences of the categorization or whether it had implications for interpretation).

Indeed, it is only with the increased judicial activity of international courts such as the European Court of Human Rights and the World Trade Organization (WTO) Appellate Body that the conversation on specialized treaty regimes and rules of interpretation has been revived.¹⁵³

A host of classificatory schemes that differentiate between treaties based on form, content, normative significance, or a combination of these elements, have been proposed.¹⁵⁴ For instance, some scholars emphasize the distinct regulatory functions of treaties constituting international organizations (institutional treaties) compared to standard contractual or legislative treaties.¹⁵⁵ Institutional treaties “administer international relations” and may be subject to imprecision and *realpolitik* to a greater extent. These factors will influence the extent to which the initial intention of the parties to the treaty as manifested in the travaux préparatoires should be relied on to interpret these treaties, especially when contrasted with contractual treaties.¹⁵⁶

In turn, what demarcates legislative treaties from contractual (and constitutive) ones has invited some controversy. One suggestion is that while reciprocity and mutuality of burdens and benefits is the defining feature of contractual treaties, law-making treaties constitute “pledges” by treaty parties to a set of norms that then apply even in the absence of reciprocity.¹⁵⁷ The different legal relationships constituted by these types of treaties should lead to different approaches to interpretation. Thus, while the will of the parties may dominate in interpreting contractual treaties, adopting a teleological method that gives effect to the collective state interest at stake might play a greater role in construing law-making treaties.¹⁵⁸ These treaties, which are often meant to endure for a long time and give expression to fundamental interests of the international community, are also more likely to necessitate a dynamic, evolutive approach to interpretation.¹⁵⁹

153. See *supra* Part II.C.

154. Catherine Brölmann, *Typologies and the ‘Essential Juridical Character’ of Treaties*, in CONCEPTUAL AND CONTEXTUAL PERSPECTIVES ON THE MODERN LAW OF TREATIES (M. Bowman and D. Kritsios eds., forthcoming); Weiler, *supra* note 9, at 13.

155. See, e.g., Julian Arato, *Treaty Interpretation and Constitutional Transformation: Informal Change in International Organizations*, 38 YALE J. INT’L L. 289, 301 (2013) (claiming treaties constituting public international organizations through a contractual agreement between States are both treaties and constitutions); Waibel, *supra* note 18, at 21.

156. Bos, *supra* note 4, at 160–61; see also Edward Gordon, *The World Court and the Interpretation of Constitutive Treaties: Some Observations on the Development of an International Constitutional Law*, 59 AM. J. INT’L L. 794, 822–23, 828 (1965).

157. Brölmann, *supra* note 154.

158. See Bos, *supra* note 4, at 156–57, 163.

159. Daniel Rietiker, *The Principle of “Effectiveness” in the Recent Jurisprudence of the European Court of Human Rights: Its Different Dimensions and Its Consistency with Public International Law — No Need for the Concept of Treaty Sui Generis*, 79 NORDIC J. INT’L L. 245, 267 (2010).

Human rights treaties are often cited as a paradigmatic case of legislative treaties.¹⁶⁰ In the context of explicitly human rights treaties such as the European Convention on Human Rights (ECHR), scholars have argued that instead of focusing on drafters' intent or the text of the treaty, it is not only appropriate but necessary for the interpreter to adopt a "moral reading" of the treaty which gives full effect to its objective and purpose.¹⁶¹ Others have suggested that since human rights treaties primarily solemnize rights and protections owed by the State to individuals, the liberty interests of the individual that are the object and purpose of the treaty will necessitate an adjustment in the general rules of treaty interpretation.¹⁶²

Treaties are also considered in relation to a hierarchy of norms. For instance, scholars have argued that treaties such as the United Nations Charter are "constitutional" in character,¹⁶³ with the implication that, in the event of a conflict between Charter commitments and obligations under some other treaty, the former will prevail.¹⁶⁴

B. *The Fractured Interpretive Community of International Lawyers*

The second challenge to the uniform approach to treaty interpretation stems from a disenchantment with the ability of interpretive rules to truly guide decision-making. International lawyers, similar to domestic scholars, have recently begun to focus on the manner in which interpretation cannot be wholly determined by a fixed set of rules. However, textual indeterminacy may still be *constrained* by disciplining rules that are considered authoritative by the community within which these interpretive practices take place.¹⁶⁵

All interpretation, including legal interpretation, takes place within an institutional setting with background assumptions and beliefs.¹⁶⁶ The

160. See, e.g., Lea Brilmayer, *From 'Contract' to 'Pledge': The Structure of International Human Rights Agreements*, 77 BRIT. Y.B. INT'L L. 163, 169–170, n.43 (2006).

161. Letsas, *supra* note 17, at 538, 540.

162. Bernhardt, *supra* note 3, at 66, 70–71.

163. See, e.g., Bardo Fassbender, *The United Nations Charter as Constitution of the International Community*, 36 COLUM. J. TRANSNAT'L L. 529 (1998); Bruno Simma, *From Bilateralism to Community Interest in International Law*, 250 RECUEIL DES COURS 229, 321–23 (1994).

164. UN Charter art. 103; see also Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. U.K.), Request for the Indication of Provisional Measures, 1992 I.C.J. 3, ¶¶ 39–41 (Apr. 14); Christian Tomuschat, *The Lockerbie Case Before the International Court of Justice*, 48 REV. INT'L COMM'N JURISTS 38, 43–44 (1992).

165. The idea of disciplining rules and interpretive communities in legal interpretation was introduced by Owen Fiss. See Owen Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739, 744 (1982).

166. Kenneth S. Abraham, *Statutory Interpretation and Literary Theory: Some Common Concerns of an Unlikely Pair*, in INTERPRETING LAW AND LITERATURE: A HERMENEUTIC READER 115, 122 (Sanford Levinson & Stephen Mailloux eds., 1988).

interpretive community is thus also enterprise-specific.¹⁶⁷ Interpretive practices can only be rationalized within the context of the purpose of the enterprise in which it takes place.¹⁶⁸ If one transposes this understanding of the interpretive community to international law, since the purposes and contexts of different kinds of treaties are vastly different, the cultural context and set of institutional beliefs that guide the interpretive exercise will also differ.¹⁶⁹ For instance, a human rights treaty which is geared towards securing individual liberties and prescribing the limits of state power operates against a background of norms, values, and beliefs that differs from a bilateral trade agreement between states which aims to promote efficiency and mutual economic advantage.

The main actors who comprise the interpretive communities of these different categories of treaty regimes also vary. Judges are members of the legal “interpretive community” by virtue of their office and their commitment to adhere to the rule of law.¹⁷⁰ Especially in the context of treaties which provide an adjudicative mechanism, judges possess unique semantic authority due to their status as the ultimate arbiters of the meaning and application of the treaty and their ability to issue binding judgments.¹⁷¹ It is doubtful, though, whether international judges form a coherent interpretive community. By their very nature and composition, international tribunals are populated by judges hailing from different jurisdictions, speaking different languages, and having been trained in different legal systems. These divisions, by themselves, make the idea of an “invisible college” of international judges more amorphous. Scholars have nonetheless argued that international judges are a relatively homogenous group.¹⁷² In practice, they are often conversant in multiple languages, educated in multiple jurisdictions (and usually at the same elite educational institutions), follow overlapping and intersecting career paths, and share a common judicial outlook committed to the aims of international justice.¹⁷³

167. The concept was coined by Stanley Fish. See STANLEY FISH, *IS THERE A TEXT IN THIS CLASS? THE AUTHORITY OF INTERPRETIVE COMMUNITIES* (1980).

168. Ian Johnstone, *Treaty Interpretation: The Authority of Interpretive Communities*, 12 MICH. J. INT'L L. 371, 378 (1991).

169. Cf. *id.* at 380 (acknowledging that treaties differ in subject matter, the number of contracting States, and the context of their conclusion but stating that certain generalizations on the enterprise of treaty interpretation as a whole are nonetheless valid).

170. Fiss, *supra* note 165, at 746.

171. See Ingo Venzke, *The Role of International Courts as Interpreters and Developers of the Law: Working Out the Jurisgenerative Practice of Interpretation*, 34 LOY. L.A. INT'L & COMP. L. REV. 99, 122–23 (2012).

172. See, e.g., Susan D. Frank et al., *The Diversity Challenge: Exploring the “Invisible College” of International Arbitration*, 53 COLUM. J. TRANSNAT'L L. 429 (2015) (setting out empirical data on the relative homogeneity of arbitrators and counsel in international arbitration).

173. Daniel Terris et al., *Toward a Community of International Judges*, 30 LOY. L.A. INT'L & COMP. L. REV. 419, 420, 425, 433–36, 469 (2008).

The distinct composition, aims, and practices of international tribunals, however, complicate this picture of an emerging international community of judges. For instance, under the Dispute Settlement Understanding, the Appellate Body of the WTO must consist of seven members with “demonstrated expertise in law, international trade and the subject matter of the covered agreements generally.”¹⁷⁴ In contrast, under the Rome Statute, out of the eighteen judges who are appointed to the court, at least nine of the judges must be experts in criminal law and procedure and have relevant experience in criminal practice, and at least five of the judges must have expertise and professional experience in a relevant field of international law, such as human rights or international humanitarian law.¹⁷⁵ Given the very different aims of the WTO and the ICC, and the experience and expertise demanded of people tasked with interpreting their legal instruments, it is difficult to say that they will form part of the same interpretive community. The institutional assumptions, values, and purposes will inevitably diverge, and the disciplining rules that are recognized as authoritative will also be different. It is thus hardly surprising that the rules of treaty interpretation developed or emphasized by specialized courts have deviated considerably from the standard template of the VCLT and from each other.

C. *Treaty Interpretation by Specialized Courts and Institutions*

On its face, the framework for treaty interpretation put in place by the VCLT has served as a template for all international courts and adjudicative bodies. As Sorel and Boré Eveno note, “[T]here is a type of incantatory reference to this ‘sacred text.’”¹⁷⁶ Notwithstanding repeated affirmations of the VCLT as the default guide for interpretation, specialized international courts and adjudicative mechanisms have often deviated considerably from its interpretive rules.

The most prominent courts that have charted their own course on interpretation are undoubtedly the international human right tribunals, especially the European Court of Human Rights (ECtHR) and the Inter-American Court of Human Rights (IACtHR). Early on, the ECtHR

174. Understanding on Rules and Procedures Governing the Settlement of Disputes art. 17, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 [hereinafter DSU].

175. Rome Statute, *supra* note 91, art. 36; *see also* Patricia M. Wald, *The International Criminal Tribunal for the Former Yugoslavia Comes of Age: Some Observations on Day-to-Day Dilemmas of an International Court*, 5 WASH. U. J. L. & POL’Y 87, 94–95 (2001) (commenting on the background of the judges at the ICTY).

176. Jean-Marc Sorel & Valérie Boré Eveno, *Article 31, in 1 THE VIENNA CONVENTION ON THE LAW OF TREATIES: A COMMENTARY* para. 33 (Olivier Corten & Pierre Klein eds., 2011).

declared the European Convention on Human Rights (ECHR) a “constitutional instrument of European public order,” thus justifying the adoption of an expansive approach to interpretation.¹⁷⁷ Surveys of ECtHR case law reveal relatively few references to the VCLT, prompting scholars to argue that the VCLT has been fairly marginal in the development of the interpretive lens adopted by the court.¹⁷⁸ Indeed, the court invokes the VCLT¹⁷⁹ primarily when it seeks to situate the ECHR within the broader international law framework and refers to other treaties or sources of international law.¹⁸⁰ The court has, for the most part, eschewed the “qualified textuality” advocated by the VCLT and only rarely engaged in “ordinary meaning” linguistic forays into the meaning of treaty terms or a search for the intent of the Convention drafters.¹⁸¹ The court has instead focused on the teleological method of interpretation to give effect to the object and purpose of the treaty and thus adopted the interpretation that guarantees the effectiveness of the norm enshrined in the treaty, rather than one that would restrict the obligations of State parties.¹⁸² According to the court’s methodology of dynamic and evolutive interpretation, the Convention is a “living instrument, which . . . must be interpreted in the light of present-day conditions.”¹⁸³

It remains unclear, however, what exactly this approach entails. While some scholars suggest that the court takes into account common practices and legal standards in member States to the ECHR as an indicator of

177. *Loizidou v. Turkey*, App. No. 15318/89, 310 Eur. Ct. H.R. (ser. A), at 22, ¶ 75 (1995) (preliminary objections).

178. *See Letsas*, *supra* note 17, at 513 (noting that the VCLT “has been cited in no more than 60 out of the 10,000+ judgments which the ECHR has delivered”); *see also* Alexander Orakhelashvili, *Restrictive Interpretation of Human Rights in the Recent Jurisprudence of the European Court of Human Rights*, 14 EUR. J. INT’L L. 529 (2003) (arguing that the court picks and chooses between different methods of interpretation, at times ignoring its own previous holdings); *cf.* Francois Ost, *The Original Canons of Interpretation of the European Court of Human Rights*, in *THE EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS: INTERNATIONAL PROTECTION VERSUS NATIONAL RESTRICTIONS* 288 (Mireille Delmas-Marty ed., 1992) (stating that notwithstanding sparse citations to the VCLT rules, they have nonetheless proved to be a source of inspiration to the ECHR).

179. VCLT, *supra* note 2, art. 31(3) (“There shall be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) any relevant rules of international law applicable in the relations between the parties.”)

180. *Letsas*, *supra* note 17, at 521; *see, e.g.*, *Saadi v. United Kingdom*, 47 Eur. Ct. H.R. 17, ¶¶ 26–40 (2008); *Demir v. Turkey*, 2008 Eur. Ct. H.R. 1345, ¶¶ 69–86 (2008).

181. *Letsas*, *supra* note 17, at 520. For exceptional cases where the court has applied the VCLT rules, including reference to “ordinary meaning” and preparatory material, *see Banković v. Belgium*, 2001-XII Eur. Ct. H.R. 33, ¶¶ 55, 58, 59, 61–65 (2002); *Johnston v. Ireland*, App. No. 9697/82, 9 Eur. Ct. H.R. Rep. 203, ¶¶ 51–53 (1986).

182. *See, e.g.*, *Stoll v. Switzerland*, 2007-V Eur. Ct. H.R. 267, ¶ 128 (2007); *Artico v. Italy*, 37 Eur. Ct. H.R. (ser. A) at 1, ¶ 33 (1980); *Rietiker*, *supra* note 159, at 256 (describing the principle of effectiveness as a cornerstone for the protection of Convention Rights).

183. *Tyrer v. United Kingdom*, 26 Eur. Ct. H.R. (ser. A), ¶ 31 (1978).

present-day consensus in values,¹⁸⁴ others argue that the court bases its decisions on a “hypothetical consensus” among States, which reflects the moral value underlying the Convention right.¹⁸⁵ Still others point to the court’s attentiveness to legal developments within the respondent State.¹⁸⁶

The IACtHR’s jurisprudence on treaty interpretation reflects many of the same themes as the ECtHR. The IACtHR has affirmed the unique status of human rights instruments that embody and protect collective guarantees regardless of the element of reciprocity between State parties.¹⁸⁷ In keeping with this recognition, it has echoed the ECtHR to hold that the American Convention on Human Rights is a living instrument that should be interpreted so as to give full effect to its object and purpose and in light of evolving standards and living conditions.¹⁸⁸ Further, the court has held that the American Convention should be interpreted in a manner that is most protective of human rights. Thus, if different norms apply in a particular case, “the norm most favorable to the individual must prevail.”¹⁸⁹ Notwithstanding its rejection of the textualist and subjective approaches to interpretation, the IACtHR purports to adhere to the VCLT rules, in particular the VCLT’s endorsement of the teleological approach to treaty construction.¹⁹⁰

In contrast to the human rights mechanisms, adjudicative bodies such as the WTO’s Appellate Body (AB)¹⁹¹ appear to be more faithful to the VCLT’s interpretive principles,¹⁹² including a strong emphasis on

184. *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (ser. A) at 19, ¶ 60 (1981); *Marckx v. Belgium*, 31 Eur. Ct. H.R. (ser. A) at 330, ¶ 41 (1979); *Bernhardt*, *supra* note 3, at 69–70 (citing Tyrer, 26 Eur. Ct. H.R. (ser. A) at 1, ¶ 31); *see also* Christos L. Rozakis, *The European Judge as Comparatist*, 80 TUL. L. REV. 257, 261 (2005).

185. Letsas, *supra* note 17, at 531.

186. Alastair Mowbray, *The Creativity of the European Court of Human Rights*, 5 HUM. RTS. L. REV. 57, 65 (2005) (citing *Stafford v. United Kingdom*, 2002-IV Eur. Ct. H.R. 115, ¶¶ 68–80).

187. *See, e.g.*, “*Mapiripán Massacre*” v. Colombia, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 134, ¶ 104 (Sep. 15, 2005); *Baena Ricardo et al. v. Panama*, Competence, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 104, ¶ 96 (Nov. 28, 2003); *Hilaire v. Trinidad and Tobago*, Preliminary Objections, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 80 (Sept. 1, 2001).

188. *Mapiripán Massacre*, Inter-Am. Ct. H.R. (ser. C) No. 134, ¶¶ 105–06.

189. *See, e.g.*, *Ricardo Canese v. Paraguay*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 111, ¶ 181 (Aug. 31, 2004); *Herrera Ulloa v. Costa Rica*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 107, ¶ 184 (July 2, 2004).

190. *See Mapiripán Massacre*, Inter-Am. Ct. H.R. (ser. C) No. 134, ¶ 106. For a detailed analysis of this aspect of the IACtHR’s jurisprudence, *see* Lucas Lixinski, *Treaty Interpretation by the Inter-American Court of Human Rights: Expansionism at the Service of the Unity of International Law*, 21 EUR. J. INT’L L. 585, 588–89, 604 (2010).

191. The WTO’s Appellate Body and panels have been tasked with clarifying the meaning of WTO agreements “in accordance with customary rules of interpretation of public international law.” DSU, *supra* note 174, art. 3.2.

192. The Appellate Body has held that Articles 31 and 32 of the VCLT codify these customary international law rules. *See, e.g.*, Appellate Body Report, *Japan — Taxes on Alcoholic Beverages*, at 10, WTO Doc. WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (adopted Oct. 4, 1996);

textualism.¹⁹³ In their careful study of AB jurisprudence, Gregory Shaffer and Joel Trachtman note that the AB has referred to the VCLT in sixty-two of its initial ninety-six decisions and frequently relied on dictionary definitions to arrive at the “ordinary meaning” of treaty terms.¹⁹⁴ However, scholars have argued that while the plain meaning of the text based on a dictionary definition might form the starting point of the inquiry,¹⁹⁵ more often than not the AB immediately contextualizes this meaning by referring to the broader context of the treaty and the dispute, and to other interpretive elements endorsed by the VCLT, including the treaty’s object and purpose.¹⁹⁶

The AB utilizes several different techniques for this purpose. For instance, the AB cross-references both across different parts of the treaty, to ensure consistency and coherence, and also between terms in the same treaty and other WTO agreements, as interpreted in previous jurisprudence.¹⁹⁷ The AB has also recognized that while the WTO Agreement, much like any other treaty, can have multiple objects and purposes, the teleology of the treaty taken as a whole is important in confirming an interpretation of treaty provisions, although it is not an independent basis for interpretation.¹⁹⁸ Additionally, the AB has endorsed the principle of effectiveness in treaty interpretation such that the treaty or

Appellate Body Report, *United States — Standards for Reformulated and Conventional Gasoline*, at 16–17, WTO Doc. WT/DS2/AB/R (adopted Apr. 29, 1996).

193. Arato, *supra* note 155, at 316; Douglas Irwin & Joseph Weiler, *Measures Affecting the Cross-Border Supply of Gambling and Betting Services (DS 285)*, 7 *WORLD TRADE REV.* 71, 89 (2008).

194. Gregory Shaffer & Joel Trachtman, *Interpretation and Institutional Choice at the WTO*, 52 *V.A. J. INT’L L.* 103, 115 (2011).

195. *See, e.g.*, Appellate Body Report, *India — Additional and Extra-Additional Duties on Imports from the United States*, ¶ 167 n.324, WTO Doc. WT/DS360/AB/R (adopted Oct. 30, 2008); *European Communities — Customs Classification of Frozen Boneless Chicken Cuts*, ¶175, WTO Doc. WT/DS269/AB/R, WT/DS286/AB/R (adopted Sept. 12, 2005); Appellate Body Report, *United States — Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, ¶ 59, WTO Doc. WT/DS257/AB/R (adopted Jan. 19, 2004).

196. For a detailed analysis of this contextualization, see Van Damme, *supra* note 3, at 621–35; *cf.* Petros C. Mavroidis, *No Outsourcing of Law? WTO Law as Practiced by WTO Courts*, 102 *AM. J. INT’L L.* 421, 446–47 (2008) (arguing that the AB has compartmentalized the “dictionary based” and “contextual” parts of the analysis, in contradiction to the very mandate of the VCLT).

197. Van Damme, *supra* note 3, at 627–28 (citing Appellate Body Report, *United States — Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, ¶¶ 72–79, WTO Doc. WT/DS166/AB/R (adopted Dec. 22, 2000); Appellate Body Report, *United States — Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand*, ¶¶ 162–181, WTO Doc. WT/DS177/AB/R, WT/DS178/AB/R (adopted May 1, 2001); Appellate Body Report, *United States — Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, ¶¶ 209–11, WTO Doc. WT/DS202/AB/R (adopted Feb. 15, 2002)).

198. Van Damme, *supra* note 3, at 631 (citing Appellate Body Report, *Japan — Alcoholic Beverages II*, *supra* note 192, at 106 n.20; Appellate Body Report, *United States — Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 17, WTO Doc. WT/DS58/AB/R (adopted Oct. 12, 1998)).

any of its constituent parts are not rendered redundant.¹⁹⁹ Finally, the AB has sought to affirm the status of the WTO Agreements as part of the corpus of international law²⁰⁰ and has held that other relevant rules of international law applicable between the parties may be used to confirm the plain meaning of the treaty provisions in the context in which they are used.²⁰¹

The use of these different techniques has led some scholars to query whether the AB has a consistent interpretive methodology, notwithstanding its frequent invocation of the VCLT for guidance.²⁰² For instance, the AB has at times veered closer to an “evolutionary approach” to treaty interpretation,²⁰³ as evidenced in its decision in *US — Shrimp*, where it held that the term “exhaustible natural resources” in Article XX(g) of the General Agreement on Trade and Tariffs should be interpreted to include living organisms and not mere non-living material, as suggested by the GATT’s negotiating history.²⁰⁴

In between these two extremes, the jurisprudence of other international courts displays significant deviations from the VCLT template, although not quite as starkly as in the case of the international human rights tribunals. For instance, individual judges at the European Court of Justice (ECJ) have openly remarked on the court’s embrace of the teleological and dynamic approach to interpretation in order to give effect to the object and purpose of the European Communities (EC) Treaty to achieve greater integration of the Community legal order.²⁰⁵ The jurisprudence of the ICJ has been somewhat mixed. The ICJ has consistently recognized the customary international law status of the VCLT’s interpretive rules.²⁰⁶ At the same time, it has acknowledged that

199. Van Damme, *supra* note 3, at 635–36 (citing, *inter alia*, Appellate Body Report, *US — Gasoline*, *supra* note 192, at 21; Appellate Body Report, *EC — Chicken Cuts*, *supra* note 195, ¶ 214).

200. Appellate Body Report, *US — Gasoline*, *supra* note 192, at 17.

201. *See* Shaffer & Trachtman, *supra* note 194, at 129 (citing Panel Report, *European Communities — Measures Affecting the Approval and Marketing of Biotech Products*, ¶ 7.92, WTO Doc. WT/DS291/R, (adopted Nov. 21, 2006)); *cf.* Richard H. Steinberg, *Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints*, 98 AM. J. INT’L L. 247, 262 (2004) (arguing that the AB has at times overstepped its mark in incorporating non-WTO public international law rules).

202. Jan Klabbbers, *On Rationalism in Politics: Interpretation of Treaties and the World Trade Organization*, 74 NORDIC J. INT’L L. 405, 414–16 (2005) (arguing that, in practice, the AB often distorts or misapplies the VCLT’s interpretive principles).

203. Mavroidis, *supra* note 196, at 445; Pauwelyn & Elsig, *supra* note 28, at 453.

204. Appellate Body Report, *US — Shrimp*, *supra* note 198, at ¶ 130.

205. *See* Nial Fennelly, *Legal Interpretation at the European Court of Justice*, 20 FORDHAM INT’L L.J. 656, 667 (1997); *see also* Pauwelyn & Elsig, *supra* note 28, at 452 (stating that the ECJ adopts a teleological approach as its dominant hermeneutic); Aust et al., *supra* note 18, at 102.

206. *See, e.g.*, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. Rep. 136, ¶ 94 (July 9); Sovereignty over Pulau Litigan and Pulau Sipadan (Indon. v. Malay.), 2002 I.C.J. 625, ¶ 37 (Dec. 17); Oil Platforms (Iran v. U.S.),

special interpretive principles may apply to particular types of treaties, such as treaties constituting international organizations. Thus, the ICJ has held that

[s]uch 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.²⁰⁷

Indeed, scholars argue that the ICJ has, in practice, adopted a “constitutional” approach to interpreting the constitutive treaties.²⁰⁸ In the context of treaties such as the United Nations Charter, the court has adopted a functional method of interpretation, which gives less importance to the will of the parties and instead looks to the purpose of the organization so as to render treaty provisions effective.²⁰⁹ In doing so, the court has at times relied on the subsequent practice of the parties to the treaty rather than the plain meaning of the term.²¹⁰

IV. APPLYING THE DIVERGENT APPROACH TO INTERNATIONAL CRIMINAL LAW TREATIES

The above analysis shows that the ostensible longevity and authority of the VCLT’s framework for interpretation has been under siege from various quarters. Far from being treaty-blind, principles of construction at specialized tribunals are increasingly treaty- and regime-specific. This Part pushes the claim for divergent interpretation even further and argues that, even within the context of a single treaty, a multiplicity of interpretive

Preliminary Objection, 1996 I.C.J. 803, ¶ 23 (Dec. 12). The ICJ has, however, been accused of merely paying lip service to the canons in practice. *See Klabbers, supra* note 202, at 426.

207. Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, 1996 I.C.J. 66, ¶ 19 (July 8) [hereinafter Nuclear Weapons Advisory Opinion].

208. Gordon, *supra* note 156, at 833; *see also* Catherine Brölmann, *Specialized Rules of Treaty Interpretation: International Organizations*, in THE OXFORD GUIDE TO TREATIES 507, 512 (Duncan B. Hollis ed., 2012) (arguing that in interpreting constitutive treaties of international organizations, courts tend to favor a teleological approach to the text which is similar to a national statutory/constitutional method and attach greater significance to the practice of the organization).

209. *See, e.g.*, Reparations for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 1949 I.C.J. 174, 182–83 (Apr. 11); *see* Kunig, *supra* note 4, at 273–74.

210. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 16, 22 (June 21); Kunig, *supra* note 4, at 274–75 (citing Case Concerning Kasikili/Sedudu Island (Botswana v. Namibia), 1999 I.C.J. 1045, ¶¶ 49–50 (Dec. 13)).

methods is warranted. The justification for this heterogeneous approach stems from the hybrid character of modern treaties, of which the Rome Statute is a prime example. It argues that the central, and arguably most prominent, part of the Rome Statute resembles a criminal code. Principles of statutory interpretation, especially those applicable to the construction of penal statutes, are therefore more appropriate tools for interpreting the penal provisions of the Rome Statute than traditional treaty canons. Other parts of the Statute are of a different character and may be subject to different interpretive rules. This Part also demonstrates the practical consequences of applying this divergent interpretive approach to different parts of the treaty.

A. Disaggregating the Rome Statute of the ICC

Since the Rome Statute of the ICC is primarily concerned with adjudicating the criminal responsibility of individuals charged with the commission of international crimes, it is not altogether surprising that the most significant parts of the treaty resemble a criminal code rather than a conventional treaty. This includes Articles 6, 7, 8, and 8bis (defining genocide, crimes against humanity, war crimes, and aggression); modes of liability, defenses, and other general principles of criminal law (Part III); and fair trial rights, sentencing, and other procedural guarantees related to the conduct of investigative and trial proceedings (located in various provisions in Parts V, VI, VII, and VIII).²¹¹ These provisions primarily establish jural relationships between the ICC as an institution and persons who are alleged to have committed crimes within the jurisdiction of the Rome Statute.

In contrast, others parts of the treaty do not partake of the character of a typical penal statute or code and have little to do with the relationship between the ICC and individual defendants. Instead, they are focused on the structure, composition, and functioning of the ICC as an international court. For instance, a considerable section of the Rome Statute concerns “institutional features” such as the legal status and powers of the court (Part I), its composition and administration (Part IV), and provisions for financing (Part XII). Indeed, the Rome Statute itself acknowledges that certain provisions in the Statute are of an “exclusively institutional nature” and may thus be subject to special procedures for amendment.²¹²

211. *Cf.* GROVER, *supra* note 4, at 1–3 (identifying a similar set of provisions that are relevant to criminal proceedings, but restricting her interpretational scope to the definitions of crimes under the Rome Statute).

212. Rome Statute, *supra* note 91, art. 122.

The Rome Statute also consists of provisions that are essentially contractual in character. These parts of the treaty define the mutual rights and obligations of states with respect to international cooperation and assistance to the court (Part IX) and the responsibilities of states relating to the enforcement of sentences (Part X). Several of these resemble conventional extradition treaties and other treaties concerning mutual cooperation and assistance between States on various matters. They regulate relationships between States on the one hand, and States and the ICC on the other, rather than those between the ICC and individual defendants or victims.

Finally, certain provisions of the Rome Statute show a distinct influence of human rights law and related considerations, such as transitional justice, peace, and security. For instance, the Preamble of the Rome Statute recognizes that the “grave crimes [within the jurisdiction of the court] threaten the peace, security and well-being of the world.”²¹³ Additionally, Article 21, which addresses the sources of law applicable before the ICC, specifically provides that this application must be “consistent with internationally recognized human rights” and without discrimination based on certain defined grounds.²¹⁴ Similar concerns are also reflected in provisions dealing with investigative proceedings and the role of victims in the trial. The prosecutor might choose to not proceed with an investigation or prosecution if, having taken into consideration the gravity of the crime and victims’ interests, she nonetheless concludes that it will not “serve the interests of justice.”²¹⁵ The Statute also contemplates substantial victim participation at several stages of the trial;²¹⁶ specifies a regime for reparations to victims, including compensation, restitution, and rehabilitation;²¹⁷ and establishes a Trust Fund for the benefit of victims and their families.²¹⁸

Given the varied character and purpose of these different kinds of legal relationships that are embedded in and ordered by different sections of the Rome Statute, it is difficult to see the justification for subjecting them to the same principles of interpretation. Indeed, several scholars explicitly recognize that, at the very least, the provisions of the Rome Statute constituting a “criminal code” may warrant a distinct interpretive methodology.²¹⁹ This acknowledgement makes it all the more astonishing that methods of statutory interpretation, in particular those related to penal

213. *Id.* pmb1.

214. *Id.* art. 21(3).

215. *Id.* arts. 53(1)(c), 53(2)(c).

216. *Id.* art. 68.

217. *Id.* art. 75.

218. *Id.* art. 79.

219. GROVER, *supra* note 4, at 2–3; Sadat & Jolly, *supra* note 4, at 758.

statutes, have not featured greatly in discussions on the appropriate interpretive methodology for the criminal code contained within the Rome Statute.

B. A Statutory Approach to the Penal Provisions of the Rome Statute

Statutes, much like their treaty counterparts, cannot lay claim to a universally accepted single method of interpretation. There are a few comparative studies that aim to capture similarities and differences in methods of statutory construction across jurisdictions.²²⁰ At a more general level of abstraction, certain commonalities in trends and methods can be discerned: the predominance of the linguistic or ordinary (or in some cases, technical) meaning of the words of the statute, the relevance of considering the terms within their context, and the importance of precedent.²²¹ However, there are also notable differences. To cite just one example, courts in the United Kingdom and the United States follow the common law tradition, whereby if the statute is not applicable by its terms, then that opens the possibility of prior law continuing to control or common law decision-making stepping into its place. Conversely, when faced with a similar situation, civil law courts will apply the rule or principle gleaned from the statute by analogy to the problem.²²²

A survey of the varied approaches to statutory construction in the legal systems of the world would be beyond the scope of this paper. There are, nonetheless, three main strands of construction that emerge, although the details of each school will differ: textual/grammatical/literal, subjective or intent-based, and teleological.²²³ These schools can be subdivided further

220. See, e.g., INTERPRETING STATUTES: A COMPARATIVE STUDY (D. Neil MacCormick & Robert S. Summers eds., 1991) (looking at Argentina, Germany, Finland, France, Italy, Poland, Sweden, the United Kingdom, and the United States); Hans W. Baade, *The Casus Omissus: A Pre-History of Statutory Analogy*, 20 SYRACUSE J. INTL L. & COM. 45 (1994) (comparing civil law and common law methods on statutory interpretation); Seán Patrick Donlan & Rónán Kennedy, *A Flood of Light: Comments on the Interpretation Act 2005*, 6 JUD. STUD. INST. J. 92 (2006) (comparing the United States, the United Kingdom, the continental approach, and Ireland).

221. Daniel A. Farber, *The Hermeneutic Tourist: Statutory Interpretation in Comparative Perspective*, 81 CORNELL L. REV. 513, 516–17 (1995).

222. Baade, *supra* note 220, at 46; Farber, *supra* note 221, at 519–20 (contrasting the German holistic approach to interpretation based on the values on the legal system to that of the United States).

223. See, e.g., William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 326–30 (1989); Bruce W. Frier, *Interpreting Codes*, 89 MICH. L. REV. 2201, 2209 (1991) (on traditional European theories of interpretation); see also Nicholas S. Zeppos, *The Use of Authority in Statutory Interpretation: An Empirical Analysis*, 70 TEX. L. REV. 1073 (1992) (conducting an empirical survey of the prevalence of the different schools in the jurisprudence of the US Supreme Court).

into categories such as strict textualism versus new textualism,²²⁴ subjective based on the historical intent of the enacting legislature versus the hypothetical intent of the rational legislature,²²⁵ and teleological, which considers the purpose of the statute in light of the problem it was enacted to address, versus an evolutionary interpretation in light of changing goals and circumstances.²²⁶

Notwithstanding the range of methodologies proposed for statutory interpretation, the interpretation of penal statutes in particular is widely deemed to be subject to a constraint that does not apply with the same strength to other enactments: *nullum crimen sine lege*, or the principle of legality. The principle of legality has various aspects, which apply to a greater or lesser degree depending on the legal system: the prohibition against ex post facto criminal law, the rule favoring strict construction of penal statutes, the prohibition or limitation of analogy as a tool for judicial construction, and the requirement of specificity and clarity in penal legislation.²²⁷ The principle is generally considered to perform three main functions: preventing arbitrary exercise of the government's punitive power, upholding popular sovereignty by preserving the legislature's prerogative to define punishable conduct and determine sanctions, and providing the accused with fair notice of the range of permissible conduct.²²⁸ The exact contours of the principle of legality remain disputed. For instance, in the international law context, the element of *lex scripta* or written/codified law has been treated as incidental rather than central to the principle; indeed, it has never been properly recognized as fundamental to the common law version of *nullum crimen sine lege* in any case.²²⁹

224. See generally KENT GREENAWALT, STATUTORY AND COMMON LAW INTERPRETATION 52 (2013); John F. Manning, *Second-Generation Textualism*, 98 CALIF. L. REV. 1287, 1291 (2010) (comparing the two schools).

225. Eskridge & Frickey, *supra* note 223, at 326–30 (outlining the different versions of intentionalism); see also AHARON BARAK, PURPOSIVE INTERPRETATION IN LAW 351 (2005) (on the various levels of abstraction at which the objective purpose can exist).

226. See, e.g., Eskridge & Frickey, *supra* note 223, at 332–333 (on purposivism); Farber, *supra* note 223, at 519–20 (describing the evolutionary interpretation of statutes by German courts).

227. Roelof Haveman, *The Principle of Legality*, in SUPRANATIONAL CRIMINAL LAW: A SYSTEM SUI GENERIS 39, 40 (Roelof Haveman et al. eds., 2003); Aly Mokhtar, *Nullum Crimen, Nulla Poena Sine Lege: Aspects and Prospects*, 26 STATUTE L. REV. 41, 51 (2005); see also M. Cherif Bassiouni, INTRODUCTION TO INTERNATIONAL CRIMINAL LAW 182–95 (2003); Jerome Hall, *Nulla Poena Sine Lege*, 47 YALE L.J. 165 (1937).

228. John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 201 (1985); see also David Luban, *Fairness to Rightness: Jurisdiction, Legality, and the Legitimacy of International Criminal Law*, in THE PHILOSOPHY OF INTERNATIONAL LAW 569, 581 (Samantha Besson & John Tasioulas eds., 2010); Beth Van Schaack, *Crimen Sine Lege: Judicial Lawmaking at the Intersection of Law and Morals*, 97 GEO. L.J. 119, 121 (2008).

229. Haveman, *supra* note 227, at 41, 53; see also Darryl Robinson, *A Cosmopolitan Liberal Account of International Criminal Law*, 26 LEIDEN J. INT'L L. 127, 148–49 (2013) (describing *lex scripta* as a contextually contingent technique rather than an elementary requirement of legality).

International instruments such as the International Covenant on Civil and Political Rights (ICCPR)²³⁰ and the ECHR²³¹ provide for recognition of non-written international law sources such as the “general principles of law” as valid bases for the imposition of criminal sanctions.²³² Similarly, there is support for a more flexible canon of interpretation,²³³ whereby progressive development of the elements of an offense meets the requirements of legality as long as the alleged acts are within the “very essence” of the original crime²³⁴ and is foreseeable.²³⁵

If one takes the elements of notice to the accused and the prevention of arbitrary exercise of coercive power seriously, adhering to the text of the statute appears to most closely effectuate the requirements of legality: the defendant cannot claim ignorance of the offense specified by the terms of the statute or accuse the organs of government of having failed to provide adequate guidance for his conduct.²³⁶ At the same time, given that the text itself is the best and most reliable indicator of what the legislature had in mind while criminalizing conduct, adopting a textual approach would also preserve legislative supremacy.²³⁷ After all, “a statute *is* law and not just an indicator of where we might find the law.”²³⁸ However, as critics point out, although the text may yield an answer in the majority of situations, it is precisely the cases in which the words of a provision are unclear that pose the greatest challenges.²³⁹ This observation, while accurate, tends to adopt an overly restrictive view of what the textual

230. International Covenant on Civil and Political Rights art. 15, Dec. 19, 1966, 999 U.N.T.S. 171.

231. Convention for the Protection of Human Rights and Fundamental Freedoms art. 7, Nov. 4, 1950, 213 U.N.T.S. 221, 228–30.

232. See Susan Lamb, *Nullum Crimen, Nulla Poena Sine Lege in International Criminal Law*, in 1 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 733, 749–50 (Antonio Cassese et al. eds., 2002) (discussing the compatibility of customary international law as a source of international criminal law with the principle of legality).

233. The application of the canon of strict interpretation seems to be far from uniform even in domestic jurisdictions. Jeffries, *supra* note 228, at 198–99; Peter K. Westen, *Two Rules of Legality in Criminal Law*, 26 LAW & PHIL. 229, 249 (2007).

234. Mohamed Shahabuddeen, *Does the Principle of Legality Stand in the Way of Progressive Development of Law?*, 2 J. INT’L CRIM. JUST. 1007, 1013, 1017 (2004).

235. Van Schaack, *supra* note 228, at 173, 178–82 (discussing the jurisprudence of the European Court of Human Rights).

236. See Caleb Nelson, *What is Textualism?*, 91 VA. L. REV. 347, 352 (2005) (on the textualist arguments on fair notice); see also Frank H. Easterbrook, *Abstraction and Authority*, 59 U. CHI. L. REV. 349, 362–63 (1992).

237. Manning, *supra* note 224, at 1290–1291; see also Eskridge & Frickey, *supra* note 223, at 340–41 (discussing arguments in favor of textualism).

238. FREDERICK SCHAUER, THINKING LIKE A LAWYER: A NEW INTRODUCTION TO LEGAL REASONING 158 (2009); see also Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 416 (1989).

239. SCHAUER, *supra* note 238, at 156–59; see also Sadat & Jolly, *supra* note 4, at 765 (making a similar argument in the context of international criminal law).

approach to interpretation entails.²⁴⁰ A sophisticated textual approach to the construction of the Rome Statute's penal provisions will not always yield a single answer in every possible case that comes before the court, but it provides the most promising route to interpretation while respecting the principle of legality.

C. Textual Construction of the "Criminal Code" of the Rome Statute

Some of the resistance to the textual approach stems from a mistakenly narrow view as to its tenets and application. On the one extreme are detractors who consider it unrealistically formal and mechanistic, akin to making "a fortress out of the dictionary,"²⁴¹ to decipher the meaning of the words in a statutory provision.²⁴² While dictionaries have certainly formed one of the points of reference for textualists,²⁴³ contemporary textualists are equally sensitive to the context of the terms of the statute.²⁴⁴ They differ, however, from subjectivists and those supporting evolutionary interpretation in that, for them, this context is primarily *semantic* rather than policy-based.²⁴⁵ Thus, modern textualists also stress the importance of elements such as syntax, grammar, and other linguistic conventions that assist in construing the meaning that statutory terms have in their context for "a skilled, objectively-reasonable user of words."²⁴⁶ Textualists also draw heavily on canons of construction, especially "textual" or "linguistic" canons that reflect the way in which they are used in communication and language more generally.²⁴⁷ These include canons such as *expressio unius est exclusio alterius* (the expression of one thing is the exclusion of the other). In addition, some, although not

240. See *infra* Section VI.C.

241. *Cabell v. Markham*, 148 F.2d 737, 739 (2d Cir. 1945).

242. See, e.g., Eskridge & Frickey, *supra* note 223, at 340, 342–43 (characterizing strict textualism as relying solely on the statutory text to derive meaning and criticizing it for its failure to consider context).

243. Note, *Looking it Up: Dictionaries and Statutory Interpretation*, 107 HARV. L. REV. 1437 (1994); Ellen P. Aprill, *The Law of the Word: Dictionary Shopping in the Supreme Court*, 30 ARIZ. ST. L.J. 275 (1998); James J. Brudney & Lawrence Baum, *Oasis or Mirage: The Supreme Court's Thirst for Dictionaries in the Rehnquist and Roberts Eras*, 55 WM. & MARY L. REV. 483 (2013); John Calhoun, *Measuring the Fortress: Explaining Trends in Supreme Court and Circuit Court Dictionary Use*, 124 YALE L.J. 484 (2014).

244. John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2388, 2392–93 (2003); Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 35 (2006).

245. John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 91 (2006).

246. Manning, *supra* note 245, at 75 (citing Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59, 65 (1988)); Nelson, *supra* note 236, at 376.

247. Manning, *supra* note 245, at 81–82; Molot, *supra* note 244, at 44; Nelson, *supra* note 236, at 383–84; see also David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. REV. 921, 934 (1992); Adrian Vermeule, *Interpretive Choice*, 75 N.Y.U. L. REV. 74, 85 (2000) (on the distinction between textual and substantive canons of construction).

all, textualists recognize the need for “substantive” canons that implement value-based or institutional choices. Canons such as the presumption against non-retroactivity of statutes and the rule of lenity fall within this category.²⁴⁸

Textualists and subjectivists both consider the legislature’s intent to be an important factor in interpreting a statutory provision. For textualists, however, in cases of ambiguity, the overall purpose of the statute may be gathered from a number of sources, including the “overall tenor or structure of the statute, its title, or public knowledge of the problems that inspired its enactment.”²⁴⁹ The attempt to unearth an underlying consensual legislative intent on the policy goals meant to be effectuated by the terms of the statute might in fact defeat the compromise and delicate balance between various, often conflicting, agendas that was struck by the legislature, as reflected in the words of the statute.²⁵⁰ Different schools of textualism thus differ on the extent to which they are willing to consider legislative history as evidence: while one strand eschews its use altogether, some contemporary textualists are willing to use particularly high quality and reliable legislative history in order to “gild the lily.”²⁵¹

Adopting the textual approach for the penal provisions of the Rome Statute will result in the following interpretive steps: The judges of the ICC will begin with a strong emphasis on the text. Thus, the ordinary or technical meaning of the term will carry tremendous weight. For this purpose, resort to dictionaries, including legal dictionaries, may prove useful, but they will not always be the most helpful resource given that the Rome Statute is authoritative in six languages.²⁵² There will also be cases of conflicting dictionary definitions, even for the same language.²⁵³ It will therefore be important to place the terms within their semantic context. For this purpose, linguistic conventions related to structure, syntax, and grammar will be useful. These would include techniques that can be seen in some decisions of the ad hoc tribunals, such as considering the statute

248. Manning, *supra* note 245, at 82; Nelson, *supra* note 236, at 384, 394.

249. Manning, *supra* note 245, at 84–85.

250. Manning, *supra* note 224, at 1290, 1304; Nelson, *supra* note 236, at 371; *see also* Molot, *supra* note 244, at 27–28 (on the textualist claim that statutes often do not have a single underlying purpose).

251. Manning, *supra* note 245, at 84–85; *see generally* Justice Elena Kagan, The Scalia Lecture: A Dialogue with Justice Elena Kagan on the Reading of Statutes, Harvard Law School (Nov. 18, 2015), available at <https://www.youtube.com/watch?v=dpEtszFT0Tg> (contrasting the textual approaches adopted by Justice Kagan and Justice Scalia).

252. Rome Statute, *supra* note 91, art. 50(1) (“The official languages of the Court shall be Arabic, Chinese, English, French, Russian and Spanish.”).

253. *See* Sadat & Jolly, *supra* note 4, at 765.

as a whole,²⁵⁴ cross-referencing terms and concepts in other parts of the statute,²⁵⁵ and paying special attention to neighboring provisions.²⁵⁶ Judges may also rely on the “Elements of Crimes”²⁵⁷ for the interpretation and application of the provisions relating to the definitions of genocide, crimes against humanity, war crimes, and aggression.²⁵⁸ These Elements of Crimes specify the conduct and mental elements for each of the crimes within the jurisdiction of the court and are widely considered a subsidiary source of law, which is of a non-binding character but a persuasive source for the judges to clarify the crime definitions.²⁵⁹

The judges will also be able to apply both linguistic and substantive canons of construction to construe terms that are ambiguous on the surface. The former will include canons that are recognized in ordinary language and communication, such as the *inclusio* or *expressio unius* canon, which holds that the inclusion or expression of one thing implies the exclusion of all others,²⁶⁰ and the *noscitur a sociis* canon, which holds that the meaning of one word may be gleaned from associated words or phrases.²⁶¹ An example of the latter usage is Judge Hans-Peter Kaul’s dissenting opinion in the *Kenya Article 15* case, where he juxtaposed the words “State” and “organization” in the Rome Statute’s definition of the elements of crimes against humanity to hold that, given the ordering of the terms in Article 7(2)(a), only organizations that possessed some characteristics of statehood would fall within its scope.²⁶²

The most important substantive canon of construction that should occupy a prominent role at the very outset of the process for interpreting the penal provisions of the Rome Statute is the rule of lenity. The Rome

254. *See, e.g.*, Prosecutor v. Tadić, Case No. IT-94-1-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶¶ 68, 90 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

255. *See, e.g.*, Blagojević v. Prosecutor, Case No. ICTY-02-60-A, Judgement, ¶ 28 (May 7, 2007); Prosecutor v. Orić, Case No. ICTY-03-68-T, Judgement, ¶ 302 (June 30, 2006).

256. *See, e.g.*, Prosecutor v. Barayagwiza, Case No. ICTR-97-19-AR72, Decision, ¶¶ 46–48 (Int’l Crim. Trib. for Rwanda Mar. 31, 2000).

257. Elements of Crimes of the International Criminal Court, ICC-ASP/1/3 at 108, U.N. Doc. PCNICC/2000/1/Add.2 (2000), available at http://legal.un.org/icc/asp/1stsession/report/english/part_ii_b_e.pdf.

258. Rome Statute, *supra* note 91, art. 9(1).

259. GROVER, *supra* note 4, at 287; Kai Ambos, *Some Preliminary Reflections on the Mens Rea Requirements of the Crimes in the ICC Statute and the Elements of Crimes*, in MAN’S INHUMANITY TO MAN: ESSAYS ON INTERNATIONAL LAW IN HONOUR OF ANTONIO CASSESE 11, 12 (J.C. Vohrah et al. eds., 2003); Herman von Hebel, *The Decision to Include Elements of Crimes in the Rome Statute*, in THE INTERNATIONAL CRIMINAL COURT: ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE 3, 8 (Roy S. Lee et al. eds., 2001).

260. ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 107 (2012).

261. *Id.* at 195–98.

262. Situation in the Republic of Kenya, Case No. ICC-01/09, Dissenting Opinion of Judge Kaul, ¶ 51 (Mar. 31, 2010), available at <http://www.icc-cpi.int/iccdocs/doc/doc854562.pdf>.

Statute itself recognizes its centrality by mandating strict construction of definitions of crimes and the prohibition on extension by analogy, as well as requiring that the crime definition be interpreted in favor of the defendant in case of any ambiguity.²⁶³ The consequences of prioritizing the rule of lenity can be demonstrated by scrutinizing the jurisprudence of the international criminal tribunals to see if the outcome in these judgments would be any different if the rule of lenity were applied in this fashion. At least a few instances of a potentially different decision can be seen.

For instance, in *Akayesu*,²⁶⁴ one of the questions before the ICTR Trial Chamber was whether the crime of genocide should be limited specifically to acts committed against one of the four expressly mentioned protected groups. Article 2 of the Statute of the ICTR states: “Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.”²⁶⁵ The Trial Chamber, rather than conducting a textual analysis of Article 2, immediately referred to the travaux préparatoires of another treaty — the Genocide Convention — to hold that the drafters of the latter treaty clearly intended the prohibition to cover any group that was stable and permanent in character.²⁶⁶ Support for this interpretation was rendered by a single footnote citing the debates of the Sixth Committee of the General Assembly, which drafted the Genocide Convention.²⁶⁷ However, as scholars have noted, the travaux préparatoires of the Genocide Convention are notoriously malleable, and quotations from the lengthy debates have often been taken out of context to support all kinds of positions.²⁶⁸ Indeed, the expansive view of the scope of the protected groups adopted in *Akayesu* seems to have commanded only limited support during the negotiations.²⁶⁹

On a textualist analysis, the judges would instead have looked at the words of the ICTR Statute, which are expressly limited to four protected groups. Nothing in the grammar or syntax of Article 2, or the structure of the Statute and surrounding provisions, suggests a broader reading of the provision. For instance, unlike the definition of crimes against humanity, which provides for a catch-all category of “other inhumane acts, there is no language pertaining to a residual category of groups or conduct

263. Rome Statute, *supra* note 91, art. 22(2).

264. Prosecutor v. Akayesu, Case No. ICTR-96-4, Judgement, ¶ 516 (Int’l Crim. Trib. for Rwanda Sept. 2, 1998).

265. ICTR Statute, *supra* note 34, art. 2.

266. *Akayesu*, Case No. ICTR-96-4, Judgement, ¶¶ 511, 516.

267. *Id.* ¶ 512 n.96.

268. Schabas, *supra* note 22, at 868.

269. *Id.* at 868–69; WILLIAM A. SCHABAS, GENOCIDE IN INTERNATIONAL LAW: THE CRIMES OF CRIMES 130–33 (2000).

elements.”²⁷⁰ Linguistic (*expressio unius*) and substantive (the rule of lenity) canons of construction would also point to limiting genocide under the ICTR statute to the specified groups: the crime definition should be construed strictly, not extended by analogy, and if an ambiguity is perceived in the words, the interpretation more favorable to the defendant should be adopted. Moreover, given the considerable textual authority in favor of a limited interpretation and the variable quality of the drafting history of an altogether different treaty in the shape of the Genocide Convention, the latter is unlikely to constitute the sort of high-quality drafting history that contemporary textualists are comfortable using as additional evidence.

Similarly, in *Musema*, when faced with a discrepancy between the equally authoritative French and English versions of ICTR Statute’s requirement for crimes against humanity, the ICTR Trial Chamber adopted the English formulation of “widespread *or* systematic” rather than the more restrictive French version of a “widespread *and* systematic” attack on the ground that the former interpretation conformed to customary international law.²⁷¹ However, if a textual approach is adopted, the analysis would look different. Given the genuine ambiguity in the wording of the Statute, it would be appropriate for the ICTR to inquire if there is anything in other parts of the ICTR Statute, including the Preamble and other crime definitions, that gives any inkling as to the correct interpretation. The ICTR may also examine whether there is high quality and reliable drafting history available on this element of the crime, including the intent of the Security Council in constituting the ICTR as evidenced in the Report of the Secretary-General, Security Council debates during the adoption of the Resolution establishing the tribunal, and previous Security Council Resolutions dealing with the situation in Rwanda. In the event that the ambiguity continues to persist, there is a strong argument for adopting the French definition of the elements of crimes against humanity on the basis of the rule of lenity.

Adopting a textual approach will also greatly curb the inference of broad and vague purposive justifications that have featured in some of the jurisprudence of the international criminal courts, such as the general “protection of the weak and vulnerable in . . . a situation where their lives and security are endangered” and facilitating “the development and effectiveness of international humanitarian law,”²⁷² or giving effect to the

270. ICTR Statute, *supra* note 34, art. 3(i).

271. Prosecutor v. Musema, Case No. ICTR-96-13-A, Judgement and Sentence, ¶ 202–03 (Int’l Crim. Trib. for Rwanda Jan. 27, 2000).

272. Prosecutor v. Erdemović, Case No. IT-96-22-A, Joint Separate Opinion of Judge McDonald and Judge Vohrah, ¶ 75 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 7, 1997).

principle of human dignity in international criminal law and international humanitarian law.²⁷³ Instead, as textualists acknowledge, a more modest effort to glean the overall purpose of the Rome Statute from its general tenor, the Preamble — the backdrop for and general knowledge of the reasons for its enactment — would be entirely appropriate. Some of the aids relied on by Judge Hans-Peter Kaul's dissenting opinion in the *Kenya Article 15* decision would fall within such an exercise. This includes his reference to the objective of the Statute to ensure accountability for the most serious crimes of concern to the international community as outlined in its Preamble in order to establish a gravity threshold for the jurisdiction of the court.²⁷⁴ It also encompasses his survey of the historical background of the concept of crimes against humanity, which were primarily geared towards mass criminality that involved State participation.²⁷⁵

D. A Divergent Approach to the Non-Penal Provisions of the Rome Statute

While a statutory, textual interpretive methodology may be the best fit for the criminal code of the Rome Statute, this will not necessarily hold true for other parts. As noted above, the Rome Statute also includes contractual, institutional, and human rights- and transitional justice-oriented sections, which do not pose similarly acute challenges from the point of view of the principle of legality, although they may still have an impact on the status of the accused.

For example, the human rights- and transitional justice-oriented provisions of the Rome Statute resemble treaty instruments such as the ECHR and the ACHR in some respects, embodying a commitment to fundamental interests of the international community that involve collective State interests.²⁷⁶ The Rome Statute, in its Preamble, in addition to affirming the central goal of the punishment and prevention of serious crimes, also emphasizes other important values: “the peace, security and well-being of the world” and respect for “international justice.”²⁷⁷ These concerns are reflected in “creatively ambiguous” provisions²⁷⁸ such as Articles 53(1)(c), which gives the prosecutor the discretion to not pursue an investigation if, despite meeting the Rome Statute's criteria for

273. Prosecutor v. Furundžija, Case No. IT-95-17/1-T, Judgement, ¶ 183 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10 1998).

274. Situation in the Republic of Kenya, Case No. ICC-01/09, Dissenting Opinion of Judge Kaul, ¶ 54 (Mar. 31, 2010), available at <http://www.icc-cpi.int/iccdocs/doc/doc854562.pdf>.

275. *Id.* ¶ 59.

276. See Bos, *supra* note 4, at 156–57, 163 (on the character of these legislative treaties, especially human rights treaties).

277. Rome Statute, *supra* note 91, pmbl.

278. Michael P. Scharf, *The Amnesty Exception to the Jurisdiction of the International Criminal Court*, 32 CORNELL INT'L L.J. 507, 521–22 (1999).

admissibility and a reasonable basis to believe that a crime has been committed, “[t]aking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.”²⁷⁹ The phrase “interests of justice” is amenable to several interpretations and occurs in various other places in the Rome Statute and its Rules of Procedure and Evidence.²⁸⁰ However, the latter pertain primarily to the rights of victims and the accused at different stages of the trial proceedings.²⁸¹ There is also no high-quality and reliable preparatory history; there is a terse reference in the report of the Working Group on Procedural Matters that “[s]ome delegates expressed concern regarding the reference to the interests of justice.”²⁸² Neither does it clarify matters to refer to the explanation accompanying the initial proposal of the phrase by the United Kingdom, which intended the formulation to confer wide discretion on the prosecutor akin to that found in domestic jurisdictions, including the determination that a prosecution would be counterproductive.²⁸³ In its Policy Paper on the Interests of Justice, the ICC’s Office of the Prosecutor interpreted the phrase in light of the objects and purposes of the Rome Statute to declare that, while “interests of justice” was “broader than criminal justice in the narrow sense,” the phrase also did not encompass every issue related to peace and security.²⁸⁴

The Office of the Prosecutor has already been embroiled in several discussions on the scope and application of the “interests of justice” in exercising prosecutorial discretion.²⁸⁵ In the event that this discretion is

279. Rome Statute, *supra* note 92, art. 53(1)(c).

280. *Id.* arts. 55(2)(c), 65(4), 67(1)(d); *id.* R. 69, 73, 82, 100, 136, 185.

281. International Criminal Court, Office of the Prosecutor, *Policy Paper on the Interests of Justice* 2 n.3 (Sept. 2007) [hereinafter *OTP Policy Paper*]; WILLIAM A. SCHABAS, *THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY ON THE ROME STATUTE* 662 (2010).

282. SCHABAS, *supra* note 281, at 663 (citing UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rep. of the Working Group on Procedural Matters, U.N. Doc. A/CONF.183/C.1/WGPM/L.2 (June 24, 1998)); *see also OTP Policy Paper, supra* note 281, at 2 (“Thorough reviews of the preparatory works on the treaty also offer no significant elucidation.”).

283. SCHABAS, *supra* note 281, at 663 (citing *UK Discussion Paper, International Criminal Court, Complementarity*, COALITION FOR THE INTERNATIONAL CRIMINAL COURT, ¶ 30 (Mar. 29, 1996), <http://www.iccnw.org/documents/UKPaperComplementarity.pdf>).

284. *OTP Policy Paper, supra* note 281, at 8; *see* Jens David Ohlin, *Peace, Security, and Prosecutorial Discretion*, in *THE EMERGING PRACTICE OF THE INTERNATIONAL CRIMINAL COURT* 185, 198–201 (Carsten Stahn & Göran Sluiter eds., 2009); *cf.* William A. Schabas, *Prosecutorial Discretion v. Judicial Activism at the International Criminal Court*, 6 *J. INT’L CRIM. JUST.* 731, 749 (2008) (criticizing the distinction between the interests of peace and the interests of justice and arguing that this constitutes an amendment of the Rome Statute by the OTP).

285. *See, e.g., OTP Policy Paper, supra* note 281, at 4 (citing the situation in Uganda); Diego Acosta Arcarazo et al., *Beyond Justice, Beyond Peace? Colombia, The Interests of Justice, and the Limits of International Criminal Law*, 26 *CRIM. L. FORUM* 291 (2005) (discussing the potential use of “interests of justice” in the context of the situation in Colombia).

exercised, the probability of a review by the Pre-Trial Chamber is fairly high, thus forcing the issue of interpretation.²⁸⁶ As noted earlier, a textual approach, either through a focus on the word “justice” or by cross-referencing other provisions of the Rome Statute, is unlikely to prove adequate to resolve the issue. Further, perusing the drafting history will not be of much use. The negotiating history shows no clear consensus on the meaning of “interests of justice,” on whether prosecutions should be the sole legitimate response to international crimes (even in situations where investigations and prosecutions might threaten fragile democracies in transition), or on the acceptability of and criteria for alternative justice mechanisms.²⁸⁷

However, the textual approach does not have the same appeal in construing the meaning of provisions that do not implicate the legality concerns as do the purely penal sections of the Rome Statute. While the exercise of prosecutorial discretion is undoubtedly an important facet of a criminal trial and should be exercised in as impartial and non-discriminatory a manner as possible, a certain amount of unpredictability is built into the very fact of discretion, which Article 53(1)(a) expressly acknowledges. Moreover, a prosecutor at the ICC cannot simply focus on the facts of the individual case in the exercise of her discretion. This is because of the very structure of the ICC as a court that is not merely a “criminal court” but also a “security court.”²⁸⁸ Unlike a typical domestic court, which primarily adjudicates the criminal responsibility of individual defendants, the ICC also exercises “classic diplomatic functions of public international law, designed to restore and improve regional peace and security.”²⁸⁹ This latter function is reflected in provisions such as Article 53(1)(c), which attempts to integrate concerns that are broader than narrow, retributive justice into the functioning of the court. To give effect to these fundamental values of the international community that touch on collective State interests, a more dynamic, evolutive interpretive methodology may be involved, as in the case of human rights instruments.

For Article 53(1)(c) and other provisions of the Rome Statute that relate to its identity as a “security court,” the ICC may thus find it particularly helpful to refer to the jurisprudence of the ECtHR and the IACtHR on the methods and techniques used for interpreting their constitutive instruments in order to fully operationalize the multiple

286. See Philippa Webb, *The ICC Prosecutor's Discretion Not to Proceed in the "Interests of Justice"*, 50 CRIM. L.Q. 306, 320–22 (2005) (discussing the intensified scrutiny by the Pre-Trial Chamber of the Prosecutor's decision not to investigate or prosecute in the interests of justice).

287. Darryl Robinson, *Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court*, 14 EUR. J. INT'L L. 481, 483 (2003).

288. Ohlin, *supra* note 284, at 192.

289. *Id.*

objects and purposes of the Rome Statute, in light of evolving international standards. It would also be appropriate for the court to situate this interpretation within other applicable rules of international human rights and humanitarian law. For instance, some scholars suggest that the recognition of a broader concept of justice that is not limited by “criminal” justice could be used by the prosecutor to accommodate legitimate amnesties and other alternative justice mechanisms, such as truth and reconciliation commissions.²⁹⁰ This departure is, however, exceptional and not to be pursued lightly given the preference for prosecutions for international crimes embodied in the tenor of the Rome Statute and the increasing commitment to the duty to prosecute certain serious international crimes in state practice, treaties, and in the jurisprudence of other international tribunals.²⁹¹

Similar arguments can be proffered for working out a distinctive interpretive approach to the mainly contractual and institutional aspects of the Rome Statute. To echo the jurisprudence of the ICJ, the very nature of the ICC, its purposes, the effective performance of its functions, and its own previous practice will be some of the significant elements in the interpretation of the provisions that are of a purely institutional character.²⁹² In contrast, similar to standard contractual interpretation in domestic law, the intent of the parties is likely to dominate the interpretation of its more contractual provisions.²⁹³

V. CONCLUSION

The Rome Statute of the ICC is a paradigmatic example of the multifaceted and complex modern international treaty that simultaneously sets out to achieve myriad objects and purposes that might at times pull in different directions. It is no wonder that such an ambitious legal

290. Richard J. Goldstone & Nicole Fritz, *In the Interests of Justice' and Independent Referral: The ICC Prosecutor's Unprecedented Powers*, 13 LEIDEN J. INT'L L. 655, 663–65 (2000); Robinson, *supra* note 287, at 483–84, 497–98 (2003); Carsten Stahn, *Complementarity, Amnesties and Alternative Forms of Justice: Some Interpretative Guidelines for the International Criminal Court*, 3 J. INT'L CRIM. JUST. 695, 698 (2005).

291. OTP Policy Paper, *supra* note 281, at 2; Robinson, *supra* note 287, at 483–84, 490–93; Stahn, *supra* note 290, at 701–03.

292. Nuclear Weapons Advisory Opinion, *supra* note 207, ¶¶ 17–19 (on the interpretation of institutional treaties).

293. See, e.g., BARAK, *supra* note 225, at 318 (noting that party autonomy and respecting the subjective will of the parties dominates the interpretation of contracts in most jurisdictions); BJORGE, *supra* note 151, at 101–03 (arguing that the main object of contractual interpretation in both civil and common law systems is to give effect to the common intention of the parties); see GROVER, *supra* note 4, at 71–73 (discussing the unreliability of the preparatory works for the Rome Statute); see also Sunstein, *supra* note 238, at 453 (arguing that “contract law is pervaded by a background norm in favor of party autonomy and the market”). It should, however, be noted that given the lack of reliable drafting history for many parts of the Rome Statute, other methods to ascertain the will of the parties may be needed.

instrument should require an equally nuanced interpretive methodology. This Article posits that what is true of principles of interpretation for the Rome Statute is also true of treaty construction in general. The orthodox treaty-blind approach to interpretation embodied in the VCLT may have sufficed for a less fragmented international order, which had not yet embraced tribunalization and binding, authoritative dispute resolution with the concomitant need for sophisticated principles for the interpretation of international legal rules. With the steadfast emergence of the expansive, judicialized, international legal regime that we see today, however, the considerable exegetical leeway that was sanctioned by the VCLT's crucible approach has resulted in one of two equally troubling scenarios: courts and academics looking to interpret increasingly regime-specific treaties in areas as diverse as international trade to human rights purport to abide by the VCLT but essentially come up with their own unique interpretive approach. Alternatively, there is an outright rebellion with different courts, judges, and scholars questioning the utility of the uniform approach and arguing that their treaty warrants differential treatment.

As a pragmatic matter, one may endorse either of these routes as a way to operationalize the divergent approach to interpretation. Indeed, prominent scholars argue that the VCLT's interpretive rules are properly characterized as "a rhetorical language that international lawyers must employ to participate in the practice of international law."²⁹⁴ Rather than constraining international tribunals and other agents tasked with interpretation, the VCLT not only permits but positively encourages substantive indeterminacy.²⁹⁵ The VCLT's crucible approach is thus *intended* to let a thousand flowers bloom: the more the merrier.

This posture, however, overlooks the deeper challenge that confronts the accepted framework governing treaty interpretation in international law: if the VCLT rules are indeed merely "scaffolding for the reasoning on questions of treaty interpretation,"²⁹⁶ this might be because the burden they have been expected to bear is too great. If the rules are meant to do

294. Email exchange with Duncan B. Hollis, James E. Beasley Professor of Law, Temple University School of Law (Jan. 23, 2016) (on file with The Virginia Journal of International Law).

295. See Baġak Ćali, *Specialized Rules of Treaty Interpretation: Human Rights*, in THE OXFORD GUIDE TO TREATIES 525, 528–533 (Duncan B. Hollis ed., 2012) (supporting this position in the context of the VCLT's application to human rights treaties); Duncan B. Hollis, *Interpretation and International Law*, in FUNDAMENTAL CONCEPTS FOR INTERNATIONAL LAW: THE CONSTRUCTION OF A DISCIPLINE 8–11 (Jean d'Aspremont & Sahib Singh eds., 2015).

296. Hugh Thirlway, *The Law and Procedure of the International Court of Justice 1960-1989: Supplement 2006: Part Three*, 77 BRIT. Y.B. INT'L L. 1, 19 (2006); Richard Gardiner, *The Vienna Convention Rules on Treaty Interpretation*, in THE OXFORD GUIDE TO TREATIES 475, 477, 504; see also Jan Klabbers, *The Invisible College*, OPINIO JURIS (Mar. 23, 2009), <http://opiniojuris.org/2009/03/03/the-invisible-college/> (denying that principles of treaty interpretation have any "norm-creating character" and comparing them to "methodological devices: as instructions to whoever gets to be in a position to interpret a text").

more and actually guide or constrain interpretation, they must be more specific and attuned to the treaty regime they are to assist in interpreting. The Rome Statute of the ICC is only one example of a hybrid, detailed treaty instrument that points to the need for developing divergent interpretive principles, not only for increasingly fragmented treaty regimes but also for different parts of the same treaty. Similar sentiments have been voiced, mostly in a glancing fashion, in the context of treaties such as the European Convention on Human Rights,²⁹⁷ the Charter of the United Nations,²⁹⁸ and the primary international treaties regulating international trade.²⁹⁹ However, they have yet to be fleshed out fully.

With the diverse approaches to interpretation championed by specialized international tribunals and the growing skepticism in international law scholarship toward the uniform approach to interpretation, the revolution in treaty interpretation has been brewing for a while. It is now time to fully embrace the potential of interpretive divergence in international law to cater to the increasingly complex public and private life of its most reliable legal instrument: the international treaty.

297. Letsas, *supra* note 17, at 538.

298. Kunig, *supra* note 4, at 273 (distinguishing between the contractual and normative parts of the UN Charter).

299. Email exchange with Isabelle Van Damme, Référendaire, Chambers of Advocate General Sharpston, Court of Justice of the European Union (Jan. 29, 2016) (on file with The Virginia Journal of International Law).