9

Sources

> Norms of international law have addressees. These include States but also individuals, physical or moral persons. It is the right of the latter to know and estimate the impact of international norms on their daily life.[1]

Two key sources of international law are treaties and customary international law.[2] At their heart is state practice: treaties are agreements between states, while customary international law results from consistent state practice by which states consider themselves bound. However, the International Court of Justice (ICJ, the Court) has recognised in certain decisions that such sources may confer rights and benefits for individuals. This chapter examines such decisions and observes that the Court adopts a more favourable approach to individuals in this area of its jurisprudence than to other subject areas examined in Part II of this book. Such measures taken by the Court reflect an acknowledgement of the relevance of such disputes for individuals in the pursuit of a greater balance between individuals and states. This chapter will first address rights conferred on individuals in treaties (Section 9.1), before turning to customary law (Section 9.2). Section 9.3 concludes.

9.1 Individual Rights Conferred upon Individuals in Treaties

A treaty is defined by the Vienna Convention on the Law of Treaties (VCLT) as follows: 'An international agreement concluded between States in written form and governed by international law, whether

[1] Laurence Boisson de Chazournes and Makane Moïse Mbengue, 'The *Amici Curiae* and the WTO Dispute Settlement System: The Doors Are Open' (2003) 2 *Law and Practice of International Courts and Tribunals* 205, 206.

[2] See Statute of the International Court of Justice, Article 38 [hereafter, ICJ Statute].

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embodied in a single instrument or in two or more related instruments and whatever its particular designation.'[3]

Under the traditional positivist doctrine, individuals were not regarded as having rights and duties under international law. No international legal source conferring rights and duties to a state was directly applicable to individuals. Rather, individuals exercised rights and duties originating exclusively from municipal law. Indeed, '[t]he pure positivist doctrine was at the same time also in principle a dualistic doctrine'.[4] There was a clear distinction between municipal law and international law – the former governing the rights and the obligations of individuals in all circumstances and the latter excluding the individual entirely and only pursuing rights and duties of states.[5] Thus, in order for international treaties to create rights or duties for individuals, contracting states had to create these provisions into their domestic law.[6]

The role of the individual in the international legal system has evolved over time, and international treaty law has not been immune to this. The conferral of rights directly to individuals through treaties particularly expanded after the Second World War with the development of international human rights treaties, intended to confer such rights directly to them. However, the ICJ has interpreted relevant provisions of other international treaties, beyond the international human rights framework, as conferring rights on individuals.[7]

The Court's method of interpretation has varied from case to case. In the International Law Commission's (ILC) initial debates on treaty interpretation, two main approaches were recognised.[8] The first was the textualist approach: a literal interpretation based on the ordinary meaning of the text, governed by Article 31 of the VCLT ('shall be interpreted (. . .) in accordance with the ordinary meaning to be given to the terms of the treaty'). The second was the 'intentionalist' approach, focused on the

[3] Vienna Convention on the Law of Treaties, 1155 UNTS 331, Article 2.1(a) [hereafter, VCLT].

[4] Peter Pavel Remec, *The Position of the Individual in International Law According to Grotius and Vattel* (Springer 1960) 5.

[5] Ibid 4.

[6] Kate Parlett, *The Individual in the International Legal System: Continuity and Change in International Law* (CUP 2011) 15.

[7] See Carlos Manuel Vázquez, 'Treaty-Based Rights and Remedies of Individuals' (1992) 92 *Columbia Law Review* 1082.

[8] Mr de Luna [1964] *Yearbook of the ILC*, vol I, 276 [16]; Mr Bartos [1964] *Yearbook of the ILC*, vol I, 279 [64].

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intentions of the drafters. While not always the case, these intentions can possibly be ascertained by considering the context of the treaty (contextual method), its object and purpose (teleological method), or its *travaux préparatoires* (historical method). There is no clear hierarchy between these latter methods to determine the drafters' intentions nor between the textualist and intentionalist approaches more broadly.[9]

The Court has never explicitly referred to its interpretative methodology using these terms, nor has it cited the VCLT in the course of its interpretation. However, the broader dichotomy of textualist and intentionalist approaches can be loosely identified in the Court's jurisprudence. For this reason, this chapter will analyse its treaty interpretation by reference to these two main approaches. I will argue that both the 'textualist' and 'intentionalist' approaches employed by the Court and its predecessor have allowed for the recognition of individuals' rights.

I will first address the 'intentionalist' interpretation employed by the Permanent Court of International Justice (PCIJ) in *Jurisdiction of the Court of Danzig* and by the Court in the 2009 *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)* case (Section 9.1.1). I will then examine the 'textualist' approach of the Court in a series of cases pertaining to the Vienna Convention on Consular Relations (Section 9.1.2).

9.1.1 'Intentionalist' Interpretation by the PCIJ and the ICJ

To understand the Court's practice in 'intentionalist' interpretation, it is important to examine the practice of its predecessor. In 1928, the PCIJ rendered an advisory opinion titled *Jurisdiction of the Court of Danzig*.[10] This judgment addressed the question of whether individuals could be directly granted rights through an international treaty.

The source of the dispute was a 1921 Agreement between the newly established Government of Poland and the Free City of Danzig, a semi-autonomous city state that existed between 1920 and 1939. Both parties

[9] VCLT, Article 31; Draft Articles on the Law of Treaties with commentaries [1966] *Yearbook of the ILC*, vol II, 218; Alexander Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (OUP 2008) 303–5.

[10] *Jurisdiction of the Courts of Danzig (Pecuniary Claims of Danzig Railway Officials who have passed into the Polish Service, against the Polish Railways Administration)* (Advisory Opinion) [1928] PCIJ Series B.

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were the product of the Treaty of Versailles.[11] The 1921 Agreement between the two parties established that Poland would administer part of the railway system in Danzig. This Agreement was not incorporated into the national laws of Danzig nor of Poland.[12]

Due to their agreement, railway officials from Danzig were transferred into the Polish service. However, the railway officials opened a case at the court of the Free City of Danzig, demanding pecuniary claims against the Polish Railways Administration, the latter having violated a clause in the 1921 Agreement. The Government of Poland argued that the railway officials could not bring claims to the Danzig court based on the 1921 Agreement. Subsequently, the dispute between Poland and Danzig was taken to the High Commissioner for the Free City of Danzig, who also supported that the railway officials could not make claims based on the 1921 Agreement, because it was an international treaty concluded between two states and did not confer direct rights on individuals.[13]

The Government of the Free City of Danzig did not accept this decision and appealed to the Council of the League of Nations. Consequently, the Council sought an advisory opinion from the PCIJ to determine the validity of the decision. In other words, could individuals bring claims to a court based on the 1921 Agreement? Did this international treaty give direct rights to individuals?

The Free City of Danzig believed that the 1921 Agreement did confer rights directly on the railway officials, placing emphasis on the intention of the parties to confer these rights.[14] Conversely, the Polish government defended that it did not confer any rights directly upon the individuals and that they therefore could not make any claims to any court upon the basis of this Agreement. It further contended that any failure to fulfill its obligations under the Agreement would render it liable solely to the Government of Danzig, not to the individuals directly.[15]

The PCIJ relied on the intention of the contracting parties in order to answer the question 'whether the international agreement formed part of

[11] See Treaty of Versailles, UKTS 4, Articles 87 and 88 (for Poland) and Articles 102 and 103 (Danzig).
[12] Parlett (n. 6) 19.
[13] 'Jurisdiction of Danzig Courts in Actions Brought by Railway Officials against the Railway Administration', Decision of the High Commissioner (8 April 1927), English translation reproduced in: *Jurisdiction of the Courts of Danzig* Advisory Opinion (n. 10) Annex I.
[14] *Jurisdiction of the Courts of Danzig* Advisory Opinion (n. 10) 18.
[15] Ibid.

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the contract of service of the Danzig officials'.[16] Possibly the most frequently quoted passage from the case is as follows:

> It may be readily admitted that, according to a well-established principle of international law, the *Beamtenabkommen* [international treaty], being an international agreement, cannot, as such, create direct rights and obligations for private individuals. But it cannot be disputed that the very object of an international agreement, according to the intention of the contracting Parties, may be the adoption by the Parties of some definite rules creating individual rights and obligations and enforceable by the national courts. That there is such an intention in the present case can be established by reference to the terms of the *Beamtenabkommen* [international treaty].[17]

Since the issuance of this decision, this passage has sparked considerable debate and opposing opinions in legal scholarship, with no clear resolution. On the one hand, certain scholars such as Hersch Lauterpacht claim that individuals may be conferred rights directly from international treaties.[18] This argument relies on the conclusion of the PCIJ elsewhere in the judgment that '[t]he wording and general tenor of the *Beamtenabkommen* [1921 Agreement] show that its provisions are directly applicable as between the officials and the Administration'[19] – bearing in mind that the 1921 Agreement had not been adopted in the domestic law of the Free City of Danzig nor of Poland. The PCIJ also clearly explains that 'the object of the [Agreement] is to create a special legal régime governing the relations between the Polish Railways Administration and the Danzig officials (. . .) [which] according to the intention of the contracting parties, is to be governed by the very provisions of the [Agreement]'.[20] Furthermore, in response to Poland's argument that Article 9 of the Agreement proves that 'the intention of the parties was to leave it to Poland to make all the regulations concerning the Danzig Railway officials', the PCIJ replied that this Article 'should not be construed in a manner which would make the applicability of [its] provisions (. . .) depend on their incorporation into a Polish

[16] Ibid.
[17] Ibid 17–18.
[18] Hersch Lauterpacht, *The Development of International Law by the Permanent Court of International Justice* (Longmans, Green and Company 1934) 52; Hersch Lauterpacht, 'The Subjects of the Law of Nations' (1947) 63(4) *Law Quarterly Review* 438.
[19] *Jurisdiction of the Courts of Danzig* Advisory Opinion (n. 10) 18.
[20] Ibid.

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Regulation'.[21] Essentially, bearing in mind that the PCIJ stated that the 1921 Agreement conferred substantive rights to the individuals and knowing that this Agreement had not been incorporated into any national laws, then the 1921 Agreement must have created such rights for the individuals directly.

On the other hand, it was also argued that the individuals could not be conferred rights directly from international treaties. This view places emphasis on the phrase (in the passage quoted before) 'an international agreement, cannot, as such, create direct rights and obligations for private individuals', and interprets 'the adoption by the Parties of some definite rules creating individual rights and obligations and enforceable by the national courts' to mean rules of domestic law. Thus, individuals are subjects of municipal laws, and solely states are subjects of international law. This is in line with the positivist doctrine that prevailed during that period. PCIJ Judge Dionisio Anzilotti, the main proponent of this view, clearly explained that

> The opinion of the PCIJ does not say that a treaty, as such, can create rights and obligations for individuals, without the need for the rules and those things associated with the rules to be incorporated into internal law; it says only that the intention of the contracting parties can be that of adopting definite rules creating rights and obligations for individuals and capable of being applied by national tribunals.[22]

In my view, the 'definite rules' referred to in Anzilotti's passage are international rules directly applicable to individuals and not municipal rules on the domestic level. This is known through examining the context: the Court is explaining the law in relation to a situation whereby the 1921 Agreement was not, *in casu*, incorporated into domestic law. The Court is describing the Agreement, noting that, in some instances, the parties may intend to create definite international rules that can be directly applied to individuals without any municipal law being created. This is affirmed by the fact that the PCIJ did not at any point in the judgment go on to examine whether the relevant clauses in the 1921 Agreement had been adopted in municipal law in order to determine whether they apply, or not, to the officials. On the contrary, it says that '[n]either Party has disputed the fact that the *Beamtenabkommen*

[21] Ibid 20.
[22] Dionisio Anzilotti, *Cours de droit international* (L.G.D.J 1999) 133–34, 407–8.

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has been actually put into effect in accordance with the intention of the contracting Parties'.[23] If the PCIJ was truly saying that municipal law is necessary in the *cas d'espèce* for the Agreement to apply to the individuals, then it would have examined if this were the case. Instead, it analysed the clauses and how they applied directly. It said 'taking into consideration the manner in which the Agreement has been applied' – the Agreement was not translated into municipal law.[24]

In response to this, Anzilotti argued that

> If, in this particular case, the [Permanent] Court did not consider it necessary to examine whether the rules outlined in the agreement had effectively been adopted, it is because the [Permanent] Court considered that the party which was obliged to adopt the said rules was not able, in any case, to take advantage of the fact that it had not executed its obligation, in order to avoid the duties imposed on it by the agreement as regards the other party.[25]

In other words, Poland had failed to meet its obligation to incorporate the rights from the 1921 Agreement into Polish law, and therefore, it could not argue that the individuals' rights did not exist in domestic law. Anzilotti is suggesting that due to these circumstances, the PCIJ deliberately ignored that the rights were not incorporated into Polish law. This partisan behaviour seems uncharacteristic of such an institution; it is difficult to believe that the PCIJ would wilfully turn a blind eye to the absence of domestic legislation and still conclude that the individuals in the present case derived rights via such a legislation that did not exist. However, the controversy surrounding the interpretation of the *Danzig* judgment is plausible. Lauterpacht describes that the PCIJ's 'departure from the established view was effected with such ingenious restraint that some have been led to believe that the decision of the Court amounts to a solemn affirmation of the established doctrine'.[26]

The *Danzig* judgment did not have any immediate transformative effect in the international legal system,[27] but in hindsight, it was the first authoritative statement addressing the possibility of individuals having their own rights conferred through a source of international law. This was arguably possible through the 'intentionalist' approach of

[23] *Jurisdiction of the Courts of Danzig* Advisory Opinion (n. 10) 20.
[24] Ibid 18.
[25] Anzilotti (n. 22) 133–34 and 407–8.
[26] Lauterpacht (1934) (n. 18) 52.
[27] Parlett (n. 6) 26.

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interpretation, which appears to offer more flexibility to advance individuals' rights and interests than the 'textualist' approach where the interpreter is more confined to the strict letter of the law. However, as the *Danzig* case indicates, this mode of interpretation can be subject to ambiguity or cast doubt on the Court's reasoning.

This is further indicated in the 2009 *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, where an 'intentionalist' approach was again employed decades later to the benefit of individuals – though not without ambiguity. In 2005, Costa Rica instituted proceedings against Nicaragua, asking the Court to determine the scope of Costa Rica's navigational rights in the San Juan River, located on the border between the two countries. To do so, the Court was tasked with the interpretation of the 1858 Treaty of Limits between both countries. This treaty had the purpose of fixing the course of the boundary between Costa Rica and Nicaragua from the Pacific Ocean to the Caribbean Sea.[28] It established that Nicaragua had sovereignty over the waters in the San Juan river but still gave Costa Rica navigational rights 'con objetos de comercio' ('for the purposes of commerce' according to Costa Rica and 'with merchandise of commerce' according to Nicaragua) on the lower course of the river.[29] In this case, the Court made two distinct interpretations in favour of individuals' rights on the basis of the drafters' intentions. These interpretations, however, gave rise to ambiguities.

First, the Court was asked to interpret the scope of the term 'commerce', to determine whether it strictly covered trade and goods, as Nicaragua contended, or extended to services, such as the transport of persons, tourists, and other individuals, as Costa Rica claimed.[30] Nicaragua argued that the 'intentionalist' approach should be applied 'to give the words used in the Treaty the meaning they had at the time the Treaty was concluded, not their current meaning, which can be quite different, because this is the only way to remain true to the intent of the drafters of the Treaty. . .'.[31] The Court explained that while it is indeed important to ascertain the meaning of a term when the treaty was drafted in order to 'shed light on the parties' common intention', a practice it has employed numerous times in the past, '[t]his does not however signify

[28] *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)* (Judgment) [2009] ICJ Rep 213, 229 [19].
[29] Ibid.
[30] Ibid 240–41 [58]–[59].
[31] Ibid 240–41 [58].

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that, where a term's meaning is no longer the same as it was at the date of conclusion, no account should ever be taken of its meaning at the time when the treaty is to be interpreted for purposes of applying it'.[32]

It elaborated that 'commerce' is a generic term whose meaning was likely to evolve over time and, given the 'continuing duration' of the treaty and its objective to achieve a permanent settlement between the parties, they presumably intended for the terms to have an evolving meaning.[33] It therefore adopted an evolutionary interpretation, defined by the ILC as '[A] meaning which is capable of evolving over time'.[34] It is not considered to be a separate type of interpretation outside of the VCLT framework, but rather 'the result of a proper application of the usual means of interpretation, as a means by which to establish the intention of the parties'.[35] It is therefore classified as a type of 'intentionalist' approach. Given that today, the term 'commerce' applies to the transport of persons, the members of the bench unanimously agreed that the right of navigation for purposes of commerce enjoyed by Costa Rica includes the transport of tourists.[36]

The Court has addressed evolutionary interpretation in past judgments, explaining that it is applicable to 'generic term[s]', as their 'meaning was intended to follow the evolution of the law and to correspond with the meaning attached to the expression by the law in force at any given time'.[37] Indeed, in *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, it recalled that 'there are situations in which the parties' intent upon conclusion of the treaty was, or may be presumed to have been, to give the terms used – or some of them – a meaning or content capable of evolving, not one fixed once and for all, so as to make allowance for, among other things, developments in international law'.[38] While this form of interpretation may allow for the conferral of rights to individuals through treaties, the task to interpret any term 'in accordance with the intentions of the parties at the time of its

[32] Ibid 242 [64].
[33] Ibid 243 [66]–[68].
[34] A/71/10, 187.
[35] Eirik Bjørge, *The Evolutionary Interpretation of Treaties* (OUP 2014) 2.
[36] *Costa Rica v. Nicaragua* (n. 28) 269 [156] (b).
[37] *Aegean Sea Continental Shelf (Greece v. Turkey)* (Judgment) [1978] ICJ Rep 3, 33 [77].
[38] *Pulp Mills on the River Uruguay (Argentina v. Uruguay)* (Judgment) [2010] ICJ Rep 14, 82–83 [204].

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conclusion'[39] is not free from ambiguity. Judge *ad hoc* Guillaume described that '[a] real difficulty arises with that approach',[40] while Judge Skotnikov, in his separate opinion, argued that no evidence submitted by the parties showed that they intended to give an evolving meaning to the word 'commerce'.[41] Dawidowicz has questioned whether this method is truly satisfactory and appears to take full account of the common intention of the parties which, to him, is 'the main task of interpretation'.[42] Skotnikov, building on former ILC member Georg Nolte's work, opined that the subsequent practice of treaties should have been applied instead – although Bjørge warns that this may be restrictive compared to evolutionary interpretation.[43] Still, the 'recourse [that] must be had to presumptions' may make the Court's choices difficult to justify in some instances.[44] It also compromises the Court's prioritisation of stability insofar as if the word 'commerce' develops a new, different, or wider meaning in fifty years' time, the dispute resurface for further debate.

The second act of treaty interpretation favourable to individuals' rights made by the Court in *Navigational and Related Rights* occurred when it was asked to determine whether Article VI of the 1858 Treaty also governed activities of navigation carried out free of charge. Indeed, it was determined by the Court that the right of *free* navigation in this clause covered two types: those for commercial transactions or those where vessel passengers paid for the transport. However, many inhabitants of the villages on the Costa Rican bank regularly navigated their

[39] *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] ICJ Rep 16, 31-32 [53].

[40] *Costa Rica v. Nicaragua* (n. 28) 226 [15].

[41] Ibid 284 [5] (Separate opinion of Judge Skotnikov).

[42] Martin Dawidowicz, 'The Effect of the Passage of Time on the Interpretation of Treaties: Some Reflections on Costa Rica v. Nicaragua' (2011) 24(1) *Leiden Journal of International Law* 201.

[43] *Costa Rica v. Nicaragua* (n. 28) 284–85 (Separate opinion of Judge Skotnikov); Georg Nolte, 'Between Contemporaneous and Evolutive Interpretation: The Use of "Subsequent Practice" in the Judgment of the International Court of Justice Concerning the Case of Costa Rica v. Nicaragua' in Holger P. Hestermeyer et al (eds), *Coexistence, Cooperation and Solidarity* (Brill 2012) 1675–84; Georg Nolte, 'Introductory Report of the Study Group on Treaties over Time' in Georg Nolte (ed), *Treaties and Subsequent Practice* (OUP 2013) 169–209; Eirik Bjørge, 'The Means of Interpretation Admissible for the Establishment of the Intention of the Parties' in *The Evolutionary Interpretation of Treaties* (OUP 2014) 56–141.

[44] *Costa Rica v. Nicaragua* (n. 28) 297–98 [15] (Declaration of Judge *ad hoc* Guillaume).

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vessels to meet the basic requirements of everyday life and thus were not subject to any fee. Were they also protected by the right to navigational freedom under Article VI of the 1858 Treaty? The Court responded that if one takes into account the provisions of the Treaty as a whole, and the way that the boundary is geographically fixed in the area, it may be insinuated that the parties wished to preserve this right for the Costa Rican inhabitants. The parties must 'be presumed, in view of the historical background to the conclusion of this Treaty and the Treaty's object and purpose as defined by the Preamble and Article I, to have intended to preserve' this right.[45] In coming to this conclusion, the Court claimed to have adopted an 'intentionalist' approach, claiming that 'while such a right cannot be derived from the express language of Article VI (. . .) [i]t cannot have been the *intention* of the authors of the 1858 Treaty to deprive the inhabitants of the Costa Rican bank of the river (. . .)'.[46]

The geographical circumstance that the Court is referring to is surely the fact that the border between Costa Rica and Nicaragua was set by the treaty to be on the Costa Rican side of the river. This is unusual, given that oftentimes, the border of two nations with a river running through it along the thalweg; the middle of the waterway. If the parties decided that the border should expressly be on the Costa Rican side and that Nicaragua should have full sovereignty of the river, there is no way Costa Rica would have accepted this without having the guarantee that its people could access the river. This appears to be a presumption, rather than something grounded in the evidence presented regarding the drafters' intentions. Ben Juratowitch argues that the Court pays lip service to Articles 31 and 32 of the VCLT but that the presumption does not stem from these provisions.[47] Nonetheless, it is a presumption to the benefit of the people of Costa Rica.

To conclude, the 'intentionalist' approach of interpretation gives freedom to advance individuals' rights and interests but leaves room for doubt. In *Danzig*, the PCIJ emphasised the intention of the state parties to the treaty as a necessary condition for individuals to be beneficiaries of rights derived from it (the 'intentionalist' approach).[48] In the

[45] Ibid 247 [79].
[46] Ibid.
[47] Ben Juratowitch, 'Individual Rights in Disputes between States' (Dialogues between International and Public Law, a conference organised by BIICL and Melbourne Law School, London, June–July 2016) 42–46.
[48] *Jurisdiction of the Courts of Danzig* Advisory Opinion (n. 10) 17–18.

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Navigational and Related Rights judgment, the Court, in two instances, also relied on the intention of the parties: to determine that Costa Rica has free navigational rights on the San Juan River for commerce including transporting passengers and tourists[49] and that the inhabitants of the Costa Rican bank had the right to navigate the river to exercise the essential needs of everyday life.[50] However, as seen, all of these exercises of interpretation left room for doubt.

9.1.2 *Textual Interpretation of the Vienna Convention on Consular Relations*

Contrary to the 'intentionalist' approach, the Court has also employed the 'textualist' approach, drawing conclusions from literal interpretations of text in a treaty. This approach has led to the acknowledgement of individuals' rights directly conferred in the Vienna Convention on Consular Relations (VCCR) in particular.

The Court has dealt with a number of cases that required it to interpret Article 36(1)(b) of the VCCR, which reads as follows:

> 1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State: (. . .) (b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph[.][51]

The Court has judged on the merits in three death penalty cases, in which it decided that individuals may acquire rights directly under international treaties: *LaGrand (Germany v. United States of America)*, *Avena (Mexico v. United States of America)*, and *Jadhav (India v. Pakistan)*. The *Vienna Convention on Consular Relations (Paraguay v. United States of America)* case also pertained to an interpretation of the same clause but was

[49] *Costa Rica v. Nicaragua* (n. 28) 246 [76].
[50] Ibid [156] (1) (a) (b) (c) and (f).
[51] Vienna Convention on Consular Relations and Optional Protocols, 596 UNTS 487.

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discontinued on 10 November 1998.[52] This section focuses on individual rights, as distinct from human rights. While human rights are fundamental rights pertaining to every human being in the world and enshrined in a number of international human rights conventions, individual rights may be directly conferred to individuals but do not necessarily carry a human rights character. While all human rights are individual rights, not all individual rights are human rights.

In *LaGrand*, the Court ruled that by breaching its obligation to inform the LaGrand brothers of their rights under the VCCR, the United States of America (US) had violated their individual rights.[53] Distinction was made between individual rights and human rights, as Germany, defending the LaGrand brothers, submitted the argument that Article 36(1)(b) of the VCCR 'assumed the character of a human right' as well as conferring individual rights to them.[54] The Court, however, did not find it necessary to consider this additional argument as it had already characterised the clause as an individual right.[55] The interpretation that Article 36(1)(b) granted individual rights was largely supported by the bench, with the exception of Judge Oda who voted against it.[56]

These findings in the *LaGrand* case were reiterated by the Court in the *Avena* case, a dispute between Mexico and the US surrounding the death penalty sentences of 54 Mexican nationals in various US states. The ICJ upheld Mexico's claim that the US had violated Article 36(1)(b) of the VCCR. The slight distinction with the *LaGrand* case was that Mexico had seized the Court based on its own direct injury as opposed to its nationals' injuries (Section 2.1.1).[57] The Court therefore specified that the rights of states and individuals reflected in this clause were 'interdependent', in the sense that 'violations of the rights of the individual under Article 36 may entail a violation of the rights of the sending State, and that violations of the rights of the latter may entail a violation of the rights of the individual'.[58] In these proceedings as well, Mexico argued that 'the

[52] *Vienna Convention on Consular Relations (Paraguay v. United States of America)* (Order of 10 November 1998) [1998] ICJ Rep 426.
[53] *LaGrand (Germany v. United States of America)* (Merits) (Judgment) [2001] ICJ Rep 466, 494 [77].
[54] Memorial of the Federal Republic of Germany (6 September 1999) [4.93].
[55] *LaGrand* (n. 53) 494 [78].
[56] Ibid [128].
[57] *Avena and Other Mexican Nationals (Mexico v. United States of America)* (Judgment) [2004] ICJ Rep 12, 35–36 [40]. See also Chapter 2.
[58] Ibid.

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right to consular notification and consular communication under the Vienna Convention is a fundamental human right that constitutes part of due process in criminal proceedings'.[59] The Court, however, stated that '[w]hether or not the Vienna Convention rights are human rights is not a matter that this Court need decide'.[60]

Most recently, the *Jadhav Case (India v. Pakistan)* was also centred on Pakistan's violation of Article 36(1)(b) in refusing to grant consular access to Mr. Kulbhushan Sudhir Jadhav before he was detained, tried and sentenced to death on 10 April 2017. On 17 July 2019, the Court ruled that Pakistan did not inform Mr. Jadhav of '*his rights*' under Article 36(1)(b) of the VCCR, and thus concluded that 'Pakistan breached its obligation to inform Mr. Jadhav of *his rights under that provision*'.[61] This reinforces the previous judgments and confirms that rights are indeed conferred to the individual through the treaty. The Court stated later in the judgment that 'the breaches by Pakistan (. . .) constitute internationally wrongful acts of a continuing character. Accordingly, the Court is of the view that Pakistan is under an obligation to cease those acts and to comply fully with its obligations under Article 36 of the Vienna Convention. Consequently, Pakistan must inform Mr. Jadhav without further delay of his rights under Article 36, paragraph 1 (b). . .'.[62] It accordingly ruled that the remedy in this case was to be effective review and reconsideration of the conviction and sentence of Mr. Jadhav.[63] In his separate opinion, Judge Antônio Augusto Cançado Trindade argued that this case provided the opportunity to examine individual rights under Article 36 of the VCCR as directly related to the human rights to due process of law and a fair trial.[64]

To conclude, the *LaGrand* judgment paid no attention to the intention of the state parties of the VCCR, but came to its conclusion after a bare reading of Article 36(1) (the 'textualist' approach), noting that, 'The clarity of these provisions, viewed in their context, admits of no doubt'.[65] Such an interpretative approach is often clearer than an 'intentionalist' approach and, as seen, may amount to the direct conferral of individuals' rights in treaties where the text permits it. However, the choice of which

[59] Ibid 60–61 [124].
[60] Ibid.
[61] *Jadhav (India v. Pakistan)* (Judgment) [2019] ICJ Rep 418, 446 [102] (emphasis added).
[62] Ibid 454 [134].
[63] Ibid 455–56 [138].
[64] *Jadhav* (n. 61) 475 [42] (Separate opinion of Judge Cançado Trindade).
[65] *LaGrand* (n. 53) 494 [77].

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approach to adopt in a given context will not always be met with consensus. In *LaGrand*, Vice President Shi Jiuyong was not convinced that this provision conferred rights on individuals, opting for 'intentionalism' over 'textualism'. He contemplated that 'indiscriminate reliance on such a dictum in any circumstances ['textualism'] may not always be dependable or helpful in determining the true *intention* of the parties to a treaty'.[66]

9.1.3 Conclusion

The last century has seen an evolution in the Court's recognition of individual rights conferred in treaties. The *Danzig* judgment challenged the notion that the individual did not bear rights directly from international law, thereby questioning the entire concept of dualism in positivist international legal thinking that prevailed at the time.[67] For this reason, this case has become a landmark judgment, which arguably solidified the PCIJ's legacy. Nonetheless, the PCIJ – adopting 'intentionalist' interpretation and being cautious with its wording – left doubt as to whether it truly conferred individual rights through international treaties. The ICJ in the *LaGrand* case, however, adopted the 'textualist' approach and was clear in its wording, leaving no room for doubt.[68] This indicates that while the 'textualist' interpretation is a more certain method, allowing for the conferral of individual rights through international treaties, the 'intentionalist' approach has led to the same conclusion, albeit with greater controversy.

In the 2009 *Navigational Rights* case, the Court was intrepid in making evolutionary interpretation in one instance and presuming the drafters' intentions on another to come to conclusions that were very favourable for the Costa Rican people. The evolution of the Court's approach from cautious to candid in this respect is manifest. In fact, it is submitted that in *Navigational Rights*, the Court may have intentionally chosen to come to conclusions that would favour individuals. There are two key indicators that suggest this was the Court's approach.

[66] Ibid 519–20 [3] (Separate opinion of Vice President Shi) (emphasis added).

[67] Catherine Brölmann, 'The PCIJ and International Rights of Groups and Individuals' in Christian J. Tams and M. Fitzmaurice (eds), *Legacies of the Permanent Court of International Justice* (Martinus Nijhoff Publishers 2013) 139.

[68] Interestingly, however, the ICJ did not refer to the *Danzig* case in its 2001 judgment. Rather, in its paragraph 77, it referred to the *Acquisition of Polish Nationality* (Advisory Opinion) [1923] PCIJ Series B, 20 to substantiate its approach of "apply[ing clauses] as they stand."

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First, given the judicial caution commonly exercised by the Court (Section 8.3), it would have been expected for the Court to adopt a more restrictive approach, pursuant to the PCIJ's *S.S. Wimbledon* case:

> The fact remains that Germany has to submit to an important limitation of the exercise of the sovereign rights which no one disputes that she possess over the Kiel Canal. This fact constituted *a sufficient reason for the restrictive interpretation, in case of doubt, of the clause which produces such a limitation*. But the Court feels obliged to stop at the point where the so-called restrictive interpretation would be contrary to the plain terms of the article and would destroy what has been clearly granted.[69]

The restrictive approach would have possibly been to interpret the scope of the freedom of navigation, and the term 'commerce', in a more limited manner. At the very least, it was expected for the Court to take a more balanced stance, claiming, for instance, that Nicaragua could deny visas to passengers in some specified exceptional cases.[70] It can be assumed that the adopted attitude of the Court was in order to preclude further disputes and definitively settle the matter between the parties (with the exception of its evolutionary interpretation of the term "commerce", which leaves ample room for the term's future evolution, potentially giving rise to new disputes). It is therefore possible that it wished to rule in a manner that would not be detrimental to the affected individuals in question.

Second, the Court came to a conclusion favourable to individuals in one instance in *Navigational and Related Rights* through no method of interpretation at all. The Court was asked to decide if Nicaragua had the right to require Costa Ricans, exercising the right of free navigation on the San Juan River to carry passports or obtain Nicaraguan visas.[71] The task of the Court was to determine if the scope of navigational freedom extends to requesting or denying a visa and on what grounds. This was a difficult task, as the 1858 Treaty was silent on this matter. The Court noted that '[t]he power of a State to issue or refuse visas is a practical expression of the prerogative which each State has to control entry by non-nationals into its territory'[72] and 'entails discretion'.[73] It also

[69] *S.S. "Wimbledon"* (Judgment) [1923] PCIJ Series A, 24–25.
[70] Marko Milanovic, 'The ICJ and Evolutionary Treaty Interpretation' (*EJIL Talk!* 14 July 2009) www.ejiltalk.org/the-icj-and-evolutionary-treaty-interpretation/
[71] *Costa Rica v. Nicaragua* (n. 28) 222 [13] (d). See also Memorial of Costa Rica (29 August 2006) [5.54]–[5.67]; Reply of Costa Rica (15 January 2008) [4.12]–[4.18]; Verbatim record 2009/6, 48–49 [37]–[40] (Lucius Caflisch).
[72] Verbatim record 2009/7, 44–46 [18]–[21] (Paul Reichler).
[73] *Costa Rica v. Nicaragua* (n. 28) 257–58 [115].

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determined that the issue of visas raises the question of *who* is entitled to and who may benefit from the right of freedom of navigation for commercial purposes. It determined that it is the owners and operators of Costa Rican vessels, and passengers on such vessels even if they were not Costa Rica nationals.[74] Thus, imposing visa requirements on these people who enjoy the right of navigational freedom is a violation of this right.[75]

In my view, the determination of who could benefit from freedom of navigation was only one step of the legal reasoning. The next step should have then been to assess whether requiring a person who enjoys navigational freedom to have a visa – regardless of who it is – is, in fact, a violation of this right at all. In other words, does the right to freedom of navigation encompass, in its scope, the right to be free from visa requirements to navigate? Furthermore, on what interpretative grounds could this be determined, given that a 'textualist' approach was not an option? Could this be understood through examining the parties' intentions, or subsequent practice?[76] The Court did not broach the latter queries, nor did it provide a clear explanation for its decision. It is described to have 'creat[ed] bright line rules out of whole cloth'.[77] This is possibly why five members of the Court objected to this specific point[78] and why the separate opinion of Judge Bernardo Sepúlveda-Amor (sharing my position on this particular point) was submitted.[79] Therefore, aspects of the legal reasoning in *Navigational and Related Rights* and *Danzig* may indicate that there was a desire to progress individuals' rights conferred in international treaties. The last century has certainly seen an evolution in this regard.

9.2 Individuals as Beneficiaries of Customary Rights: A Mystifying Threshold

Beyond treaties, the Court has also conferred rights to individuals through the identification of customary international law. It has been required, in some cases, to identify customary international law, the

[74] Ibid 257 [114].
[75] Ibid 257–58 [114]–[115].
[76] See ibid 284–85 [8]–[10] (Separate opinion Judge Skotnikov).
[77] Milanovic (n. 70).
[78] *Costa Rica v. Nicaragua* (n. 28) 269 [156] (d).
[79] Ibid 274–77 [8]–[19] (Separate opinion of Judge Sepúlveda-Amor).

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existence of which would confer rights to private persons in specific contexts. In this section, it is observed that the high threshold for the identification of bilateral custom has seemingly eased over time, ultimately benefiting individuals.

Customary international law is the settled, extensive, and virtually uniform practice of states coupled with their belief (*opinio juris*) that such practice amounts to a legal obligation.[80] While this implies a large number of states, it is also possible for bilateral rules binding just two states to be identified. This is referred to as local custom. In *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)*, Honduras even argued that even a 'trilateral local custom' could have established an agreement regarding joint sovereignty between itself, El Salvador, and Nicaragua.[81] The Court has clearly explained the concept of local custom in the *Right of Passage over Indian Territory (Portugal v. India)* case:

> Where therefore the Court finds a practice clearly established between two States which was accepted by the Parties as governing the relations between them, the Court must attribute decisive effect to that practice for the purpose of determining their specific rights and obligations. Such a particular practice must prevail over any general rules.[82]

The guidelines for the standard of proof required to identify local custom were established in the *Asylum (Colombia/Peru)* case, in which Peruvian national and political leader Victor Raúl Haya de la Torre had been accused of instigating a military rebellion and was granted diplomatic asylum in the Colombian Embassy in Peru. The Court was asked to decide, *inter alia*, whether Colombia was entitled to unilaterally decide whether the offence committed was a political offence or a common crime – a decision which would be binding on Peru, the territorial state. Colombia argued that it was entitled to do so, and such a decision was binding on Peru due to an existing local custom recognised by Latin American states.[83] In response, the Court clarified the standard of proof:

[80] *North Sea Continental Shelf cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)* (Judgment) [1969] ICJ Rep 3, 43 [74] and 44 [77].

[81] Memorial of the Government of the Republic of Honduras (1 June 1998) [53]. See also *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)* (Judgment) [1992] ICJ Rep 351, 597–98 [399].

[82] *Right of Passage over Indian Territory (Portugal v. India)* (Merits) (Judgment) [1960] ICJ Rep 6, 43–44.

[83] Memorial submitted by the Government of the Republic of Colombia (10 January 1950) [15], [24], [29], [30], [31].

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> The Party which relies on a custom of this kind must prove that this custom is established in such a manner that it has become binding on the other Party. The Colombian Government must prove that the rule invoked by it is in accordance with a constant and uniform usage practiced by the States in question, and that this usage is the expression of a right appertaining to the State granting asylum and a duty incumbent on the territorial State. This follows from Article 38 of the Statute of the Court, which refers to international custom "as evidence of a general practice accepted as law".[84]

In this case, the Court deemed that Colombia had not effectively proven that these conditions had been fulfilled. With regards to the requirement of constant and uniform usage practised by the relevant states, the Court noted that the evidence presented by Colombia 'disclose[d] so much uncertainty and contradiction, so much fluctuation and discrepancy (. . .)'.[85] The inconsistency made it impossible to discern any constant and uniform usage.[86] Furthermore, this case placed special emphasis on the importance of *opinio juris*, which is seemingly stricter in a bilateral context.

While the requirements to establish international and local custom are the same and both find their roots in Article 38 of the ICJ Statute, the standards of proof in order to bilaterally bind two states appear to be more rigorous. General customary international law is a more flexible law-making approach as it considers an undetermined number of states' behaviour reflecting the 'majority holding' with regard to a particular practice. On the other hand, local (bilateral) custom only involves two states and therefore depends on the particular activity of one state being accepted by the other. It requires the unequivocal acceptance of the two parties in order to take shape. The keystone principle of consent thus manifests itself more starkly in the context of local (bilateral) custom than with respect to general customary international law. One would therefore presume that local custom is indeed more difficult to establish.

However, in the *Right of Passage over Indian Territory (Portugal v. India)* case one decade later, the Court was satisfied that the conditions described in the *Asylum* case had been met. In this case, the Court had to ascertain the existence of a local custom between India and Portugal with

[84] *Asylum (Colombia v. Peru)* (Judgment) [1950] ICJ Rep 266, 276.
[85] Ibid 277.
[86] Ibid.

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regard to a right of passage of private persons, civil officials, and goods. Noting that the passage of private persons and civil officials was clearly defined and agreed upon by both parties, it found a 'constant and uniform practice allowing free passage between Daman and the enclaves' which had 'continued over a period extending beyond a century and a quarter unaffected by the change of regime in respect of the intervening territory which occurred when India became independent'.[87] This practice had therefore given rise to a right and a correlative obligation.[88] No further explanation was given with respect to its reasoning.

Similarly, the Court's approach to identifying custom relevant to individuals' rights in the aforementioned *Navigational and Related Rights* case indicates a progressive relaxation to the benefit of individuals. Beyond interpreting the 1858 Treaty of Limits, as analysed earlier, it was also requested by Costa Rica to determine whether Costa Rica's inhabitants had a customary right to subsistence fishing in the San Juan river.[89] The Court found that the riparian communities in Costa Rica had a customary right to subsistence fishing from the San Juan River. If we apply the criteria established in *Asylum (Colombia v. Peru)* and in *Right of Passage over Indian Territory (Portugal v. India)*, there was no evidence that Costa Rica's right to subsistence fishing had become binding on Nicaragua,[90] as Costa Rica never claimed before the case that it even had such a right.[91] Furthermore, there was no constant and uniform usage practised by states, as the Court itself stated that 'the practice, by its very nature, especially given the remoteness of the area and the small, thinly spread population, is not likely to be documented in any formal way in any official record'.[92] Thus, there was no documented practice attesting a customary fishing right.[93]

The Court, in its reasoning, explained that Nicaragua never protested the Costa Ricans fishing in the area.[94] Is acquiescence, however, enough to establish the *opinio juris* of the parties? There is no unanimous answer

[87] *Right of Passage over Indian Territory* (n. 82) 40.
[88] Ibid.
[89] *Costa Rica v. Nicaragua* (n. 28) 265 [140].
[90] Nicaragua strictly reiterated that it had "absolutely no intention of preventing Costa Rican residents from engaging in subsistence fishing activities". See ibid.
[91] Milanovic (n. 70).
[92] *Costa Rica v. Nicaragua* (n. 28) 265 [141].
[93] Yoshifumi Tanaka, 'Navigational Rights on the San Juan River: A Commentary on the *Costa Rica v. Nicaragua* Case' (2009) *Hague Justice Journal* 213.
[94] *Costa Rica v. Nicaragua* (n. 28) 265 [141].

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in international law, although the ILC's 2018 Draft conclusions on identification of customary international law state in Article 10(3) that '[f]ailure to react over time to a practice may serve as evidence of acceptance as law (*opinio juris*), provided that states were in a position to react and the circumstances called for some reaction'.[95] The commentary to the draft conclusions specifies that two conditions must be met:

> First, it is essential that a reaction to the practice in question would have been called for: this may be the case, for example, where the practice is one that affects — usually unfavourably — the interests or rights of the State failing or refusing to act. Second, the reference to a State being "in a position to react" means that the State concerned must have had knowledge of the practice (which includes circumstances where, because of the publicity given to the practice, it must be assumed that the State had such knowledge), and that it must have had sufficient time and ability to act. Where a State did not or could not have been expected to know of a certain practice, or has not yet had a reasonable time to respond, inaction cannot be attributed to an acknowledgment that such practice was mandated (or permitted) under customary international law.[96]

In the present case, as the Court itself recognised the remoteness of the area and its small population,[97] the absence of protest could have simply derived from the lack of practical significance of the very small amount of fishing involved. There is no evidence that Nicaragua did not protest because it felt a sense of legal obligation that the riparian Costa Ricans had the right to fish.[98] It would therefore appear that the requirement for the establishment of local custom is not as high as would be expected. In this case, the Court demonstrated exceptional flexibility with regard to these criteria in order to uphold the fishing rights of the riparian communities.

To conclude, it is difficult to ascertain what the necessary standard of proof is for establishing local custom. In the sparse case law, progression can be noted by the Court from a high threshold to a more flexible approach granting individuals rights. As with the assessment with respect to treaty interpretation described earlier, the Court has seemingly been more receptive to identifying customary rights to the benefit of individuals in time – although few cases serve to establish a solidified pattern.

[95] Draft conclusions on identification of customary international law [2018] *Yearbook of the ILC*, vol II, Part Two, Article 10 (3).
[96] Ibid 140.
[97] *Costa Rica v. Nicaragua* (n. 28) 265 [141].
[98] Milanovic (n. 70).

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Another related indicator of this is the Court's acknowledgment of individuals' behaviour as contributing to the formation of custom in *Navigational and Related Rights*. Customary law (international or local) is traditionally established by actions of states.[99] However, in the specific case, it is the practice of a local community of Costa Rican riparians – the affected individuals – that is being discussed. Indeed, the ILC explains that 'the acts of private individuals may sometimes be relevant to the formation or expression of rules of customary international law, but only to the extent that States have endorsed or reacted to them'.[100] It would therefore appear that in the present case, the Court recognised the existence of customary international law through the acts of local populations reflecting Costa Rica's effective control upon them. This draws a parallel to the conclusions drawn in Chapter 7 on territorial disputes: individuals may contribute to the formation of a legal title justifying the state's ownership of a piece of land, if the individuals' actions prove the state's sovereignty.

9.3 Conclusion

To conclude this chapter, the approaches identified by the Court when identifying sources of international law have allowed for the rights of populations to be acknowledged in the Court's jurisprudence and in the international legal system at large. The Court's findings have contributed to the undisputed fact that the VCCR confers individual rights, for instance, and its predecessor arguably advanced individuals' rights in *Danzig*. Its evolutionary interpretation of the word 'commerce' has also benefited a large scope of individuals. Furthermore, its recognition of the constant and uniform usage practised by Costa Rican riparians as amounting to custom was equally beneficial to individuals, as well as other conclusions drawn despite questions raised as to its reasoning.

The Court's recognition of individuals' rights conferred in treaties and customary law has therefore been favourable to individuals compared to other areas of its jurisprudence examined in the previous chapters in Part II of this study. Indeed, more rigid and detailed rules and processes governing substantive areas such as territorial (Chapter 7) or maritime disputes (Chapter 6) have been developed through years of jurisprudence, offering less discretion. This is possibly because the interpretation

[99] *Asylum* (n. 84) 276.
[100] *Costa Rica v. Nicaragua* (n. 28) 265 [140].

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of treaties and the identification of custom are two of the most complex and mysterious tasks in international law.

Indeed, the Court has often been criticised for the mystery it generates when tasked with identifying sources of international law. Scholars have painstakingly tried to understand the Court's reasoning and method in its identification of custom – referred to by one author as 'secret custom'.[101] Similarly, scholars have noted the politics and challenges in treaty identification by the Court.[102] The Court's ambiguous approach to the identification and interpretation of international legal sources is therefore commonplace and not necessarily due to a particular desire to address individuals' concerns. Regardless of its intentions, this chapter shed light on the opportunities the Court has largely seized to conduct treaty interpretation and to identify customary law in a way favourable to affected individuals.

[101] Massimo Lando, 'Secret Custom *or* The Impact of Judicial Deliberations on the Identification of Customary International Law' (2022) 81(3) *The Cambridge Law Journal* 550–80. See also Stefan Talmon, 'Determining Customary International Law: The ICJ's Methodology between Induction, Deduction and Assertion' (2015) 26 (2) *European Journal of International Law* 417–43; Niels Petersen, 'The International Court of Justice and the Judicial Politics of Identifying Customary International Law' (2017) 28 (2) *European Journal of International Law* 357–85; Alberto Alvarez-Jiménez, 'Methods for the Identification of Customary International Law in the International Court of Justice's Jurisprudence: 2000 – 2009' (2011) 60(3) *International and Comparative Law Quarterly* 681–712; Rowan Nicholson, 'The International Court of Justice as a "Shortcut" to Identifying Custom' (2021) 20(3) *The Law & Practice of International Courts and Tribunals* 490–518.

[102] Joost Pauwelyn and Manfred Elsig, 'The Politics of Treaty Interpretation: Variations and Explanations across International Tribunals' in Jeffrey L. Dunoff and Mark A. Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (CUP 2012) 445–74; Duncan French, 'Treaty Interpretation and the Incorporation of Extraneous Legal Rules' (2006) 55(2) *The International and Comparative Law Quarterly* 281–314.

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