

INDEX

abortion, 286-9 Ackermann, Bruce, 56-8 aconsensual consensualism, 320-1, activity core, balancing and weighing in, 126-8 actor knot, 165-6 Acts Interpretation Act (Australia), 109 - 14adoption rights, ECtHR jurisprudence and, 292-4 Aegean Sea Continental Shelf case, 222-3, 239-43, 267-9 Aerial Incident case, 231-4 a fortiori maxim, 116-18 Agreement of Free Movement, 186-7 Alexy, R., 140-1n.329 Al-Khasawneh (Judge), 246-51 Alland, 10-11 Al-Saadoon and Mufdhi, 280-1, 329-31 Alvarez, Alejandro (Judge), 52-4, 246-51 amendments to treaties ECtHR jurisprudence and, 273-8 interpretation and, 15-16 VCLT provisions concerning, 193-4 American Institute of International Law, 101-2 American Law Institute, Restatement Second of, 102-4, 129-34, 365 - 6analogies interpretation and, 22-7 analytical jurisprudence, circularity in treaty interpretation and, 67-71 Anglo-Iranian Oil Company case, 218-19, 235-6, 267-9 Annoni case, 285-6

Application of the Convention on the Prevention and Punishment of the Crime of Genocide case, 223-4 approximate application, evolutive interpretation and, 27 arbitration cases, 26 argumentative process ICJ jurisprudence and, 224-5 354 - 6weight and hierarchy in, 129-34 Aristotle, 13n.55 categorical models of, 18-21 deductive logic of, 8-13 on knowledge, 138-9 topoi of, 124-5 armed conflict, effect on treaties, 183-4n.488 arrest, ECtHR jurisprudence concerning, 284-5 art of interpretation, 138-9 ascertainment knot, 159-62 ECtHR jurisprudence and, 326-7 ICJ jurisprudence and, 257-8 perception and, 210-11 Assembly of the Council of Europe, 273 - 8assumed intentions, 243-6 Auerbach, Erich, xiii-xviii Austin, J. L., 14n.62 Austin case, 284-5, 309-14 authentic interpretation flexibility and, 91-7 hierarchies of interpretation and, 132 - 4historical evolution of, 51-2 subsequent agreement and practice

and, 162-7



402 INDEX

authoritative interpretation, 85–6 Azevedo (Judge), 258, 263–7

balancing techniques. See also rebalancing; weighing activity core and, 126-8 consensus and, 315-16, 334-6 in ECtHR intertemporality, 278-301 in ECtHR justificatory patterns, hierarchies of interpretation and, 129 - 34interpretation and, 16-17 Banković case, 296-7, 306-9, 333-4 Bates, E., 185-6 Bayatyan case, 289, 328-9 Bederman, D. J., 83-5 Bedjaoui (Judge), 246-51, 253-5, 263-7 Bentham, Jeremy, 97-8 Bernhardt, Rudolf, 277n.412 'better understanding' principle, ECtHR jurisprudence and, 321-2 birth certificates, ECtHR jurisprudence concerning, 286-9, 338-43 Bluntschli, Caspar David, 97-8 Bonnello (Judge), 309-14 border treaties, ICJ jurisprudence concerning, 226-30, 239-43 Borscheid, Peter, 211-13 Brest, Paul, 31-54 Broom, H., 116-18 Bustamante (Judge), 246-51, 263-7

Câmpeanu case, 297
Cançado Trindade (Judge), 246–51, 257–8
cardinal cores of VCLT, 350–4
activity core, 126–8
argumentative weight and hierarchy
core, 129–34
functional reconstruction and, 76–8
function as core of cores, 140–6
means core, 114–25
nature care, 109–14
openness core, 134–8
ordinary and special meaning and,
153–7
Carnap, Rudolf, 20–1, 72–3

B v. France case, 286-9

Cartier-Bresson, Henry, xiii-xviii
Casadevall (Judge), 309-14
Case Concerning Questions of
Interpretation and Application of
the 1971 Montreal Convention
Arising from the Aerial Incident at
Lockerbie, 223-4

Case Concerning the Gabčíkovo– Nagymaros Project, 225, 239–43, 250–1, 263–7, 269–71

Case Concerning the Land and Maritime Boundary between Cameroon and Nigeria, 227-8, 240-1n.184

Case Concerning Rights of Nationals of the United States of America in Morocco, 217–18, 235–6, 267–9, 354–6

Castro (Judge), 250–1, 253–5, 262–7 categories of treaties, VCLT rules of interpretation and, 32–4

Chapman case, 286-9

Charter of Fundamental Rights of the European Union, 332–3

children's rights, ECtHR jurisprudence and, 286–9, 292–4, 320–1

Christine Goodwin case, 286-9, 291-2, 321-2, 324-6, 338-43

circularity

in treaty interpretation, 67–71, 347–50 circumstances of the conclusion of the treaty, 171–2, 333–4

civil rights, ECtHR jurisprudence concerning, 285–6

classification of the treaty inferences from, 120–1 supplementary means and, 174

clausula rebus sic stantibus principle, 174-8

Code Civil (France), méthode scientifique and méthode evolutive interpretations of, 60–5

codification approach to treaty interpretation, 97–106, 363–4 compilation v. synthesis approaches, 98–100

collective bargaining, ECtHR jurisprudence and, 290–1



INDEX 403

collective juridical conscience, Saleilles' concept of, 62-4 Colombian-Peruvian Asylum case, 231 - 4common law intertemporal doctrine and, 65-6 originalism and, 56-8 communication codification of interpretation and, 105 - 6functions of treaty rules and, 145-6 treaty interpretation and, 8-13 comparative law, functional reconstruction in, 72-3 conditional interpretive declaration, 367 - 8conscientious objection, ECtHR jurisprudence concerning, 289 consensus method ECtHR jurisprudence and, 273-8, 315-16, 334-6 internal practice and, 316-18 constitutional interpretation classification of treaties and, 120-1 ECtHR jurisprudence and, 273-8 functional reconstruction and, 72-3 intertemporal doctrine and, 172-81 living instrument doctrine and, 301-5 subsequent practice principle and, 162 - 7Constitution of the United States, 31 - 54construction, evolutive interpretation and, 56 consular relations International Court of Justice jurisprudence and, 217-18 termination or suspension of treaties and severance of, 198-9 contemporanea expositio est optima et fortissima in lege maxim, 116–18, 350 - 4contemporaneity, principle of, 52-4 intertemporality and, 178-81 contemporaneous interpretation competing principles and, 32-4

Rutherforth's discussion of, 49-51 VCLT rules of interpretation and, contential evolution, 20-1, 39 context of discovery v. context of justification, 140-6 in ICJ justificatory patterns, 251 - 63contextualist approach, 135-7, 210 contract treaties (traité contrat), structure of, 33-4 Cossey case, 286-9, 291-2, 338-43 Court of Justice of the European Union competences of, 14-15 VCLT rules and, 334-6 Covenant of the League of Nations International Status of South West Africa and, 216-17 Wilson's Draft of, 187-8 crucible metaphor balancing and weighing in treaty rules and, 126-8 hierarchies of interpretation and, 129-34 Cruz Varas case, 298-9, 323-34 customary law circularity in treaty interpretation and, 67-71 International Court of Justice jurisprudence and, 214-16 intertemporal doctrine and, 39-41 legality of VCLT cardinal cores and, 109-14

D'Amato, Anthony, 31–2
Darwin, Charles, 18–21
D'Aspremont, J., 71–7n.422
Davidson, Donald, 152–3
death penalty, ECtHR jurisprudence and, 280–1, 328–9
deductive logic, treaty interpretation and, 8–13
degrading treatment, ECtHR jurisprudence concerning, 281–3, 301–5
De jure bellis libri tres (Gentili), 48
Demir and Baykara case, 273–8, 290–1,

329-32, 334-6

precedent and, 267-9



404 INDEX

Denkbewegung (movement of thought/ way of thinking) approach evolutive interpretation and, 183-4 functional reconstruction and, function in practice and, 76-8 denunciation of treaties, contractual right of denunciation and withdrawal, 196-7 detention devolution of rights concerning, 361 - 3309 - 14ECtHR jurisprudence concerning, 284 - 5devolution in interpretation, ECtHR and problem of, 309-14 dictionaries, ICJ use of, 153, 256 Dikme case, 281-3 diplomatic relations, termination or suspension of treaties and severance of, 198-9 discretionary process, balancing in interpretation and, 126-8 discrimination, prohibition of, ECtHR jurisprudence and, 292-4 discursive mapping, intertemporal doctrine and, 34-5 doctrinal argument history of treaty interpretation and, 83 - 5originalism and, 56-8 Suárez's interpretive methods and, domestic jurisdiction, International Court of Justice jurisprudence and, 222-3 Dörr, Oliver, 30-1 dualist democracy, originalism and, 56 - 8Dupuy, P., 34-5 duration of treaties, 33, 162, 256 education, right to, ECtHR jurisprudence and, 295-6 effectiveness, principle of, VCLT rules 54-66 of interpretation and, 32-4

elections, right to free elections, 295-6 Emonet case, 318-19 environmental standards treaties devolution of, 309-14 ECtHR jurisprudence concerning, ICJ jurisprudence and, 225, 253-5, 269 - 71relevant rules for, 262 equitable construction phase, 95-7, equity, 22-7 European Commission for Democracy through Law (Venice Commission), 316-18, 333 European Commission of Human Rights, 273-8 European Convention on the Legal Status of Children Born out of Wedlock, 293, 318-19 European Court of Human Rights (ECtHR) additional protocols and jurisprudence of, 329-31 consensus method and jurisprudence of, 273-8, 315-16, 334-6 devolution and, 309-14 institutional aspects of, 273-8 intertemporal issues and jurisprudence of, 272-3, 278-301 justificatory patterns in, 314–43 legacy of, 272-3 living instrument doctrine and, 26n.137, 301-5 precedent in jurisprudence of, 337-8 table of cases, 20-4 European Movement, 184-9, 309-14 European Parliament, ECtHR jurisprudence on elections to, 295-6 evidence, interpretation and, 15 evolutive interpretation basic principles, 18-21, 347-50 classification of terms and, 40, 255-63 comparative law and solutions to, competing principles and, 32-4 express regulation and, 184-9 false application and, 227n.119

Ehrlich, Ludwik, 52-4, 98-100, 118-19,

363 - 4



> INDEX 405

historical background for, 48-54 ILC draft article on intertemporal law and, 37-41 intertemporality and, 178-81 invalidity, termination and suspension rules, 195-201 limits of, 22-7 living instrument doctrine and, 301 - 5maxims for, 116-18 méthode scientifique and méthode evolutive interpretations of Code Civil and, 60-5 norm conflict and, 194-5 ordinary and special meaning and, originalism and non-originalism and, 31-54 peremptory norms of international law and, 199-201 precedent and, 267-9 retroactive application by ECtHR of, 305 VCLT rules and, 28-31, 183-202 voting rights and, 295-6 ex aequo et bono, equity as, 22-7 expressio unius maxim, 116-18 external practice, ECtHR jurisprudence and, 318-19, 334-6 extra-legal considerations, 31-2 in ECtHR jurisprudence, 326-7 in ICJ jurisprudence, 243-6, 263-7 extrinsic evidence, rules of interpretation and, 135-7 concerning, 285-6

fair trial, right to, ECtHR jurisprudence family life, right to, ECtHR jurisprudence and, 286-9 Fauchille, Paul, 93-4 Ferrazzini case, 285-6, 324n.680 Feteris, E. T., 72-3 Field, David Dudley, 97-8 Fiore, P., 52-4 Fiore, Pasquale, 98-100 Fisheries Jurisdiction (Spain v. Canada) cases, 240n.180, 267-9 ICJ jurisprudence, 225-6, 231-4

Fisheries Jurisdiction (United Kingdom v. Iceland and Germany v. Iceland) cases, ICJ jurisprudence, 221-2 Fitzmaurice, Gerald, 52-4, 101, 112-14, 120-1, 243-51, 258-62, 301-5 Fitzmaurice, Malgosia, 31-4 flexible phase of treaty interpretation hierarchies of interpretation and, 129 - 34history of, 91-7, 101 fluidification of treaties, 187-8 foetus, protection of, ECtHR jurisprudence concerning, 280 - 1forced labour, ECtHR jurisprudence concerning, 283 formal principles legal v. non-legal interpretations, 134 - 8properties of, 122-3 Foster (Judge), 263-7 fragmentation in international law, treaty interpretation and, 177n.484 France, méthode scientifique and *méthode evolutive* interpretations of Code Civil in, 60-5 freedom of assembly and association, ECtHR jurisprudence concerning, freedom of expression, ECtHR jurisprudence concerning, 290 freedom of thought, conscience and religion, ECtHR jurisprudence concerning, 289 free elections, right to, ECtHR provisions concerning, 295-6 free scientific inquiry (libre recherche scientifique), Gény's concept of, freezing clauses, rules of interpretation and, 184-9 Frege, Gottlob, 11–15 Fretté case, 292-4 Friedman, Wolfgang, 5-8 Frontier Dispute case, 231-4,

240-1n.184

Frowein, Jochen, 277n.412, 309-14

> 406 INDEX

functional reconstruction in treaty interpretation, 71-6 historical account of, 83-108 practical application of, 76-8, 350-4 future law, intertemporal interpretations and, 231-4 fuzzy cases, ICI jurisprudence and, 231-4 F v. Switzerland case, 291-2, 321-2

Gadamer, H., 13n.57, 138-9 Gardiner, Richard, 67–71, 151–2n.365 generality, techniques of interpretation and, 115-16 generic terms

in Aegean Sea Continental Shelf case, 239 - 43defined, 28-31, 347-50

in ICJ justificatory patterns, 251-63 ordinary and special meaning and,

in South West Africa cases, 236-9 genocide, ICJ jurisprudence on, 223-4 Gentili, A., 48, 65-7, 86-8, 150-3 Gény, François, 60-4

Germany, evolutive interpretation discourse in, 65-6 goal knot of interpretation, 147-50

Golder case, 273-8 good faith, 86-8, 90-1, 150-3

governments, resistance to intertemporal doctrine by, 39-41

Aegean Sea Continental Shelf case and, 222-3, 239-43

resistance to intertemporal doctrine in, 39-41

Grotius, Hugo, 48-9, 53-4, 84n.4 interpretive methods of, 86-8, 90-1, 95-7, 350-4

on presumptions in interpretation, 118 - 19

Guillaume (Judge ad hoc), 246–51, 258 - 69

gypsies, rights of, ECtHR jurisprudence and, 286-9

Haas case, 286-9 Habermas, J., 140-1n.329 Hague Peace Conferences of 1899 and 1907, 97-8

Hale (Baroness), 65-6 Hall, W. E., 95-7

harmonisation, international law rules and rules of interpretation, 167-9

Harroudj case, 286-9

Hart, H. L. A., 72

Harvard Draft Convention, 98-100, 124-5, 350-4

balancing and weighing in, 126-8 techniques of interpretation and,

115-16, 365 Hassan case, 309-14

Hatton case, 309-14

Havana Convention on Asylum, 101-2, 263 - 7

Heisenberg uncertainty principle, xiii-xviii

hermeneutics, 140-6

hierarchies of interpretation

argumentative process and, 129-34 openness core and, 134-8

Higgins, Rosalyn (Judge), 32-4, 253-5 Hirsi Jamaa case, 295-6

history of treaty interpretation

codificatory phase of, 97-106 flexible phase of, 91-7

mechanical phase of, 85-91 overview of, 83-108

homosexuality, ECtHR jurisprudence and, 292-4, 321-2

Huber, Max (Judge), 31-2, 178-81, 347 - 50

Hudson, Manley, O., 98-100, 124-5 human rights. See also specific rights, e.g. liberty and security, right to devolution in, 309-14

ECtHR jurisprudence and, 296-7, 329 - 31

new rights creation and, 306-9 object and purpose of interpretation and, 162n.415, 185n.496

Hyde, Charles, 93-4, 111-12

ILO Commission, 301-5 implied powers, necessary implications and, 22-7



> INDEX 407

'in accordance with' principle, hierarchies of interpretation and, in dubio pro mitius principle flexible interpretative approaches and role of, 94-5 ICI rejection of, 263-7 inferences from classification of the treaty, 120-1 interpretative outcome and, 174-8 from nature of the treaty, 119-20, 263 - 7from structure of treaties, 121-2, 2.63 - 7innovation, in evolutive interpretation, 22 - 7Institut de Droit International, 28-31, 97-8, 101, 365 art of interpretation, 138-9 legality issues discussed by, 111-12 institutional facts, profile of international courts and, 205-8 intentionalist interpretation codification and, 102-4 Grotius and, 86-8 ICJ jurisprudence and, 250-1, 263-7 Navigational and Related Rights case and, 243-6 Vattel and, 88-90 interim measures, ECtHR jurisprudence including, 298-9 internal law ECtHR jurisprudence and, 273-8 living instrument doctrine and, 301 - 5modification of intertemporal doctrine and, 41-7 Suárez's interpretive methods and, 85 - 6VCLT provisions and, 193 internal practice, consensus and, 316-18, 334-6 International Commission of Jurists, 101 - 2International Court of Justice (ICJ). See also specific cases analytical framework concerning,

ex aequo et bono in statutes of, 22-7 future law and, 231-4 institutional aspects of, 214-16 intertemporal issues and jurisprudence of, 216-31, 246-63, 269-71 justificatory patterns in, 251-69 miscellaneous rules of interpretation used by, 263-7 norm conflict and jurisprudence of, 194 - 5peaceful co-existence approach and, 235 - 6precedent in rulings of, 267-9 shift to evolutive interpretation in, 246 - 51table of cases, 24-6 treaty interpretation and jurisprudence of, 52-4, 214, 234-51, 354-6 international courts and tribunals circularity in treaty interpretation and, 67-71 codification of treaty interpretation and, 101 factor-based treaty interpretation, object and purpose of treaties and, 159 - 62profiling of, 205-8 treaty interpretation and, 5-8 International Covenant on Economic, Social and Cultural Rights, 187-8 international law codification of, 97-106 expansion of, 210-11 treaty interpretation and, 5-8 International Law Association, 97-8 International Law Commission (ILC) balancing and weighing in draft of, 126 - 8codification and, 97-8 draft article on intertemporal law, evolutive interpretation and, 30n.156 intertemporal openness and, 357-8 modification of intertemporal doctrine by, 41-7

205 - 8



408 INDEX

International Law Commission (ILC) historical precedent for, 52-4 ICJ jurisprudence and, 216-31, on object and purpose of treaties, 246-63, 269-71 ILC draft article on, 37-41 interim measures of ECtHR and, presumptions in interpretation and, 298-9 international law rules and, 167-9 reservations concerning treaties and, knot of interpretation and, 172-81 rules of treaty interpretation and, méthode scientifique and méthode 37 - 47evolutive interpretations of Code state practices and, 109-14 Civil and, 60–5 Working Group on Fragmentation, modification through practice of, 30 - 541 - 7international legal method, evolutive non-judicial interpretations, 231-4 interpretation and, 18-21 object and purpose concept and, international organisations, creation of, 158 - 62pace of judicial interpretation and, 32 - 4International Status of South West 211 - 13Africa, 216-17, 252, 262 right to life and, 280-1 Internoscia, Jerome, 98-100 rules of interpretation and, 201-2, interpretation. See also rules of 350 - 4interpretation; specific interpretive stocking concerning, 278-301 methods subsequent agreement and practice application of, 14-15 and, 162-7 basic principles of, 8-13, 347-50 summary of, 181-2 interpretation by usage, 85-6 VCLT rules of interpretation and, Interpretation of Peace Treaties advisory opinion, 231-4 intra-subjective perspective, contextual interpretive declarations, reservations analysis of treaties and, 140-6 concerning treaties and, 189-92 invalidity of treaties, 195-201 interpretive knot. See knots of Islamic kafala, recognition of, 286–9 Island of Palmas case, 31-2, 178-81, interpretation interpretive method and methodology 347 - 50analysis of, xi-xiii Israel, resistance to intertemporal definitions, 3-5 doctrine in, 39-41 means of interpretation and, 22-7 interpretive practice, defined, 3-5 Jacobs, Francis, 151-2n.365, 309-14 intertemporal problems James case, 294-5 British and German discourses on, Jessup, Phillip (Judge), 138-9, 263 - 7ECtHR and, 272-3, 278-301 Johnston case, 333-4 future applications of, 357–8 judicial authority goal knot of interpretation and, in authentic interpretation, 132–4 147 - 50rules of interpretation and, 140-6 good faith in interpretation and, judicial corporal punishment, abolition of, 301-5 152 - 3governments' resistance to, 39-41 judicial creativity, in evolutive Grotius and, 48-9 interpretation, 22-7



> INDEX 409

judicial mechanisms language philosophy of, 156, 255 in ECtHR, 273-8 originalism debate and, 31-54 treaty interpretation and, 5-8 ius cogens devolution of rights and, 314 ECtHR jurisprudence and, 331-2, intertemporal doctrine and, 201-2 norm conflicts and, 199-201 justificatory function contextual analysis of treaties and, 140 - 6in European Court of Human Rights, 269 - 71314 - 43in ICJ treaty interpretations, 251-63 profile of international courts and, Kasikili Sedudu case, ICJ jurisprudence in, 226-7, 239-43, 252-3, 255-6, 258-63, 269-71 Kelsen, Hans, 8-9, 122n.250 267 - 9Klabbers, Jan, 112-14, 140-1n.329, 152 - 3262 - 3knots of interpretation actor knot, 165-6 ascertainment knot, 159-62, 258, functional reconstruction and, in, 71-6 76 - 8goal knot, 147-50 intertemporal knot, 172-82, 211 - 13194 - 5participation knot, 167-9, 331-2 perception and, 210-11 qualitative agreement knot, 166-7, 259, 329 quantitative agreement knot, 166 source knot and, 167-9, 331-2 subject knot, 159-62 Konstantin Markin case, 292-4 Koroma (Judge), 246-51 linguistics Koselleck, Reinhard, 3-5 Koskenniemi, Martti, 4n.8, 67-71, 74n.444, 147-50 Kratochwil, Friedrich, 124-5 Kress case, 301-5

treaty interpretation and, 8-13 Lasswell, Harold, 135-7 Lauterpacht, Elihu, xiii-xviii, 27, 101 law-making treaties ECtHR jurisprudence and, 306-9 interpretation and, 15-16 structure of, 33-4 law-making treaties (traité loi), 120-1 Lawrence, T. J., 95-7, 143-4 League of Nations ICJ justificatory patterns and, 257-8, International Status of South West Africa and, 216-17 South West Africa cases (Ethiopia, Liberia and Namibia) and, 220, 231-4, 236-9, 255 Lebedev case, 284-5 Legality of the Threat or Use of Nuclear Weapons case, 224-5, 258-62, Legality of the Use of Force case, ICJ jurisprudence and, 223-4 legal personality doctrine, ICJ jurisprudence and, 231-4 legal theory, functional reconstruction legitimacy, in treaty interpretation, xi-xiii Lessig, Lawrence, 56-8 lex posterior maxim, norm conflict and, lex specialis, express regulation in treaties and, 184-9 Leyla Şhahın case, 295-6 liberty and security, right to, ECtHR jurisprudence concerning, 284-5 libre évolution scientifique, Saleilles' concept of, 62-4 Linderfalk, U., 156-7 interpretation and, 8-13, 88-90 ordinary and special meaning and, semantic change and, 18-21 semiotic triangle and, 11-13



410 INDEX

literal interpretation, 86-8 flexibility and, 91-7 Vattel's maxim and, 88-90 living instrument doctrine devolution of rights and, 309-14 ECtHR jurisprudence and, 26n.137, 301-5, 337-8, 354-6 loci, maxims of interpretation and, 116 - 18locus standi, in South West Africa cases, 236 - 9Loizidou case, 296-7, 301-9, 328-34 L v. Lithuania case, 286-9 MacCormick, Neil, 73-4 Mamatkulov case, 298-9 Mangouras case, 284-5 Marckx case, 292-4, 305 margin of appreciation, ECtHR jurisprudence and, 306-9 marriage, rights concerning, ECtHR jurisprudence and, 291-2, 321-2 material breach, termination or suspension of treaties and, 197-8 material impossibility, termination or suspension of treaties and, 197-8 material principles good faith in interpretation and, 150-3 in ICJ rulings, 263-7 perception and, 210-11 properties of, 122 Matthews case, 295-6 maxims of interpretation, 116-18, 173 McDougal, Myres, 105-6, 131-2, 134-8, 162 - 7McNair, Arnold, 93-4, 257-8 MC v. Bulgaria, 281-3 McVeigh case, 284-5, 309-14 meaning of treaties defined, 11-13, 347-50 flexible interpretative approaches

means of interpretation, 22-7 core principles for, 114-25 Grotius' interpretive methods and, historical evolution of, 83-108 techniques, 114-25 mechanical approaches to treaty interpretation, 85-91, 359-61 hierarchies of interpretation and, 129 - 34intertemporality and, 176-8 precedence and, 267-9 media technology, devolution of interpretation and, 309-14, 321-2 method and methodology of interpretation defined, 3-5, 347-50 Suárez's interpretive methods and, 85 - 6méthode evolutive, interpretation of French Code Civil and, 60-5 méthode scientifique, evolutive interpretation of French Code Civil and, 60-5 Miller, James C., 135-7 misconduct of interpreter, good faith in interpretation and, 150-3 modification interpretation and, 15-16 through practice, ILC draft on intertemporality and, 41-7 most-favoured-nations principle, International Court of Justice jurisprudence and, 217-18 Mouvement Raëlien Suisse case, 290 Mowbray, A. R., 26n.137 multilateral treaties, evolutive interpretation and, 32-4 multilingual treaties, flexibility in interpretation of, 94-5 Namibia. See also South West Africa cases (Ethiopia, Liberia and

Namibia. See also South West Africa cases (Ethiopia, Liberia and Namibia)
ECtHR jurisprudence concerning, 301–5, 354–6
ICJ jurisprudence concerning, 220, 231–4, 236–9, 257–8, 354–6

and role of, 94-5

harmonisation of, 140-1n.329

in Kasikili Sedudu case, 226-7

interpretation and, 85–91 natural and ordinary meaning, 52–4

mechanical approaches to treaty

ordinary and special meaning, 153-7



> INDEX 411

national courts, interpretation and, Nationality Decrees Issued in Tunisia and Morocco case, 231-4, 267-9 ECtHR jurisprudence and, 316-18, legality of VCLT cores and, 109 - 14nature of the treaty inferences from, 119-20 supplementary means and, 174 Navigational and Related Rights case, 228-30, 243-6, 258-62, 264n.319, 267-9, 269-71, 354-6 ne bis in idem prohibition, ECtHR jurisprudence and, 295-6 necessary implications, interpretive results as, 22-7 Netherlands, resistance to intertemporal doctrine in, 39 - 41Neuberger (Lord), 65-6 New Haven School of interpretation, 105-6, 134-8 new rights, creation of, 306-9 Nolte, Georg, 28-31 non-derogable norms. See jus cogens principle normative argument functional reconstruction and, 73-6 originalism and, 56-8 peremptory norms of international law and, 199-201 norm conflict, treaty interpretation and, 194-5 nuclear weapons, ICJ jurisprudence concerning, 224-5, 258-62 object and purpose circularity in treaty interpretation and, 67-71 consensus and, 334-6 ECtHR jurisprudence and, 326–7, 354 - 6hierarchies of interpretation and,

inferences from nature of the treaty and, 119-20 in Navigational and Related Rights case and, 243-6 subject knot and, 158-62 objective approach to interpretation, 102 - 4objective inquiry, evolutive interpretation and, 62-4 obligations Grotius on role of, 86-8 rules of interpretation and role of, 88-90 structural features of treaties and, 121 - 2Öcalan v. Turkey case, 280n.427, 329-31 openness core, rules of interpretation and, 134-8 opinio juris sive necessitatis principle customary international law and, 109 - 14ECtHR jurisprudence and, 328-9 Oppenheim, Lassa, 95-7, 361-3 ordinary and special meaning ECtHR jurisprudence and, 324-6 ICJ justificatory patterns and, 251-63 International Court of Justice jurisprudence and, 222-3 in Navigational and Related Rights case and, 243-6 rules of interpretation and, 153-7 originalism evolutive interpretation and, 31-54 ICJ trend toward, 246-51 Ovid, xiii-xviii pace of judicial interpretation, 211 - 13ECtHR jurisprudence and, 338–43 ICJ rules of interpretation and, 208-9, 269-71 Pacific Settlement of International Disputes of 1928, 222-3

pacta sunt servanda principle good faith in interpretation and, 150 - 3

in ICJ justificatory patterns, 251-63



412 INDEX

pacta sunt servanda principle (cont.) presumption internal law and treaty interpretation flexible interpretative approaches and role of, 94-5 and, 193 material breach/material in ICI jurisprudence, 263-7 impossibility and, 197-8 inferences from nature of the treaty modification of intertemporal and, 119-20 doctrine and, 46-7 rules of interpretation and, 30-1, parental rights, ECtHR jurisprudence 118 - 19and, 292-4, 316-19 as supplementary means, 174 Parra-Arranguren (Judge), 258-62 pretium, interpretation and principle participation knot, 167-9, 331-2 of, 8-9 path dependency, functions of treaty Pretty case, ECtHR jurisprudence in, rules and, 145-6 280 - 1Pauwelyn, J., 16n.71 principles in international law, peaceful co-existence, ICJ 32-4, 122-3jurisprudence and, 235-6 intertemporality and, 178-81 perception private life, right to, ECtHR in ECtHR jurisprudence, 338–43 jurisprudence and, 286–9 property rights, ECtHR jurisprudence in ICJ jurisprudence, 210–11, and, 294-5 Perelman, Chaim, 124-5 proportionality Petroleum Development Ltd v. Sheikh of balanced interpretation and, 16-17 Abu Dhabi case, 267-9 ECtHR intertemporality and, Phillimore, Robert, 51-2, 84n.4 278-301 Philosophical Investigations freedom of expression and, 290 public law in treaties, 120-1 (Wittgenstein), 67-71 Pichkur, 292-4, 331-2 Pufendorf, Samuel, 84n.4, 88 political methods, ICJ jurisprudence Pulp Mills on the River Uruguay case, and, 263-7 229-30, 263-7 Port Royal Topics, 124-5 purposive interpretation power 208-9 codification and, 102-4 of ECtHR jurisprudence, 338-43 competing principles and, 32-4 in ICJ jurisprudence, 208-9, 269-71 practice qualitative agreement knot, 166-7, circularity in treaty interpretation 258-62, 328-9 quantitative agreement knot, 166 concerning, 67-71 defined, 347-50 functional reconstruction and, Ranjeva (Judge), 258-62 Rantsev case, 283, 324-6, 331-2 Preah Vihear case, 219-20, 242-3, ratio decidendi, of precedent, 22-7 258-62, 267-9 ratio legis, analogies and, 22-7 precedent reality, text and, 14-15 in ECtHR jurisprudence, reasonably assumed intentions 337 - 8concept, ICJ jurisprudence and, in ICJ jurisprudence, 267-9 243 - 6rebalancing, in ECtHR jurisprudence, Preparatory Committee for the Codification Conference (League 286 - 9of Nations), 97-8 Rechtsfortbildung, 23, 26-7



INDEX 413

reciprocal obligations ICJ jurisprudence and, 222-3 VCLT rules of interpretation and, reconstruction. See functional reconstruction in treaty interpretation Rees case, 286-9, 291-2, 338-43 referent, defined, 11-13 referential evolution, 20-1 ICJ justificatory discourse on, 262 ILC draft article on intertemporal law and, 39 International Court of Justice jurisprudence and, 217-18 relevant rules in ECtHR jurisprudence, 283-4n.440, 331 - 2ICJ justificatory interpretations and, 262 religion, freedom of, ECtHR jurisprudence concerning, 289 Reparations for Injuries Suffered in the Service of the United Nations case, 231 - 4reservations concerning treaties, 189-92, 367-8 restrictive interpretions, in ICJ jurisprudence, 263-7 results of interpretation, 22-7 retroactive evolutive interpretation, ECtHR jurisprudence and, 305 right to life, ECtHR intertemporality concerning, 280-1 Roman law maxims of interpretation and, 116-18 rules of interpretation and, 111-12 Rosa, Hartmut, 211-13 rule core of VCLT, legality of, 109-14 rule of interpretation. See also cardinal cores of VCLT; maxims amendments to treaties and, 193-4 application and obedience to, 69-70n.414 canons of treaty construction, 84n.4 circularity in interpretation of, 67-71 codification and, 97-106 contextual analysis and, 157-8

ECtHR jurisprudence and, 323-34 functional reconstruction and, function as cardinal core, 140-6 goal knot of interpretation, 147-50 hierarchies in, 129-34 historical overiew of pre-VCLT methods, 83-108, 350-4 ICJ jurisprudence and, 214–16, 251 - 63international law rules relevant to, 167 - 9invalidity, termination and suspension rules, 195-201 legality of, 109-14 mechanical approaches to, 85-91 openness core in, 134-8 ordinary and special meaning and, 153 - 7perception and, 210-11 power and, 208-9 reservations on interpretations, 189 - 92travaux préparatoires and, 170-1 in VCLT, 28-31, 350-4 rule of lawyer's considerations, functional reconstruction and, rule on intertemporal law, 178-81 rulers of law considerations, functional reconstruction and, 73-6 Rutherforth, Thomas, 49-51, 84n.4, 90-1,361Saleilles, Raymond, 62-4 same sex marriage ECtHR jurisprudence and, 291-4, 316-18 internal practices of states and, 316 - 18Schalk and Kopf case, 286-9, 291-4, 338 - 43schools of interpretation codification and, 102-4 supplementary means and, 173-4 VCLT rules and, 34-5 Schröder, J., 4n.9

Schwarzenberger, G., 16n.70



414 INDEX

Schwizgebel case, 292-4 soft-law instruments, ECtHR scientific method jurisprudence and, 332-3 ECtHR jurisprudence and, 321-2 Sørensen, Max, 28-31, 273-8, 301-5, functional reconstruction in, 72-3 rules of interpretation and, 123-4 source knot, 167-9 Scoppola No. 3 case, 295-6, 309-14 in ECtHR jurisprudence, 331-2 Second Restatement (American Law source thesis, rules of interpretation Institute), 102-4, 129-34, 365-6 and, 71-2n.422 Selmouni case, 281-3 South West Africa cases (Ethiopia, semantic change, evolutive Liberia and Namibia), 354-6 interpretation and, 18-21 ECtHR jurisprudence concerning, semiotic triangle application of, 14-15 ICJ jurisprudence and, 220, 231-4, defined, 11-13 236-9, 255, 263-9 sermo humilis, Auerbach's concept of, sovereignty xiii-xviii evolutive interpretations of, Seventh International Conference of 250n.236 American States, 109-14 flexible interpretative approaches severity requirements, prohibition and, 91-7 against torture and, 281-3 ICJ jurisprudence and, 219-20, sex-change operations, ECtHR 264n.319 jurisprudence concerning, intertemporal law and, 30-5 286 - 9treaty interpretation and, 3-5 shared expectations, codification of specification, interpretation and, 22-7 interpretation and, 105-6 Spender (Judge), 235-9, 243-51, 258-67 Sheffield and Horsham case, 286-9, state practice 291-2, 321-2, 338-43 authentic interpretation and, 132-4 Shi (Judge), 246-51, 258-62 continuation of treaties in succession sign, defined, 11-13 of states, 183n.487 Sigurjōnsson case, 290-1 ECtHR jurisprudence and Member Simma, Bruno, 34-5 States practices, 286-9, 315-16, Sitaropoulos case, 295-6 Skinner, Quentin, 3-5 evolutive interpretation and, 188-9 flexible interpretive methods and Skotnikov (Judge), 253-6, 258-67 slavery, ECtHR jurisprudence role of, 91-7 concerning, 283 freedom of states in treaty Smend, Rudolf, 162-7 interpretation, 143-4 social factors in interpretation ICJ justificatory patterns concerning, ECtHR jurisprudence and, 321-2, 258-62 336 - 7internal practice, 316-18 functional reconstruction in, International Court of Justice 72 - 3jurisprudence and, 223-4 legality of VCLT and, 109-14 ICJ jurisprudence and, 263–7 temporal aspects of treaties and, presumptions in, 118-19 211-13, 246-51 reservations on interpretation and, Société Colas Est case, 286-9, 338-43 189 - 92Soering case, 280-1, 329-31 of respondent states, 320-1



> INDEX 415

subsequent agreement and practice in Navigational and Related Rights case and, 243-6 and, 165-6 static interpretation, 22-7 rules of interpretation and, 162-7 classification of terms and, 255-63 suicide, right to, ECtHR jurisprudence comparative law and solutions to, and, 286-9 Summers, Robert, 72-3 ECtHR jurisprudence and, 298-301, supplementary means 323-34, 338-43, 354-6 hierarchies of interpretation and, express regulation in treaties and, intertemporal knot and, 172-81 ICJ jurisprudence and, 236-9, Supreme Court (Canada), 26 246-51, 269-71, 354-6 suspension of treaties ILC draft article on intertemporal inferences from nature of the treaty and, 119-20 law and, 39-41 living instrument doctrine and, rules on, 195-201 301 - 5severance of diplomatic/consular maxims for, 116-18 relations and, 198-9 Sutherland v. the United Kingdom, ordinary and special meaning and, 153 - 7292 - 4voting rights and, 295-6 synonymous terms, ICJ jurisprudence STEC case, 328-9 concerning, 255-63 stocktaking synthesis, rules of interpretation and, ECtHR intertemporal interpretations 138 - 9and, 278-301, 338-43, 354-6 Syria, resistance to intertemporal ICJ jurisprudence and, 229-30, doctrine in, 39-41 354-6 system-oriented perspective, functional reconstruction and, 73-6 profile of international courts and, 205 - 8Stoll case, 290, 309-14, 321-2 table of cases, 20-6 Strauss, David, 56-8 Tanaka (Judge), 243-6, 263-7 structural features of treaties techniques of interpretation, 115-16. evolutive interpretation and, 32-4 See also mechanical approaches to inferences from, 121-2 treaty interpretation actor dimension in, 208-9 supplementary means and, 174 Stummer case, 283 in ECtHR jurisprudence, 323-34 Suárez, Francisco, 85-6 ICJ justificatory patterns and, 251-63 subjective interpretation, 102-4 as means in VCLT, 124-5 subject knot, rules of interpretation weighing and balancing and, 126-8 and, 159-62 subsequent agreement and practice ECtHR jurisprudence and, 280n.425, teleological approach 280n.426, 283-4n.440, 285-6n.448, 328 - 9in ICJ justificatory patterns, 251-63, temporal aspects of treaties intertemporal doctrine and, 41-7, 153 - 752 - 4



> 416 INDEX

temporal aspects of treaties (cont.) pace of judicial interpretation and, techniques of interpretation and, termination of treaties, 195-201 ICI jurisprudence and, 231-4 severance of diplomatic/consular relations and, 198-9 territorial issues, evolutive interpretation of, 48 terrorism, devolution of rights and, 309 - 14textualist approach to interpretation, 231-4, 267-9 102 - 4openness core and, 134-8 case and, 222-3 ordinary and special meaning and, Tomuschat, Christian, 30-1, 162-7 topoi maxims of interpretation and, 116-18 **UN** Charter means of interpretation and, 124-5 Torres Bernárdez (Judge ad hoc), 263-7 torture, prohibition of, ECtHR jurisprudence and, 281-3 263 - 7trade unions, ECtHR jurisprudence concerning, 290-1 trafficking jurisprudence, ECtHR interpretations and, 283, 336-7 traité contrat. See contract treaties traité loi. See law-making treaties (traité transgender rights, ECtHR jurisprudence and, 286-9, 291-2, United States 324 - 6translation, originalism and in, 101-2 non-originalism and, 56-8 travaux préparatoires, 102-4 contractual right of denunciation in, 39-41 and withdrawal and, 196-7 ECtHR jurisprudence and, 333–4 Rights, 332-3 functions of rules of interpretation and, 140-6 history of treaty interpretation and, 91-7, 350-4

rules of interpretation and, 170-1 state practice and, 223-4 static interpretations and, 159-62 Treaty of Granada, 48 Treaty of Limits, ICJ jurisprudence and, Treaty of Peace and Friendship, 217-18 Treaty of Separation, 253-5 Treaty on the Functioning of the European Union (TFEU), application of, 14-15 Tulkens, Françoise, 273-8 Tunisia, ICJ jurisprudence concerning, Turkey, Aegean Sea Continental Shelf T v. the United Kingdom case, 281-3 *Tyrer* case, 281–3, 301–5, 337–8, 354–6 unaffected parties, ECtHR jurisprudence including, 297 circularity in interpretation of, 67-71 ICJ jurisprudence and, 246-51, 258, treaty interpretation and, 194-5 UNCITRAL Rules on Transparence in Treaty-based Investor-State Arbitration, 188-9 United Kingdom, evolutive interpretation discourse in, 65-6 United Nations, ICJ jurisprudence and, codification of treaty interpretation originalism debate in, 31-54 resistance to intertemporal doctrine Universal Declaration of Human unmarried parents, ECtHR jurisprudence concerning, 292-4 use of force, ICJ jurisprudence on, 223 - 4uti possidetis principle, border treaty cases and, 240-1n.184

ICJ judicial interpretations and,

262 - 3



> INDEX 417

validation of treaties. See also invalidity of treaties ICJ jurisprudence and, 231-4 internal law and, 193 techniques of interpretation and, Vallianatos case, 292-4, 316-18 van der Mussele case, 301-5 Van Wyk (Judge), 243-6 Vattel, Emer de, 49-51, 53-4, 84n.4 on art of interpretation, 138-9 balancing and weighing in treaty rules and, 126-8 codification of rules of interpretation and, 98-100 hierarchies of interpretation and, 129 - 34interpretive methods of, 347-50, 88-90 Vattel's maxim of interpretation, 88-90 Verfassungswandel, discourse concerning, 65-6 victims, ECtHR jurisprudence and, 297 Viehweg, Theodor, 124-5 Vienna Conference, ILC rules of treaty interpretation and, 37-47 Vienna Convention on Diplomatic Relations, 193-4 Vienna Convention on the Law of Treaties (VCLT) amendments to treaties and, 193-4 argumentative process in, 129-34 cardinal cores of, 350-4 circularity in rules of, 67-71, 347-50 circumstances at conclusion of, 171-2 complementary approaches to rules of, 30-5 contractual right of denunciation and withdrawal, 196-7 ECtHR interpretations and rules of, 273-8, 323-36 evolutive interpretation in context of, 183 - 202express regulation in, 184-9 functional reconstruction of rules in, function in practice of, 76-8

historical evolution of interpretation prior to, 83-5, 107-8, 350-4 ICJ justificatory patterns in conformance with, 251-63 ILC modification of, 41-7 International Court of Justice and, 214 - 16international law rules relevant to, 167 - 9international legal method in, 18-21 interpretive method and methodology, xi-xiii, 28-35, 73-7 intertemporal openness and, 357-8 invalidity, termination and suspension rules in, 195-201 legal v. non-legal issues in, 135n.302 méthode scientifique and méthode evolutive interpretations of Code Civil and, 62-4 norm conflict and, 194-5 presumptions in, 118-19 profile of international courts and, 205 - 8relevant rules defined in, 262 reservations on interpretation in, 189-92 rigidity and flexibility questions concerning, 75 rule of interpretation in, 28-31 structure of treaties and, 121-2 techniques as means of, 124-5 Vilho Eskelinen and others, 285-6, 305 Vogenauer, Stefan, 62-4 von Jhering, Rudolf, 60-2 voting rights, ECtHR jurisprudence on, VO v. France, 280-1 126 - 8

Waldock, Humphrey (Sir), 37, 109-14, balancing and weighing in draft of, draft article on intertemporal law and, 37-41 intertemporal doctrine and, 152-3 on maxims of interpretation, 116-18



418

Waldock, Humphrey (Sir) (cont.) modification of intertemporal doctrine and, 41-7 object and purpose concept and, 158-62 on synthesis in rules of interpretation, 138-9 on techniques of interpretation, 115-16, 124-5 techniques of interpretation and, 147-50 Wall Opinion, 228, 258-62 Weeramantry (Judge), 263-7 weighing, 126-8. See also balancing Westlake, John, 92 Whittington, Keith, 56

INDEX

Wildhaber, Luzius, 277n.412, 309–14 withdrawal from treaties contractual right of denunciation and withdrawal, 196–7 inferences from nature of the treaty and, 119–20 Wittgenstein, Ludwig, 67–71, 69–70n.414, 76–8

X and others case, 309–14, 316–18, 320–1 X v. Austria case, 292–4 X, Y and Z case, 286–9, 337–8

Zaunegger case, 292–4 Zolotukhin case, 295–6