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On the Interpretation of Treaties

The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties

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by international law, *whether embodied in a single instrument or in two or more related instruments*".[7] One obvious example of this is when states enter into an agreement in order to amend a treaty, concluded at some earlier juncture. Naturally, two instruments, of which one entails an amendment of the other, are always to be considered as integral parts of one single treaty.[8] Another example is when negotiating states, already at the process of drafting a treaty, split up the agreement into several instruments, of which one is drawn up to express the bulk of the agreement, and the others are used for adding detail. As one of the more extreme examples of this practice, mention may be made of an agreement concluded by Yugoslavia and Romania, on 31 November 1963.[9] The agreement contains the following provision:

> This Agreement, the Conventions, the Protocols and all the other instruments concluded in connexion with the construction and operation of the Iron Gates System, which are enumerated in the Final Act signed this day, shall constitute a single unit.[10]

Within the scope of the one single treaty, we would consequently be able to count one "Agreement", five "Conventions", four of which with "Annexes" added, one "Charter", two "Protocols", both with "Annexes" and one with an "Addendum", as well as two "*Échanges des Lettres*".[11]

It is not always easy to determine whether two instruments, both of which have been subject to signature, shall be considered as integral parts of a single treaty, or whether they shall be considered as two separate treaties.[12] Of course, a treaty that consists of multiple instruments may itself point this out in an express provision; take for instance the agreement between Yugoslavia and Romania cited above. In cases like this, the issue is easily settled. Problems arise in cases where the treaty is silent on the matter. Two instruments are not necessarily to be regarded as two separate treaties, just because it is not expressly stated that they are to be considered as an integrated whole. The ultimate determining factors for the relationship between two instruments are the intentions of their parties.[13] To determine whether two or more instruments are to be considered as an integrated whole or as two separate treaties, it is evident that a separate process of interpretation might be needed on occasion.[14]

Intimately linked to this discussion is the question how the applier should conduct himself when faced with two instruments, both of which have been separately signed, where the one has been designated as an annex to the other. It is tempting to believe that two instruments, of which the one has been designated as an annex to the other, shall automatically be considered as integral parts of one single treaty. This is not the case. It is true that in VCLT article 31 § 2 annexes are expressly mentioned. However, on a careful reading no more no less is said than this: for interpretation purposes an annex shall be included in the context *when it is a part of the treaty*

text.[15] "The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes..." – this is how the paragraph reads. Now, of course, this must not lead us to the opposite conclusion, that the fact that an instrument has been designated as an annex is of no importance at all. If an applier is uncertain about the relationship holding between two instruments, and the one is designated as an annex to the other, then clearly this is a circumstance that suggests considering the instruments as parts of a single treaty, and not as two separate treaties. But – and this is the point – it is not a circumstance that conclusively determines the matter. There can be other circumstances suggesting the opposite. Such a circumstance is the content of the annex. In the *Guinea – Guinea-Bissau Maritime Delimitation* case,[16] for example, the court of arbitration had been asked to decide on the effect to be attributed to a series of instruments, designated as "annexes" to an almost 100 year-old convention concluded by France and Portugal. Some of the instruments contained maps expressly referred to in the convention; others contained records and documents deriving from the drafting of the convention.[17] The former were said to belong to the context,[18] whereas the latter, in the view of the court, were to be considered as nothing more than preparatory work.[19]

2 "[T]HE TEXT" PUT TO USE

What communicative standard or standards shall the parties to a treaty be assumed to have followed, *when an applier interprets the treaty using "the text" of the treaty?* Let us begin by better defining our task. As a label of what an applier does when, in accordance with VCLT article 31, she interprets a treaty using the context, authors have often employed the term SYSTEMATIC INTERPRETATION.[20] When an applier uses the context – this is the assumption – the interpreted treaty provision and the context together form a larger whole, a system.[21] Clearly, however, this assumed system is not a uniform concept. In the literature, SYSTEMATIC INTERPRETATION is used to refer to not one system only but two, depending on whether the authors envision the interpreted treaty provision and its context as the *body of text* constituted by the text and its context, or the set of *norms* expressed. In the former case, SYSTEMATIC INTERPRETATION is based on the existence of a linguistic system;[22] in the latter case it is based on the existence of a system in the logical sense.[23] The use of the context has been described earlier in the following manner:

> If it can be shown that the interpretation of a treaty provision in accordance with interpretation rule no. 1 leads to conflicting results, and that between the provision and the context there is a relationship governed by the communicative standard S, then the provision shall be understood as if the relationship conformed to this standard.[24]

This norm can now be more exactly defined:

> If it can be shown that the interpretation of a treaty provision in accordance with interpretation rule no. 1 leads to conflicting results, and that between the norm content of the provision, and the norms forming the context, there is a relationship governed by the communicative standard S, then the provision shall be understood as if the relationship conformed to this standard.

> If it can be shown that the interpretation of a treaty provision in accordance with interpretation rule no. 1 leads to conflicting results, and that between the expressions used for the provision, and the expressions forming the context, there is a relationship governed by the communicative standard S, then the provision shall be understood as if the relationship conformed to this standard.

Obviously, an applier must take into account not only one but several communicative standards when he interprets a treaty provision using the "text" of the treaty. All in all, I have found that as many as five communicative standards can be established; to simplify reference to these, I will denote them using the letters A to E. The standards are of two different types. The one type is represented by standards A, C, and D, which govern the linguistic relationship that shall be assumed to hold between the expressions used for a an interpreted treaty provision and the expressions forming the context. The other type is represented by standards B and E, which govern the logical relationship that shall be assumed to hold between the norm content of an interpreted treaty provision and the norms forming the context. Let us take a closer look at these different standards. We shall examine them in alphabetical order.

Standard A. It is the general view held in the literature that a word or phrase used on multiple occasions in the text of a treaty shall be assumed to bear a uniform meaning.[25] Thus, it is stated by the authors of *Oppenheim's International Law*:

> The same term used in different places in a treaty may be presumed to bear the same meaning in each [...].[26]

Haraszti writes:

> [I]n conformity with the principle developed in international practice the interpreter has to start from the thesis that the parties to the treaty have intended to use uniform terms in a uniform meaning throughout the treaty.[27]

Professor Bernhardt expresses it in more detail:

> Schließlich ist noch ein mehr technischer Aspekt des vertraglichen Zusammenhangs zu erwähnen. Es dürfte eine Vermutung dafür sprechen, daß bei der abschließenden Redaktion

eines Vertrages die Terminologie regelmäßig in der Weise vereinheitlicht wird, daß gleiche Gegenstände in den verschiedenen Vertragsteilen gleich bezeichnet werden und der Interpret daher davon ausgehen kann, daß wiederkehrende Worte und Formulierungen eine übereinstimmende Bedeutung haben.[28]

So, when an applier interprets a treaty using its "text", then this would be on the basis of the following communicative standard:

> If a state makes an utterance taking the form of a treaty provision, then the provision should be drawn up so that the words and phrases used for the provision are given a consistent meaning, considering the words and phrases forming the context.

Standard B. When an applier interprets a treaty using the context – according to a frequent claim – he shall do so on the basis of the assumption that the different parts of the treaty do not contradict one another.[29] For example, Vitányi writes:

> Modern doctrine regards recourse to the context as a particularly effective means of determining the intention of the parties. It is generally accepted that the meaning of treaty provisions whose words lend themselves to different interpretations cannot be settled without reference to the other clauses, but only in the context of the treaty as a whole. The same applies if the different clauses do not fit happily together, in which event it must be presumed that the parties did not intend contradictions but rather that they meant the clauses to explain each other. International jurisprudence has constantly relied upon this method.[30]

However, exactly what type of contradiction the author is referring to remains unsaid. If a contradiction is said to hold between two provisions of a treaty, it can be of different types: it can be pragmatic, logical, teleological, axiological, and so on. I can only conclude that the contradiction meant in this case is a *logical contradiction*. Two reasons, in particular, substantiate this conclusion.[31] First, one of the most fundamental requirements placed on a logical system is that it be free of logical contradictions. If the context is to be used on the assumption that the different norms of a treaty together form a logical system, such use would then also be on the assumption that the different norms are not logically incompatible. Second, few treaties (if any) are created on such premises that each individual provision can be considered self-sufficient. Normally, a treaty is drawn up as an intricate network, where one of two provisions often functions as a normative complement to the other. Perhaps the one provision contains a definition of the expressions used for the other; perhaps the one provision is to be seen as *lex specialis* in relation to the other, being in this case the *lex generalis*; perhaps the one provision contains an exception to the norm expressed by the other; or perhaps the one provision contains some sort of addendum or supplement to the other. No such complementary provision

will have effect if we do not assume the treaty to have been drawn up on the premise that its different parts must be logically compatible. When an applier interprets a treaty using its "text", this would then be on the basis of the following communicative standard:

> If a state produces an utterance taking the form of a treaty provision, then the provision should be drawn up, so that it does not logically contradict the context.

Standard C. A treaty shall be interpreted so that none of the expressions used for the treaty take the form of a pleonasm – this is a view generally accepted by the literature.[32] "[A]ll provisions of the treaty", Thirlway observes, ...

> ... must be supposed to have been intended to have significance and to be necessary to convey the intended meaning; ... an interpretation which reduces some part of the text to the status of a pleonasm, or mere surplussage, [sic!] is prima facie suspect.[33]

Haraszti expresses himself in a similar manner:

> "[A] legal text should be interpreted in such a way that a reason and a meaning can be attributed to every word in the text".[34]

Hogg has termed it "the surplus words rule"; he describes the norm as follows:

> The operation of this rule establishes a presumption that, if possible, every word used in a treaty should be given effect — Its application presupposes that there are two words or groups of words in the text; that one of these words or groups of words is susceptible of two or more reasonable meanings; that the text is ambiguous as to which of the meanings was intended by the parties; and that the choice of one of those meanings would deprive the other word or words of all significance.[35]

All things considered, I have difficulty coming to any other conclusion than this: when an applier interprets a provision using "the text" of the treaty, this is *inter alia* on the basis of the following communicative standard:

> If a state produces an utterance taking the form of a treaty provision, then the provision should be drawn up so that in the context there will be no instance of a pleonasm.

Standard D. According to *Oppenheim's International Law*, when an applier interprets a treaty provision using "the text" of the treaty ...

> … the use of similar but different terms ... may be presumed to involve dissimilar meanings [...].[36]

This is an assumption generally ignored by authors in the literature; unjustly so, it seems – in international judicial opinions it is quite often expressed.[37]

To my mind, however, the practice of international courts and tribunals allows for more precise conclusions than those formulated in Oppenheim's. Certainly, the way the assumption is expressed by Oppenheim's is better than the way the parallel assumption sometimes has been put in general jurisprudence. For example, Peczenik writes: "If different words and expressions appear in one and the same law, one should assume that their meanings are different, if good reasons do not exist to assume the opposite".[38] The subject of the present discussion is a rule of interpretation earlier described using the following model:

> If it can be shown that the interpretation of a treaty provision in accordance with interpretation rule no. 1 leads to conflicting results, and that between the expressions used for the provision, and the expressions forming the context, there is a relationship governed by the communicative standard S, then the provision shall be understood as if the relationship conformed to this standard.[39]

Note the word relationship. From a purely semantic standpoint, I have difficulty accepting that a relationship could exist between two expressions, simply because they represent the use of different words or lexicalised phrases. What exists between two such expressions or phrases is rather the lack of a relationship. I definitely find it more appealing to say, like in Oppenheim's, that a relationship holds between two expressions if they express words or phrases that are *similar* to one another. Of course, the flaw in this formula it is that we still have only a very faint idea of what "similar" means. Two words or phrases can be SIMILAR to one another, if the two agree from a purely graphical point of view (such as LEG and LEGUME); from the point of view of etymology (such as MEET and MEETING); from the point of view of class (such as MULTIPLICATION and QUALIFICATION); from the point of view of style (such as DELICT and EXONERATE); and so on. My conclusion is that two words or phrases are "similar" to one another, insofar as they belong to the *same lexical field*. So, when an applier interprets a provision using "the text" of the treaty, this would be on the basis of the following communicative standard:

> If a state produces an utterance taking the form of a treaty provision, then the provision should be drawn up so that the words and phrases used for the provision do not take on a meaning equal to the meaning of words and phrases found in the context, in so far as the words or phrases are part of the same lexical field.

In Section 3 of this chapter, this is a proposition I will attempt to further clarify.

Standard E. In the legal literature, writers are of the view that a treaty shall be interpreted so that in no instance can superfluities be found to exist;[40]

let us call this THE RULE OF NON-REDUNDANCY. To name one, Thirlway writes:

> [It is a] rule that the whole of the text must be presumed to have some significance, so that an interpretation which would render part of it redundant is to be rejected [...].[41]

Gordon makes the following observation with regard to the practice of the International Court of Justice:

> A twin-forked rule of interpretation constantly mentioned by the Court is (a) that a treaty must be read as a whole to give effect to all of its terms and avoid inconsistency, and (b) that *no word or provision may be treated as or rendered superfluous*.[42]

A passage often cited is that of Fitzmaurice:

> Treaties are to be interpreted with reference to their declared or apparent objects and purposes; and *particular provisions are to be interpreted* so as to give them their fullest weight and effect consistent with the normal sense of the words and with other parts of the text, and *in such a way that a reason and a meaning can be attributed to every part of the text*.[43]

Evidently, we can consider as a part of this rule – the rule of non-redundancy – what we earlier termed as the *surplus words rule*.[44] Some authors appear to take this idea a step further. They seem to consider *the rule of non-redundancy* and *the surplus words rule* as amounting to the very same thing.[45] This is a position I have difficulty supporting. In my view, *the rule of non-redundancy* is broader. In fact, the idea that a treaty shall be interpreted to steer clear of redundancies stands for two different things, depending on whether "redundant" is defined as *linguistically* or *normatively* redundant.[46] First, a treaty provision shall be understood so that in the context there will be no instance of a pleonasm. (A pleonasm occurs when an expression used for a provision fails to carry more information than is already carried by the context.) Secondly, a treaty provision shall be understood so that in the context there will be no instance of a *logical tautology*. (A logical tautology occurs when a norm expressed by a provision is already spelled out in the context – that is, in the text and the context it is stated in multiple places, each independently of the other, that a specific state of affairs shall, may, or should be realised, or – in the alternative – shall not, may not, or should not be realised.) Therefore, in my view, when *the rule of non-redundancy* is applied, it is not only on the basis of the standard earlier denoted as standard C. It is also on the basis of the following standard:

> If a state produces an utterance taking the form of a treaty provision, then the provision should be drawn up so that in the context there will be no instance of a logical tautology.

Support for this conclusion can be found particularly in the practice of international courts and tribunals.[47] In Section 4 of this chapter, I will attempt to establish this proposition.

3 "[T]HE TEXT" PUT TO USE: DIFFERENT WORDS AND PHRASES SHALL (SOMETIMES) BE GIVEN DIFFERENT MEANINGS

To begin with, let us first establish what is meant by a LEXICAL FIELD. The term has its origins in linguistics. More specifically, it has its origins in structural linguistics – that sub-discipline of linguistics committed to the task of studying and describing the relationships between different words and lexical phrases of a language.[48] According to structural linguistics, human language is organised in such a way that a relationship not only holds between the different units of a lexicon and that which they denote. There is also a relationship holding between the lexical units *themselves*; we can talk about the internal structure of a lexicon.[49] This structure, according to the view held by structural linguistics, is an important factor in explaining why words and lexical phrases mean what they mean. The denotation of a word or phrase in a lexicon – this is the central tenet – is at least partially dependent upon the meaning relationships held between the word or phrase and the remainder of the lexicon.[50] For example, the meaning of the term CHERRY RED depends upon the fact that CHERRY RED can be contrasted with MAROON and BURGUNDY. The meaning of the term HOLIDAY depends upon the fact that HOLIDAY can be contrasted with WORKDAYS. The meaning of the word LION depends upon the fact that LION can be contrasted with FELINE. One way to formalise these meaning relationships held between the different units of a lexicon is to break down the lexicon into smaller lexical fields.[51] If a meaning relationship can be said to hold between two words or phrases in a lexicon, then this is because the different concepts represented by the words and phrases are related; the concepts are parts of a single conceptual field. Each individual set of words and phrases, together covering a conceptual field – thanks to the meaning relationships holding between them – can then be called a lexical field.[52] So, for example, we can talk about a lexical field corresponding to the concept *red*; a lexical field corresponding to the concept *days of the week*; a lexical field corresponding to the concept *predators*; and so on.

The point I am trying to make is this. Assume that an applier is given the task to establish the legally correct meaning of a treaty provision. Naturally, her first step would be to use conventional language. According to the legally recognised rules of interpretation, the applier would then be justified in saying that all words used for the provision bear the meaning given to them in conventional language. In a second stage of the interpretation process, the applier notes that in the treaty there are two words, which – while they are not identical – certainly belong to the same lexical field. On

the same basis as before – conventional language – the applier would then also be justified in saying that between these two words, in the sense used for the treaty interpreted, there is a meaning relationship. Of course, this observation can be further exploited. All the applier needs to come up with is a communicative assumption concerning the more precise construction of the relationship holding between the two words. This assumption, according to the view presented here, is the following: when two words belong to the same lexical field, their extensions are not identical. When an applier interprets a treaty provision using "the text" of said treaty, it is namely (among other things) on the basis of the following communicative standard, earlier labeled as standard D:

> If a state produces an utterance taking the form of a treaty provision, then the provision should be drawn up so that the words and phrases used for the provision do not take on a meaning equal to the meaning of words and phrases found in the context, insofar as the words or phrases are part of the same lexical field.[53]

As support for this conclusion I would like to point to the practice of international courts and tribunals.[54] Mention can be made of four decisions in particular.

A first decision is the judgment of the European Court of Human Rights in the case of *Brogan and Others*.[55] In 1984, the applicants – four young men, all residents of Northern Ireland – had been arrested by British police. They were detained, suspected of involvement in terrorist activity, until their subsequent release. The detention for each applicant had been 4 days and 6 hours, 4 days and 11 hours, 5 days and 11 hours, and 6 days and 16 and a half hours, respectively. During this time, however, none of the applicants had been brought before a judge or any other judicial authority. The question arose as to whether the United Kingdom, by these actions, had violated the obligations incumbent upon it according to article 5 § 3 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*:

> Anyone arrested or detained in accordance with the provisions of paragraph 1.c of this article shall be brought promptly [Fr. "*aussitôt"*] before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

Attention focused on the expression "promptly". Can the time requirement represented by this expression be considered fulfilled, even though a detention has lasted as long as 4 days and 6 hours, 4 days and 11 hours, 5 days and 11 hours, and six days and 16 and a half hours, respectively? In all four cases, the Court denied that this was so. The reasoning of the Court is extensive; it includes several more or less clearly expressed arguments

of interpretation. The following line of reasoning appears particularly interesting:

> The obligation expressed in English by the word "promptly" and in French by the word "*aussitôt*" is clearly distinguishable from the less strict requirement in the second part of paragraph 3 ("reasonable time"/ "*délai raisonnable*") and even from that in paragraph 4 of Article 5 ("speedily"/ "*à bref délai*").[56]

The manner of expression is brief, but the message is clear enough. According to what the Court says, the meaning of the expression "promptly" appears more clearly, when it is compared with the expression "within a reasonable time" in article 5 § 3 and with the expression "speedily" in article 5 § 4. Three reasons support this proposition. The first and second reasons are explicitly stated: (1) the correct meaning of "promptly" is not the same as the meaning of either "within a reasonable time" or "speedily"; (2) the time requirement represented by the expression "promptly" is more demanding than that represented by either the expression "within a reasonable time" or the expression "speedily". The third reason is implied: in an earlier decision – that of *De Jong*, *Baljet and Van den Brink* –[57] the Court found that three Netherlands servicemen who were placed under military arrest for 7, 11, and 6 days, respectively, but who were never given opportunity to appear before a court during their detainment, could not be considered to have had a "speedily" made decision on the lawfulness of their detainment.[58] For our purposes, the decisive question is this: why does the European Court assume that the correct meaning of "promptly" is not the same as that of the expressions "within a reasonable time" or "speedily"? In terms of conventional language, the differences in meaning are not at all clear-cut. It is incontestable that the expression "promptly" represents the use of a different lexical unit than the expressions "within a reasonable time" and "speedily". It is also plain enough that PROMPTLY, WITHIN A REASONABLE TIME, and SPEEDILY are all parts of a single lexical field. More specifically, they are parts of a field corresponding to the conceptual area *time limit (by which something shall be done)*. Thus – and this is of course the obvious answer to our question – it seems to be the assumption of the European Court, that the parties to the Convention have expressed themselves in accordance with the communicative standard D.

The *Handyside* case –[59] also forming part of the repertoire of the European Court for Human Rights – provides an obvious parallel to the interpretative line of reasoning presented by the Court in *Brogan and Others*. Here, the European Court was asked to decide whether British authorities, by seizing from a publisher all copies of a specific book that he had published, had restricted the publisher's right to freedom of expression in violation of the European Convention, article 10. According to article 10 § 2, the

right to freedom of expression is subject only to "such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary [Fr. *'necessaire'*] in a democratic society", among other things, "for the protection of health or morals". It was not disputed that a restriction had indeed taken place, and that the restriction had been made on the basis of "law" and for the protection of "morals". The question was whether the restriction could also be said to have been "necessary". This led the court to make the following observation:

> [W]hilst the adjective "necessary", within the meaning of Article 10 § 2, is not synonymous with "indispensible" (cf., in Articles 2 § 2 and 6 § 1, the words "absolutely necessary" and "strictly necessary" and, in Article 15 § 1, the phrase "to the extent strictly required by the exigencies of the situation"), neither has it the flexibility of such expressions as "admissible", "ordinary" (cf. Article 4 § 3), "useful" (cf. [in] the French text of the first paragraph of Article 1 of Protocol No. 1 [the expression "*utile"*]), "reasonable" (cf. Articles 5 § 3 and 6 § 1) or "desirable".[60]

Clearly, in conventional language, one must consider as relatively fluid the boundaries between the extension of "necessary" on the one hand, and the extension of the expression "absolutely necessary" or the expressions "ordinary", "utile" or "reasonable", on the other. Nevertheless, it is obviously the opinion of the European Court that the meanings of the various expressions are not the same. The question is why. Clearly, the expression "necessary" represents the use of a different lexical unit than the expression "absolutely necessary"; the same applies to the expressions "ordinary", "utile" and "reasonable". It is also clear that NECESSARY and ABSOLUTELY NECESSARY, like the words ORDINARY, UTILE and REASONABLE, all belong to a single lexical field. More specifically, they belong to a field corresponding to the conceptual area *necessity*. Once again, it seems to be the assumption of the European Court, that the parties to the European Convention expressed themselves in accordance with the communicative standard D.

A third decision to be mentioned is the decision of the American Supreme Court in the case of *Air France v. Saks*.[61] On 16 November 1980, the plaintiff, Valerie Saks, had boarded an Air France flight in Paris, bound for Los Angeles. The journey proceeded smoothly until the plane started its approach for landing in California. During landing, the plaintiff had experienced extreme pressure and severe pain in one of her ears, which was later stated to have led to permanent deafness. Nevertheless, the plane's automatic pressure stabilisation system was shown to have functioned normally. The plaintiff brought suit in an American court, claiming that the French airline was responsible for the injuries she had suffered. The basis given for the

claim was article 17 of the 1929 Warsaw Convention,[62] according to which a carrier is responsible for personal injuries sustained by passengers …

… if the accident which caused the damage so sustained took place on board the aircraft.[63]

With respect to the meaning of this provision, however, the views of the defendant clearly differed from that of the plaintiff. According to the plaintiff, the expression "accident" should be understood as *hazard of air travel*. According to the defendant, it was to be understood as *abnormal*, *unusual or unexpected occurrence aboard the aircraft*. The Supreme Court agreed with the defendant, invoking among other things the following argument:

Article 17 of the Warsaw Convention establishes the liability of international air carriers for harm to passengers. Article 18 contains parallel provisions regarding liability for damage to baggage. The governing text of the Convention is in the French language — The official American translation of this portion of the text, which was before the Senate when it ratified the Convention in 1934, reads as follows:

"Article 17
The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, *if the accident which caused the damage* so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking."

"Article 18
(1) The carrier shall be liable for damage sustained in the event of the destruction or loss of, or of damage to, any checked baggage or any goods, *if the occurrence which caused the damage* so sustained took place during the transportation by air." 49 Stat 3018–3019.

Two significant features of these provisions stand out in both French and the English texts. First, Article 17 imposes liability for injuries to passengers caused by an "accident", whereas Article 18 imposes liability for destruction or loss of baggage caused by an "occurrence". The difference in the parallel language of Article 17 and 18 implies that the drafters of the Convention understood the word "accident" to mean something different than the word "occurrence", for they otherwise logically would have used the same word in each article.[64]

Despite the fact that in this case, a comparison is made involving only two expressions, the one being compared with the other, while in *Brogan and Others* and *Handyside* one expression was compared with *several* others, in principle the line of reasoning seems to be the same. According to conventional language, the meaning of the expression "accident" overlaps completely with the meaning of the expression "occurrence". The word OCCURRENCE stands for any event. The word ACCIDENT is sometimes used in the sense of an *unintentional*, *unexpected event*, *being a cause of personal injury or material loss*, and sometimes in the sense of an *unintentional*, *unexpected event*, *regardless of cause*. Nevertheless, in the opinion of the Supreme Court, the correct meaning of the expression "accident" is not the same as that of the expression "occurrence": by "accident" in article

17 of the Warsaw Convention we shall understand ACCIDENT only in the sense of *unintentional*, *unexpected event*, *being a cause of personal injury or material loss*. How can this opinion be explained? Clearly, "accident" represents the use of a different lexical unit than "occurrence". It is also a matter of fact that the words ACCIDENT and OCCURRENCE belong to a single lexical field; more specifically, they belong to a field corresponding to the conceptual area of *event*. In my view, the answer to the question is this: it is an assumption of the Court, that the parties to the Warsaw Convention expressed themselves in accordance with the communicative standard D.

A fourth decision to be mentioned is the international award in the case of *Guinea – Guinea-Bissau Maritime Delimitation*.[65] The facts of the case have been described in a previous chapter of this work.[66] To avoid unnecessary repetition, I will restate only the text of the treaty relevant to our present discussion:

In Guinea, the *boundary* separating the Portuguese possessions from the French possessions will follow, in accordance with the course indicated on Map number 1 attached to the present Convention:

To the north, a line which, starting from Cape Roxo, will remain as much as possible, according to the lay of the land at equal distance from the Cazamance (Casamansa) and San Domingo de Cacheu (Sao Domingos de Cacheu) rivers, up to the intersection of the meridian of 17° 30' longitude west of Paris with parallel of 12° 40' north latitude. Between this point and the meridian of 16° longitude west of Paris, the *boundary* will conform to parallel of 12° 40' north latitude.

To the east, the *boundary* will follow the meridian of 16° west, from parallel 12° 40' north latitude to the parallel of 11° 40' north latitude.

To the south, the *boundary* will follow a line starting from the estuary of the Cajet River, located between Catack Island (which will belong to Portugal) and Tristao Island (which will belong to France), and following the lay of the land, it will remain, as much as possible, at equal distance from the Rio Componi (Tabati) and the Rio Cassini, then from the northern branch of the Rio Componi (Tabati) and the southern branch of the Rio Cassini (Marigot de Kakondo) first and the Rio Grande afterwards. It will end at the intersection of the meridian of 16° west longitude and the parallel of 11° 40' north latitude.

Shall belong to Portugal all islands located between the Cape Roxo meridian, the coast and the southern *limit* represented by a line which will follow the thalweg of the Cajet River, and go in a southwesterly direction through the Pilots' Pass to reach 10° 40' north latitude, which it will follow up to the Cape Roxo meridian.[67]

As we know, Guinea and Guinea-Bissau were of different opinions as to the reason why in the last paragraph the expression "the southern *limit*" had been used, while in other paragraphs it was consistently spoken of as "the *boundary*". No disagreement seems to have existed between the disputing parties regarding the meaning of the term BOUNDARY. "*[B]oundary*", according to what is noted, ...

... [is] the "limit which separates the territory of a State from that of a neighboring State".[68]

Even more interesting is that the disputing parties seem to have been of one mind in other respects too. The Court observes:

> [N]either of the two Parties disputes that, in matters pertaining to treaties, the use of different legal terms must be justified by more than the purely literary concern of avoiding repetition.[69]

The implication is clear. There is a rule of interpretation, according to which the expression "limit" shall be assumed to bear a different meaning than that conferred on the expression "boundary"; this assumption shall be held valid, at least as long as other rules of interpretation cannot be adduced suggesting the opposite.

The proposition can be analysed along the lines of the decision in *Air France v. Saks*. According to conventional language, the meaning of "limit" overlaps completely with the meaning of "boundary". The word BOUNDARY is unambiguous: "[it is] the limit which separates the territory of a State from that of a neighbouring State".[70] The word LIMIT is ambiguous; it can be used as synonymous with BOUNDARY, but it can also be used in the more general sense of "[the] extreme part where a territory, or a domain ends".[71] Why, then, are the disputing parties nevertheless of the opinion – apparently shared by the court – that the correct meaning of "limit" is not the same as that of "boundary"? Clearly, "limit" represents the use of a different lexical unit than "boundary". It is also a matter of fact that the words LIMIT and BOUNDARY belong to the same lexical field; more specifically, they belong to a field corresponding to the conceptual area of *the extreme part where a territory*, *or a domain ends*. Under such premises, I do not see how the answer to the question I have posed can be any other than this: it is an assumption of the Court, that Guinea and Guinea-Bissau expressed themselves in accordance with the communicative standard D.

4 "[T]HE TEXT" PUT TO USE: NO LOGICAL TAUTOLOGIES

As I stated previously, it is my conclusion that when an applier interprets a provision using "the text" of the treaty, one of the communicative standard on which he bases the process is the following, earlier termed as standard E:

> If a state produces an utterance taking the form of a treaty provision, then the provision should be drawn up so that in the context there will be no instance of a logical tautology.[72]

Again, the conclusion is one based mainly on the practice of international courts and tribunals.[73] I would like to provide four examples of this.

My first example is the decision of the International Court of Justice in the *Case Concerning Border and Transborder Armed Actions*.[74] In July 1986, Nicaragua had filed an application with the Hague Court instituting proceedings against the Honduras. According to Nicaragua, Honduran

military personnel had been present in Nicaraguan territory, where they had assisted the "*Contras*" in armed raids; in some raids, Honduran personnel had even themselves taken part. Through this action, the Honduras had incurred the responsibility of that state under international law. The opposite party objected, arguing that the Court lacked jurisdiction. As support for its view that the Court had indeed jurisdiction to try the application, Nicaragua had cited the *1948 American Treaty on Pacific Settlement ("the Pact of Bogotá")*, article XXXI of which provides as follows:

> In conformity with Article 36, paragraph 2, of the Statute of the International Court of Justice, the High Contracting Parties declare that they recognize, in relation to any other American State, the jurisdiction of the Court as compulsory *ipso facto*, without the necessity of any special agreement so long as the present Treaty is in force, in all disputes of a juridical nature that arise among them concerning:
> (a) The interpretation of a treaty;
> (b) Any question of international law;
> (c) The existence of any fact which, if established, would constitute the breach of an international obligation;
> (d) The nature or extent of the reparation to be made for the breach of an international obligation.[75]

This view, claimed the Honduras, was based on a misconception; it assumed an interpretation of the Pact of Bogotá that clearly could not be considered correct.

One of the arguments advanced by the Honduras was that article XXXI of the Bogotá Pact could only be read correctly if placed in relation to the subsequent article XXXII:

> When the conciliation procedure previously established in the present Treaty or by agreement of the parties does not lead to a solution, and the said parties have not agreed upon an arbitral procedure, either of them shall be entitled to have recourse to the International Court of Justice in the manner prescribed in Article 40 of the Statute thereof. The Court shall have compulsory jurisdiction in accordance with Article 36, paragraph 1, of the said Statute.[76]

Article XXXII defined the conditions, under which the International Court of Justice could be seized. Article XXXI was relevant only insofar as it defined the extent of the jurisdiction held by the Court, when once it had been seized. Therefore, the Honduras argued, the Court would have no jurisdiction to settle a dispute according to the provisions of article XXXI, in the cases covered by that article, if there had not been previous recourse to conciliation according to article XXXII, which was not the case in the situation at hand. Nicaragua had suggested a different reading of the two articles. According to Nicaragua, articles XXXI and XXXII were autonomous provisions – each conferred jurisdiction upon the Court independently of the other. Hence, the Court would have jurisdiction to settle a dispute according to the provisions of article XXXI, in the cases covered by that article, regardless of whether

there had been previous recourse to conciliation according to article XXXII. The Court concurred on this latter interpretation.

In order to establish the flaw in the reading suggested by the Honduras, the Court presented two arguments, the first amounting to an act of interpretation using the ordinary meaning:

> Honduras's interpretation of Article XXXII runs counter to the terms of that Article. Article XXXII makes no reference to Article XXXI; under that text the parties have, in general terms, an entitlement to have recourse to the Court in cases where there has been an unsuccessful conciliation.
>
> It is true that one qualification of this observation is required, with regard to the French text of Article XXXII, which provides that, in the circumstances there contemplated, the party has "le droit de porter *la question* devant la Cour". That expression might be thought to refer back to the question which might have been the subject of the dispute referred to the Court under Article XXXI. It should, however, be observed that the text uses the word "*question*", which leaves room for uncertainty, rather than the word "*différend* (dispute)", used in Article XXXI, which would have been perfectly clear. Moreover, the Spanish, English and Portuguese versions speak, in general terms, of an entitlement to have recourse to the Court and do not justify the conclusion that there is a link between Article XXXI and Article XXXII.[77]

The second argument amounted to an act of interpretation using the context:

> Moreover, Article XXXII, unlike Article XXXI, refers expressly to the jurisdiction which the Court has under Article 36, paragraph 1, of the Statute. That reference would be difficult to understand if, as Honduras contends, the sole purpose of Article XXXII were to specify the procedural conditions for bringing before the Court disputes for which jurisdiction had already been conferred upon it by virtue of the declaration made in Article XXXI, pursuant to Article 36, paragraph 2.[78]

The latter argument is the one on which I would now like to focus attention. It must be admitted the reasoning of the Court can be interpreted in two different ways. According to a first interpretation, the context is used as a supplementary means of interpretation, according to the provisions of VCLT article 32, because the Court considers the ordinary meaning to be unambiguous, but still wishes to have this meaning confirmed.[79] According to a second interpretation, the context is used as a primary means of interpretation, according to the provisions of VCLT article 31, because the Court considers the ordinary meaning to be ambiguous, and hence it must be more precisely defined. Personally, I have difficulty understanding the Court other than according to interpretation no. 2. The Court considers the ordinary meaning to be unambiguous, but nevertheless wishes to be cautious. Even assuming that the ordinary meaning is ambiguous, the interpretation suggested by Nicaragua still remains the only one that agrees with the context – this, as I see it, is the only reasonable way to understand the reasoning of the Court. The question we must then ask ourselves is why the

Court considers such a claim to be justified. The first part of the explanation is given by the Court itself: if articles XXXI and XXXII of the Pact of Bogotá were to be understood according to the reading suggested by the Honduras, then apparently two provisions could be applied – each independently of the other – to confer jurisdiction upon the Court under circumstances, which are (at least) partly identical. The second part of the explanation must then be this: it is an assumption of the Court, that the parties to the Pact of Bogotá expressed themselves in accordance with the communicative standard E.

My second example is the judgment of the European Court for Human Rights in the *Guzzardi* case.[80] In 1973, Michele Guzzardi, an Italian national hailing from Sicily, had been detained and charged by an Italian court for conspiracy and participation in the kidnapping of a well-known Italian businessman. Before the passing of a judgment, a decision was handed down in January 1975 for compulsory residence; suspected of involvement with the Italian Mafia, Guzzardi was placed on Asinara Island for a period of 3 years. The claim made by Guzzardi was that Italy, by making this decision, had acted in violation of its obligations under article 5 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* . According to the provisions of article 5, everyone has a "right to liberty". A fact relevant to the case was that at that point in time, Italy had still not ratified Additional Protocol No. 4, article 2, which provides for a right to freedom of movement. Naturally, a question was raised concerning the relationship of article 5 of the Convention with article 2 of Additional Protocol No. 4. The Court elaborates on the matter as follows:

> The Court recalls that in proclaiming the "right to liberty", paragraph 1 of Article 5 is contemplating the physical liberty of the person; its aim is to ensure that no one should be dispossessed of this liberty in an arbitrary fashion. As was pointed out by those appearing before the Court, the paragraph is not concerned with mere restrictions on liberty of movement; such restrictions are governed by Article 2 of Protocol No. 4 which has not been ratified by Italy.[81]

Evidently, the Court makes an assumption concerning the relationship held between article 5 § 1 of the European Convention, and article 2 § 1 of Protocol No. 4. According to the literal sense of the term, a right to liberty could very well include a right to freedom of movement; but it does not. The conclusion of the Court is that the different rights have different scopes of application: no restriction of the right to freedom of movement can be considered *ipso facto* a violation of the right to liberty, and vice versa. It is an implicit assumption of the Court that the parties to the European Convention and to Protocol no. 4 have expressed themselves in accordance with the communicative standard E. Consequently, as I read the Court, the European Convention and Protocol No. 4 are seen to be parts

of a single treaty text. That Protocol No. 4, for the purpose of interpreting article 5 of the Convention, is to be considered part of "the text" of that treaty, in the sense of VCLT article 31 § 2, is certainly not expressly spelled out in the Protocol. According to the provisions of the Protocol, "[a]s between the High Contracting Parties ... Articles 1–5 of this protocol shall be regarded as additional Articles to the Convention, and all the provisions of the Convention shall apply accordingly". But it remains an unanswered question how the Protocol shall be looked upon from the perspective of the state, which is only a party to the Convention. Instead, as support for the conclusion that the European Convention and Protocol No. 4 are seen by the Court to be parts of a single treaty text, we may turn to the practice of the European Court itself. As the Court has repeatedly stated, the European Convention and its protocols "must be read as a whole".[82] To my mind, this amounts to saying that the European Convention and its protocols are to be considered as together forming the text of one single treaty.

This kind of reasoning used by the European Court in the *Guzzardi* case can also be found in the *dissenting opinion* of Judge Fitzmaurice.[83] I quote:

Article 2 of this Protocol [Protocol No. 4, that is] states in terms that:

"Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence."

Put negatively, this prohibits restrictions on movement or place of residence, and from it certain deductions relevant to the present case can be drawn: (a) The existence of this provision [Article 2 of Protocol No. 4, that is] shows either that those who originally framed the Convention on Human Rights did not contemplate that its Article 5 should go beyond preventing actual deprivation of liberty, or extend to mere restrictions on freedom of movement or choice of residence; – or else that the Governments of the Council of Europe did not see Article 5 as covering measures of "deprivation of liberty" where the basic character of those measures consisted primarily of restrictions of movement and place of residence, – or they would not have considered it necessary to draw up a separate Protocol about that. The resulting picture is that Article 5 of the Convention guaranteed the individual against illegitimate imprisonment, or confinement so close as to amount to the same thing – in sum against deprivation of liberty *stricto sensu* – but it afforded no guarantee against restrictions (on movement or place of residence) falling short of that. The latter was effected only by the Protocol, so that in those countries (of which Italy is one) that have not ratified it, such restrictions are not prohibited.

(b) It follows that if Article 5 of the Convention is not to impinge on ground intended to be covered by Article 2 of the Protocol, and is not to do double duty with the latter, it (Article 5) must be interpreted strictly and regarded as limited to cases of actual imprisonment or to detention close enough and strict enough to approximate to a virtually complete derivation of liberty.[84]

Of course, Fitzmaurice does not share the opinion of the Court majority with regard to whether article 5 of the European Convention should be applied to the particular case. According to the majority, article 5 applies.

According to Fitzmaurice it does not – the actions taken by Italy in the case of Guzzardi amount to nothing more than a restriction of the right to freedom of movement, in the sense of article 2 of Additional Protocol No. 4. However, in certain respects Judge Fitzmaurice is still in complete agreement with the majority: when all is said and done, there must be a dividing line between the scope of application covered by the European Convention article 5, and that covered by article 2 in Protocol No. 4.

> Article 5 of the Convention is not to impinge on ground intended to be covered by Article 2 of the Protocol ... [it] is not to do double duty with the latter [...].[85]

Obviously, it is not only an assumption of the Court, but also of Fitzmaurice, that the parties to the European Convention and its Protocol No. 4 expressed themselves in accordance with the communicative standard E.

My third example is the international award in the *Beagle Channel Arbitration* case.[86] In 1971, Argentina and Chile had concluded a special agreement to obtain a judicial decision on the territorial claims made by the two parties in the area of *Tierra del Fuego*. The dispute centred mainly on the sovereignty of three islands – Picton, Nueva and Lennox ("the PNL group") – situated in the eastern part of the *Canal Beagle* ("the Beagle Channel"). No territorial rights to the area could be claimed on grounds other than a bilateral Boundary Treaty,[87] signed in 1881 – neither Argentina nor Chile disputed this. However, the parties were of different opinions as to the correct way of reading the agreement. Among other things, different opinions were held on the meaning of articles II and III:

> *Article II*
> In the southern part of the Continent, and to the north of the Straits of Magellan, the boundary between the two countries shall be a line, which, starting from Point Dungeness, shall be prolonged by land as far as Monte Dinero; from this point it shall continue to the west, following the greatest altitudes of the range of hillocks existing there, until it touches the hill-top of Mount Aymond. From this point the line shall be prolonged up to the intersection of the 70th meridian with the 52nd parallel of latitude, and thence it shall continue to the west coinciding with this latter parallel, as far as the divortia aquarum of the Andes. The territories to the north of such a line shall belong to the Argentine Republic, and to Chile those extending to the south of it, without prejudice to what is provided in Article III, respecting Tierra del Fuego and adjacent islands.

> *Article III*
> In Tierra del Fuego a line shall be drawn, which starting from the point called Cape Espiritu Santo, in parallel 52° 40', shall be prolonged to the south along the meridian 68° 34' west of Greenwich until it touches Beagle Channel. Tierra del Fuego, divided in this manner, shall be Chilean on the western side and Argentine on the eastern. As for the islands, to the Argentine Republic shall belong Staten Island, the small islands next to it, and the other islands there may be on the Atlantic to the east of Tierra del Fuego and of the eastern coast of Patagonia; and to Chile shall belong all the islands to the south of Beagle Channel up to Cape Horn, and those there may be to the west of Tierra del Fuego.[88]

According to Chile, article II attributed to her all the territory and islands south of the line between Point Dungeness and the Andes as far as Cape Horn, subject only to the provisions of article III. According to Argentina, article II confined the allocations of Chile to the territory and islands south of the Point Dungeness-Andes Line, only to the extent of the area lying north of the Straits of Magellan. When a decision is eventually made by the Court on the matter, it is exceptionally well-reasoned. To bring out the flaw in the reading suggested by Chile, the Court ventured a series of arguments. One argument is the following:

The objection that can be made ... is that Article III proceeds to make allocations of territorities [sic!] and islands south of the Straits of Magellan, not only to Argentina, but also to Chile. If it confined itself to doing the former alone – allocating territorities [sic!] and islands to Argentina – there would be no difficulty. Such allocations would thereby be taken out of Chile's global allocation under Article II and would go to Argentina, while all areas not specifically so allocated would automatically remain Chilean by virtue of Article II. The moment, however, that Article III proceeds (as is the fact) to make allocations to Chile, as well as to Argentina, of localities south of the Straits, it merely does all over again what (according to the Chilean contention) is supposed already to have been done globally under Article II. In other words, if Chile's view of Article II is correct, the attributions made to her under Article III would appear to be redundant and unnecessary.[89]

The text speaks for itself. Quite obviously, it is an assumption of the Court that the parties to the 1881 Boundary Treaty have expressed themselves in accordance with the communicative standard E.

My fourth example is the advisory opinion given by the International Court of Justice in *Namibia*.[90] The facts of the case have already been described in part in earlier chapters,[91] and I will not repeat myself. As we know, South Africa, acting in the capacity of a mandatory state, had administered the former German colony of Southwest Africa. In October 1966, the UN General Assembly had adopted resolution 2145 (XXI).[92] In the resolution, the General Assembly noted that for years, "South Africa has failed to fulfil its obligations in respect of the administration of the Mandated Territory"; it decided that the administration "is therefore [to be considered as] terminated" – "henceforth Southwest Africa comes under the direct responsibility of the United Nations"; and it called the attention of the Security Council to the resolution.[93] Upon this request, the Security Council had adopted resolution 276, declaring illegal the continued presence of the South African authorities in Namibia, and calling upon states to refrain from any dealings with the Government of South Africa that were inconsistent with the resolution.[94] Therefore, in August 1970 the Security Council decided to submit to the International Court of Justice a request for an advisory opinion.[95] The issue

to be clarified was the legal consequences of South Africa's continued presence in Namibia, notwithstanding Security Council resolution 276.

One of the questions the Court had to answer in order to accomplish this task concerned the request directed by the Security Council to the international community in resolution 276. As a basis for adopting the resolution, the Security Council had cited article 24 § 1 of the UN Charter:

> In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.

The question was whether the decision of the Council should be seen as imposing a legal obligation upon the member states. According to what was alleged by the South African Government, the answer had to be in the negative. It is true that in article 25 of the UN Charter, the following is provided:

> The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.

But – according to the contention – article 25 pertained only to enforcement measures adopted under Chapter 7 of the Charter, and therefore it did not apply to decisions adopted by the Security Council under the provisions of article 24. The Court was of a different opinion:

> Article 25 is not confined to decisions in regard to enforcement action but applies to "the decisions of the Security Council" adopted in accordance with the Charter.[96]

It is interesting to examine the reasons given to justify this reading:

> If Article 25 had reference solely to decisions of the Security Council concerning enforcement action under Articles 41 and 42 of the Charter, that is to say, if it were only such decisions which had binding effect, then Article 25 would be superfluous, since this effect is secured by Articles 48 and 49 of the Charter.[97]

Clearly, it is an assumption of the Court that the parties to the UN Charter have expressed themselves in accordance with the communicative standard E.

5 CONCLUSIONS

According to VCLT article 31 § 1, a treaty shall be interpreted in good faith "in accordance with the ordinary meaning given to the terms of the treaty in their context". As a means of interpretation, the context comprises an exceptionally wide range of data. Therefore, to facilitate presentation, I have chosen to divide the concept into three parts, each part comprising a separate chapter of this work. The purpose of the current chapter is to describe what it means to interpret a treaty using "the text" of said treaty. Based on

the observations made above, the following five rules of interpretation can be established:

Rule no. 2

§ **1**. If it can be shown that the interpretation of a treaty provision in accordance with interpretation rule no. 1 leads to conflicting results, and that not only in the provision interpreted, but also in some other part of the text of said treaty, a word or phrase is included, the usage of which in one of the two possible ordinary meanings can be considered consistent, while in the other it cannot, then the former meaning shall be adopted.
§ **2**. For the purpose of this rule, the TEXT of a treaty means any and all instruments, of which – considered from the point of view of the parties – the treaty can be considered comprised.
§ **3**. For the purpose of this rule, PARTIES means any and all states for which the treaty is in force at the time of interpretation.

Rule no. 3

§ **1**. If it can be shown that the interpretation of a treaty provision in accordance with interpretation rule no. 1 leads to conflicting results, and that somewhere in the text of said treaty a norm is expressed, which – in light of the provision interpreted – in one of the two possible ordinary meanings can be considered to involve a logical contradiction, while in the other it cannot, then the latter meaning shall be adopted.
§ **2**. For the purpose of this rule, the TEXT of a treaty means any and all instruments, of which – considered from the point of view of the parties – the treaty can be considered comprised.
§ **3**. For the purpose of this rule, the TEXT of a treaty means not only textual representations but also non-textual ones.
§ **4**. For the purpose of this rule, PARTIES means any and all states for which the treaty is in force at the time of interpretation.

Rule no. 4

§ **1**. If it can be shown that the interpretation of a treaty provision in accordance with interpretation rule no. 1 leads to conflicting results, and that somewhere in the text of said treaty there is an expression, which – in light of the provision interpreted – in one of the two possible ordinary meanings can be considered a pleonasm, while in the other it cannot, then the latter meaning shall be adopted.
§ **2**. For the purpose of this rule, the TEXT of a treaty means any and all instruments, of which – considered from the point of view of the parties – the treaty can be considered comprised.
§ **3**. For the purpose of this rule, PARTIES means any and all states for which the treaty is in force at the time of interpretation.

Rule no. 5

§ 1. If it can be shown that the interpretation of a treaty provision in accordance with interpretation rule no. 1 leads to conflicting results, and that in the provision interpreted, as well as in some other part of the text of said treaty, words or phrases are included, the usage of which in one of the two possible ordinary meanings can be considered to differ, while in the other meaning the usage does not, then the latter meaning shall be adopted, provided that the words or phrases, if not identical, can nevertheless be considered to be parts of the same lexical field.

§ 2. For the purpose of this rule, the TEXT of a treaty means any and all instruments, of which – considered from the point of view of the parties – the treaty can be considered comprised.

§ 3. For the purpose of this rule, PARTIES means any and all states for which the treaty is in force at the time of interpretation.

Rule no. 6

§ 1. If it can be shown that the interpretation of a treaty provision in accordance with interpretation rule no. 1 leads to conflicting results, and that somewhere in the text of said treaty a norm is expressed, which – in light of the provision interpreted – in one of the two possible ordinary meanings can be considered to involve a logical tautology, while in the other it cannot, then the latter meaning shall be adopted.

§ 2. For the purpose of this rule, the TEXT of a treaty means any and all instruments, of which – considered from the point of view of the parties – the treaty can be considered comprised.

§ 3. For the purpose of this rule, PARTIES means any and all states for which the treaty is in force at the time of interpretation.

NOTES

1. See e.g. *Oppenheim's International Law*, p. 1274, n. 17; Villiger, p. 344; Bos, 1984, p. 184; Köck, p. 90; Lang, p. 157; Elias, 1974, p. 75; Degan, 1968, p. 17. See Draft Articles With Commentaries (1966): "[T]he word 'context' in the opening phrase of paragraph 2 is designed to link all the elements of interpretation mentioned in this paragraph to the word 'context' in the first paragraph and thereby incorporate them in the provision contained in that paragraph. Equally, the opening phrase of paragraph 3 'There shall be taken into account *together with the context*' is designed to incorporate in paragraph 1 the elements of interpretation set out in paragraph 3." (*ILC Yrbk*, 1966, Vol. 2, p. 220, § 8.)
2. By so doing – and I want to emphasise this – I do not assume a reading of the Vienna Convention incompatible with conventional language. VCLT article 31 § 2 provides: "The context for the purpose of the interpretation of a treaty shall comprise ... ('Aux fins de l'interprétation d'un traité, le contexte comprend ...' – 'Para los efectos de la interpretación de un tratado, el contexto comprenderá ...'.)" The word COMPRISE,

comprend, comprender is ambiguous. It can be used in the sense of *contain; include; embrace*; but it can also be used in the sense of *consist of; composed of or constituted by*. In my opinion, the one sense used for the provisions of article 31 § 2 is the former. I consider the description given in § 2 to be an exemplification of what is meant by "the context" used in article 31 § 1. Only in combination with the provisions of § 3 can the description given in § 2 be considered an exhaustive definition of *the context*. What I am therefore forced to accept is that "the context" used in § 2 stands for something different than "the context" used in § 3. "[T]he context" used in § 2 is co-referent with "the context" used in § 1. According to conventional language, "the context" used in § 3 can be understood in two ways. It can be understood as co-referent with "The context" in § 1; and it can be understood as a reference to *the context*, *as described in § 2*. In my opinion, the expression shall be understood in the latter sense.

3. Cf. Ch. 1, Section 3, of this work.
4. It is also evident from reading the preparatory work of the Vienna Convention. From the Commentary adopted by the International Law Commission in 1966, I quote the following passage: "*Paragraph 1* [of draft article 27, later to be adopted as VCLT article 31] contains three separate principles. The first – interpretation in good faith – flows directly from the rule *pacta sunt servanda*. The second principle is the very essence of the textual approach: the parties are to be presumed to have that intention which appears from the ordinary meaning of the terms used by them. The third principle is one both of common sense and good faith; the ordinary meaning of a term is not to be determined in the abstract but in the context of the treaty and in the light of its object and purpose." (Draft Articles With Commentaries (1966), *ILC Yrbk*, 1966, Vol. 2, p. 221, § 12.)
5. For an excellent introduction to this topic, see Weissberg, pp. 781–803.
6. Several circumstances support this conclusion. One such circumstance is the definition provided by the Vienna Convention itself. Treaty, in the sense of the Convention, means an international agreement "in written form" (article 2 § 1); that is, in practice, a treaty is an agreement, which is neither oral nor tacit. (See Draft Articles With Commentaries (1966), *ILC Yrbk*, 1966, Vol. 2, p. 190, § 3.) Another circumstance involves the judicial opinions expressed. That a non-textual representation contained in a treaty shall be considered part of that treaty's text is an inference seemingly to be made based on the practice of international courts and tribunals. See e.g. *Guinea – Guinea-Bissau Maritime Delimitation*, where two maps attached as annexes to a convention were considered parts of the context "in keeping with the views of the Parties themselves, and Article 31, paragraph 2, of the Vienna Convention on the Law of Treaties" (*ILR*, Vol. 77, p. 670, § 70).
7. My italics.
8. Cf. VCLT art. 39: "*A treaty* may be amended by agreement between the parties." (My italics.) See also *U.S.-France Air Services Award*, *ILR*, Vol. 54, p. 329, § 50, cf. p. 304; *Air Transport Services Agreement Arbitration*, *ILR*, Vol. 38, pp. 230–231. For a seemingly different view, see Seidl-Hohenveldern, 1998, p. 13.
9. *Final Act*, *Agreement and other Acts relating to the establishment and operation of the Iron Gates Water Power and Navigation System on the River Danube* . All signed at Belgrade, on 30 November 1963. The text cited is the official English translation of the agreement, which was authenticated only in Romanian and Serbo-Croatian.
10. *Agreement concerning the construction and operation of the Iron Gates Water Power and Navigation System on the River Danube* , Article 22, excerpt. The text cited is the

official English translation of the agreement, which was authenticated only in Romanian and Serbo-Croatian.

11. Cf. Final Act, Article I.
12. See, further, Voïcu, pp. 165–172.
13. See *Oppenheim's International Law*, pp. 1211, 1274, n. 15; Yasseen, p. 38; Elias, 1974, p. 75. See also Draft Articles With Commentaries (1966), *ILC Yrbk*, 1966, Vol. 2, p. 221, § 13, cit. *Ambatielos (Preliminary Objection)*, *ICJ Reports*, 1952, pp. 43, 75.
14. See e.g. *Ambatielos (Preliminary Objection)*, *ICJ Reports*, 1952, pp. 41–44.
15. This means that for the purpose of interpreting an annex to a treaty, the context shall include the "main instrument" as well as any other annexes possibly drawn up. (See e.g. *Young Loan*, *ILR*, Vol. 59, pp. 533–540.)
16. Guinea – Guinea-Bissau Maritime Delimitation Case, Award of 14 February 1985, *ILR*, Vol. 77, pp. 636ff.
17. Ibid., p. 636 et passim.
18. Ibid., p. 664, §§ 54–55, pp. 669–670, §§ 69–70.
19. Ibid., pp. 669–670, §§ 69–70, cf. p. 657, § 39.
20. See e.g. Ress, pp. 30, 43; Ost, pp. 290–291; Bernhardt, 1984, p. 322; Bos, 1984, p. 147; Matscher, 1983, pp. 562–563; Lang, pp. 157–158; Schwarzenberger, 1957, pp. 505–508.
21. See e.g. Matscher, 1983, p. 562; Vitányi, p. 53; Yasseen, p. 33; Haraszti, pp. 104–105; Lang, p. 157; Rousseau, pp. 285–286; Bernhardt, 1963, p. 69, n. 338, cit. De Visscher, 1959, p. 384; Fitzmaurice, 1963, pp. 150–152.
22. Cf. e.g. *Oppenheim's International Law*, p. 1273, n. 12; Seidl-Hohenveldern, 1992, p. 92; Haraszti, pp. 89–90; Matscher, 1983, p. 562; Müller, pp. 129–130; Bernhardt, 1963, pp. 85–86.
23. Cf. e.g. Merrills, p. 75, cit. *Johnston and Others*, *Publ. ECHR*, Ser. A, Vol. 112, § 57; Ost, p. 291, cit. *Guzzardi*, diss. op. Fitzmaurice, *Publ. ECHR*, Ser. A, Vol. 39, p. 52; von Glahn, p. 504; Yasseen, pp. 33–34; Haraszti, pp. 104–105; Müller, pp. 129–130; De Visscher, 1963, pp. 59–61; Degan, 1963, p. 98, cit. *Corfu Channel (Merits)*, *ICJ Reports*, 1949, p. 26; Schwarzenberger, 1957, p. 508.
24. See p. 102 of this work.
25. In addition to the authorities directly cited in the text below, see Akehurst, 1987, p. 203; Matscher, 1983, p. 562. See also the judicial opinions expressed by international courts and tribunals, e.g. *Canadian Agricultural Tariffs*, *ILR*, Vol. 110, p. 579, § 134; *La Bretagne Arbitration*, *ILR*, Vol. 82, pp. 620–621, §§ 38–39; *Guinea – Guinea-Bissau Maritime Delimitation*, *ILR*, Vol. 77, pp. 663–664, § 52.
26. *Oppenheim's International Law*, p. 1273, n. 12, cit. *Ministry of Defence v Ergialli*, *ILR*, Vol. 26, p. 732.
27. Haraszti, p. 108.
28. Bernhardt, 1963, pp. 85–86, cit. *Diversion of Water from the Meuse*, *PCIJ*, Ser. A/B, No. 70, p. 24, and Judge Hudson's *individual opinion* appended to that same case, ibid., p. 75.
29. In addition to Vitányi, see Akehurst, 1987, p. 203; Matscher, 1983, pp. 562–563; Yasseen, pp. 33–34.
30. Vitányi, p. 54. (Footnotes omitted.)
31. See also the judicial opinions expressed by international courts and tribunals, e.g. *Maritime Delimitation: Jan Mayen*, *ILR*, Vol. 100, p. 418, § 26; *Soering*, *Publ. ECHR*, Ser. A, Vol. 161, p. 40, § 103; *Border and Transborder Armed Actions*, *ILR*, Vol. 84, pp. 239–240, §§ 35–36; *Johnston and Others*, *Publ. ECHR*, Ser. A, Vol. 112,