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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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of the treaty". A contrary suggestion was made at Vienna by the delegation of Czechoslovakia: "in force at the time of application of the treaty". The article as adopted has put aside both these opposing time-references. The reason is that this is a question which must remain open and depends on whether the parties intended to incorporate in the treaty some legal concepts with a meaning that would remain unchanged, or intended to leave certain terms as elastic and open-ended, subject to change and susceptible of receiving the meaning they might acquire in the subsequent development of the law. There are terms which must be understood according to the legal concepts prevailing at the time of conclusion of the treaty: for instance, a treaty conferring on another State rights in the territorial sea must be interpreted in the light of the concept of the territorial sea in force at the time of concluding the treaty and not as incorporating the wider notion this term has subsequently acquired. On the other hand, and perhaps more exceptionally, there are terms in a treaty obviously inviting an interpretation in harmony with the conditions and opinions prevailing from time to time.

The International Court of Justice found in its Advisory Opinion on the question of *Namibia* that this had occurred with the terms "sacred trust", "strenuous conditions of the modern world" and "well-being and development" of dependent peoples. The Court stated in this respect: [here follows the passage from the ICJ advisory opinion already found in the quotation of Sinclair].[91]

Nevertheless, considering the way authors express themselves, I cannot see how the literature alone could possibly be advanced as sufficient support for the conclusion here suggested. The literature simply lacks the precision that such support would require. First, it is my judgment that the decisive criterion for using the "relevant rules of international law" is the type of referring expression interpreted. The question is whether or not the thing interpreted is a generic referring expression with a referent assumed by the parties to the treaty to be alterable. According to several authors, the only decisive criterion is THE INTENTIONS OF THE PARTIES, which indeed remains a very vague criterion.[92] Second, it is my judgment that appliers can interpret a treaty using "relevant international rules of law" without having to distinguish between the different varieties of a language.[93] If someone asks whether the meaning of the expression "applicable" shall be determined based on the law applicable at the time of interpretation, or whether it shall be determined based on the law applicable at the time when the treaty was concluded, then the answer will not differ merely because the word interpreted belongs to a certain linguistic variety (e.g. everyday language, the language of ecology, the language of shipping, banking and finance language, the language of law, etcetera). It seems that according to some authors the temporal variation of law is simply a problem that arises in connection with the interpretation of terms belonging to the language of law.[94] Hence, all things considered, I cannot conclude my argument at this early stage and expect the reader to accept my assertions as credible. I must present the additional reasons I believe can be used to support my conclusion. This is the purpose of Section 5.

5 THE MEANING OF SUBPARAGRAPH (C): "APPLICABLE"

Based on what I have asserted, the issue of variations in law over time is to be resolved in the very same manner as that we used earlier to resolve the issue of temporal variation in language.

> If it can be shown, that the thing interpreted is a generic referring expression with a referent assumed by the parties to be alterable, then the decisive factor for determining the meaning of the "relevant rules of international law" shall be the law applicable at the time of interpretation. In all other cases, the decisive factor shall be the law applicable at the time when the interpreted treaty was concluded.[95]

Several arguments support this conclusion.

A first argument is the object and purpose of the interpreted treaty. Clearly, a certain level of agreement exists between the object and purpose conferred on the provisions of VCLT article 31 § 1 that governs the use of conventional language, and the object and purpose conferred on the provisions of article 31 § 3(c). One of the intentions underlying article 31 § 1 is that appliers should be able to take into consideration the language of international law. By "the ordinary meaning" of the terms of a treaty we must understand the meaning ascribed to these terms not only in everyday language, but also in the language of law.[96] The easy way to determine the language of international law is to consult some sort of lexicon or dictionary. However, things are not always that simple – in some cases, lexicons and dictionaries are simply not of help. To determine the conventions of language in such cases, actual utterances must be examined.[97] Of course, particularly important utterances are those that can be found in international treaties. It seems a fair assumption that all this was common knowledge for the parties to the Vienna Convention. Accordingly, just like VCLT article 31 § 3(c), the provision that governs the use of conventional language would seem to rely on the existence of written agreements. On such premises, it stands to reason that both provisions apply according to the same principles.

My second argument amounts to an interpretation of the literature. In the literature, the different issues of how language and law vary over time are often addressed conjointly.[98] On occasion, the issues are treated without any real indication given that they are actually two separate issues, and not just one.[99] However, even if authors tend to cause confusion about the issue of temporal variation of international law, it nevertheless seems they give us clear information on one point: the issue of variation in law should be addressed using an approach similar to that used in addressing the issue of variation in language. This position appears particularly in the writings of Elias, Sinclair and Jiménez de Aréchaga. In the texts of all three authors, we

find a short excerpt from the ICJ advisory opinion in the *Namibia* case.[100] However, if we examine the excerpt more closely, we see that the primary issue dealt with by the court is not the use of "relevant international rules of law", but rather the use of conventional language.[101] Thus, it seems we have two options. Either we assert about the authors that they are guilty of a pure misunderstanding, which is not a very appealing option considering the fact that Elias, Sinclair and Jiménez de Aréchaga are such recognised authorities. Or, we assume that when the three authors cite the opinion of the Hague Court, this is not in order to provide direct support for the conclusion they draw, but merely as part of a reasoning *ex analogia*. Clearly, the latter option seems the most acceptable.

My third argument is the practice of international courts and tribunals after 1969. As an answer to the question addressed in Section 4 of this chapter, a norm was articulated. This norm appears to be the one generally applied in international courts and tribunals. I have particularly two examples of this.[102]

My first example is the judgment of the International Court of Justice in the case of *Gabčíkovo -Nagymaros Project*.[103] In September 1977, Hungary and the former Czechoslovakia had concluded a treaty regarding the construction and operation of a joint investment project in the Danube River.[104] Two important purposes of the project were to produce hydro-electric power and improve conditions for navigation on the river. The costs would be divided equally between the parties, who would also – once the project came to completion – benefit in equal measure from the power produced. The treaty addressed many issues, including the construction of two series of locks: one upstream at Gabčíkovo, in Czechoslovakian territory; and one downstream at Nagymaros, in Hungarian territory. In addition to guidelines for the construction project as such, the agreement contained provisions concerning the preservation of water quality and the protection of fishery and natural resources. I cite from articles 15, 19 and 20:

Article 15. Protection of Water Quality

1. The Contracting Parties shall ensure, by the means specified in the joint contractual plan, that the quality of the water in the Danube is not impaired as a result of the construction and operation of the System of Locks.

Article 19. Protection of Nature

The Contracting Parties shall, through the means specified in the joint contractual plan, ensure compliance with the obligations for the protection of nature arising in connection with the construction and operation of the System of Locks.

Article 20. Fishing Interests

The Contracting Parties, within the framework of national investment, shall take appropriate measures for the protection of fishing interests in conformity with the Danube Fishing Agreement, concluded at Bucharest on 29 January 1958.

According to the agreement, all the technical details of the project would be specified in a separate instrument – designated by the parties as "the Joint Contractual Plan" – which could later be updated as the parties saw fit.[105]

By 1989, construction in Czechoslovakian Gabčíkovo had advanced well, while in Hungarian Nagymaros construction was still in a preliminary phase. On the heels of political upheaval and a drastically changed economic situation, public opinion in Hungary had turned to scepticism toward the project, based partly on ecological reasons. In October 1989, the Hungarian Government decided to permanently abandon the works at Nagymaros. Czechoslovakia protested, and the parties began negotiations towards an agreed modification of the project. However, no agreement was ever reached. In November 1991, Czechoslovakia unilaterally commenced construction of what it called the provisional solution. In May 1992 the Hungarian government sent a *Note Verbale* to its Czechoslovakian counterpart, allegedly terminating the 1977 treaty. One year later, in April 1993, Hungary and Slovakia – the latter as acknowledged successor to the rights and obligations of Czechoslovakia – mutually decided to file an application with the International Court of Justice for a final decision on the matter.

One of the issues to be dealt with by the ICJ was the effect of Hungary's 1992 *note*. In its pleadings, Hungary had presented five arguments, which she asserted gave her cause for terminating the 1977 treaty. According to one argument, application of the treaty was precluded because of new requirements in international environmental law. This argument did not convince the Court. In the law of treaties, only two rules would make the more recent requirements of international environmental law grounds for termination, given the circumstances of the case: the ones expressed in articles 62 and 64 of the VCLT, concerning the effect of a fundamental change of circumstances, and the development of new *jus cogens*, respectively. The former rule, the Court observes, is quite obviously inapplicable. In order for a fundamental change of circumstances to give a state legitimate cause to withdraw from a treaty, the change must have been completely unforeseen by Hungary and Czechoslovakia, when in 1977 they concluded the treaty. Such was not the case with regard to the developments in international environmental law.

> What is more, the formulation of Articles 15, 19 and 20, designed to accommodate change, made it possible for the parties to take account of such developments and to apply them when implementing those treaty provisions.[106]

The second rule assumes the existence of a new peremptory norm of international law.

Neither of the Parties [has however] contended that new peremptory norms of environmental law had emerged since the conclusion of the 1977 Treaty, and the Court will consequently not be required to examine the scope of Article 64 of the Vienna Convention on the Law of Treaties.[107]

This observation, the court concludes – obviously intent on developing to some degree the issue touched upon in the passage above – must not be taken to mean that the new norms of international environmental law have no relevance at all.

[T]he Court wishes to point out that newly developed norms of environmental law are relevant for the implementation of the Treaty and that the Parties could, by agreement, incorporate them through the application of Articles 15, 19 and 20 of the Treaty. These articles do not contain specific obligations of performance but require the parties, in carrying out their obligations to ensure that the quality of water in the Danube is not impaired and that nature is protected, to take new environmental norms into consideration when agreeing upon the means to be specified in the Joint Contractual Plan.

By inserting these evolving provisions in the Treaty, the parties recognized the potential necessity to adapt the Project. Consequently, the Treaty in not static, and is open to adapt to emerging norms of international law. By means of Articles 15 and 19, new environmental norms can be incorporated in the Joint Contractual Plan.[108]

What the court says is clearly topical for the interpretation of treaties as well: article 15 requires that the parties, in drafting the Joint Contractual Plan, consider the rules of international environmental law originating after 1977. The reason to pay this statement specific attention is that the requirement noticed by the Court is not something, which can be drawn expressly from the treaty as such. In article 15, the only thing stated is that the parties shall ensure that the water quality in the Danube River does not deteriorate. If the Court reaches the conclusion that international environmental laws must be taken into consideration, then this is on the basis of reasons other than the mere text of the article. The true reason lies in the rules of interpretation applied by the Court. Apparently, the Court takes for granted that the 1977 treaty can be interpreted using "relevant rules of international law". In my judgment, the use of "relevant rules of international law" can be described along the lines of the following rule of interpretation:

> 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 a relevant rule of international law exists, which is applicable in the relations between the parties, and – considered in light of the provision interpreted – in one of two possible ordinary meanings involves a logical contradiction, while in the other it does not, then the latter meaning shall be adopted.[109]

Hence, for the interpretation of article 15, the "relevant rules of international law" would – according to the Court – be considered a reference to the law applicable at the time of interpretation. The question remains how the Court can justify such an opinion.

The thing interpreted is the expression "[t]he Contracting Parties ensure ... that the quality of the water in the Danube is not impaired". According to conventional language, this is either a singular referring or a generic referring expression.[110] It can be used to refer either to a single occasion, on which the parties ensure the water quality in the Danube River. Or it may be used to refer to a more extended state-of-affairs, whose existence in time has not been determined. Clearly, the thing interpreted is a generic referring expression. A generic referring expression, in turn, can be used in two different ways. It can be used to refer to a referent – in this case a specific state-of-affairs – assumed by the utterer to be unalterable. It can also be used to refer to a referent, which the utterer assumes will alter. The observation made by the Court is that article 15 has been designed to accommodate change; that the provisions expressed are evolving; that the parties recognised the necessity of adapting the project (to better correspond to changing circumstances); and that, therefore, the content of the treaty is not static. Arguably, this is tantamount to saying that the expression interpreted is a generic referring expression with a referent assumed by the parties to be alterable.

My second example is the ICJ advisory opinion in the *Namibia* case.[111] The facts of this case have already been stated,[112] and I will not engage in unnecessary repetition. As we know, the dispute involved the purpose of the so-called C-mandates. According to South Africa, a C-mandate was more or less tantamount to an annexation, and it maintained that this was evident in the various statements reported in the preparatory work to the Covenant of the League of Nations. For the International Court of Justice, a C-mandate was something else. Under article 22 § 1 of the League Covenant, South Africa, as a mandatory over South-West Africa, had assumed as "a sacred trust" to provide for the "well-being and development" of the South-West African population. Article 22 § 1 provides:

> To those colonies and territories which as a consequence of the late war has ceased to be under the sovereignty of the States which formerly governed them and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilisation and that securities for the performance of this trust should be embodied in this Covenant.[113]

In order to live up to this commitment, the court observed, South Africa must act, not for the annexation of the mandate territory, but instead for its independence and self-determination:

> [T]he subsequent development of international law in regard to non-self governing territories, as enshrined in the Charter of the United Nations, made the principle of self-determination applicable to all of them. The concept of the sacred trust was confirmed and expanded to all "territories whose peoples have not yet attained a full measure of self-government" (Art. 73). Thus it clearly embraced territories under a colonial régime. Obviously, the sacred trust continued to apply to League of Nations mandated territories on which an international status had been conferred earlier. A further important stage in this development was the Declaration on the Granting of Independence to Colonial Countries and Peoples (General Assembly resolution 1514 (XV) of 14 December 1960), which embraced all peoples and territories which "have not yet attained independence". Nor is it possible to leave out of account the political history of mandated territories in general. All those which did not acquire independence, excluding Namibia, were placed under trusteeship. Today, only two out of fifteen, excluding Namibia, remain under United Nations tutelage. This is but a manifestation of the general development which has led to the birth of so many new States.
>
> 53. All these considerations are germane to the Court's evaluation of the present case. Mindful as it is of the primary necessity of interpreting an instrument in accordance with the intentions of the parties at the time of its conclusion, the Court is bound to take into account the fact that the concepts embodied in Article 22 of the Covenant – "the strenuous conditions of the modern world" and "the well-being and development" of the peoples concerned – were not static, but were by definition evolutionary, as also, therefore, was the concept of the "sacred trust". The parties to the Covenant must consequently be deemed to have accepted them as such. That is why, viewing the institutions of 1919, the Court must take into consideration the changes which have occurred in the supervening half-century, and its interpretation cannot remain unaffected by the subsequent development of law, through the Charter of the United Nations and by way of customary law. Moreover, an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of interpretation. In the domain to which the present proceedings relate, the last fifty years, as indicated above, have brought important developments. These developments leave little doubt that the ultimate objective of the sacred trust was the self-determination and independence of the peoples concerned. In this domain, as elsewhere, the *corpus iuris gentium* has been considerably enriched, and this the Court, if it is faithfully to discharge its functions, may not ignore.[114]

The thing interpreted by the Court is the expression "a sacred trust". The conclusion is that, in reading this expression, particular regard must be paid to the development brought about in international law since 1919, the year the Covenant was concluded. We shall note that the Court itself does not expressly mention the means of interpretation it exploits. As I stated earlier, my understanding of the Court is as follows: the means of interpretation used are first conventional language – more specifically, the language expressed in article 73 of the Charter of the United Nations, and in the "Declaration on the Granting of Independence to Colonial Countries and Peoples" – and then, at the end of § 53 (in the passage beginning with

"Moreover"), the "relevant rules of international law". Consequently, for the interpretation of the expression "a sacred trust", the "relevant rules of international law" would, according to the Court, be considered a reference to the law applicable at the time of interpretation. The decisive question is what the Court thinks might justify such a finding.

Let me remind the reader how the Court explained its finding that the ordinary meaning of "a sacred trust" should be determined based on the language conventions adhered to at the time of interpretation.[115] The Court says, first of all, that it is aware that the ultimate purpose of all treaty interpretation is to determine the utterance meaning of the interpreted treaty; second, that the terms used in the League Covenant, according to the language adhered to in 1919, represented something evolutionary; and third, that therefore it must be assumed that the parties to the Covenant, too, used the terms in this manner.

> Mindful as it is of the primary necessity of interpreting an instrument in accordance with the intentions of the parties at the time of its conclusion, the Court is bound to take into account the fact that the concepts embodied in Article 22 of the Covenant – "the strenuous conditions of the modern world" and "the well-being and development" of the peoples concerned – were not static, but were by definition evolutionary, as also, therefore, was the concept of the "sacred trust". The parties to the Covenant must consequently be deemed to have accepted them as such.[116]

As we observed earlier, this is tantamount to saying that the expressions in question are generic referring expressions with referents assumed to be alterable.[117] It is my understanding of the Court that, in fact, this explanation pertains not only to the use of conventional language, but also to the use of "relevant rules of international law".

As a consequence of this understanding, what I need to explain is the following passage:

> Moreover, an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of interpretation.[118]

Treaties shall be interpreted with consideration only for those rules of law that are applicable at the time of interpretation – this is what the court literally says, which cannot possibly be what it intended to say. First of all, the utterance would be clearly incompatible with international law as it currently stands. The dominant opinion in the modern literature is that an applier – depending upon the circumstances – has the possibility of taking into consideration not only the law applicable at the time when the interpreted treaty was concluded, but also the law applicable at the time of interpretation.[119] Second, the expression would be clearly incompatible with the overall point made by the Court. If the Court were of the opinion

that treaties should be interpreted with consideration only for those rules of law that are applicable at the moment of interpretation, then there is no reasonable explanation why the Court so strongly emphasises the development of law as such.

> In the domain to which the present proceedings relate, the last fifty years … have brought important developments --- [T]his the Court, if it is faithfully to discharge its functions, may not ignore.[120]

Considering the context, the more probable interpretation is that the Court merely wants to call our attention to the prevailing legal state-of-affairs. The Court wishes to remind us that in contrast with the earlier doctrine, according to current international law, appliers have the possibility of not only using those rules of law that were once applicable at the conclusion of the interpreted treaty, but also those rules that are applicable at the time of interpretation.

6 THE CONTEXTUAL ELEMENTS 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 three classes of phenomena provided in VCLT article 31 § 3? With regard to the use of context, there is reason to repeat part of what we have already noted. In Chapter 4, we observed that in the legal literature, the act of interpretation using context is often termed as SYSTEMATIC INTERPRETATION.[121] When an applier uses the context – this is the assumption – the interpreted treaty provision and the context together form some kind of larger whole, a system. I also noted about the system assumed in the legal literature that it is not a uniform concept.[122] The term SYSTEMATIC INTERPRETATION is used to refer to not one type of system but two, depending on whether 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 a system of a linguistic character; in the latter case it is based on the existence of a system in the logical sense. Based on these observations, I then put into words the five communicative standards assumed by appliers when they interpret a provision using "the text" of the treaty interpreted; these standards have been designated with the letters A to E.[123] The standards are of two types. Standards A, C and D govern the linguistic relationship assumed to hold between the expressions used for an interpreted treaty provision and the expressions used for the context. Standards B and E govern the logical relationship that shall be assumed to hold between the norm content of an interpreted treaty provision and the norms comprised by the context.

As we observed in Chapter 5, partly different communicative standards are to be assumed by appliers, when they use the contextual elements described in VCLT article 31 § 2(a) and (b), compared to when they use "the text" of a treaty. When using the contextual elements of article 31 § 2(a) and (b), appliers shall base their operations solely on the assumption that the interpreted treaty provision and the context form a system in the logical sense.[124] Among the different arguments I advanced to support this conclusion, one was the fact that the expectations placed on a treaty provision are considerably higher when it is considered part of a linguistic system, compared to when it is considered part of a system in the logical sense.[125] If a treaty is to be considered part of two systems, of which the one is linguistic and the other logical, then it stands to reason that the extension of the former should be limited to include only part of the latter. As we noted, the inherent line of limitation is formed by the text of the interpreted treaty.[126] This same argument should be valid also when appliers use the contextual elements described in VCLT article 31 § 3. If, when they use the contextual elements set out in article 31 § 2(a) and (b), appliers are not to assume that the interpreted treaty provision and the context form a system in the linguistic sense, nor should they assume so when they use the elements described in article 31 § 3.

Further confirmation of this proposition is provided if we consider the nature of the three classes of phenomena set out in article 31 § 3. Subparagraph (a) speaks of "any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions". As observed, "agreement" refers to any legally binding agreement regardless of form, including not only written agreements but also non-written ones.[127] If a communicative standard governs the relationship held between an interpreted treaty provision and a subsequent non-written agreement, then obviously this relationship cannot be the one that holds between the expressions used for these two accords. Subparagraph (b) speaks of "any subsequent practice in the application of the treaty which establishes agreement between the parties regarding its interpretation". A practice does not take the form of a text. If a communicative standard governs the relationship held between an interpreted treaty provision and a subsequent practice, then obviously this relationship cannot be the one that holds between expressions used for the treaty and those that appear in the practice. Subparagraph (c) speaks of "relevant rules of international law applicable in the relations between the parties". "[R]ules of international law" means each and every rule that springs from international agreements, from customary international law, or from "the general principles of law recognized by civilized nations".[128] Customary international law does not take the form of a text; nor

do the general principles of law recognized by civilized nations. If a communicative standard governs the relationship held between an interpreted treaty provision and a rule of international law, whatever its source, then clearly this relationship cannot be the one that holds between the expressions used for the interpreted treaty provision and the rule.[129] All things considered, I have difficulty arriving at any other conclusion than this: when an applier interprets a treaty using a "subsequent agreement", a "subsequent practice", or any one of the "relevant rules of international law", it is solely on the assumption that the interpreted treaty provision and the context form a system in the logical sense.

The communicative standard assumed when an applier uses the "relevant rules of international law" is easily established. According to an opinion generally held in the literature, a treaty shall always be assumed compatible with those other rules of international law that apply in the relation between the parties, as long as the opposite has not been shown to be the case.[130] See for example O'Connell, who notes with regard to the provisions of VCLT article 31 § 3(c):

> The process of interpretation supposes that the parties contemplate a result not incompatible with customary international law.[131]

Oppenheim's International Law declares:

> "[I]t is a rule of interpretation that a text emanating from a Government must, in principle, be interpreted as producing and as intended to produce effects in accordance with existing law and not in violation of it".[132]

Let us also cite a passage from the records of the 770th meeting of the ILC:

> Mr. de **LUNA** said that the text of a treaty was never drawn up *in vacuo* — In cases where a treaty did not expressly say whether its provisions should be interpreted in a manner derogating from or consistent with a rule of international law in force, the interpretation should be in conformity with the rule in question, for States were presumed to be under a duty to conform with international law, even were it was a case of *jus dispositivum*.[133]

Hence, when appliers interpret a treaty using "relevant rules of international law", they do so on the basis of the communicative standard B:

> 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.[134]

It seems obvious that this standard B should also be assumed when appliers use a "subsequent agreement" or a "subsequent practice"; for the most fundamental requirement placed on a logical system is that it be free of logical contradiction. However, concentrating on the use of a "subsequent agreement", I wish to go one step further. Using a "subsequent agreement",

appliers also assume that the parties to the interpreted treaty have abided by the communicative standard E:

> If a state produces an utterance taking the form of a treaty provision, then the provision should be drawn up in such a way that in the context there will be no instance of a logical tautology.[135]

To support this proposition, I will offer one argument only, and that is the opinion expressed in the legal literature. According to a view generally held in the literature, we shall count as a "subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions" certain legally binding interpretation agreements.[136] When such an agreement is used for the interpretation of a treaty, and this is done based on the communicative assumption that the treaty and the agreement do not logically contradict one another, the interpretation arrived at is an AUTHENTIC INTERPRETATION (Fr. UN INTERPRÉTATION AUTHENTIQUE).[137] An authentic interpretation does not compete on equal terms with an interpretation arrived at through an application of the rules laid down in the Vienna Convention (or the identical rules of customary international law); the authentic interpretation always takes precedence. After all, the rules of interpretation laid down in the Vienna Convention are *jus dispositivum* – they apply only on the condition, and to the extent, that the parties to a treaty have not come to agree between themselves on something else.[138] If we accept the suggestion that a legally binding interpretation agreement can be used according to the provisions of VCLT article 31 § 3(a), then, as a result, this usage must be based on some other communicative standard than B. All things considered, the conclusion I draw is the following: when appliers interpret a treaty using the contextual element described in article 31 § 3(a), they do so on the basis of not only standard B but also standard E.

7 CONCLUSIONS

According to VCLT article 31 § 1, a treaty shall be interpreted in good faith "in agreement with the ordinary meaning given to the terms of the treaty in their context and in the light of its object and purpose". 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 being the subject of a separate chapter of this work. The purpose of this chapter is to describe what it means to interpret a treaty using the contextual elements described in VCLT article 31 § 3. Based on the observations made in this chapter, the following four rules of interpretation can be established:

Rule no. 11

§ 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 subsequent to the conclusion of the treaty the parties made an agreement regarding the interpretation of the treaty or the application of its provisions, and the agreement – 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, AGREEMENT means any agreement governed by international law, whether written or not.

§ 3. For the purpose of this rule, an agreement was made SUBSEQUENT to the conclusion of a treaty, if (and only if) it was made after the point in time when the interpreted treaty was established as definite.

§ 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.

§ 5. For the purpose of this rule, an agreement is one REGARDING the interpretation of a treaty or the application of its provisions, if (and only if) the agreement was made with the purpose of either clarifying the meaning of said treaty, or of serving in some other manner as a guide for its application.

Rule no. 12

§ 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 subsequent to the conclusion of the treaty the parties made an agreement regarding the interpretation of the treaty or the application of its provisions, and the agreement – 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.

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§ 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.

§ 5. For the purpose of this rule, an agreement is one REGARDING the interpretation of a treaty or the application of its provisions, if (and only if) the agreement was made with the purpose of either clarifying the meaning of said treaty, or of serving in some other manner as a guide for its application.

Rule no. 13

§ 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 subsequent to the conclusion of the treaty a practice has developed, which can be said to establish the agreement of the parties regarding the interpretation of said treaty, so that the practice – 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, PRACTICE means any number of applications, one or many.

§ 3. For the purpose of this rule, the APPLICATION of a treaty means any and all measures based on the treaty.

§ 4. For the purpose of this rule, a practice is considered SUBSEQUENT to the conclusion of a treaty, if (and only if) it developed after the point in time when the interpreted treaty was established as definite.

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

§ 6. For the purpose of this rule, AGREEMENT means not only the concordance upon which the treaty was originally concluded, but also any possible concordance arrived at after the conclusion of the treaty, excluding, however, interpretative agreements governed by international law.

§ 7. For the purpose of this rule, a practice establishes agreement with regard to the INTERPRETATION of a treaty, only on the condition that practice agrees with the treaty, when interpreted in accordance with rule no. 1.

Rule no. 14

§ 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 a relevant rule of international law is applicable in the relationship between the parties, and the rule – considered 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, RULE OF INTERNATIONAL LAW means any and all rules whose origin can be traced to a formal source of international law.

§ 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.

§ 4. For the purpose of this rule, whether a rule of law is APPLICABLE or not is determined based upon the legal state-of-affairs that prevailed at the

time when the treaty was concluded, unless otherwise applies according to § 5.

§ 5. For the purpose of this rule, whether a rule of law is APPLICABLE or not is determined based upon the legal state-of-affairs prevailing at the time of interpretation, provided that it can be shown that what is being interpreted is a generic referring expression with a referent assumed by the parties to be alterable.

NOTES

1. See p. 102 of this work.
2. See Yasseen, pp. 44–45; Schwarzenberger, 1969, p. 220; Bartoš, at the ILC's eighteenth session, 870:th meeting, *ILC Yrbk*, 1966, Vol. 1, Part 2, p. 192, § 91. See also, implicitly, Villiger, p. 344; Rest, p. 146; Bernhardt, 1967, p. 499; Draft Articles With Commentaries (1966), *ILC Yrbk*, 1966, Vol. 2, p. 221, § 14, who all speak of "subsequent agreements" as a form of authentic interpretation. AUTHENTIC INTERPRETATION usually means a legally binding interpretation agreement to be applied within the framework of international law. (See e.g. *Oppenheim's International Law*, p. 1268; Skubiszewski, 1983, p. 898; Karl, 1983, pp. 40–41.)
3. See Aust, p. 787.
4. See, expressly, Yasseen, p. 45; Müller, pp. 131–132; Bernhardt, 1967, p. 499. See, implicitly, Villiger, p. 344, cf. p. 343 and in particular n. 181, in which the author refers to (among other things) the following statement by Yasseen: "Ce qui importe ici, c'est l'accord en tant que tel; peu importe sa forme". A different opinion seems to be the one that Bartoš expressed, at the ILC's eighteenth session, 870th meeting, *ILC Yrbk*, 1966, Vol. 1, Part 2, p. 192, § 91.
5. See, implicitly, Sinclair, 1984, p. 136; Yasseen, p. 44. See also Voïcu, pp. 176–177. Several authors refer to "successive agreements" as a form of authentic interpretation. (See n. 2 on this page). AUTHENTIC INTERPRETATION usually means an interpretation agreement, which is to be considered legally binding for all the original parties (See e.g. *Oppenheim's International Law*, p. 1268; Skubiszewski, 1983, p. 898; Haraszti, p. 43).
6. Cf. Ch. 5 of this work, concerning the meaning of the word PARTY in the context of VCLT article 31 § 2(a) and (b).
7. I cannot see what else "subsequent" might refer to. (See, in a similar vein, Villiger, p. 344; Elias, 1974, p. 75; Müller, p. 131; Bernhardt, 1967, p. 499.)
8. See Ch. 5, Section 1, of this work.
9. See Ch. 5, Section 3, of this work.
10. See e.g. Mus, pp. 220–222; Sinclair, 1984, p. 98; Zuleeg, p. 256.
11. See e.g. Czaplinski and Danilenko, p. 19; Dahl, p. 282; Sørensen, 1973, p. 54.
12. See, implicitly, Villiger, p. 344; Sinclair, 1984, p. 136; Yasseen, pp. 44–47; Rest, p. 146; Bernhardt, 1967, p. 499; Draft Articles With Commentaries (1966), *ILC Yrbk* , 1966, Vol. 2, p. 222, § 14; Waldock, Sixth report on the Law of Treaties, ibid., p. 98, § 18, which all speak of "subsequent agreements" either as a form of authentic interpretation (Fr. INTERPRÉTATION AUTHENTIQUE), or as synonymous with interpretative agreements (Fr. ACCORDS INTERPRÉTATIFS). Naturally, an authentic interpretation, like

an interpretative agreement, is an agreement whose *express purpose* is to clarify the meaning of a treaty.

13. See Section 2, of this chapter.
14. See e.g. Bos, 1984, p. 112; Maluwa, p. 343; Haraszti, p. 16.
15. Of course, the proposition is valid only insofar as it concerns the *operative interpretation* of treaties. The meaning of this concept has been explained in Ch. 1, Section 3, of this work.
16. Strictly speaking, what an applier uses for the interpretation of a treaty is not practice as such, but rather the agreement established by practice. Compare the way an applier uses the preparatory work of a treaty. We may say that appliers use the *travaux préparatoires*, but actually they use the concordance established by the *travaux*.
17. See Ress, pp. 38–42; Amerasinghe, pp. 198–200; Thirlway, 1991, pp. 49–50; *Oppenheim's International Law*, pp. 1274–1275, n. 20; McGinley, pp. 212–213, Elias, 1974, pp. 76–77; Bernhardt, 1984, p. 323; Sinclair, 1984, pp. 137–138; Karl, 1983, pp. 115–117. For a different opinion, see O'Connell, p. 262.
18. See Thirlway, 1991, pp. 50–51, cit. *Border and Transborder Armed Actions*, *ICJ Reports*, 1988, p. 87, § 36, and *Nicaragua v. United States*, *ICJ Reports*, 1984, p. 410, § 40; Merrills, pp. 81–82, cit. *Soering*; *Publ. ECHR*, Ser. A, Vol. 161, § 103; McGinley, pp. 212, 214; Karl, 1983, pp. 114–115.
19. For authorities supporting the broader interpretation, see Amerasinghe, p. 199, cit. *IMCO*, *ICJ Reports*, 1960, pp. 167–168, and *European Commission of the Danube*, *PCIJ*, Ser. B, No. 14, pp. 57–58; E. Lauterpacht, p. 457. For authorities supporting the more narrow interpretation, see Sinclair, 1984, p. 137; Yasseen, p. 48; Capotorti, p. 208, as he is cited by Thirlway, 1991, p. 53, n. 254.
20. Yasseen, p. 10.
21. It is symptomatic that authors sometimes refer to "subsequent practice" ("*pratique ultérieur")* by means of terms such as SUBSEQUENT CONDUCT (Haraszti, pp. 138, 140; Jacobs, p. 329), CONDUITE SUBSÉQUENTE (Cot, p. 632 et passim), and CONDUITE ULTÉRIEUR (Lang, p. 162).
22. See e.g. Wolfke, pp. 34–35; Sinclair, 1984, p. 137, cit. *Chamizal*, AJIL, Vol. 5 (1911), p. 805; Yasseen, p. 48.
23. See e.g. McGinley, pp. 218–219, cit. *Certain Expenses of the United Nations*.
24. See e.g. McGinley, p. 212, cit. *Rights of US Nationals in Morocco*, *ICJ Reports*, 1952, p. 211.
25. See e.g. Amerasinghe, p. 199; Thirlway, 1991, p. 57; Elias, 1974, pp. 76–77 – all citing *Namibia*, *ICJ Reports*, 1971, p. 22, § 22.
26. Cf. e.g. Thirlway, 1991, p. 51, cit. *Nicaragua v. United States*, *ICJ Reports*, 1984, p. 410, § 40; McGinley, pp. 212, 214; Karl, 1983, p. 115.
27. See e.g. McGinley, p. 212; Jacobs, p. 328, cit. *Anglo-Iranian Oil*, *ICJ Reports*, 1952, p. 107; McNair, 1961, p. 426.
28. See e.g. Merrill, pp. 81–82, cit. *Soering*, *Publ. ECHR*, Ser. A, Vol. 161, § 103; Matscher, 1983, p. 564.
29. Similarly, see Di Stefano, p. 42; Karl, 1983, p. 114.
30. Cf. Di Stefano, p. 42; Thirlway, 1991, pp. 48, 55; Haraszti, p. 138; Jacobs, p. 328; Bernhardt, 1967, p. 499. See also Yasseen, who maintains that a "subsequent practice" cannot be anything but a practice that chronologically follows the conclusion of the interpreted treaty, since it is a question of a practice "in the application of the treaty" (p. 47). This argument is not tenable. A treaty does not necessarily need to enter into

force in order to be *applied*. According to VCLT article 25, a treaty shall be provisionally applied *pending its entry into force*, if the parties to the treaty so agree (whether in writing or not). On provisional application in general, see Lefeber, pp. 81–95.

31. Cf. Section 1 of this chapter.
32. VCLT article 2 § 1(g).
33. See Thirlway, 1991, p. 52; Villiger, p. 344; McGinley, p. 217; Sinclair, 1984, p. 138; Karl, 1983, pp. 188–194; Yasseen, pp. 48, 52; Elias, 1974, p. 76; Haraszti, p. 141; Jennings, p. 549.
34. Cf. the meaning of the word PARTY in VCLT article 31 § 2(a) and (b). (See Ch. 5, Sections 1 and 3, of this work.)
35. The exact amount of practice required to establish an agreement between the parties to the interpreted treaty remains a question of judgment that can only be decided on a case-by-case basis.
36. Cf. Thirlway, 1991, p. 56, n. 262; Villiger, p. 344; McGinley, p. 225; Yasseen, pp. 48–49; Elias, 1974, p. 76; Haraszti, p. 141.
37. See articles 39–40.
38. See e.g. Wolfke, pp. 34–35; Di Stefano, pp. 54–67; Ress, p. 41; Thirlway, 1991, pp. 48, 52; Sinclair, 1984, p. 138; Verdross och Simma, pp. 505–506; Yasseen, p. 51; Akehurst, 1974/1975, pp. 277–278; Haraszti, pp. 143–145.
39. An entirely different matter is that a judicial interpretation based on a subsequent practice often has an influence on the continued application of the treaty.
40. Sinclair, 1984, p. 138.
41. Cf. Hexner, p. 124.
42. See the introduction to this chapter, and the introduction to Ch. 4.
43. Similarly, see Wolfke, p. 34; Thirlway, 1991, p. 52; Akehurst, 1987, p. 204; Bernhardt, 1967, p. 499. For a different opinion, see Karl, 1983, pp. 36–39, who nevertheless appears to have founded his opinion on the same misconception as Sinclair.
44. See e.g. Bernhardt, 1963, p. 131; De Visscher, 1963, p. 124; McNair, 1961, p. 424; Schwarzenberger, 1957, p. 532.
45. See Ress, pp. 38–42; Di Stefano, pp. 44–54; Amerasinghe, p. 199; Thirlway, 1991, pp. 52–56; *Oppenheim's International Law*, p. 1275, n. 20; Akehurst, 1987, p. 204; Villiger, p. 344; McGinley, p. 227; Sinclair, 1984, pp. 135–137; Karl, 1983, p. 190; Yasseen, p. 49; Müller, p. 132; Jacobs, pp. 327–331. For a different opinion, see Haraszti, pp. 142–143.
46. See Karl, 1983, pp. 144–147.
47. See e.g. Sinclair, 1984, p. 137; Yasseen, pp. 48, 52; Elias, 1974, p. 76; Schwarzenberger, 1969, p. 220; Bernhardt, 1967, p. 499.
48. See e.g. Amerasinghe, p. 199; McGinley, pp. 218, 227; Karl, 1983, pp. 190–194; Jacobs, p. 331.
49. For an example of such an author, see, implicitly, Rest, pp. 39–42, especially p. 41, n. 151.
50. Cf. Ch. 5, Section 4, of this work.
51. On authentic interpretation in general, see e.g. Pan, pp. 503–535; *Oppenheim's International Law*, pp. 1268–1269; Skubiszewski, 1983, pp. 898–902; Karl, 1983, pp. 40–45, 204–211; Haraszti, pp. 43–51; Voïcu, pp. 73–110, 137–217; Bernhardt, 1963, pp. 44–46.
52. See Ch. 1, Section 1, of this work.
53. See Section 6 of this chapter.

54. In addition to the authorities cited in the text, see *Hagerman v. United States and Others*, *ILR*, Vol. 92, pp. 724–725; *Riley and Butler v. The Commonwealth*, *ILR*, Vol. 87, p. 154; and possibly also *Bankovic*, § 62.
55. United States-United Kingdom Arbitration Concerning Heathrow Airport User Charges, Award of 30 November 1993, *ILR*, Vol. 102, pp. 216ff.
56. The text cited here is that provided by the arbitration tribunal. (See *ILR*, Vol. 102, pp. 563–564, Appendix IV.)
57. Ibid., p. 549.
58. Ibid., p. 551.
59. Ibid., p. 353, §§ 6.7–6.8.
60. The Kingdom of Belgium, The French Republic, The Swiss Confederation, The United Kingdom and the United States of America v. The Federal Republic of Germany, Award of 16 May 1980, *ILR*, Vol. 59, pp. 495ff.
61. See Ch. 3, Sections 2 and 5, of this work.
62. See *ILR*, Vol. 59, pp. 530–531, §§ 18–19.
63. Ibid., pp. 531–540, §§ 20–29.
64. Ibid., pp. 540–541, § 30.
65. Ibid., pp. 541–543, § 31.
66. Ibid., pp. 541–542, § 31.
67. Ibid., p. 542, § 31. (The italics used for the word *should* are mine.)
68. *Beagle Channel Arbitration (Argentina v. Chile)*, Court of Arbitration, Award of 18 February 1977, *ILR*, Vol. 52, pp. 93ff.
69. See Ch. 4, Section 4, of this work.
70. *ILR*, Vol. 52, pp. 221–222, § 166. (Footnote omitted.)
71. Ibid., p. 223, § 167. (Footnote omitted.)
72. Ibid., p. 223, § 168.
73. Ibid., p. 224, § 169.
74. In the reasoning of the Court, one expression calls for comments. The court speaks of the probative value of conduct "as a subsidiary method of interpretation". One could easily get the impression that the court uses subsequent practice according to the provisions of VCLT article 32. (For more on the context considered as a supplementary means of interpretation, see Ch. 8 of this work). Another meaning emerges when the expression is seen in the light of its broader textual context. According to a more plausible reading, the court uses subsequent practice in the same way as Chile and Argentina have done earlier – as a way of making more precise the conventional meaning of the 1881 treaty, applying the provisions of Vienna Convention article 31. [See, especially, Chile's observation: "The subsequent conduct of the two Governments confirms the Chilean interpretation of the Treaty, if it be the case that the textual approach is not considered to be conclusive". (See p. 199 of this work.)] On the other hand, this ambiguity in the reasoning of the court hardly makes a difference for our discussion. The context used according to the provisions of VCLT article 32 is the exact same context described in article 31 §§ 2 and 3. (See Ch. 8 of this work.) If a subsequent concordance is to be considered an "agreement" for the application of VCLT article 32, even though it is not held with a law-creating intention, then it can be considered so for the application of VCLT article 31as well.
75. See Pauwelyn, p. 254; ILC, Report of the ILC Study Group on the Fragmentation of International Law, 2006, § 426; McLachlan, p. 290; Marceau, p. 1087; Villiger, p. 268; Matscher, 1983, p. 561; Yasseen, p. 63; Haraszti, p. 146, n. 181; Waldock, at the ILC's

sixteenth session, 769th meeting, *ILC Yrbk*, 1964, Vol. 1, p. 310, § 10, cf. p. 316, §§ 13, 17. See also, implicitly, *Oppenheim's International Law*, p. 1275, n. 21.

76. Schwarzenberger, 1969, p. 220.
77. Sinclair, 1984, p. 139.
78. Further on the meaning of the expressions "subsequent" and "regarding the interpretation of the treaty or the application of its provisions ", see Section 1 of this chapter.
79. My emphasis.
80. Uibopuu, p. 4. Cf. Villiger: "[T]he rules must be 'relevant', i.e. concern the subject-matter in question" (p. 268).
81. See Section 6 of this chapter.
82. VCLT, article 2 § 1(g).
83. See, expressly, Pauwelyn, pp. 257–259; Matscher, 1983, p. 561; Yasseen, p. 63; Haraszti, p. 148; Bernhardt, 1967, p. 500. See also EC–Biotechnical Products, pp. 299–300. For a different opinion, see Marceau, according to whom "the parties" appears to refer to the states parties of a dispute. (Marceau, p. 1087.)
84. Cf. Sections 1 and 3 of this chapter, on the meaning of the word PARTY in the context of VCLT article 31 § 3(a) and (b), respectively. Cf. Ch. 5, on the meaning of the word PARTY in the context of article 31 § 2.
85. Fitzmaurice, 1953, p. 5.
86. See Higgins, 1996, pp. 173–181; Dupuy, p. 221; *Oppenheim's International Law*, p. 1275, n. 21, 1281–1282; Sinclair, 1984, pp. 139–140; Verdross and Simma, pp. 496–499; Elias, 1980, pp. 285–307; Jiménez de Aréchaga, pp. 48–50; Yasseen, pp. 64–67; Rest, p. 150; Jacobs, pp. 330–331. Cf. also Ress, pp. 35–37; Thirlway, 1991, pp. 57–60, cf. Thirlway, 1989, pp. 135–143; and Sørensen, 1973, pp. 90–91 – all of whom refuse to clearly specify whether the problem they confront is one of variation in language only, or one of variation in language as well as in law.
87. See Ch. 3 of this work.
88. Sinclair, 1984, pp. 139–140. (Footnote omitted.)
89. Elias, 1974, p. 77. (Footnote omitted.)
90. Yasseen, pp. 66–67. (A footnote and the number of a paragraph have been omitted.)
91. Jiménez de Aréchaga, pp. 48–49. (Footnotes omitted.)
92. See e.g. Elias and Sinclair, as earlier cited. For a discussion on the various meanings that could be associated with the term INTENTIONS OF THE PARTIES, see Ch. 2, Section 1, of this work.
93. See Ch. 2, Section 2, of this work.
94. See e.g. Elias och Jiménez de Aréchaga, as earlier cited.
95. See p. 87 of this work.
96. See Ch. 3, Sections 1 and 2, of this work.
97. Another way to determine the language of international law (if not technical language in general) is by asking for an expert opinion. (Cf. for example sep. op. Aldrich, Holtzmann and Mosk, on the Issue of the Disposition of Interest Earned on the Security Account, *ILR*, Vol. 68, pp. 546–547.)
98. See e.g. Higgins, 1996, pp. 173–181; Ress, pp. 35–37; Thirlway, 1991, pp. 57–60, cf. Thirlway, 1989, pp. 135–143; *Oppenheim's International Law*, pp. 1281–1282; McWhinney, pp. 179–199; Waldock, 1981, pp. 535–547; Elias, 1980, pp. 285–307; Sørensen, 1973, pp. 89–94.

99. See e.g. Higgins, 1996, pp. 173–181; McWhinney, pp. 179–199; Elias, 1980, pp. 285–307.
100. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion of 21 June 1971, *ILR*, Vol. 49, pp. 3ff.
101. See Ch. 3, Section 4, of this work.
102. In addition to the examples provided in the body text, see possibly *OSPAR*, § 103; *Ijzeren Rijn*, § 79; *US–Shrimp*, § 130.
103. Case Concerning the Gab Gabcíkovo-Nagymaros Project, Judgment of 25 September 1997, *ILR*, Vol. 116, pp. 2ff.
104. Treaty between the Hungarian People's Republic and the Czechoslovak Socialist Republic Concerning the Construction and Operation of the Gabcíkovo-Nagymaros System of Locks, Signed at Budapest, on 16 September 1977.
105. Several such updates were later made.
106. *ILR*, Vol. 116, p. 74, § 104.
107. Ibidem, p. 76, § 112.
108. Ibidem, pp. 76–77, § 112.
109. See Section 7 of this chapter.
110. For a more detailed description of these concepts, see Ch. 3 of this work.
111. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion of 21 June 1971, *ILR*, Vol. 49, pp. 3ff.
112. See Ch. 3 of this work.
113. The text cited is that provided by the court. (See *ILR*, Vol. 49, p. 18, § 45.)
114. Ibid., pp. 21–22, §§ 53–54.
115. See Ch. 3, Section 4, of this work.
116. *ILR*, Vol. 49, p. 21, § 53.
117. See Ch. 3, Section 4, of this work.
118. *ILR*, Vol. 49, p. 21, § 53.
119. See Section 4 of this chapter.
120. *ILR*, Vol. 49, pp. 21–22, § 53.
121. See Ch. 4, Section 2, of this work.
122. Loc. cit.
123. See Ch. 4, Sections 2–4, of this work.
124. See Ch. 5, Section 5, of this work.
125. Loc. cit.
126. Loc. cit.
127. See Section 1 of this chapter.
128. See Section 4 of this chapter.
129. Some authors, such as Yasseen and Haraszti, can be read (at least implicitly) to mean that there is a standard that governs the relationship between the expressions used for an interpreted treaty on the one hand, and on the other, the expressions used for a rule of international law, where "a rule of international law" can be nothing but a rule laid down in another treaty. (See Yasseen, p. 63; Haraszti, p. 148.) This is an opinion clearly at odds with a basic assumption – that which precludes the existence of a communicative standard governing the relationship held between an interpreted treaty provision and a relevant rule of international law *of a specific kind*, for example a rule laid down in a written agreement.

130. In addition to the authorities cited in the text, see Amerasinghe, p. 203, cit. *Namibia*, *ICJ Reports*, 1971, pp. 31, 41; Czaplinski and Danilenko, p. 13; Yasseen, p. 63, cit. *Georges Pinson*, *Recueil des sentences arbitrales*, Vol. 5, p. 422; Haraszti, pp. 146, 149–150; Bernhardt, 1967, p. 500; De Visscher, 1963, p. 92; see also, implicitly, Villiger, p. 268. Cf. *Al Adsani v. United Kingdom*, ILR, Vol. 123, p. 40, § 55; *Fogarty v. United Kingdom*, ibid., Vol. 123, p. 65, § 35.
131. O'Connell, p. 261, cit. *Reparation for Injuries*, *ICJ Reports*, 1949, p. 182. In a footnote to the cited passage, the following explanation has been added: "Article 27(3)(c) states that relevant rules of international law may be resorted to in treaty interpretation". This is a clear reference to VCLT article 31 § 3(c).
132. *Oppenheim's International Law*, p. 1275. The authority cited by Oppenheim's is the ICJ in *Rights of Passage (Preliminary Objections)*, *ICJ Reports*, 1957, p. 142.
133. De Luna, at the ILC's sixteenth session, 770th meeting, *ILC Yrbk*, 1964, Vol. 1, pp. 316–317, §§ 29–30.
134. See Ch. 4, Section 2, of this work.
135. Loc. cit.
136. See e.g. Skubiszewski, 1983, p. 899; Sinclair, 1984, p. 136; Karl, 1983, pp. 186, 190, 192, 194; Yasseen, pp. 44–47; Bernhardt, 1967, p. 499; Voïcu, pp. 104–105; implicitly, *Oppenheim's International Law*, p. 1274, n. 19, cf. p. 1268. See also Draft Articles With Commentaries (1966), *ILC Yrbk*, 1966, Vol. 2, p. 222, § 15; Waldock, Sixth Report on the Law of Treaties, ibid., p. 98, § 18.
137. On authentic interpretation in general, see e.g. *Oppenheim's International Law*, pp. 1268–1269; Skubiszewski, 1983, pp. 898–902; Karl, 1983, pp. 40–45, 204–211; Haraszti, pp. 43–51; Voïcu, pp. 73–110, 137–217; Bernhardt, 1963, pp. 44–46.
138. See Ch. 1, Section 1, of this work.

CHAPTER 7

USING THE OBJECT AND PURPOSE

It is the purpose of this chapter to describe what it means to interpret a treaty using its object and purpose. "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty... in the light of its object and purpose" – this is provided in article 31 § 1.

Un traité doit être interprété de bonne foi suivant le sens ordinaire à attribuer aux termes du traité ... à la lumière de son objet et de son but.

Un tratado deberá interpretarse de buena fe conforme al sentido corriente que haya de atribuirse a los términos del tratado ... teniendo en cuenta su objeto y fin.

One thing is immediately evident from reading this text. When an applier uses the object and purpose of a treaty in accordance with the provisions of VCLT article 31, the object and purpose is not considered independently of other means of interpretation. The object and purpose is always used in relation to conventional language ("the ordinary meaning"). Seen from a different perspective, we could say that when appliers use the object and purpose of a treaty, it is always a second step in the interpretation process.[1] The question has arisen whether or not a given complex of facts shall be considered to come within the scope of application of the norm expressed by a certain treaty provision P, and the provision P has been interpreted using conventional language. However, this (very first) introductory act of interpretation has been found insufficient. The ordinary meaning of the treaty provision P is either vague or ambiguous – the use of conventional language leads to conflicting results. Possibly, conventional language has a role to play in the process of gaining understanding of the treaty, but then it must be supplemented by additional means of interpretation. The idea of using the object and purpose is that it will serve as such a supplement. Where the ordinary meaning of a treaty provision is vague, using the object and purpose will make the meaning of the provision more precise. Where the ordinary meaning is ambiguous, using the object and purpose will help to determine which one of two possible meanings is correct, and which one is not. All this is evident from VCLT article 31 § 1.[2] What the provision says is *not* that the terms of a treaty shall be interpreted in the light of its object

and purpose. What the provision says is that a treaty shall be interpreted "in accordance with the ordinary meaning to be given to the terms of the treaty ... in the light of its object and purpose". Hence, if we wish to give a shorthand description of how the object and purpose of a treaty shall be used, the description could look like this:

> 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 object and purpose of the treaty there is a relationship governed by the communicative standard S, then the provision shall be understood as if the relationship conformed to this standard.

Two questions must be answered, in order for my task to be considered completed:

(1) What is meant by "the object and purpose" of a treaty?
(2) What communicative standard or standards shall the parties to a treaty be assumed to have followed, when an applier interprets the treaty using its "object and purpose"?

I shall now give what I consider to be the correct answers to these questions. In Sections 1–3, I shall begin by answering question (1). In Sections 4–5, I shall then answer question (2).

1 ON THE MEANING OF "OBJECT AND PURPOSE" IN GENERAL

In VCLT article 31 § 1, "the object and purpose" of a treaty means those reasons for which the treaty exists – sometimes termed as the *ratio legis* or the treaty's *raison d'être*.[3] As with all things, the object and purpose of a treaty is in essence subjective. If we say of a thing that it has a certain object or a certain purpose, then it is only because someone, according to what we assume, confers on the thing this very object or purpose. Of course, different people may confer different objects and purposes on a thing. For some, a bottle of wine can be a means of intoxication; others may consider the wine an accompanying drink to a meal; still others may view it as a collector's item and an investment. The question is what concept or human idea we assume, when in Vienna Convention article 31 we speak of "the object and purpose" of a treaty.

At this juncture it may be useful to consider international law from the perspective of national legal doctrine. Sometimes, the interpretation of a treaty using its object and purpose is referred to by the term TELEOLOGICAL INTERPRETATION.[4] In certain national legal systems, jurisprudence distinguishes between two types of teleological interpretation, termed as subjective

and objective.[5] According to this terminology, interpretation is SUBJECTIVE TELEOLOGICAL when a law is interpreted based on the objects and purposes presumedly conferred on the law by the original "lawmaker". If, on the other hand, the law is dissociated from its authors, and instead the applier ventures to interpret it based on the objects and purposes presumedly assigned to the law by the legal community – given the laws of the nation at large – or by people in general, then interpretation is OBJECTIVE TELEOLOGICAL.[6] This division into subjective and objective teleological interpretation has no counterpart in international law. Here, teleological interpretation is merely subjective. It is a view generally held in the literature that when appliers interpret a treaty using its object and purpose, it is *always* based on those objects and purposes assumedly conferred on the treaty by the treaty parties.[7] Considering the ultimate goal of all treaty interpretation, I really have difficulty seeing how an act of objective teleological interpretation would at all be possible. When an applier interprets a treaty using its object and purpose, it is to determine the legally correct meaning of that treaty.[8] The legally correct meaning of a treaty has been defined earlier as follows: those pieces of information conveyed by the treaty with regard to its norm content, according to the intentions of the treaty parties – all those states, for which the treaty is in force – insofar as these intentions can be considered mutually held.[9] Given this, "the object and purpose" of a treaty can hardly be anything other than the object and purpose, which the parties to the treaty intended it to have – or rather, more specifically, *mutually* intended it to have.

So, the ultimately determining factor for what shall be considered the content of *the object and purpose* of a treaty would, as things stand, be the intentions of the treaty parties. To determine the object and purpose of a treaty it is evident that a separate process of interpretation might sometimes be needed.[10] In some cases, the intentions of the parties to a treaty with regard to its object and purpose are bound to be considered unclear. Some authors, however, wish to go a step further. For instance, according to professors Bos and Sur, the object and purpose of a treaty is something that *always* must be determined through an interpretation process – before the object and purpose of a treaty has been determined through interpretation, the treaty cannot possibly be subjected to an act of interpretation using its object and purpose.[11] By making this assertion, the authors (quite understandably) slip up in their thinking. The flaw of their argument is that they do not distinguish between the object and purpose of a treaty in relation to a specific interpretation alternative (that is to say, a specific norm) on the one hand, and on the other hand the object and purpose of a treaty in relation to that treaty's norm content *in extenso*.

When appliers determine the object and purpose of a treaty, it is only in relation to a specific interpretation alternative. What the applier wants to know is whether she can arguably assert about two specific interpretation alternatives – of which neither, from the point of view of conventional language, and that language only, can be considered more correct than the other – that only one is correct from the point of view of the object and purpose of the interpreted treaty. Of course, professors Bos and Sur are right in the sense that *sometimes*, a relatively high degree of clarity must be obtained with regard to the object and purpose of a treaty vis-à-vis that treaty's norm content *in extenso*, before the object and purpose of the treaty can be determined vis-à-vis the given interpretation alternatives; and, of course, they are right in the sense that achieving this clarity *often* requires a separate process of interpretation. This typically ought to be the case when the applier has to choose between two interpretation alternatives, both of which lead to a realisation of the object and purpose, but one of them does so to a greater degree than the other. But the two professors are clearly wrong, when they assert that determining the object and purpose of a treaty vis-à-vis two given interpretation alternatives *always* requires a separate process of interpretation. An applier may be somewhat unclear about the object and purpose of a treaty vis-à-vis its norm content *in extenso*. But at the same time, she can be completely clear about the object and purpose of the treaty vis-à-vis the two interpretation alternatives she is to consider. For example, often one does not need to know much about the object and purpose of a treaty vis-à-vis its norm content *in extenso*, to observe that a specific interpretation alternative leads to a result that does *not* agree with the object and purpose.

An important distinction to be made is that between "the object and purpose" of a treaty on the one hand, and on the other hand those reasons that are the CAUSE (Fr. MOTIF) for the treaty.[12] By the "object and purpose" of a treaty – as stated earlier – we understand the reasons for which the interpreted treaty exists. Of course, this definition is ambiguous in the sense that we cannot directly determine from its wording whether by "reasons" we mean the state-of-affairs, which the parties expect either shall or should be the consequence of their agreement, or the state-of-affairs of which, assumedly, the agreement itself is a consequence. The former state-of-affairs is non-factual; it belongs to the time subsequent to the establishing of the treaty as definite.[13] With the terminology of the Vienna Convention this is what we would usually call the "object and purpose" of a treaty. As an example, we could say that the object and purpose of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* is to defend and uphold the ideal of a democratic society.[14] The latter state-of-affairs is factual; it belongs to the time prior to the establishing of the treaty as definite.[15] This is what we call the CAUSE for a treaty. Accordingly,