Joseph Klingler, Yuri Parkhomenko and Constantinos Salonidis (eds). ***Between the Lines of the Vienna Convention? Canons and Other Principles of Interpretation in Public International Law.*** Alphen aan den Rijn: Kluwer Law International, 2019. Pp. xxvii + 426. €204. ISBN: 9789041184030

The title of this book gives an excellent indication of what is required when using the 'rules' in Articles 31–33 of the 1969 Vienna Convention on the Law of Treaties (VCLT) for treaty interpretation.[1] The International Law Commission (ILC), in drawing up these rules, for generally good reasons tended to pare down the content of the principles as drafting progressed, on the basis that points omitted from the drafts were implicit in the text that was retained. This decision, however, has left the rules themselves open to the need for interpretation, and the proliferation of cases citing them justifies attempts to detect coherence.

This book covers a part of what may be latent content of the Vienna rules – that is, canons, maxims or principles of interpretation and construction. As the preface notes, these canons and principles, though not expressly codified in the VCLT, are 'nonetheless arguably authorized "between the lines"' (at xxvii). However, the question mark in the title should not be taken as diminishing the potential significance in some instances of the canons and, hence, of the book. Sir Humphrey Waldock, who as special rapporteur in the ILC was the 'architect' of the VCLT, treated warily the canons and maxims of interpretation then in common use, mainly because their deployment could not be seen as obligatory. He nevertheless characterized the canons (of which he listed several in their Latin form) as being 'for the most part, principles of logic and good sense'.[2] This book seems generally to follow his line of thinking, giving a well-balanced account of the canons, maxims and principles while not making over-generous claims for their utility. The depth of research and scholarship is prodigious with copious citations to support the analysis and to assist those seeking yet further guidance.

The opening chapter (Alain Pellet) sets out its own distinctions in the usage of terms, taking 'means' of interpretation to refer to standards or rules – 'canons' for means not expressly envisaged in the VCLT – while reserving 'maxims' for those principles commonly expressed in Latin. Treating the canons and maxims as the contents of a toolbox to work with the Vienna rules, these distinctions, while potentially helpful in avoiding repetition of the phrase 'canons, maxims and principles', are not strictly adhered to in the subsequent chapters; but this is to no detriment as the chapters clearly identify and explain the individual 'tools' that they cover. The second chapter (Sean D. Murphy) draws on schools of American jurisprudence to furnish lessons for treaty interpretation, with legal realism prompting a very revealing table of how conflicting canons could be invoked in the thrust and parry of interpretative argument. Canons outside those codified in the VCLT are seen as having a potentially assisting role rather than being determinative, a stance that in effect echoes Waldock.

While Murphy's and Pellet's chapters address overarching themes, the majority of the book's chapters analyse particular canons, maxims and principles of treaty interpretation. Prospective readers should not be put off by the abundant appearance of Latin. The key phrases or maxims are really just used as labels or shorthand for principles or precepts that are readily grasped as they are fulsomely explained, analysed and furnished with examples throughout the book. Prospecting readers – that is, those seeking to mine the book for a very specific matter – will have no difficulty if they have a particular maxim in mind as the maxims appear in their respective chapter headings, but they may need luck to find much help if they are reliant on the

[1] Vienna Convention on the Law of Treaties 1969, 1155 UNTS 331.

[2] [1966] *Yearbook of the ILC*, vol II, pp 218–19, paras 4–5.

parsimonious index, and they may find irksome the absence of tables of cases and treaties if seeking an entry point by way of a known case or treaty.

Not every chapter title is graced with a Latin cognomen, and it is tempting to speculate whether those not so endowed are to be seen as deliberately categorized as being of a different order or value from the Latin ones. While some such distinction may be the explanation of the inclusion of 'other principles of interpretation' in the book's title, and seems to have influenced the grouping of chapters into those with Latin followed by those without, the presence or use of Latin does not seem so significant a factor as whether the particular principles are actually principles of interpretation. The more important issue is whether the canons and other principles actually provide interpretative methods. Some clearly do provide aids to construction or at least interpretative arguments. The chapter on *expressio unius est exclusio alterius* (Joseph Klingler) concludes that this canon is among the most recognizable in public international law, even if it is essentially a grammatical rule that merely creates a logical presumption. The guidance that is given in this chapter on the modalities of its use in the past, and, hence, its potential, is valuable.

Likewise, other chapters provide similar benefits, each with their particular features, and some noting applicability being stronger in particular specialist fields, such as *eiusdem generis* (Freya Baetens), which shows the maxim achieving some prominence in cases about most-favoured-nation treatment. Sometimes a phrase such as *a fortiori* comes into a lawyer's mind as an argument unfolds but which, as the chapter *per argumentum a fortiori* (Alina Miron) indicates well, warrants careful consideration whether this is being used to fortify a truly logical sequence or purely as a rhetorical artifice.

For some chapters, the important issue is whether the canons and other principles actually provide interpretative methods. The chapter on *in dubio mitius* (Panos Merkouris) concludes that the canon or maxim has been relegated to a description of the interpretative outcome rather than constituting a self-standing interpretative principle. In a similar vein, the chapter on 'the rule of necessary implication' (Andrew D. Mitchell and Tania Voon) concludes that these words may be better understood as expressing an assessment of the appropriate result of applying the customary rules of treaty interpretation. The same chapter cites Christian Djeffal (*Static and Evolutive Treaty Interpretation: A Functional Reconstruction*) in explaining that, while reliance on subsequent practice may provide a method leading to evolutive interpretation, evolutive interpretation is a result rather than a method.[3] Nevertheless, the book's final chapter, on 'contemporaneous and evolutionary interpretation' (Peter Tzeng), provides an extremely helpful account of the principle of interpretation contemporaneous with the treaty, distinguishing this from the role of the so-called inter-temporal law and identifying the circumstances in which evolutionary interpretation is the result of the application of the Vienna rules.

Interpretation of treaties is increasingly required within national legal systems, whether in the work of courts, officials implementing treaties, lawyers in private practice or others. It is to be hoped that this book will come to the attention of those involved in this work. While there is a useful account of the origins of the canons and maxims in domestic law (Michael Waibel), the main run of cases investigated in the chapters on specific canons come from international jurisdictions. This may be because few national courts have received back their canons of interpretation for use in connection with treaties, though there are quite a number of examples of such courts purporting to apply the Vienna rules and a few achieving this quite creditably.

An example of how domestic courts could benefit from this book could be found in cases in US courts interpreting the provisions relating to jurisdiction and procedure in the 1929 Warsaw

[3] C. Djeffal, *Static and Evolutive Treaty Interpretation: A Functional Reconstruction* (2015).

Convention on carriage by air in its various forms.[4] A single article limits the venue for claims to one of four specified jurisdictions for any claim 'at the choice of the claimant [plaintiff]' (*au choix du demandeur*), while a second paragraph provides that 'questions of procedure' shall be governed by the law of the court seized of the case. Some courts have found ambiguity in this article as to whether a jurisdiction chosen by a claimant can be rejected on the basis of '*forum non conveniens*' as a rule of procedure. Others have simply taken *forum non conveniens* as a rule of procedure falling within the second paragraph of the provision without assessing its relation with the first paragraph. While it might be interpretatively sufficient to hold that 'at the choice of the claimant' is quite unambiguous, particularly in the context of this treaty, application of the principle *generalia specialibus non derogant*, explained in the eponymous chapter on *lex specialis* (Dirk Pulkowski), would make it unassailably clear that a general rule relating to procedure could not properly be interpreted to defeat the plain meaning of a text explicitly granting a choice of jurisdiction to a particular person.

The same maxim could also combine with the provisions of Article 31(3)(c) of the VCLT in their applicability to the meaning of 'investment' in the 1965 Convention on the International Centre for the Settlement of Investment Disputes (ICSID Convention).[5] Article 31 of the VCLT makes it clear that other international obligations of the parties are to be taken into account when forming an interpretation – hence, in this instance, pointing to the bilateral investment treaties with their detailed definitions of 'investment'. The chapter on *lex specialis* shows how the maxim applies not only within a treaty but also to related instruments. One can therefore speculate whether use of the maxim should have played a part in obviating what has effectively been extensive legislation – that is, arbitral awards developing criteria for the meaning of 'investment' in the ICSID Convention, despite the term being given detailed definition in each of the bilateral investment treaties under arbitration. Investigators of such a situation might also want to familiarize themselves with the chapter on *in pari materia* (Paula F. Henin).

While these two examples of the potential utility of the canons are not taken from the book, the chapters on particular canons, maxims and principles are replete with examples of both their application and situations where their application has been rejected. The value of these is not just as a quarry for those seeking support for a particular argument. They are also comprehensive analyses of the utility and validity of the canons as tools in the interpretative process. Yet, over time, although one or two principles such as that of effectiveness have maintained or advanced their role, the canons, maxims and principles of interpretation have generally been somewhat eclipsed by the increasing attention given to the Vienna rules and by developments in international law.

The chapter on *in dubio mitius* (Merkouris), with a feast of Latin phrases (mostly accompanied by helpful translations), illustrates this well. Merkouris notes the irrelevance of the maxim for human rights treaties, treaties of a humanitarian law character and international criminal law treaties (at 284). A principle giving primacy to respect for sovereignty fits ill with treaties whose purpose is to control exercise of sovereignty. Merkouris also characterizes the maxim as synonymous with the principle often described as 'restrictive interpretation' (at 260) and indicates that rejections of the principle 'are on the rise' (at 291). This assessment is supported by citation of quite a number of cases (at 291–292), of which perhaps the best-known rejection

[4] Convention for the Unification of Certain Rules Relating to International Carriage by Air 1929, 137 LNTS 11. See e.g. *Hosaka v United Airlines* 305 F.3d 989 (9th Cir. 2002), and cf. treatment of the similar issue in *Pierre-Louis v. Newvac Corp.,* 584 F.3d 1052 (11th Cir.2009) and *Galbert v West Caribbean Airways* 715 F.3d 1290 (US Court of Appeals, 11th Cir, 2013).

[5] Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) 1965, 575 UNTS 159.

of restrictive interpretation and in favour of the Vienna rules is in the judgment in *Dispute Regarding Navigational and Related Rights (Costa Rica v Nicaragua)*.[6]

Does consequent doubt over the utility of the maxim and principle limit the value of the extensive and scholarly account found in this chapter? The answer is that the study of this canon has several values. Even if the canon cannot serve as a presumption, it may have some continuing role as a supplementary element in interpretation in some cases. As well as the intrinsic historical value of an account of a principle, traced here over nearly two millennia to show the development of a particular strand of law and furthering understanding of the considerable body of cited cases, there may be cognate canons – for example, in international criminal law where *in dubio rei* offers a presumption in favour of the defendant.

It may seem churlish to reiterate the shortcomings of the index and the absence of tables of cases and treaties. However, while the aficionado of treaty interpretation will want to read the book from beginning to end, researchers and practitioners may wish to pursue particular points. For example, in seeking to establish whether the notion of restrictive interpretation (mentioned above) is to be taken as being synonymous with *in dubio mitius*, the two page numbers listed in the index for 'Restrictive' do not take one to the admirably clear statement on the term in the introduction to the chapter on *in dubio mitius* nor even to all of the references to restrictive interpretation of exceptions in the chapter on 'exceptions to a rule must be narrowly construed' (Alexia Solomon).

Further, if a reader wanted to know whether the *LaGrand* case before the International Court of Justice (on the binding effect of provisional measures) is discussed, this would involve quite a task using a hardcopy of the book. The Court's judgment in that case involved the reconciliation of languages by reference to the object and purpose of the treaty and of giving the Court power to indicate provisional measures. One such purpose was to ensure that the Court's efforts would be effective. The book has an excellent chapter on *effet utile* (Céline Braumann and August Reinisch) explaining that interpretation based on effectiveness, being wider than the canon *ut res magis valeat quam pereat*, includes the two different ideas of terms not being deprived of any role and of preferring a meaning that implements the treaty. To find out whether the *LaGrand* case could be an example of the latter application of the principle would be a situation in which a fuller index or table of cases could help a researcher find out whether the case is considered in this context. If, in due course, the book becomes available in electronic form, searches of this kind would become a different and much easier exercise for users of that format.

That limitation aside, the book does have a particular place in the literature on treaty interpretation. It does not purport to give an account of the Vienna rules, though several of the chapters have a section on how their canon, maxim or principle relates to those rules. The book therefore differs from general ones on treaty interpretation, from the commentaries on the articles that constitute the Vienna rules and from books on treaty interpretation in specific areas (such as World Trade Organization law, investment treaties or tax treaties), which mostly preface their specialist accounts with an overview of the full content of the rules.

Lacking any such substratum, this book could not provide a lead in to a general understanding of how treaties are to be interpreted. Nevertheless, that is the very reason why 'between the lines of the Vienna Convention' is such an appropriate element in the title. The book supplements other works on treaty interpretation by giving detailed attention to what usually attracts only summary treatment. Given that the canons, maxims and principles that it covers are still invoked, however occasionally or intermittently, the book does have a worthwhile role. It offers detailed histories, analyses, examples and guidance on those interpretative canons, maxims and

[6] [2009] ICJ Reports 214 at 237– 238.

principles which may spring to the attention of many lawyers, perhaps only from time to time, but which, when they do surface, need careful handling and considerable awareness for proper deployment in treaty interpretation.

Richard Gardiner

Visiting Professor
University College London
Email: r.gardiner@ucl.ac.uk

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Individual Contributions

Alain Pellet, Canons of Interpretation under the Vienna Convention
Sean D. Murphy, The Utility and Limits of Canons and Other Interpretive Principles in Public International Law
Michael Waibel, The Origins of Interpretive Canons in Domestic Legal Systems
Céline Braumann & August Reinisch, Effet Utile
Joseph Klingler, Expressio Unius Est Exclusio Alterius
Alison Macdonald QC, Ex Abundante Cautela
Freya Baetens, Ejusdem Generis and Noscitur a Sociis
Dirk Pulkowski, Lex Specialis Derogat Legi Generali/Generalia Specialibus Non Derogant
Alina Miron, Per Argumentum a Fortiori
Paula F. Henin, In Pari Materia Interpretation in Treaty Law
Pierre d'Argent, Contra Proferentem
Panos Merkouris, In Dubio Mitius
Rumiana Yotova, Compliance with Domestic Law: An Implied Condition in Treaties Conferring Rights and Protections on Foreign Nationals and Their Property?
Andrew D. Mitchell & Tania Voon, The Rule of Necessary Implication
Alexia Solomou, Exceptions to a Rule Must Be Narrowly Construed
Peter Tzeng, The Principles of Contemporaneous and Evolutionary Interpretation