Accounting for Difference in Treaty Interpretation Over Time

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Introduction

The law of treaty interpretation presents a familiar paradox. All students of public international law are at some point taught (perhaps with a wink) that as a matter of doctrine all treaties are subject to the same unified rules of interpretation—those principles codified at Articles 31–33 of the Vienna Convention on the Law of Treaties (VCLT), generally understood as reflecting customary international law.1 Yet at the same time, everyone knows that some treaties are special. Time and again we hear that some kinds of treaties are different. Courts, tribunals, and scholars often intone that some types of treaties are entitled to special treatment when it comes to interpretation, especially as regards those changes of circumstances and intentions attending the passage of time. The problem is that the explanations offered for such differentiation rarely satisfy.

The most common case involves the special nature of human rights treaties. Perhaps most famously, the European Court of Human Rights (ECtHR) has extolled the special place of the European Convention on Human Rights (ECHR) as an ‘instrument for the protection of individual human beings’.2 As the Court famously stated, in Soering v UK, ‘[i]n interpreting the Convention regard must be had to its special character as a treaty for the collective enforcement of human rights and fundamental freedoms’.3 According to the Court, such special characteristics call for an outsized reliance on effective interpretation,4

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2 Soering v UK (1989) 11 EHRR 439, [87].

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and justify viewing the Convention as a 'living instrument'. The Inter-American Court of Human Rights (IACtHR) has similarly emphasized the special nature of human rights treaties in general, and the American Convention on Human Rights in particular, finding that such instruments 'are not multilateral treaties of the traditional type concluded to accomplish the reciprocal exchange of rights for the mutual benefit of the contracting States', and that 'human rights treaties are living instruments whose interpretation must consider the changes over time and present-day conditions'.

Such arguments are not limited to the field of human rights. Similar claims have been raised regarding the 'special' nature of treaties for the protection of the environment, territorial treaties, and treaties for the protection of civilians during armed conflict.

So on the one hand we have the universal Vienna rules, equally applicable to the interpretation of all treaties; on the other hand we have differential treatment. Faced with the familiar paradox of accounting for difference under the sign of equality, the question of the day is how to explain such differential treatment within the law of treaties. What justifies weighing some rules of interpretation more strongly than others (ie emphasizing object and purpose over text, or vice versa)? When and to what extent might deviation from the usual rules be justified?

Even in the abstract, the interpretation of treaties over time can lead to doctrinal difficulties. Under what circumstances can a treaty change over time? To what extent can it change on the basis of the parties’ subsequent intentions—as

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5 Loizidou v Turkey (preliminary objections) (1995) 20 EHRR 99, [71].
6 Effect of Reservations on the Entry into Force of the American Convention on Human Rights (Arts 74 and 75), Advisory Opinion OC-2/82, Inter-American Court of Human Rights Series A No 2 (24 September 1982), [29].
7 The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, Advisory Opinion OC-16/99, Inter-American Court of Human Rights Series A No 16 (1 October 1999), [114]. Such views are not limited to human rights courts. For example, the investor-state arbitral tribunal in RosInvest similarly acknowledged that human rights treaties are especially amenable to evolutive interpretation—by contrast to the bilateral investment treaty (BIT) at issue, which was not capable of autonomous evolution. RosInvest Co v Russian Federation (SCC Case No V 079/2005) Award on Jurisdiction (October 2007), [40].
10 See eg Kupreškić et al (Judgment) ICTY-95-16-T (14 January 2000), [517]–[519].
11 While all treaty interpretation is in some sense ‘interpretation over time’, I employ the expression here as a shorthand for the question of treaty change or development over time through interpretation—specifically on the basis of certain codified (or quasi-codified) techniques of interpretation, ie evolutive (dynamic) interpretation and interpretation on the basis of the substantive practice of the parties. See further Julian Arato, ‘Subsequent Practice and Evolutive
evidenced by their subsequent agreement and practice? To what extent can a treaty evolve over time in the absence of authorization by the parties at the time of interpretation, or even in spite of their intentions to the contrary (‘evolutive interpretation’)? And where these canons conflict with one another, or with the other components of the Vienna rules, which principles take precedence? These questions go to the core of the law of treaties—the consent of the parties to be bound by mutual agreement and the extent to which they remain the masters of their treaties in the long term.

At the least, if the doctrine of universality is to be believed, the answer to these questions would remain constant, across treaties of all stripes. Yet we see frequent attempts to insulate certain kinds of treaties from the potentially shifting will of the parties, or to classify some ‘special’ treaties as autonomous from their creators—capable of large-scale evolutionary change more or less beyond the parties’ continued control. These intuitions are often valuable—but as yet it remains unclear, beyond broad generalizations, what considerations explain and justify such distinctions in particular cases.

Differential treatment tends to be explained in one of two ways, both of which prove ultimately unsatisfying. On the one hand, many scholars and tribunals appeal to the general subject matter of certain treaties in singling them out for special treatment (eg treaties for the protection of human rights, or the environment). In light of their special subject matter, the argument goes, such treaties should be understood as insulated from the changing will of the parties, and even in some instances capable of autonomous evolution. On the other hand, the second main school of thought rejects such generalizations, calling instead for a more particularized approach to treaty interpretation over time based on the object and purpose of the specific treaty in question. For the latter group, the touchstone must always be the intention of the parties, as reflected in the goals their particular agreement seeks to achieve.

By contrast to the ‘subject-matter approach’, which I suggest creates an unhelpful typology of treaties, I suggest that the ‘object and purpose approach’ goes too far toward the position that there is no benefit to be gained from thinking about

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12 See Article 31(3)(b) VCLT; see also Georg Nolte (ed), *Treaties and Subsequent Practice* (OUP 2013); Arato, ‘Subsequent Practice and Evolutive Interpretation’.


14 Treaties protecting the human person form a special category, according to one perennial recital, such as those concerning international humanitarian law or human rights. See eg Theodor Meron, *The Humanization of International Law* (Brill 2006); *Fragmentation Report*, [428]. More recently one also hears that treaties protecting the environment have a special place: *Fragmentation Report*, [250].

types of treaties at all (for the purposes of taking a differential approach to interpretation over time). Moreover, the latter approach runs into problems of its own, related to the difficulty of determining the object and purpose of a treaty or treaty provision in a meaningful way. I want to propose a middle ground.

This chapter argues that the crucial consideration lies not in the subject matter of the treaty, nor even purely in its object and purpose, but rather in the nature of the obligations incorporated by the parties in order to achieve their goals. The critical question is whether a treaty provision entails a merely reciprocal exchange of rights and duties, or rather incorporates a more absolute commitment by the parties to take on an obligation insulated from their changing intentions, and over which their subsequent mastery might prove relatively limited. The two most important examples of such absolute (non-reciprocal) obligations are: interdependent norms, meaning obligations of coordination entirely dependent upon the mutual compliance of all of the parties for their effect; and integral norms, which may be understood as absolute obligations stricto sensu—norms meant to withstand non-compliance, for which violation requires redress, but never justifies retaliatory breach by the other parties. Whereas a reciprocal obligation entails a bilateral exchange of rights and duties between two treaty parties, absolute obligations are owed to all the states parties as a collective group (erga omnes partes) or even to a higher collectivity like the international community as a whole (erga omnes). This typology reflects, in other words, the level of commitment by the states parties toward achieving their treaty aims. This chapter argues that the type of obligation is a crucial consideration in the process of treaty interpretation over time.

To be clear, I do not want to suggest that the nature of a norm is decisive for the applicability or non-applicability of any particular technique of interpretation. I am not arguing for a typology of treaty norms that would mechanically determine when and how techniques of treaty interpretation should be seen as appropriate. I only mean to suggest that the nature of a norm as reciprocal, integral, or interdependent should be a consideration—an important consideration—in the interpretation of treaties over time. This characteristic should be taken into account alongside the more familiar factors articulated at

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16 In the dramatic words of the ICTY, the notion of absolute obligations marks ’the translation into legal norms of the “categorical imperative” formulated by Kant in the field of morals: one ought to fulfill an obligation regardless of whether others comply with it or disregard it’: Kupreškić, [518].

17 Effect of Reservations, [29].

18 A handful of the more reflective cases stress the centrality of the distinction. See Ireland v UK (Judgment) (1978) 2 EHRR 25, [239] (’unlike international treaties of the classic kind, the Convention comprises more than mere reciprocal engagements between Contracting States. It creates...objective obligations’); Effect of Reservations, [29] (’modern human rights treaties...are not multilateral treaties of the traditional type concluded to accomplish the reciprocal exchange of rights’); Kupreškić, [517]–[518] (contrasting the ’absolute nature’ of most IHL treaties to merely reciprocal commercial treaty norms); RosInvest, [40] (contrasting reciprocal BIT provisions to more absolute obligations in human rights treaties).
Articles 31–32 of the VCLT: text, context, object and purpose, subsequent agreement and practice, etc.\textsuperscript{19}

In Part I, I canvass several venerable and more recent attempts to explain (or advocate) variations in approach to the interpretation of different kinds of treaties. While some of these views produce valuable insights, they each prove either untenable or ultimately incomplete. In Part II, I present a case for grounding differential treatment on the nature of the obligation under interpretation.

\section*{I. Old and New Explanations of Difference}

This part canvasses three prominent attempts to explain variations in approach to the interpretation of different kinds of treaties over time, based on: (a) the subject matter of the treaty; (b) object and purpose; and (c) whether the treaty grants rights to non-state actors. I suggest that each proves ultimately insufficient. The first is outright misleading. The object and purpose approach, on the other hand, is valuable but overly abstract if taken on its own. Only the third approaches the matter from the right perspective, but it proves to be perhaps too narrowly confined—its private law focus on third party rights and reliance contains only a kernel of what I take to be the best explanation (and justification) for affording certain kinds of treaty norms special treatment in interpretation: the nature and extent of the obligations undertaken by the parties.

\subsection*{A. Subject matter}

The most common justification for taking a differential approach to the interpretation of certain treaties over time has been an appeal to their ‘special subject matter’, echoing the common refrain that human rights treaties are special \textit{because} they concern fundamental human rights.\textsuperscript{20} Judge Tanaka expressed this view in now-classical terms in a dissenting opinion to the 1966 \textit{South West Africa} case. In calling for the evolutive interpretation of the treaty-basis for the mandate system in light of a new rule of customary international law, Tanaka explained:

\textit{[T]he protection of the acquired rights of the Respondent is not the issue, but its obligations, because the main purposes of the mandate system are ethical and humanitarian.}

\textsuperscript{19} This chapter seeks to account for differential treatment \textit{within} the voluntaristic structure of the law of treaties. Of course it is possible to reach beyond the confines of party consent. Though beyond the scope of the present exercise, it is also well worth reflecting on the possibility some treaties may be entitled to special treatment for reasons completely external to consent—eg by shifting focus toward the communal or human interests reflected in a particular agreement. See Bruno Simma, ‘From Bilateralism to Community Interest in International Law’ (1994) 250 Recueil des Cours 6; Robert Kolb, \textit{Interprétation et création du droit international: Esquisse d’une herméneutique juridique moderne pour le droit international public} (Bruylant 2006) 202–3; Eyal Benvenisti, ‘Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders’ (2013) 107 AJIL 295.

\textsuperscript{20} Information on Consular Assistance.
The Respondent has no right to behave in an inhuman way today as well as during these 40 years. Therefore the recognition of the generation of a new customary international law on the matter of non-discrimination is not to be regarded as detrimental to the Mandatory, but as an authentic interpretation of the already existing provisions...of the Mandate and the Covenant... What ought to have been clear 40 years ago has been revealed by the creation of a new customary law...  

At the time it was usually assumed that treaties were static, to be interpreted strictly according to the so-called inter-temporal rule—requiring that in most circumstances they should be interpreted in light of the law extant at the time of promulgation, not at the time of interpretation. However, Tanaka here explained that treaties concerning the rights of the human person must be treated differently. They must be understood as open to the evolution of general international law concerning the human person. In his view, such treaties should be open to progressive change in light of developments in customary international law in the same field. In the intervening decades, various courts and tribunals have confirmed the ‘special’ nature of human rights treaties—that such treaties may have a more autonomous existence, less in thrall to the mastery of the parties. More recently, similar arguments have arisen in favour of special treatment for treaties concerning other subjects, ranging from the protection of civilians in armed conflict, to the protection of the environment, to territorial boundaries.  

Most of the time, such claims that a particular type of treaty is entitled to special treatment rest on a mere assertion about the importance of the treaty’s subject matter. The draw of this kind of explanation is at least partially explained by the diversification and specialization of international courts and tribunals (and to some extent specialization in scholarship)—in other words, by asking who is offering the explanation. Increasingly specialized courts have highlighted the special nature of the treaties over which they have jurisdiction. Likewise, not surprisingly, expert scholars tend to emphasize the special nature of the kinds of treaties over which they have expertise. Such explanations arise in other settings...
as well, as in the RosInvest arbitration where an investor-state tribunal rejected the notion that the underlying bilateral investment treaty (BIT) was entitled to any special treatment. The Tribunal distinguished the BIT from human rights treaties or the constituent instruments of international organizations, which it deemed more appropriate candidates for evolutionary interpretation. Although many of these courts, tribunals, and commentators may be right to adopt a differential approach to the interpretation of their particular treaties over time, it is difficult to see how subject matter per se does any legal work.

The most obvious problem with the subject-matter approach is that it tends to obscure the fact that most treaties, and especially multilateral ones, are package deals, often touching on multiple areas of law. In the example of the Fragmentation Report, ‘a treaty on, say, maritime transport of chemicals, relates at least to the law of the sea, environmental law, trade law, and the law of maritime transport’. If the question of interpretation over time depends on pigeon-holing legal instruments as ‘trade law’ instead of ‘environmental law’, or ‘human rights law’ instead of ‘investment law’, then the question of special treatment would be wholly dependent upon the seemingly arbitrary choice of how to label a complex treaty. It would thus be a good first step to avoid asking why some treaties are different from others, and ask instead why some treaty provisions are different from others (bearing in mind, of course, that the context of the rest of the treaty remains important evidence for interpretation). Any move away from trying to essentialize a treaty’s sole subject matter, toward inquiring into the subject of the particular provision under interpretation, would already represent some progress. However, there is a second, more fatal difficulty with reliance on subject matter as the touchstone for a differential approach.

The deeper problem with the subject-matter approach is that it ultimately cannot capture much of legal significance—even if we limit our analysis to particular norms. Privileging subject matter simply gives rise to a problem of branding. Even a single norm can be described as having different subject matters depending on perspective. For example, a BIT provision could be described as being about protecting foreign investment, about development, or even about human rights (ie the right to property). Beyond the problem of essentializing complex instruments, Martti Koskenniemi rightly suggests that ‘characterizations (“trade law”, “environmental law”) have no normative value per se… The characteristics have less to do with the “nature” of the treaty than the interests from which it is described’. To return to the example of investment disputes, an advocate for investors’ interests might try to argue that a treaty provision obliging the state to provide investors with fair and equitable treatment (FET) concerns the

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28 See RosInvest, [39].
29 I am only criticizing the tendency in these cases to appeal to subject matter in accounting for treating some treaties differently. These cases are not always devoid of other, better, reasons. A few also hit upon the crux of the issue: Effect of Reservations, [29]; RosInvest, [40].
30 Fragmentation Report, [21].
31 Fragmentation Report, [22].
32 Fragmentation Report, [21].
human right to property, and thus justifies an evolutionary approach (expanding investor rights). Conversely a state-friendly advocate could just as convincingly argue that FET represents a concession between states to grant rights to a certain class of individuals to facilitate investment and development—since investors are not party to the treaty at all, there can be no argument that their rights expand over time to the detriment of the host state’s sovereignty. Subject matter is inherently contestable, and devolves into a matter of interest or perspective-based branding. It is ultimately an unsuitable, even arbitrary basis on which to ground a differential approach to the interpretation of treaties over time.

I do not want to unfairly impugn the arguments of these specialized courts or scholars in grounding their differential approaches on the basis of subject matter. Often they are absolutely right in identifying these treaties as having a special relationship to the parties and their intentions over time. Without doubt the results of this approach have had an enormous and beneficial effect on international law over the years, especially in the areas of human rights and humanitarian law. However, I want to probe more deeply into why certain regimes are considered ‘special’. In other words, the foundational question is how to qualify what characteristics of these various treaties give judges and scholars pause in determining whether the usual consent-oriented rules apply in the usual way.

B. Object and purpose

Rosalyn Higgins provides a somewhat more compelling explanation for the differential approach to treaty interpretation over time. According to Higgins, the root criterion for assessing whether and how a treaty may be susceptible to change over time is its specific object and purpose. She explains Judge Tanaka’s 1966 opinion in *South West Africa* on the basis of the centrality of protecting the human person as an object of the mandate system. 33 One might likewise explain the supposed special nature of a territorial treaty by reference to its particular object and purpose, which necessarily entails ‘the need for the stability of boundaries’. 34

Unlike the subject-matter approach, this object and purpose approach rejects generalizing abstract types of treaties. Instead it analyses the propriety of applying the various techniques of interpretation over time on a case-by-case basis, in light of a particular treaty’s goals. And it has the advantage of being the only explanation purely immanent in the Vienna rules themselves. Because object and purpose is recognized in Article 31(1) of the VCLT, this approach explains variations in the

33 Higgins, ‘Time and the Law’, 519. For Higgins, subject matter cannot explain exempting human rights provisions from a general presumption of static-interpretation: ‘[H]uman rights provisions are not really random exceptions to a general rule. They are an application of a wider principle—intention of the parties, reflected by reference to the objects and purpose—that guides the law of treaties.’

weight afforded to the different factors listed at Article 31 by appeal to one of those self-same factors.

There is no doubt that object and purpose is essential to the analysis of interpretation over time. That said, it is not a panacea. On its own, it constitutes an unsatisfying touchstone for determining when and how a treaty should be capable of change over time. The inquiry into object and purpose entails troubling doctrinal and conceptual ambiguities, and seems, moreover, fundamentally incomplete. As a result, reliance on object and purpose alone risks obscuring some of the most important considerations about a treaty germane to the question of change over time.

The first problem concerns the long-standing doctrinal debate as to whether a treaty has just one ‘object and purpose’ or whether it can have several. And if several, are they all general, or can individual provisions have different objects and purposes? On the one hand, some scholars insist that a treaty has only one object and purpose, properly understood. In the emphatic words of Judge Anzilotti of the Permanent Court of International Justice:

I do not see how it is possible to say that an article of a convention is clear until the subject and aim of the convention have been ascertained, for the article only assumes its true import in this convention and in relations thereto.  

Thus, according to Anzilotti, a treaty term cannot be understood except in light of the object and purpose of the treaty as a whole. It simply does not make sense, on this view, to talk about the intent of the provision in isolation from the object and purpose of the whole. Jan Klabbers concurs, adding that ‘when the notion of object and purpose of a treaty is used to refer to single provisions of a treaty, or when object and purpose becomes numerous objects and purposes, something valuable is lost’—specifically the idea of an overarching goal of the treaty, against which reservations, modifications, and purported interpretations should be measured.  

On the other hand, some commentators insists that treaties can have multiple, and perhaps even divergent objects and purposes. Ian Sinclair states that ‘most treaties have no single, undiluted object and purpose but a variety of differing and possibly conflicting objects and purposes’. In this vein, the Appellate Body of the WTO held in Shrimp–Turtle that the General Agreement on Tariffs and

35 *Interpretation of the Convention of 1919 Concerning Employment of Women During the Night* [1932] PCIJ Rep Series A/B No 50, Dissenting Opinion of Judge Anzilotti, 383. The older usage ‘subject and aim’ appears to have been one of several synonyms of ‘object and purpose’ that have ultimately given way to the latter term. See Isabelle Buffard and Karl Zemanek, ‘The “Object and Purpose” of a Treaty: An Enigma?’ (1998) 3 ARIEL 311, 317.

36 Buffard and Zemanek, ‘The “Object and Purpose” of a Treaty’, 342–3 contend that a treaty has only a general object and purpose, and suggest that some articles may be essential to it while others may not be (eg for purposes of reservations).

37 Jan Klabbers, ‘Treaties, Object and Purpose’ in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (OUP 2012) [6], [7], [23].

Trade (GATT) has multiple objects and purposes in its varied provisions, and in particular that the purposes of the General Exceptions clause at Article XX (here, environmental protection) are separate and must be assessed separately from the Treaty’s more general purposes (ie trade liberalization). According to the Appellate Body, different provisions are included for different reasons, and these reasons should not be subsumed into the general goals of the treaty.

The Shrimp–Turtle case usefully illustrates why the question of one or several object(s) and purpose(s) matters. Framing the issue in caricatured form, Article XX(g) is a lonely, but important, provision incorporating environmental protection (specifically the protection of ‘exhaustible natural resources’) in a treaty otherwise mostly dedicated to trade liberalization. Assume, for convenience, that environmental protection would be typical of the kind of object and purpose that could support evolutive interpretation, while the goal of trade liberalization would militate in favour of static interpretation along the principle of contemporaneity—ie sticking to the bargain struck. If the GATT has only one general object and purpose, it would be difficult to say that environmental protection is anything but an ancillary concern. Environmental considerations would thus not legitimately affect the question of how the provision should be interpreted along the steady march of time (even as environmental law and science rapidly outpace understandings contemporaneous with the GATT’s promulgation). On the other hand, if Article XX(g) has its own object and purpose, ‘environmental protection’, and this is taken to be the referent for determining how the treaty should be interpreted over time, the picture looks very different.

The more conceptual problem is the level of abstraction at which to frame object and purpose. Nuance in the framing of even a single object and purpose can be decisive. The Iron Rhine arbitration is illustrative. There, the Tribunal held that the boundary treaty at issue had an evolutive nature, in light of its object and purpose. The treaty incorporated cross-border rights regarding the operation and maintenance of a railway. The dispute concerned, inter alia, the scope of the Netherlands’ obligation to maintain (and/or modernize) the railway over the long term. The treaty’s object and purpose could be stated in more or less abstract forms: for example, as simply ‘establishing a stable border’, or as ‘demarcating the border while maintaining Belgium’s most efficient rail-access to Germany in order to effect a stable boundary without undermining the economic capacity of either State’. The latter could be read into the former, broadly construed. However, it only becomes clear that the treaty must be read as evolutive if its object and purpose is construed in the latter complex form. If necessary maintenance were not considered part of the treaty’s object and purpose, Belgium could have lost one of its central gains—an efficient rail link to Germany—thereby undermining the future stability of the boundary settlement. Important as it is, no bright line rule can realistically resolve this issue of abstraction; tribunals can

40 Arbitration Regarding the Iron Rhine (Ijzeren Rijn) Railway (Belgium v Netherlands) (2005) 27 RIAA 35, [80]–[84].
only try to determine the full meaning of a treaty’s object(s) and purpose(s) on a case-by-case basis.

Finally, beyond its potential indeterminacy, the inquiry into object and purpose does not necessarily exhaust all fundamental considerations relevant to interpretation over time. Even where a treaty’s goals are sufficiently determinate, the interpreter must still ask how far the parties were willing to go to achieve their goals. Given the centrality of consent to the interpretive process, it is important to distinguish between the parties’ ends and their chosen means. Insofar as the inquiry into object and purpose fails to take the parties’ level of commitment into account, it cannot adequately explain how much weight such object and purpose is due vis-à-vis the other factors in the Vienna rules.

Higgins is right to underscore the importance of object and purpose to questions of interpretation over time, as reflective of the parties’ intentions. And as Klabbers rightly notes, the malleability of object and purpose as a consideration in interpretation ‘is not necessarily a bad thing…as it opens up a space for political debate and discussion on the most desirable interpretation of a treaty’. But the vagaries inherent in the concept dilute its analytical value for assessing the particularly sensitive question of whether and how interpretation can bring about treaty change over time. There are serious ambiguities about what goes into the analysis, and an over-reliance on this one facet of interpretation risks leaving fundamental considerations aside.

C. Third party rights and reliance

A very different and promising recent proposal is grounded in private law. It emphasizes a particular objective characteristic of certain treaties—the conferral of rights on third parties, including individuals or other non-state actors. Anthea Roberts has argued that the rules of interpretation should be specially tailored when applied to treaties granting directly enforceable rights to non-state actors, including a wide array of investment treaties and human rights conventions (particularly the ECHR). Roberts argues for a differential approach to such treaties in light of their asymmetric nature. ‘Treaties that grant rights to nonstate actors, such as human rights and investment treaties, do not share the symmetry between those who hold the rights and those who can interpret them’, Roberts contends. Therefore, she suggests that care be taken in the application of doctrines like subsequent practice to protect the rights and legitimate expectations of third party rights conferees: ‘The treaty parties may still be the masters of the treaty, but one cannot assume no harm, no foul in accepting their interpretations of nonstate actors’ rights.’

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41 Klabbers, ‘Treaties, Object and Purpose’, [22].
Roberts confines her analysis to the propriety of relying on subsequent practice in interpreting treaties that confer directly enforceable rights upon non-state actors. She proposes that in the case of such treaties interpreters should keep in mind both the interests of the rights-conferring states parties as ‘masters of the treaty’, and at the same time the interests of the rights-conferees in the substance of their rights, and in legal certainty as to the stability of that substance. A key question for Roberts involves reliance—whether the third party has relied on such rights, and when such reliance can vest. As such, Roberts argues, interpreters should still give weight to subsequent party agreement and practice, but in a modified form that takes into account the asymmetry of interests inherent in these treaties. Turning specifically to investment treaties, Roberts argues that it is important to distinguish between three issues: scope (whether the subsequent practice supports an interpretation that expands or narrows rights); reasonableness (whether the new interpretation appears to strain the text); and timing (whether the subsequent practice established the new interpretation before or after the investment was made, the alleged breach occurred, and any claim was filed, in order to determine and weigh reliance). Roberts highlights these issues to prod tribunals to consider subsequent practice in the interpretation of investment treaties, while paying due attention to the legitimate expectations of the investors to whom these treaties grant rights.

Roberts provides an insightful picture of how subsequent practice could be tailored to take into account both state and investor interests in the interpretation of investment treaties over time. However, as a general theory for distinguishing between types of treaties for the purposes of interpretation, this rights-based explanation is potentially both over- and under-inclusive.

First, it is not clear that all rights-conferring treaties should be understood as equally insulated or autonomous from the mastery of the parties. The mere fact that a treaty grants rights to an individual does not imply, of itself, that states have given up any of their mastery of the treaty—including their capacity to reinterpret the treaty at will through subsequent agreement or practice. The question turns upon what kind of rights are conferred, or more precisely, what kind of obligations the states parties take on to confer and guarantee those rights. Roberts recognizes that treaties conferring rights to individuals are due differential treatment, while mere benefit-conferring treaties are not. And as she further acknowledges, third party rights may sometimes be little more than mere benefits, conferred on the tenuous basis of reciprocity by the other parties to the treaty. A diplomat’s rights conferred by a diplomatic treaty are not easily equated with the rights of an investor under a BIT, which are distinct in turn from an individual’s fundamental rights under a human rights treaty. These differences in character are highly material to the question of the continued vitality of party consent and intentions in interpretation over time. The issue is how to determine whether such rights are something more than benefits and to what extent any such difference should play

The Nature of the Obligation

I accept the premise, shared by all the views canvassed above, that treaties are not all the same, and that it is not always appropriate to apply the same techniques of interpretation to different kinds of treaties—at least not in the same way. This is especially true in the context of interpretation over time, which, in ascertaining state ‘intentions’, necessarily implicates systemic issues of state consent and legal certainty. The problem is that Article 31 of the VCLT does not provide for how its component doctrines interrelate, or how they are to be weighed against one another.48 On the one hand, the rules cannot be mechanically applied to derive

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48 ILC, ‘Draft Articles on the Law of Treaties with Commentaries’ (1966) II ILC Ybk 219–20 (indicating that in general there is no hierarchy between the elements of Article 31 VCLT, but that ‘[a]ll the various elements, as they were present in any given case, would be thrown into the crucible, and their interaction would give rise to the legally relevant interpretation’); Richard Gardiner, Treaty Interpretation (OUP 2008) 9.
a ‘correct’ answer to interpretive questions (nor could any rules be expected to do so). On the other hand, the rules cannot be taken as meaningless legalistic justifications for achieving desired outcomes without doing imprudent violation to the idea of international law as law, as well as its foundations in state consent. The difficulty of differentiating between treaties for the purposes of interpretation over time is to determine what factors are important to take into consideration in applying the Vienna rules—without either reducing everything to outcomes (the subject-matter approach), or boiling everything down to one aspect of the rules (object and purpose).

I propose that a critical piece of this interpretive puzzle is the nature of the norm under interpretation—in other words, the kind of obligation set up by the parties to achieve their goals. The key question is whether a treaty provision incorporates a merely reciprocal exchange of rights and duties between states, or rather establishes a more durable kind of obligation, resilient against shifts in party intention. Integral obligations represent the archetypal counterpart to merely reciprocal obligations, while interdependent obligations lie somewhere in between. As indicative of the states parties’ level of commitment, the nature of a treaty obligation as reciprocal, integral, or interdependent is as relevant to the interpretation of that norm over time as the object and purpose it seeks to achieve.

A. Types of obligation in the law of treaties

Though absent from the VCLT’s general rule on interpretation, the distinction between treaty norms according to type of obligation has a pedigree in the law of treaties. The nature and extent of an obligation is a venerable, but perennially under-appreciated and under-theorized, criterion for distinguishing between treaties or treaty norms—particularly because it was not expressly included in any portion of the final VCLT.

Sir Hersch Lauterpacht already formulated the core idea as Second Rapporteur on the Law of Treaties. He called upon the International Law Commission (ILC) to distinguish between contractual and law-making treaties for the purpose of successive treaty-making. According to Lauterpacht, treaties of the law-making type, ‘affecting all members of the international community or which must be deemed to have been concluded in the international interest’, would take precedence over merely contractual treaties in case of temporal conflict. In his view, a later-in-time contractual treaty could not trump a conflicting law-making treaty and would be invalid to whatever extent it conflicted with the prior instrument.

Succeeding Lauterpacht as Third Special Rapporteur, Sir Gerald Fitzmaurice set aside the language of contractual and law-making treaties, but extended the

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idea at its root, envisioning distinctions among treaty norms meriting differential treatment. Rather than distinguishing between sweeping generalized types of treaties, Fitzmaurice took a more fine-grained approach—reorienting the focus towards the nature of particular treaty norms. He distinguished between norms establishing reciprocal obligations, reflecting mere exchanges of rights and duties between parties (akin to Lauterpacht’s ‘contractual treaties’), and those treaty norms incorporating more absolute obligations (akin to instruments of public law). Within the latter set, Fitzmaurice identified two types: those truly absolute integral obligations and interdependent obligations, representing a kind of hybrid between the integral and the reciprocal types.\(^{51}\)

Fitzmaurice attached two significant legal issues to the distinction between types of treaty obligations: one concerning the consequences of breach, and the other concerning successive treaty-making. According to him, a party could appropriately suspend or terminate a treaty in response to the other party’s material breach of a reciprocal norm. Further, the parties could derogate from a reciprocal treaty obligation through enacting a subsequent treaty on the same matter. By contrast, it would be impermissible to respond to the breach of integral norms with suspension or termination. Such norms as are found in the Genocide Convention, to use Fitzmaurice’s example, are meant to bind all parties irrespective of the behaviour of the other parties. They are meant to withstand violation, and enforcement must occur through channels other than the mutual threat of noncompliance.\(^{52}\) Similarly, unlike with reciprocal norms, any reciprocal treaty conflicting with a prior integral norm would be invalid to the extent of their contradiction.

It is important to see that the qualification of an obligation as reciprocal or integral does not depend on the number of parties to a treaty.\(^{53}\) A multilateral treaty may well entail no more than a complex web of reciprocal obligations among its parties, as in Fitzmaurice’s example of the Vienna Convention on Diplomatic Relations (VCDR).\(^{54}\) At the same time, a bilateral treaty could easily incorporate integral obligations, as is arguably the case where a BIT accords substantive rights and access to arbitration to third party individuals and non-state actors.\(^{55}\)

Beyond reciprocal and integral norms, Fitzmaurice envisaged a third category of interdependent obligations, for which the model was an arms control treaty.\(^{56}\) These fall somewhere in between reciprocal and integral norms. On the one hand, because they depend on unanimous application, they are more like reciprocal


\(^{55}\) See Roberts, ‘Power and Persuasion in Investment Treaty Interpretation’. Cf RosInvest, [40].

obligations for purposes of determining the consequences of material breach—the
parties only agree to abide by this kind of obligation insofar as the others all do
the same. Each party understands that if any party began to violate the treaty
by stockpiling the controlled weapon, no party would continue to see itself as
bound. However, with respect to successive treaties, interdependent norms are
more like integral obligations. Precisely because any slippage by one party would
likely engender slippage by all the other parties (rendering the treaty norm a dead
letter), Fitzmaurice believed that any inter se agreement between some of the par-
ties cutting against the object of the interdependent norm would be null and void.
The interdependent treaty would take absolute priority over any subsequent treat-
ies between only some of the parties.\footnote{Fitzmaurice, ‘Third Report on the Law of Treaties’, arts 18–19, [2].}

Here at last is a distinction that gets to the heart of the issue of differential
treatment in treaty interpretation over time—if not, perhaps, ascribed such a pur-
pose by Fitzmaurice himself. By reorienting focus away from the treaty’s object
and purpose or subject matter, the tripartite distinction between reciprocal, inte-
gral, and interdependent obligations affords more solid ground for explaining why
some treaties attain a degree of autonomy from the parties in a manner consistent
with the core notion of state consent. By focusing on the modalities by which
the parties agree to take on obligations giving effect to their diverse objects and
purposes, it becomes easier to account for (and argue for) differences in approach
to the interpretation of different kinds of treaties over time.

In stark terms, differences in type of obligation—typified in terms of the extent
to which states consent to be bound—should have a strong bearing on the relative
weight and appropriate contours of the component rules of Article 31 VCLT.
Type of obligation, in other words, should constitute an authentic criterion in the
interpretation of treaties over time.

It is important to note that Fitzmaurice’s strong vision of the role of the dis-
tinction, with regard to the consequences of breach and for resolving conflicts
between successive treaties, is not necessarily reflected in current law. The last
Special Rapporteur on the law of treaties, Sir Humphrey Waldock, abandoned
the distinction in his final reports. He considered the notion overly complicated,
The final VCLT elided any express reference to the distinction between types of obligation.\footnote{Fitzmaurice, ‘Dynamic (Evolutive) Interpretation of Treaties, Part I’.}
But Waldock’s abandon-
donment of the distinction was not the end of the story. The type of obligation
has retained more subtle relevance in the VCLT, and, more recently, the ILC has
returned to the distinction for the purposes of state responsibility and addressing
problems of successive treaties through interpretation.\footnote{Humphrey Waldock, ‘Second Report’ (1963) II ILC Ybk [28]–[30].}

First, it bears noting that the ghost of the distinction can be felt throughout the
final VCLT. Most obviously, the recognition of a limited set of hierarchical norms
(jus cogens) ensures that certain integral norms like those in Fitzmaurice’s preferred

\[\text{Equation}\]
\[\text{Expression}\]
example—the Genocide Convention—will get special treatment.\textsuperscript{61} Moreover, Joost Pauwelyn finds additional traces of the idea.\textsuperscript{62} He notes that Article 60(5) on material breach bars termination or suspension in response to breach of a wider set of integral norms than those codifying \textit{jus cogens}—ie provisions relating to the ‘protection of the human person contained in treaties of a humanitarian character’.\textsuperscript{63} And with regard to successive treaties, Article 40(1)(b)(i) bans (without invalidating) inter se modifications among only some parties to a multilateral treaty when they ‘affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations’; and Article 40(1)(b)(ii) prohibits inter se modifications that relate to ‘a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as whole’. Thus, between these two provisions, it would be impermissible in most cases for only some parties to a multilateral treaty to contract around any norm that could properly be called integral. To do so would likely undercut the rights of others or undermine the object and purpose of the treaty as a whole. Finally, Article 58 provides similar rules regarding the inter se termination or suspension of treaties.\textsuperscript{64}

More recently the ILC’s work on state responsibility and fragmentation has breathed new life into the idea of distinguishing between abstract types of obligation. The ILC’s Draft Articles on State Responsibility recognize a difference, for the purposes of standing, between bilateral (or reciprocal) obligations, and multilateral obligations owed to all the parties of a particular regime (\textit{erga omnes partes}) or to the international community as a whole (\textit{erga omnes}).\textsuperscript{65}

But it was the \textit{Fragmentation Report} that did the most to resuscitate the distinction between reciprocal, integral, and interdependent norms in the context of successive treaties. The \textit{Report} turned to the distinction not for the purpose of determining which treaties would get ‘hard’ priority in the sense of invalidating conflicting instruments, but rather for the ‘softer’ purpose of harmonizing potentially conflicting treaties through interpretation. Most of the time, according to the \textit{Report}, harmonization turns on interpretive canons like \textit{lex posterior} and \textit{lex specialis}—it is not that one treaty invalidates the other, but rather that the treaty that is later in time, or more specific, gets precedence. However, according to the \textit{Report}, the picture changes in cases of potential conflict between reciprocal and more absolute types of treaty obligation. In such situations, the nature of the norm should be taken into consideration as a counterweight to the normal canons of \textit{lex posterior} and \textit{lex specialis}, because the parties’ choice to establish an integral norm provides in and of itself a good reason to give interpretive priority to that norm. All else being equal, the reciprocal should be interpreted to be in line with the integral or interdependent (as much as possible), and not the other way

\textsuperscript{61} Article 53 VCLT.
\textsuperscript{63} Article 60(5) VCLT.
\textsuperscript{64} Article 58 VCLT.
Accounting for Difference in Treaty Interpretation Over Time

The Report noted that '[n]othing has undermined Fitzmaurice’s original point': that certain norms in ‘human rights and humanitarian law treaties, (as well as for example environmental treaties) form a special class of non-bilateral (“integral” or “interdependent”) instruments that cannot be operated through the same techniques as “ordinary” treaties creating bilateral relationships’. The point to take from all this is that states try to achieve a wide variety of goals through international treaties, and in so doing they agree to take on very different kinds of obligations—even within a single instrument. The type of obligation they decide to take on has important consequences for their continued mastery over the treaty. It seems relatively unproblematic that states retain their mastery over treaty norms incorporating reciprocal obligations, being free to modify or replace them through mutual agreement, or to suspend or terminate them in response to one another’s breach. On the other hand, it is much less clear that they maintain such mastery with regard to more absolute types of treaty norms (whether interdependent or integral, *erga omnes partes* or *erga omnes*). To the contrary, it appears that by incorporating such obligations states establish norms over and above themselves that are beyond their grasp. And interdependent norms lie somewhere in between. The issue at the heart of the distinction between types of treaty obligation is the relevance of state consent to the continued vitality of a treaty norm. It is this issue also that makes the distinction relevant to problems of interpretation over time.

B. Categories of obligation and interpretation over time

For many of the same systemic reasons underlying its relevance throughout the law of treaties, Fitzmaurice’s distinction between types of obligations should be an important consideration in the process of treaty interpretation—particularly with regard to whether and how such interpretation may bring about treaty change over time. The nature of a treaty obligation is germane to at least three interpretive questions that are left unresolved by the text of Article 31 of the VCLT: (1) whether one or another technique of interpretation over time is appropriate at all in a particular case; (2) how liberally and expansively such dynamic techniques should be applied; and (3) how to weigh such doctrines against the other elements of the Vienna rules. The point here is both descriptive and normative. I am suggesting that distinguishing between reciprocal, integral, and interdependent norms helps both to explain the instincts of international adjudicators in a wide variety of cases, and to justify drawing distinctions between types of treaty norms for the purposes of interpretation over time in certain circumstances.

Questions of dynamic interpretation over time on the basis of the parties’ subsequent practice or the purported evolutionary character of a treaty norm strongly implicate the core notion of state consent undergirding the entire law of treaties. Here, as with questions of material breach or harmonizing successive treaties, the

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66 Fragmentation Report, [407].
67 Fragmentation Report, 250.
The Nature of the Obligation

question of the extent to which the parties agreed to be bound should be carefully assessed. As noted above, states can take on different kinds of obligations in establishing their joint projects. In acceding to mere reciprocal norms, states agree to a pseudo-contractual exchange of rights and duties, which may be enforced by retaliatory suspension or termination, or abrogated by successive treaty-making. With integral norms, states agree to create obligations meant to withstand violations and the changing whims of the parties. This distinction is vital to the question of whether and how the parties can exercise their interpretive authority to develop, augment, or restrict a treaty’s provisions, as well as the question of whether and to what extent such provisions are amenable to autonomous change over time.

Consider the weight assigned to the subsequent practice of the parties. As regards an integral norm, the nature of the obligation would seem to weigh against an interpretation on the basis of subsequent practice that cuts against the object and purpose of a treaty. For example, it would seem uncomfortable (and unlikely) for the ECtHR to narrow an integral rights protection provision in the ECHR on the basis of the subsequent practice of the parties. In the case of Demir & Baykara v Turkey, the Court relied on the overwhelming subsequent practice of the parties, inter alia, to justify expanding ECHR Article 11 (freedom of association) to include the rights of municipal civil servants to unionize, and the right of all unions to bargain collectively. But imagine the situation had been the reverse—that Article 11 had clearly included the rights of public workers in its ambit at the outset, but a majority of states had subsequently banned public worker unionization (without any protest by the minority). There would seem to be something wrong with relying on such conduct to establish a restrictive interpretation of the Convention. To the contrary, this behaviour would look more like violations of the freedom of association en masse. The mere fact that these violations occurred in a group, without protest by the other states parties, should not necessarily transform them into the grounds of a new authoritative interpretation of the law.

Both the original case and my hypothetical turned on interpreting the same integral obligation to respect the freedom of association—the difference is the conformity of the subsequent practice to the object and purpose of an integral treaty norm meant to protect individual rights from encroachment by the states parties. Here the integral nature of the norm hews toward privileging object and purpose over subsequent practice. On the other hand, the object and purpose

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69 Such a restrictive interpretation would not be impossible in the case of integral norms. But in such cases arguments for a restrictive interpretation based on party practice should be viewed quite a bit more sceptically and subjected to more rigorous evidentiary standards than in cases of merely reciprocal obligations: Fitzmaurice, ‘Interpretation of Human Rights Treaties’, 742.

70 Fitzmaurice, ‘Interpretation of Human Rights Treaties’, 742 (noting that the integral nature of human rights treaties seems to lead to ‘reductions in the importance of the actual text of the treaty in relation to other factors relevant to interpretation—in particular enhancing the importance of the object and purpose of the treaty’).
may not have proven so decisive in the case of a treaty conferring reciprocal obligations (for example, the VCDR). If the parties remain masters of the treaty, as with merely reciprocal norms, then it is not clear that a court’s determination of the object and purpose of the treaty should defeat evidence of the parties mutually changing intent about the meaning of the agreement—even if that subsequent intent seems to cut against the treaty’s original object. And of course the issue will not always be clear, as in the more borderline case of investor rights.71

The consequences of this analysis for interdependent norms lie, as always, somewhere in the middle. There is reason to be cautious in labelling restrictive party practice as breaches en masse rather than evidence of a narrow interpretation. By contrast to integral norms, which are meant to withstand treaty breach, interdependent norms permit suspension and termination by all parties in the case of any one party’s material breach. Thus, with interdependent norms, a clearly common practice evidencing the parties’ agreement would have to be given effect, as failing to do so could have the farcical consequence of vitiating the treaty entirely. But recalling that such norms are supposed to withstand later in time conflicting treaties or inter se modifications, there is reason to be especially watchful for real commonality, consistency, and concordance in the parties’ practice in terms of evidence (as compared to reciprocal norms)—for example by subjecting claims based on limited practice plus acquiescence to heightened scrutiny.

Distinguishing between reciprocal, integral, and interdependent norms further helps us explain (and justify) the instincts of judges and arbitrators in singling out certain kinds of treaties as specially capable of autonomous evolution. A handful of cases expressly draw our attention to the nature of the obligations at issue. Beyond exhorting the red herring of subject matter or the incomplete explanation of object and purpose, the IACtHR and ECtHR have both at times emphasized the integral nature of the treaty norms under their charge in adopting an evolutionary approach to interpretation.72 The former stressed that such instruments ‘are not multilateral treaties of the traditional type concluded to accomplish the reciprocal exchange of rights for the mutual benefit of the contracting States’,73 concluding that ‘human rights treaties are living instruments whose interpretation must consider the changes over time and present-day conditions’.74 By contrast, the Tribunal in RosInvest held that the obligations entailed by the UK–Soviet BIT were not amenable to autonomous evolution over time, absent evidence of the parties’ consent, by specific appeal to their merely reciprocal nature. Acknowledging the propriety of evolutive interpretation for human rights conventions like the ECHR, the RosInvest Tribunal strongly questioned ‘whether these special kinds of multilateral treaty are at all analogous to bilateral engagements regulating a particular area of the relations between one Party and the other’. According to the

72 Loizidou; Information on Consular Assistance, [114].
73 Effect of Reservations, [29].
74 Information on Consular Assistance, [114].
Tribunal, the BIT reflected merely ‘a (reciprocal) bargain and the Parties must be held to what they agreed to, but not more, or less’.75

We need not agree that the matter is as cut and dried as portrayed in these cases (ie that integral norms are capable of evolution but reciprocal norms are not). But what should be clear is that the nature of the obligation has an important bearing on the extent to which we can plausibly view a treaty norm as insulated from the mastery of the parties. Absolute obligations are more insulated from the changing will of the parties (reducing the weight assigned to subsequent practice that deviates from the treaty’s object and purpose), and are potentially more amenable to autonomous evolution (again in light of its object and purpose). Reciprocal obligations are, by contrast, more amenable to change over time on the basis of the parties’ subsequent agreement and practice, but less easily presumed capable of autonomous evolution absent party action. Whether or not we agree in particular instances, the distinction provides a helpful explanation for the tendency of international courts and tribunals to afford special treatment to certain kinds of treaties. Even more importantly, it provides a principled basis for accounting for difference going forward.

While the nature of a treaty obligation is highly material to the question of interpretation over time, it should be emphasized that it is not a panacea. It is no more than one consideration among many, and it is crucial not to give too much weight to any one factor. Real cases are complicated. Most disputes over treaty interpretation in public international law involve a great many factors weighing in different directions, which are generally not easily or mechanically resolved. Take for example the border dispute between Eritrea and Ethiopia, arbitrated in 2002.76 One aspect of that dispute concerned a portion of the treaty delineating the border between those two countries. The Tribunal had to determine whether the border had shifted from the line envisioned in the treaty on the basis of the subsequent practice of the two states. It ultimately held that the practice of the parties had modified the treaty border, but for present purposes the result is less important than the analysis.

Were the relevant treaty provisions simply reciprocal in nature, it would have been easy to come to the Tribunal’s conclusion. But a boundary treaty of this type is inherently integral, constituting an objective and stable boundary to be respected by all states in the international community—not just the signatories.77 The integral nature of such obligations necessitates a measure of caution in considering the subsequent practice of the parties, in appreciation of the treaty’s object and purpose.

At first glance, there appears to have been a real tension between the object and purpose of the treaty and the subsequent practice of the parties. As with any

75 RosInvest, [40].
76 Decision Regarding the Delimitation of the Border between Eritrea and Ethiopia (2002) 25 RIAA 83, [4.60].
border treaty, a major aspect of the agreement’s object and purpose is the stability and finality of the border, in the interest of peace. And yet the practice of the parties seemed to indicate that for some time Ethiopia had treated as its own a significantly populated rural township situated on Eritrea’s side of the treaty line, to no apparent protest by the latter, as well as treating the residents there as its own nationals for various administrative purposes.78 Framed in the abstract, modifying the treaty line to take party practice into account might seem to cut against the object and purpose of stability of boundaries. However, in full view of the current situation—admittedly resulting from the parties’ practices—the demands of object and purpose appear more ambivalent. By the time of arbitration, a reversion to the textual boundary would have also been highly disruptive and destabilizing, imposing an overnight change in territorial and administrative status on the residents of the disputed township, with unclear effects on their personal status.

The integral nature of the boundary provision only goes so far in resolving these thorny interpretive questions. It hews toward taking the treaty’s object and purpose particularly seriously in assigning weight to the subsequent practice of the parties; but insofar as object and purpose proves ambivalent, the relevance of subsequent practice becomes an increasingly open question. The Tribunal ultimately decided that the boundary had changed, and unsurprisingly the result was controversial.79 But more importantly, for present purposes, the example underscores the complexity of the interpretive process, in which the nature of a treaty obligation plays an important but certainly not decisive part.

The most we can say is that appreciating the type of obligation is critical to the process of treaty interpretation, just as it is for assessing the consequences of material breach or successive treaty-making. And indeed the concept helps account for the instincts of international courts and tribunals in a wide variety of cases. This consideration helps us navigate among the various doctrines comprising the Vienna rules, especially in determining their appropriate scope and weight vis-à-vis one another in particular cases. But as the Ethiopia–Eritrea case shows, this consideration should not be taken as a trump. It cannot provide mechanical answers to complex interpretive questions any more than the other canons codified at Article 31 of the VCLT. It is a crucial consideration, given the centrality of state consent in the interpretive process, but it is not an all-encompassing one.

Conclusion

The practice of treaty interpretation demonstrates that adjudicators occasionally feel compelled to draw critical distinctions between types of treaties. While

78 Eritrea/Ethiopia, [4.73]–[4.78].
79 Compare Kohen, ‘The Decision on the Delimitation of the Eritrea/Ethiopia Boundary’ (criticizing the Tribunal’s reasoning) with Shaw, ‘Title, Control, and Closure?’ (taking a sympathetic view).
the basic insight at work in such cases is often compelling, the justifications and explanations proffered for such differential treatment have thus far proven unsatisfactory or incomplete from the perspective of general international law. In this chapter I have argued that the practice of differential treatment is indeed justifiable and can be accounted for within the law of treaties.

In accounting for difference in treaty interpretation over time, the crucial consideration ought to be the nature of the obligation under interpretation. Is the provision merely a reciprocal exchange of rights and obligations? Or is it a more absolute integral or interdependent norm? Just as the nature of a norm bears on the consequences of material breach, or the resolution of conflicts between successive treaties, I have argued that the nature of an obligation is germane to determining how to interpret a treaty over time, especially as regards the possibility and legitimate extent of interpretive change. What these questions share is a common concern with the continued vitality of state consent, or, put another way, the parties’ mastery over their treaties.

One important consequence of my account is that different norms in the same treaty may be subject to different interpretive yardsticks. This certainly complicates the task of interpretation, but it is a complication worth internalizing. Integral and interdependent norms are not especially common, and it is likely they will be found packaged in large multilateral treaties along with various reciprocal obligations. If it is correct that distinguishing between these types of obligations matters in the abstract, it would be a serious mistake to pave over such differences by assuming that all provisions of a particular treaty are of the same type.

Finally, it remains to be acknowledged that drawing legally significant distinctions between types of obligations will not be completely free of problems, particularly as regards classifying norms in particular treaties. Even if one accepts the value of such distinctions in the abstract, it will often be unclear and disputable whether a treaty norm is really best classified as reciprocal, integral, or interdependent. This short chapter is not the place for a comprehensive analysis of that evidentiary question. Suffice it to say that the question should not be simply reduced to subjectivity; the nature of a treaty obligation need not be entirely in the eye of the beholder. While express language will likely be rare, interpreters should look to objective indicia of the parties’ level of commitment. Does the treaty permit parties to make reservations or interpretive declarations? Does it express particular consequences for material breach (as with most GATT commitments) or successive treaty-making (as with Article 103 of the UN Charter, which declares the Charter’s superiority over conflicting later-in-time treaties)? Does it envision compulsory international adjudication? Does it grant rights to third parties, along with the means to enforce them? This list is of course not exhaustive, but affirmative answers to any of the above will be probative evidence that the parties intended to create something more than merely reciprocal obligations susceptible to easy derogation or retaliatory breach.

I hope to have shown that temporal problems in the interpretation of treaties should not be decided on the basis of their object and purpose alone, any more than by recourse to abstract generalizations about their subject matter. Especially
in light of the voluntaristic roots of the law of treaties, the interpreter must also
take into account the extent to which the parties were willing to commit to achiev-
ing their ends. But I do not suggest that simply doing so will resolve such temporal
problems by yielding a ‘correct’ interpretation. Like any canon of interpretation,
thinking in terms of types of obligation can only help guide the interpreter toward
a right, or at least legitimate, answer. And of course there will always be disputes
about whether a norm is really reciprocal or integral, and how much weight this
factor should ultimately have. In the final analysis, the application of all such
rules will always require judgment. Insofar as such judgment can never be fully
mechanized, the art of interpretation is to determine when the rules apply, and to
give them appropriate weight vis-à-vis one another in particular cases.

(Praeger 1950) xv.