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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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be considered axiomatic that for each and every particular case, and for each and every treaty provision, there is a meaning, which cannot only be considered correct, but will also allow a final decision to be made in the case.[38] Thus, by definition, the correct meaning of a treaty cannot be anything other than unambiguous. Given that the text of article 32 shall be understood in accordance with interpretation rule no. 15, then we cannot unconditionally say of the third "the meaning" in the article that it stands for *the correct meaning of the treaty*.

The alternative is that the third "the meaning" in article 32 stands for *the meaning of a treaty that ensues from the application of VCLT article 31*. This is hardly a more attractive alternative. As I stated earlier, it is clear for me that when the drafters drew up the text of article 32 – including the passage "when an interpretation according to article 31: (a) Leaves the meaning ambiguous or obscure" – they had four scenarios in mind.[39] One of these has earlier been described as follows:

> (4) Drawing up the provision, the parties used an expression whose form *does not* correspond to an expression of conventional language; hence, none of the interpretation rules nos. 1–16 can be applied.[40]

In order for situation (4) to be counted as part of the extension of the text in question, the situation must occur because the use of primary means of interpretation, according to Vienna Convention terminology, has left the meaning "obscure" (Fr. "*obscure";* Sp. "*oscuro")*, not "ambiguous" (Fr. "*ambigu";* Sp. "*ambiguo")*. However, interpretation rule no. 1 argues against such an interpretation:

> If it can be shown that in a treaty provision, there is an expression whose form corresponds to an expression of conventional language, then the provision shall be understood in accordance with the rules of that language.[41]

In dictionaries, the word OBSCURE is defined as *unknown; concealed*, *hidden*. Semantically, however, it is pure nonsense to speak of the meaning of a treaty obtained through an application of VCLT article 31 as unknown, concealed or hidden. Given that the text of VCLT article 32 shall be understood in accordance with interpretation rule no. 1, then we cannot unconditionally say of the third "the meaning" in the article that it refers to *the meaning of a treaty that ensues from the application of VCLT article 31*. All things considered – given that we maintain the position that all the situations (1) through (4) fall under the extension of the text here put to scrutiny – it seems that we would be forced to accept the rather odd conclusion that the expression "the meaning" stands for two completely different things, depending on whether we read it in connection with the expression "ambiguous" or the expression "obscure". In the former case it

refers to the meaning of a treaty that ensues from the application of VCLT article 31. In the latter case, it refers to the correct meaning of the treaty.

4 THE EXPRESSION "LEADS TO A RESULT WHICH IS MANIFESTLY ABSURD OR UNREASONABLE"

What do we mean when we say that the use of primary means of interpretation "leads to a result which is manifestly absurd or unreasonable"? As I see it, there are two important issues we need to resolve concerning the meaning of the expression "leads to a result which is manifestly absurd or unreasonable" ("*conduit à un résultat qui est manifestement absurde ou déraisonnable", "[c]onduzca a un resultado manifiestamente absurdo o irrazonable")*. First, we must ask ourselves how the qualifier "manifestly absurd or unreasonable" is to be read in relation to the main word "result". Grammatically, we have only one interpretation alternative; henceforth, we will be terming this alternative by the letter (a):

> Supplementary means of interpretation may be used to determine the meaning of a treaty, when an interpretation according to VCLT article 31 leads to a result, which is manifestly *either* absurd *or* unreasonable.[42]

The reading that I will profess is a completely different one. In my judgment, the meaning of the expression "absurd or unreasonable" cannot be determined by a mere combining of the individual meanings of the words ABSURD, OR and UNREASONABLE in a syntactically correct manner. Rather, the expression "absurd or unreasonable" is used as an idiomatic phrasal lexeme – in the expression "absurd or unreasonable", the constituent units "absurd", "or" and "unreasonable" simply have no independent meaning at all. In other words, the interpretation I would like to propose is the following:

> Supplementary means of interpretation may be used to determine the meaning of a treaty, when an interpretation according to VCLT article 31 leads to a result, which is manifestly "absurd or unreasonable", where the expression "absurd or unreasonable" is to be considered an idiomatic phrasal lexeme.

This second interpretation alternative – henceforth to be termed by the letter (b) – is also the one that first presents itself when we look to the literature to see what authors generally say about the expression "absurd or unreasonable" ("*absurde ou déraisonnable")*. It is a striking fact that when authors comment upon the use of supplementary means of interpretation,

almost never do they distinguish between an interpretation result which is "absurd" (Fr. "*absurde")* and one which is "unreasonable" (Fr. "*déraisonable")*.[43] It remains to be seen whether this reading of VCLT article 32 can also be justified by reference to the rules of interpretation laid down in international law.

Interpretation rule no. 1 argues *against* alternative (b):

> If it can be shown that in a treaty provision, there is an expression whose form corresponds to an expression of conventional language, then the provision shall be understood in accordance with the rules of that language.[44]

As far as I can tell, neither in everyday nor in any technical language is there a convention, which associates the phrase ABSURD OR UNREASONABLE with any other meaning than that obtained in combining ABSURD, OR and UNREASONABLE in accordance with current syntax. Consequently, given that the text of VCLT article 32 shall be understood in accordance with interpretation rule no. 1, interpretation alternative (a) – not (b) – would then be the one we should advocate.

In favour of alternative (b), interpretation rule no. 18 can be adduced:

> If, by using the preparatory work of a treaty, a concordance can be shown to exist, as between the parties to said treaty, and with regard to the norm content of an interpreted treaty provision, then the provision shall be understood in such a way that it logically agrees with the concordance.[45]

In the preparatory work of the Vienna Convention there is not the slightest suggestion of a discussion that sheds light on or compares the content of the conceptual pair: *a result which is absurd* and *a result which is unreasonable*. To a great extent, "absurd or unreasonable" is used as an idiomatic phrasal lexeme.[46] And when it is not used as an idiomatic phrasal lexeme, this seems merely to be a means to simplify expression or to avoid repetition. One and the same person can speak of a result which is absurd or unreasonable, and then about a result which is absurd, or a result which is unreasonable, without anything in the protocols to suggest that these different expressions are not wholly co-referent.[47] Whether taken together or seen on their own, these facts all give the impression that the parties to the Vienna Convention regard the expression "absurd or unreasonable" *("absurde ou déraisonnable", "absurdo o irrazonable")* as a single, indivisible idiom. Hence, given that the text of VCLT article 32 shall be understood in accordance with interpretation rule no. 18, alternative (b), and not (a), would then be the one we should advocate.

Hence, in the given situation, it is apparent that there is a conflict between interpretation rules nos. 1 and 18. In the Vienna Convention there are rules for resolving such conflicts. Earlier in this work, the content of these rules

have provisionally been described in the form of two norm sentences, termed as NS_1 and NS_2. Norm sentence NS_1 states:

> If it can be shown that the interpretation of a treaty provision in accordance with any one of the interpretation rules nos. 1–16 leads to a result, which is different from that obtained by interpreting the provision in accordance with any one of the interpretation rules nos. 17–39, and that the application of the former rule either leaves the meaning of the provision "ambiguous or obscure", or "leads to a result which is manifestly absurd or unreasonable", then the provision shall not be understood in accordance with this rule.

Norm sentence NS_2 reads as follows:

> If it can be shown that the interpretation of a treaty provision in accordance with any one of the interpretation rules nos. 1–16 leads to a result, which is different from that obtained by interpreting the provision in accordance with any one of the interpretation rules nos. 17–39, then, rather than being understood in accordance with the latter of the two rules, the provision shall be understood in accordance with the former, except for those cases where it can be shown that the application of this rule leaves the meaning of the provision "ambiguous or obscure", or "leads to a result which is manifestly absurd or unreasonable".

It is my judgment that the text of Vienna Convention article 32 shall not be understood in accordance with interpretation rule no. 1. Accordingly, it is my task to show that an interpretation according to rule no. 1 leaves the meaning of article 32 "ambiguous or obscure", or that it "leads to a result which is manifestly absurd or unreasonable". Clearly, an interpretation according to rule no. 1 does not leave the meaning of article 32 "ambiguous or obscure". The decisive question is whether I can show that an interpretation according to interpretation rule no. 1 "leads to a result which is manifestly absurd or unreasonable".

With this question, we move unavoidably onward to the next issue that I stated would be dealt with in Sections 4–6 of this chapter. As I understand the matter, there are two issues that we need to resolve concerning the meaning of the expression "leads to a result which is manifestly absurd or unreasonable" [48] First, we must ask ourselves how the qualifier "manifestly absurd or unreasonable" is to be read in relation to the headword "result". Second, we must ask ourselves this: how shall an applier go about justifying a claim that an interpretation according to VCLT article 31 "leads to a result which is manifestly absurd or unreasonable"? The first question is

something that we have already begun to examine. However, wishing to answer the question conclusively, it is apparent that we are faced with some serious difficulties. The answer to our first question obviously presupposes the answer to our second. In order to establish interpretation alternative (b) as correct, I must be able to show that an interpretation of VCLT article 32 in accordance with rule no. 18 "leads to a result which is manifestly absurd or unreasonable". The problem is that the answer to our second question presupposes an answer to the first. In order for us to determine how appliers should go about justifying the proposition that an interpretation according to VCLT article 31 "leads to a result which is manifestly absurd or unreasonable", we need to know how the qualifier "manifestly absurd or unreasonable" shall be read in relation to the main word "result". I shall now turn my attention to answering question number two. To do so, I will assume interpretation alternative (b) – not (a) – to be the correct reading of VCLT article 32. When our second question has been answered I will return once again to answering question number one.

5 THE EXPRESSION "LEADS TO A RESULT WHICH IS MANIFESTLY ABSURD OR UNREASONABLE" (CONT'D)

How should the applier proceed to justify the proposition that an interpretation according to VCLT article 31 "leads to a result which is manifestly absurd or unreasonable"? As stated earlier, the expression "absurd or unreasonable" (*"absurde ou déraisonnable", "absurdo o irrazonable")* shall not be understood in accordance with conventional language. The question is how we should then read the expression. It is apparent that the words ABSURD, ABSURDE, ABSURDO and UNREASONABLE, DÉRAISONNABLE, IRRAZONABLE share a certain degree of kinship. UNREASONABLE, DÉRAISONNABLE, IRRAZONABLE, according to conventional language, represents *the quality of not being justifiable*; the same holds true for the word ABSURD, ABSURDE, ABSURDO. Consequently, saying that interpreting a certain treaty provision T through the application of a certain first-order rule of interpretation A leads to a result, which is ABSURD, ABSURDE, ABSURDO or UNREASONABLE, DÉRAISONNABLE, IRRAZONABLE, would in both cases be tantamount to saying:

> The reasons for not understanding treaty provision T in accordance with rule A are stronger than those for the opposite.

Of course, some distinction of meaning exists between the words ABSURD, ABSURDE, ABSURDO and UNREASONABLE, DÉRAISONNABLE, IRRAZONABLE. If the interpretation of a treaty through application of a certain interpretation

rule A leads to a result which is ABSURD, ABSURDE, ABSURDO, then in relative terms, the reasons to not understand the text in accordance with interpretation rule A are stronger than those that would have prevailed, had the application of rule A instead led to a result which is UNREASONABLE, DÉRAISONNABLE, IRRAZONABLE. I believe it is against this background that we must view the meaning of "absurd or unreasonable" *("absurde ou déraisonnable", "absurdo o irrazonable").* If the interpretation of a treaty through the application of a certain rule of interpretation leads to a result, which is "absurd or unreasonable" *("absurde ou déraisonnable", "absurdo o irrazonable")*, then this is because there are reasons to not understand the text in accordance with the rule in question. In relative terms, these reasons are stronger than those that would have prevailed, had the interpretation instead led to a result which is UNREASONABLE, DÉRAISONNABLE, IRRAZONABLE, but they are not fully as strong as in the situation where the interpretation produces a result which is ABSURD, ABSURDE, ABSURDO.[49]

To this we shall add the meaning of the expression "manifestly". If the interpretation of a treaty provision in accordance with any of the interpretation rules nos. 1–16 leads to a result, which is different from that obtained by interpreting the provision in accordance with any of the interpretation rules nos. 17–39, and the applier is of the opinion that in the prevailing situation the provision shall not be understood in accordance with the former rule, but rather with the latter, then he must not only show that the application of the former rule leads to a result which is "absurd or unreasonable". He must also show this fact to be manifest – the result must be shown to be "manifestly" (Fr. "*manifestement";* Sp. "*manifiestamente")* absurd or unreasonable. The expression "manifestly" embodies a requirement of significance. Hence, saying that the interpretation of a certain treaty provision T through the application of a certain first-order rule of interpretation A "leads to a result which is manifestly absurd or unreasonable" would be tantamount to saying:

> The reasons for not understanding treaty provision T in accordance with rule A are *significantly stronger* than those for the opposite.

Seeking to determine the contents of VCLT article 32, there is one further thing that we need to clarify. Assume that we interpret a treaty provision (T) by applying two different rules of interpretation: those rules being, first, any one out of rules nos. 1–16, for example rule no. 1; secondly, any one out of rules nos. 17–39, for example interpretation rule no. 18. In addition, suppose that the two rules are in conflict with one another: depending upon whether treaty provision T is interpreted in accordance with rule no. 1 or rule no. 18, different results will ensue. And last of all, suppose that we want

to defend the proposition that treaty provision T shall not be understood in accordance with rule no. 1, since by applying that rule we will end up with a result "which is manifestly absurd or unreasonable". In order for us to justify the proposition, we must be in the position to show the reasons for *not* understanding treaty provision T in accordance with rule no. 1 to be significantly stronger than the reasons that can be adduced for the opposite proposition – that provision T *shall* be understood in accordance with interpretation rule no. 1. The question is what kind of reasons we are talking about. Obviously, we are talking about something other than the reasons represented by interpretation rules nos. 1 and 18. If we interpret treaty provision T by applying rules nos. 1 and 18, and we discover that those two rules are in conflict, then certainly, rule no. 18 is a reason for the proposition that provision T *shall* not be understood in accordance with interpretation rule no. 1, whereas rule no. 1 is a reason for the proposition that provision T *shall not* be understood in accordance with rule no. 18. However, faced with a conflict between interpretation rules nos. 1 and 18, we cannot ever say that the one is significantly stronger than the other. Both are part of international law, and as such they are equally strong.

It seems that in fact the reasons we are discussing are a matter of the reasons *underlying* the rules of interpretation. When a rule of interpretation is applied, it is always on the basis of some specific communicative assumption. This issue was brought up in detail in Chapter 2 of this work. Take for example interpretation rule no. 1:

> If it can be shown that in a treaty provision, there is an expression whose form corresponds to an expression of conventional language, then the provision shall be understood in accordance with the rules of that language.[50]

Why should we interpret a treaty provision, for example the one in VCLT article 32, through application of interpretation rule no. 1? The answer is twofold. In part, it is because (in international law) there is a meta-norm to the effect that if a need to interpret a treaty provision arises, then the provision shall be understood in accordance with the utterances produced by the parties to the treaty by means of the provision. In part, it is because we assume that the parties to the treaty expressed themselves in accordance with the following standard:

> If a state makes an utterance taking the form of a treaty provision, then the provision should be drawn up so that every expression in the provision, whose form corresponds to an expression of conventional language, bears a meaning that agrees with that language.[51]

It can also be expressed as follows:

> The parties to the Vienna Convention have expressed themselves in such a way that the meaning of the expression "leads to a result which is manifestly absurd or unreasonable" agrees with conventional language.

This latter assumption is what I have earlier called a communicative assumption.

As we know, a communicative assumption carries more or less weight, depending upon the reasons that can be shown either in support or in rebuttal of the assumption. In the particular situation confronted – we interpret treaty provision T, and we have shown that interpretation rules nos. 1 and 18 are in conflict with one another. Now, we wish to show that there are significantly stronger reasons for not understanding treaty provision T in accordance with rule no. 1 than there are reasons for the opposite – it might therefore seem a sound suggestion that we direct our attention not to interpretation rules nos. 1 and 18 as such, but to the communicative assumptions underlying those rules. What we need to show is that the application of interpretation rules nos. 1 and 18 is based on assumptions, of which the assumption underlying the application of rule no. 1 is significantly weaker than the assumption underlying the application of rule no. 18. Given the basic assumptions of this work, the fact is that I cannot see any other reasonable reading of VCLT article 32. All things considered, I would like to describe the meaning of the expression "leads to a result which is manifestly absurd or unreasonable" as follows:

> If it can be shown that the interpretation of a treaty provision in accordance with any one of the interpretation rules nos. 1–16 leads to a result, which is different from that obtained by interpreting the provision in accordance with any one of the interpretation rules nos. 17–39, and that the application of the two rules is based on communicative assumptions, of which, for good reasons, the assumption underlying the application of the former can be considered significantly weaker than the assumption underlying the application of the latter, then the provision shall not be understood in accordance with this former rule.

6 THE EXPRESSION "LEADS TO A RESULT WHICH IS MANIFESTLY ABSURD OR UNREASONABLE" (CONT'D)

It seems we can now return to our introductory question: how is the qualifier "manifestly absurd or unreasonable" to be read in relation to the main word "result"? Two alternative readings have been discussed. According to a first alternative – earlier termed as alternative (a) – supplementary means of interpretation may be used to determine the meaning of a treaty, when an interpretation according to VCLT article 31 leads to a result, which is manifestly *either* absurd *or* unreasonable.[52] According to a second alternative – alternative (b) – supplementary means of interpretation may be

used to determine the meaning of a treaty, when an interpretation according to VCLT article 31 leads to a result, which is manifestly "absurd or unreasonable", where the expression "absurd or unreasonable" is to be considered an idiomatic phrasal lexeme.[53] As support for alternative (b), we have cited interpretation rule no. 18:

> If, by using the preparatory work of a treaty, a concordance can be shown to exist, as between the parties to said treaty, and with regard to the norm content of an interpreted treaty provision, then the provision shall be understood in such a way that it logically agrees with the concordance. [54]

As support for alternative (b), we have cited have interpretation rule no. 1:

> If it can be shown that in a treaty provision, there is an expression whose form corresponds to an expression of conventional language, then the provision shall be understood in accordance with the rules of that language.[55]

The interpretation alternative that I have suggested to be correct is alternative (b). Thus, I must now show that an interpretation of article 32 in accordance with interpretation rule no. 1 "leads to a result which is manifestly absurd or unreasonable". I must show that the application of interpretation rules no. 1 and no. 18 are based on communicative assumptions, of which, for good reasons, the assumption underlying the application of the former can be considered significantly weaker than the assumption underlying the application of the latter.

Interpretation rule no. 1 is based on the assumption that when a state produces an utterance taking the form of a treaty, it always does so in such a way that every expression used in the treaty, whose form corresponds to an expression of conventional language, agrees with the rules of that language.[56] Translated to the interpretation of VCLT article 32, and the expression "leads to a result which is manifestly absurd or unreasonable", this can be stated as follows:

> The parties to the Vienna Convention have expressed themselves in such a way that the meaning of the expression "leads to a result which is manifestly absurd or unreasonable" agrees with conventional language.

For the sake of simplicity, let us term this as the assumption underlying the application of interpretation rule no. 1.

Interpretation rule no. 18 is based on the assumption, that parties to a treaty express themselves in such a way that the treaty and its preparatory work are logically compatible, insofar and to the extent that, by using the preparatory work, good reasons can be provided showing a concordance to exist, between the parties to the treaty, with regard to its norm content.[57]

Translated to the interpretation of VCLT article 32, and the expression "leads to a result which is manifestly absurd or unreasonable", this can be stated as follows:

> The parties to the Vienna Convention have expressed themselves in such a way, that the meaning of VCLT article 32 logically agrees with the preparatory work of VCLT, insofar and to the extent that by using the preparatory work, good reasons can be provided showing a concordance to exist, between the parties to the Vienna Convention, and with regard to the norm content of article 32.

For simplicity's sake, we will term this as the assumption underlying the application of interpretation rule no. 18.

As far as I can see, there are only two ways of showing that an assumption A is significantly weaker than an assumption B. First, arguments can be presented undermining assumption A. Second, arguments can be presented reinforcing assumption B. I will now present two arguments, which undermine the assumption underlying the application of rule no. 1.

The first argument focuses on the wording of the expression "absurd or unreasonable". According to the conventional meaning of this expression, one may use supplementary means of interpretation to determine the meaning of a treaty, when an interpretation according to VCLT article 31 leads to a result which is manifestly "absurd" or "unreasonable". According to conventional language, the result of an act of interpretation is termed as ABSURD …

> … [when it is] so clearly untrue or unreasonable as to be laughable or ridiculous.[58]

Hence, according to the wording of VCLT article 32, the extensions of the two expressions "a result which is manifestly absurd" and "a result which is manifestly … unreasonable" would be such that the former is entirely included in the latter – "a result which is manifestly absurd" is also, by the very same reason, "a result which is manifestly … unreasonable". Given that the parties to the Vienna Convention have expressed themselves in such a way that the meaning of the expression "leads to a result which is manifestly absurd or unreasonable" agrees with the rules of conventional language, then the expression "absurd" (Fr. "*absurde";* Sp. "*absurdo")* would be utterly superfluous, at least in the practical sense. Thus, the wording of the expression "absurd or unreasonable" must be said to undermine the assumption underlying the application of interpretation rule no. 1.

The second argument focuses on the wording of the expression "manifestly absurd". According to conventional language, the result of an act of interpretation is referred to as MANIFESTLY ABSURD when the absurdity of

the result is manifest. The word MANIFEST, in turns, is defined in dictionaries as *evident; obvious; easily noticed*. Hence, according to the conventional meaning of the expression "manifestly absurd", it seems it would be an unmitigated tautology. If the result of interpretation is ABSURD, then this is exactly because absurdity is manifest; it cannot be made more manifest than it already is. Thus, the wording of the expression "manifestly absurd" must be said to undermine the assumption underlying the application of interpretation rule no. 1.

These two arguments can be augmented with the absence of arguments to the contrary. I am unable to find an argument that either reinforces the assumption underlying the application of interpretation rule no. 1 or undermines the assumption underlying the application of interpretation rule no. 18. Naturally, it is a matter of judgment as to whether this means that the assumption underlying the application of interpretation rule no. 1 could be considered significantly weaker than the assumption underlying the application of interpretation rule no. 18. For my part, I find it difficult to draw any other conclusion. In my judgment, it can indeed be shown that in the given interpretation situation, the application of interpretation rule no. 1 "leads to a result which is manifestly absurd or unreasonable". If it can be shown that, according to interpretation rule no. 1, the expression "leads to a result which is manifestly absurd or unreasonable" shall be interpreted in a way different than according to interpretation rule no. 18, then, as a result, the expression shall not be understood in accordance with interpretation rule no. 1. This is precisely the position I maintain.

7 THE RELATIONSHIP BETWEEN PRIMARY MEANS OF INTERPRETATION AND SUPPLEMENTARY MEANS OF INTERPRETATION, RESPECTIVELY

As I stated earlier, it is the purpose of this chapter to investigate the content of the set of second-order rules of interpretation laid down in international law. I have chosen to organise the chapter according to the different means of interpretation that can be used in the interpretation of treaties. As my first task, I have undertaken to determine the relationship that shall be assumed to hold between primary and supplementary means of interpretation. This has been the subject of Sections 1–6. As a second task, I have decided to determine the relationship that shall be assumed to hold among primary means of interpretation and supplementary means of interpretation, respectively. This is the subject of Section 7. Two questions shall be answered:

(1) What is the relationship that shall be assumed to hold among the different *primary* means of interpretation?
(2) What is the relationship that shall be assumed to hold among the different *supplementary* means of interpretation?

Let us start with the first of the two questions.

What is the relationship that shall be assumed to hold as among the different primary means of interpretation? When appliers interpret a treaty using primary means of interpretation, they need to be observant of the strong interdependency that exists between conventional language on the one hand, and the context and the object and purpose of the treaty on the other. When appliers apply the provisions of Vienna Convention article 31, the context and the object and purpose of the treaty may only be used relative to conventional language ("the ordinary meaning").[59] Article 31 § 1 does *not* instruct appliers to interpret the terms of a treaty with regard to their context and in the light of the treaty's object and purpose. It instructs appliers to interpret the treaty "in accordance with the ordinary meaning to be given to the terms of the treaty in their context" and "in accordance with the ordinary meaning to be given to the terms of the treaty … in the light of its object and purpose". Given this observation, it is not unjustified to argue that an ordinary meaning independent of the context and the object and purpose simply does not exist: if an applier interprets a treaty provision using first conventional language, and second, the context or the object and purpose, and it turns out that the use of different means leads to conflicting results, then the provision shall not be understood using conventional language.

Above anything else – apart from the text in article 31 § 1 – one thing can be adduced in support of this proposition; and this is the concept of interpretation assumed in the Vienna Convention. When the rules of interpretation laid down in VCLT articles 31–33 are applied, it is to clarify a text shown to be unclear.[60] From this concept two very important norms can be derived; they both govern the process of interpretation as such.[61] According to the one norm, a process of interpretation shall *not* be concluded, as long as the interpreted treaty provision *cannot* be regarded as clear.[62] If appliers interpret a treaty provision using some certain means of interpretation, only to conclude that the provision acquires a meaning which still cannot be regarded as clear, then this meaning shall not be considered normative. As we have noted, it is the general view held in the literature that a treaty provision cannot be considered clear as long as the meaning of that provision remains ambiguous.[63] If appliers interpret a treaty provision using some certain means of interpretation, only to conclude that the meaning of the provision still remains ambiguous, then, according to the literature, this meaning should not be considered normative. The use of conventional

language ("the ordinary meaning") has been described earlier as the application of interpretation rule no. 1.[64] The use of the context and the object and purpose of the treaty has been described as the application of interpretation rules nos. 2–16.[65]

A condition for applying any of interpretation rules nos. 2–16 is that the application of interpretation rule no. 1 leaves the meaning of the interpreted treaty provision ambiguous.[66] If the application of interpretation rule no. 1 *does not* leave the meaning of the interpreted treaty provision ambiguous, then interpretation rule no. 1 cannot ever be in conflict with any of the interpretation rules nos. 2–16. The sum and substance of this can be described as follows:

> If it can be shown that the interpretation of a treaty provision in accordance with interpretation rule no. 1 leads to a result, which is different than that obtained by interpreting the provision in accordance with any of the interpretation rules nos. 2–16, then it shall not be understood in accordance with interpretation rule no. 1.

Hence, according to international law, the relationship between the primary means of interpretation would be such that the context and the object and purpose must be considered as of generally greater authority than conventional language. Now the question is whether, in a similar fashion, the internal relationship between the context and the object and purpose has been settled once and for all in a rule of a general content. Nothing of this sort can be derived from the text of the Vienna Convention – a fact that agrees with what originally seems to have been the intention, judging by comments made in the literature.[67] This view is further confirmed by a quick look at the preparatory work of the Vienna Convention. In the final draft adopted by the International Law Commission in 1966 there is a rule titled "*Article 27. General rule of interpretation*".[68] This rule – the text of which, with one minor exception,[69] corresponds entirely with that of final article 31 – is commented upon by the Commission as follows:

> The Commission re-examined the structure of article 27 in the light of the comments of Governments and considered other possible alternatives … It considered that the article, when read as a whole, cannot properly be regarded as laying down a legal hierarchy of norms for the interpretation of treaties. The elements of interpretation in the article have in the nature of things to be arranged in some order. But it was considerations of logic, not any obligatory legal hierarchy, which guided the Commission in arriving at the arrangement proposed in the article. Once it is established – and on this point the Commission was unanimous – that the starting point of interpretation is the meaning of the text, logic indicates that "the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose" should be the first element to be mentioned. Similarly, logic suggests that the elements comprised in the "context" should be the next to be mentioned since they form

part of or are intimately related to the text. Again, it is only logic which suggests that the elements in paragraph 3 – a subsequent agreement regarding the interpretation, a subsequent practice establishing the understanding of the parties regarding the interpretation and relevant rules of international law applicable in the relations between the parties – should follow and not precede the elements in the previous paragraphs. The logical consideration which suggests this is that these elements are extrinsic to the text. But these three elements are all of an obligatory character and by their very nature could not be considered to be norms of interpretation in any way inferior to those which precede them.[70]

All things considered, I find it difficult to arrive at any other conclusion than this: according to international law, the authority of the context shall not be regarded as greater than that of the object and purpose, and the authority of the object and purpose shall not be regarded as greater than that of the context. From a legal point of view, the authorities of the two means of interpretation are perfectly equivalent. If it can be shown that the interpretation of a treaty provision in accordance with any of interpretation rules nos. 2–16 leads to a result, which is different from that obtained by interpreting the provision in accordance with any other of the rules nos. 2–16, then this is a conflict that must be resolved in some other manner than by the application of a rule of law.

What is the relationship that shall be assumed to hold among the different supplementary means of interpretation of interpretation? Let us once again turn our attention to the text of article 32. As an explanation of the expression "supplementary means of interpretation" we are given only two examples, namely "the preparatory work of the treaty" and "the circumstances of its conclusion". Based on this, some authors draw the conclusion that according to the Vienna Convention, "the preparatory work of the treaty" and "the circumstances of its conclusion" shall be considered more important than other supplementary means of interpretation. One such author is Alfred Rest:

Ausdrücklich werden als "supplementary means" lediglich die Vorarbeiten und die Begleitumstände des Vetragsschlusses genannt. Diese Aufzählung sollte wohl weniger enumerativen Charakter haben, als vielmehr lediglich der Hervorhebung der beiden wichtigsten Auslegungsmittel dienen.[71]

Saying that a means of interpretation (A) is generally more important than another means of interpretation (B) is tantamount to saying that the means of interpretation A possesses an authority that, regardless of the circumstances, must be considered greater than the authority of the means of interpretation B. If appliers interpret a treaty using "the preparatory work of the treaty" or "the circumstances of its conclusion", as well as some other supplementary means of interpretation, and they discover that a conflict exists between the different means of interpretation, then the conflict would always be resolved with "the preparatory work of the treaty" and "the circumstances

of its conclusion", respectively, coming out as final "victors" – all according to Rest. Personally, I find it difficult to see how such a reading of VCLT article 32 could be considered correct.

Obviously, the reading that Rest seems to advocate is diametrically opposite to the text of the Vienna Convention as interpreted using conventional language. This is how the text of article 32 reads:

> Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion ...
>
> Il peut être fait appel à des moyens complémentaires d'interprétation, et notamment aux travaux préparatoires et aux circonstances dans lesquelles le traité a été conclu ...
>
> Se podrá acudir a medios complementarios, en particular a los trabajos preparatorios del tratado y a las circunstancias de su celebración ...

Nothing in the term INCLUDING, ET NOTAMMENT, EN PARTICULAR indicates that, according to the Vienna Convention, "the preparatory work of the treaty" and "the circumstances of its conclusion" would have an authority that is somehow greater than that possessed by other supplementary means of interpretation. In any event, the reading that Rest seems to advocate is another than that imparted through the application of interpretation rules nos. 1–16. Such an interpretation is certainly not beyond the bounds of possibility. There are elements in the rules of interpretation laid down in international law that open up for the possibility of understanding a treaty provision by setting aside the rules of conventional language. The possibility is, however, strictly limited. First, the applier must be able to show that understanding the provision according to a non-conventional meaning has the support of one or more of the interpretation rules nos. 17–39. Second, the applier must be able to show that understanding the provision in accordance with conventional language amounts to a result "which is manifestly absurd or unreasonable".

Nothing in the description of article 32 given by Rest gives the slightest indication that these two conditions are met. In fact, I think strong reasons suggest the opposite to be the case. As we know, the ultimate purpose of an act of interpretation is to determine the legally correct meaning of a treaty.[72] If we agree with the proposition that "the preparatory work of the treaty" and "the circumstances of its conclusion", according to the Vienna Convention, possess an authority greater than that possessed by other supplementary means of interpretation, then as part of the "bargain" we would also need to accept the following proposition: "the preparatory work of the treaty" and "the circumstances of its conclusion", according to what is assumed by the parties to the Vienna Convention, are typically better indicators of the correct meaning of a treaty provision than for example an

act of interpretation *per analogiam* or an application of *the rule of necessary implication*. Is this proposition really acceptable? I think not – not when we know that "the preparatory work of the treaty" and "the circumstances of its conclusion" are means of interpretation whose origins relate to the time prior to when a treaty is adopted as definite; and not when we know that in many instances, a treaty continues to be in force for a very long time, in some cases up to hundreds of years. All things considered, the reading suggested by Rest seems to be entirely without merit. My conclusion is that the legal authority possessed by "the preparatory work of the treaty" and "the circumstances of its conclusion" is exactly that very same authority possessed by other supplementary means of interpretation.[73] If it can be shown that the interpretation of a treaty provision in accordance with any one of interpretation rules nos. 17–39 leads to a result, which is different than that obtained by interpreting the provision in accordance with any one of interpretation rules nos. 17–39, then this is a conflict that must be resolved in some other manner than by the application of a rule of law.

8 CONCLUSIONS

It is the purpose of this chapter to describe the relationship that shall be assumed to hold between, and among, the various means of interpretation recognised as acceptable by the Vienna Convention. According to international law, what is the relationship that shall be assumed to hold between primary and supplementary means of interpretation? And what is the relationship that shall be assumed to hold among the primary and the supplementary means of interpretation, respectively? These are the two questions I have undertaken to answer. Based on the observations made in this chapter, the following three rules of interpretation can be established:

Rule no. 40
§ 1. If it can be shown that the interpretation of a treaty provision in accordance with any one of interpretation rules nos. 1–16 leads to a result, which is different from that obtained by interpreting the provision in accordance with any one of interpretation rules nos. 17–39, and that the application of the former rule either leaves the meaning of the interpreted treaty provision ambiguous or obscure, or amounts to a result which is manifestly absurd or unreasonable, then the provision shall not be understood in accordance with this former rule.
§ 2. For the purpose of this rule, the meaning of a treaty provision shall be considered AMBIGUOUS OR OBSCURE, if interpreting the provision in accordance with any one of interpretation rules nos. 2–16 leads to a result, which

is different than that obtained by interpreting the provision in accordance with any other of those fifteen rules.

§ 3. For the purpose of this rule, saying that the application of a rule of interpretation LEADS TO A RESULT WHICH IS MANIFESTLY ABSURD OR UNREASONABLE is tantamount to saying that the application of the two conflicting rules – the first being one among rules numbered 1 to 16, the other being one among the rules numbered 17 to 39 – is based on communicative assumptions, of which the assumption underlying the application of the former rule can be considered significantly weaker than the assumption underlying the application of the latter.

Rule no. 41

If it can be shown that the interpretation of a treaty provision in accordance with any one of interpretation rules nos. 1–16 leads to a result, which is different from that obtained by interpreting the provision in accordance with any one of interpretation rules nos. 17–39, then, rather than being understood in accordance with the latter of the two rules, the provision shall be understood in accordance with the former, except for those cases where interpretation rule no. 40 applies.

Rule no. 42

If it can be shown that the interpretation of a treaty provision in accordance with interpretation rule no. 1 leads to a result, which is different from that obtained by interpreting the provision in accordance with any one of interpretation rules nos. 2–16, then the provision shall not be understood in accordance with interpretation rule no. 1.

NOTES

1. See Ch. 1, Section 1, of this work.
2. See Ch. 2, Section 5, of this work.
3. Ibid., Section 6, of this work.
4. See Ch. 1, Section 5, and Ch. 2, Section 5, of this work.
5. See Chapters 8–9 of this work.
6. See Chapters 3–7 of this work.
7. My emphasis.
8. See, explicitly, Thirlway, 1991, pp. 33–36; *Oppenheim's International Law*, pp. 1275–1276; Greig, pp. 478, 481; Yasseen, pp. 80–82; Haraszti, pp. 102–103; Hummer, pp. 98–99; Lang, pp. 164–165; Köck, p. 93; Jacobs, pp. 325–326; Degan, 1968, p. 19. See also, more or less implicitly, Ress, p. 37; Merrills, p. 92; Reuter, 1989, pp. 75–76; Amerasinghe, pp. 191–192; E. Lauterpacht, p. 439; Dupuy, pp. 219, 221; Brownlie, p. 630; Sinclair, 1984, p. 141; Bernhardt, 1984, p. 323; Tabory, pp. 202–205; Jiménez de Aréchaga, p. 47; Elias, 1974, pp. 79–80; Favre, 1974, p. 254; Jennings, p. 550; Gross, p. 117; Schröder, p. 124; Bernhardt, 1967, p. 495, n. 12.
9. See Ch. 2, Section 6, of this work.

10. See Ch. 1, Section 3, of this work.
11. See e.g. Bernhardt, 1984, p. 322; Yasseen, p. 81; Elihu Lauterpacht, pp. 417–419; Voïcu, p. 27; Berlia, pp. 297–305; McNair, 1961, p. 367. According to some authors, the doctrine of plain meaning is inadequate. (See e.g. Schwebel, 1996, pp. 541–547; Schwebel, 1997, pp. 797–804; Hummer, pp. 87–163; Klabbers, 2003, pp. 267–288; McNair, 1961, p. 372; McDougal, pp. 992–1000; McDogal, Laswell and Miller, pp. 78–82.) For a rebuttal of this argument, see Linderfalk, 2007(a), pp. 140–144.
12. See e.g. Thirlway, 1991, p. 21; Brownlie, pp. 628–629; Greig, pp. 477–484; Favre, 1974, p. 253; Fitzmaurice, 1957, p. 211. According to some authors, the principle of natural and ordinary meaning – the doctrine of plain meaning – is inadequate. (See e.g. Schwebel, 1996, pp. 541–547; Schwebel, 1997, pp. 797–804; Hummer, pp. 87–163; Klabbers, 2003, pp. 267–288; McNair, 1961, p. 372; McDougal, pp. 992–1000; McDogal, Laswell and Miller, pp. 78–82.) For a rebuttal of this argument, see Linderfalk, 2007(a), pp. 140–144.
13. Cf. Linderfalk, 2007(a), p. 141; Ress, p. 37; Thirlway, 1991, p. 33; Ris, pp. 119–120; Brownlie, p. 630; Bernhardt, 1984, p. 322; Yasseen, p. 81; Haraszti, pp. 91–104; Favre, 1974, p. 254; O'Connell, p. 253; Degan, 1968, p. 13.
14. Cf. Linderfalk, 2007(a), p. 141; Yasseen, p. 81; Bernhardt, 1967, p. 503.
15. We should recall the observations made in Chapter 1, Section 3, namely that the provisions of VCLT articles 31–33 can be seen to govern both the result of the interpretation process and the interpretation process as such.
16. See the limitations in Ch. 1, Section 3, of this work.
17. See, explicitly, Ress, p. 37; Thirlway, 1991, pp. 24–25; *Oppenheim's International Law*, pp. 1275–1276; Brownlie, p. 630; Bernhardt, 1984, p. 322; Yasseen, pp. 81–82; Haraszti, pp. 91–102; Favre, 1974, p. 254. See also, more or less implicitly, Amerasinghe, pp. 200–201; Sinclair, 1984, p. 127; Jiménez de Aréchaga, pp. 46–47; Elihu Lauterpacht, p. 417; Köck, p. 86; Hummer, pp. 98–99; Greig, pp. 477–481; Bernhardt, 1967, p. 503.
18. Similarly, Ress, p. 37; Amerasinghe, pp. 200–201; *Oppenheim's International Law*, pp. 1272–1273; Bernhardt, 1984, p. 322; Jiménez de Aréchaga, pp. 46–47; Hummer, p. 99, n. 44; Haraszti, pp. 91–102; Greig, pp. 477–481. According to several authors, this should also be considered a result of the provision in VCLT article 31 § 1, according to which a treaty shall be interpreted *in good faith ("de bonne foi", "de buena fe")*. (See e.g. *Oppenheim's International Law*, p. 1272; Sinclair, 1984, p. 120; Yasseen, pp. 22–23.)
19. Some commentators express themselves as if this were indeed the case. (See e.g. Jennings, p. 550; Sharma, p. 388.)
20. Cf. Draft Articles with Commentaries (1966): "The word 'supplementary' emphasizes that article 28 does not provide for alternative, autonomous, means of interpretation but only for means to aid an interpretation governed by the principles contained in article 27." (*ILC Yrbk*, 1966, Vol. 2, p. 223, § 19.)
21. See limitations in Ch. 1, Section 3, of this work.
22. Villiger, p. 346, n. 212. (My italics.)
23. Jennings, p. 550.
24. Schröder, p. 124.
25. See e.g. Verdross and Simma, p. 493, n. 9; Yasseen, p. 87; Tabory, p. 205; Sharma, p. 389; Gross, p. 117; Jacobs, p. 326; Jennings, p. 550; Bernhardt, 1967, p. 495.

26. Jacobs, p. 326. (Footnote omitted.)
27. See Draft Articles with Commentaries (1966), *ILC Yrbk*, 1966, Vol. 2, pp. 217–218.
28. See Comments on the final draft articles on the law of treaties prepared by the International Law Commission at its eighteenth session, Report of the Secretary-General (UN Doc. A/6827 and Add. 1 and 2), *UN General Assembly*, *Official Records*, Annexes to the 22nd session, Agenda item 86, p. 26.
29. See *Documents of the Conference*, p. 149, § 269.
30. Cf. USA, at the first session of the Vienna Conference, 31st meeting of the Committee of the Whole, *Official Records*, pp. 167–168, §§ 38–50.
31. See Vietnam, at the first session of the Vienna Conference, 31st meeting of the Committee of the Whole, *Official Records*, p. 168, § 51; Switzerland, at the same meeting, ibid., p. 180, § 27.
32. See, at the first session of the Vienna Conference, 32nd meeting of the Committee of the Whole, Tanzania, *Official Records,* p. 173, §§ 14–15, 17; and at the first session of the Vienna Conference, 33rd meeting of the Committee of the Whole, United Kingdom, ibid., p. 178, §§ 8–9; Argentina, ibid., p. 180, § 24; Nigeria, ibid., p. 181, §§ 35–37; Mexico, ibid., p. 181, § 40; Cuba, ibid., p. 182, §§ 44–45; Portugal, ibid., pp. 182–183, § 56; Madagascar, ibid., p. 183, §§ 61–63.
33. A point of clarification might be appropriate. As observed, the rules of interpretation laid down in the Vienna Convention must be seen to govern both the result of the interpretation process and the interpretation process as such. (See Ch. 1, Section 3 of this work.) What I am interested in establishing are the rules that govern the result of the interpretation process. The task is to explain the concept of a correct interpretation result considered from the point of view of international law. According to what I have just stated, there are four different types of situations that might create problems for the applier who interprets a treaty provision using primary means of interpretation. This statement must be adjusted somewhat, depending upon whether we are talking about the result of the interpretation process or the process of interpretation as such. Of course, all situations of type (1)–(4) can be seen to pose problems if we make it our task to explain the concept of a correct process of interpretation, considered from the point of view of international law. However, the same does not apply if we instead imagine the situation of an applier, who wishes to know whether, from the point of view of international law, a given interpretation proposition can be considered correct. In such a case, only situations (1)–(3) will cause problems. If none of the rules nos. 1–16 is applicable, then naturally no conflict can arise between our two categories of rules – nos. 1–16 and nos. 17–39.
34. My italics.
35. I have taken for granted that the text in article 32 refers back to the text in article 31 § 1: "A *treaty* shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context ...". Another possible interpretation is that the text in article 32 instead refers back to the text in 31 § 4: "A special meaning shall be given to a *term*...". (All italics mine.)
36. See pp. 227–228 of this work.
37. With regard to the concept of *operative interpretation*, more details are provided in Ch. 1, Section 3 of this work.
38. Loc. cit.
39. See pp. 331–332 of this work.
40. Loc. cit.
41. See p. 95 of this work.

42. Strictly speaking, there are *two* grammatically correct interpretations of the expression "leads to a result which is manifestly absurd or unreasonable". The problem is the syntax of the expression "manifestly absurd or unreasonable". The expression "manifestly" can be understood to qualify both "absurd" and "unreasonable", and it can be understood to qualify only "absurd" and not "unreasonable". In this discussion, I have disregarded this grammatical ambiguity.
43. See, however, Schwebel, 1997: "[I]t is not infrequent that the 'ordinary meaning' of the terms of a treaty, even if found to be unambiguously such, leads to a result which, if not 'manifestly absurd' is 'unreasonable' " (p. 799).
44. See p. 95 of this work.
45. See p. 269 of this work.
46. See e.g. Poland, at the second session of the Vienna Conference, 13th plenary meeting, *Official Records,* p. 58, § 68; Waldock, Sixth Report on the Law of Treaties, *ILC Yrbk*, 1966, Vol. 2, p. 99, § 20; Reuter, at the ILC's eighteenth session, 871st meeting, *ILC Yrbk*, 1966, Vol. 1, Part 2, p. 195, § 22; Ago, at the ILC's eighteenth session, 872nd meeting, ibid., p. 202, § 51; Yasseen (speaking as member), at the ILC's eighteenth session, 873rd meeting, ibid., pp. 203–204, § 13; Rosenne, at the same meeting, ibid., p. 205, § 30; Waldock, at the same meeting, ibid., p. 206, § 39; Waldock, Third Report on the Law of Treaties, *ILC Yrbk*, 1964, Vol. 2, p. 57, § 16, p. 58, § 20; Draft Articles With Commentaries (1964), ibid., p. 205, § 16; Ago (speaking as chairman), at the ILC's sixteenth session, 765th meeting, *ILC Yrbk*, 1964, Vol. 1, p. 281, §§ 86, 92; Ruda, at the ILC's sixteenth session, 766th meeting, ibid., p. 283, § 12; Yasseen, at the same meeting, ibid., p. 286, § 49.
47. See e.g. Bulgaria, at the first session of the Vienna Conference, 32nd meeting of the Committee of the Whole, *Official Records,* p. 176, § 56; Yasseen (speaking as member), at the ILC's eighteenth session, 873rd meeting, *ILC Yrbk*, 1966, Vol. 1, Part. 2, pp. 203–204, § 13; Rosenne, at the same meeting, ibid., p. 205, § 30; Draft Articles With Commentaries (1964), *ILC Yrbk*, 1964, Vol. 2, p. 204, § 15.
48. See pp. 333–334 of this work.
49. Cf. Fitzmaurice – on page 10 of his 1951 article – quotes the following passage from the ICJ decision in the *(Second) Admissions* case: "If, on the other hand, the words in their natural and ordinary meaning are ambiguous or lead to an unreasonable result [sont équivoques ou conduisent à des résultats déraisonnables], then and only then, must the Court, by resort to other methods of interpretation, seek to ascertain what the parties really did mean [avaient en réalité dans l'ésprit] when they used these words. As the Permanent Court said in the case concerning the *Polish Postal Service in Danzig* (P.C.I.J., Series B, No. 1, p. 39):
    'It is a cardinal principle of interpretation that words must be interpreted in the sense which they would normally have in their context, unless such interpretation would lead to something unreasonable or absurd.'
    When the Court can give effect to a provision of a treaty by giving to the words used in it their natural and ordinary meaning, it may not interpret the words by seeking to give them some other meaning." An interesting point in this context is the footnote that Fitzmaurice has added to the French expression "*déraisonnable"* in the quotation: "The French term *déraisonnable* is somewhat stronger than the English 'unreasonable' and means something more like 'contrary to reason'."
50. See p. 95 of this work.
51. See p. 61 of this work.

52. See p. 334 of this work.
53. See p. 335 of this work.
54. See p. 335 of this work.
55. See p. 335 of this work.
56. See the introduction to Ch. 3 in this work.
57. See Ch. 8, Section 7, of this work.
58. *Webster's New World Dictionary*, Third College Edition.
59. See Chapters 4–7 of this work, especially the introductions to Chapters 4 and 7.
60. See Ch. 1, Section 3, of this work.
61. See Ch. 10, Section 2, of this work.
62. Loc. cit.
63. Loc. cit.
64. See Ch. 3 of this work.
65. See Chapters 4–7 of this work.
66. Loc. cit.
67. See e.g. Ris, p. 118; *Oppenheim's International Law*, p. 1272, n. 6; Villiger, p. 345; Tabory, pp. 202–205; Haraszti, p. 102; Mehrish, p. 62; Gross, p. 119; Schröder, p. 124; Bernhardt, 1967, p. 495, n. 12; Jennings, p. 550.
68. Draft Articles with Commentaries (1966), *ILC Yrbk*, 1966, Vol. 2, p. 217.
69. The exception being the text in § 3(a). In the 1966 draft, article 27 § 3(a) reads: "Any subsequent agreement between the parties regarding the interpretation of the treaty". The Vienna Convention text contains the following addition: "... or the application of its provisions".
70. Draft Articles with Commentaries (1966), *ILC Yrbk*, 1966, Vol. 2, p. 220, § 9.
71. Rest, p. 151. (Footnote omitted.)
72. See Ch. 2, especially Section 1, of this work.
73. Similarly, *Oppenheim's International Law* , pp. 1276–1277; Yasseen, p. 79; Tabory, pp. 202–205; Schröder, p. 124.

CHAPTER 11

THE SPECIAL RULE REGARDING THE INTERPRETATION OF TREATIES AUTHENTICATED IN TWO OR MORE LANGUAGES

When states initiate negotiations on the conclusion of a treaty, and negotiations are successful, the negotiating states will reach a point at which the drafting stage can be brought to a close. They will then proceed to confirm that a final and definite text of treaty is in hand. After this point when confirmation is provided, we say the treaty *has been authenticated*.[1] In international law, there is no generally applicable norm stating in what language or languages a treaty shall be authenticated. In principle, the negotiating states are free to choose the language or languages they find suitable for the purpose. Considering this, the abundance of strategies illustrated by the practice of states is perhaps not surprising.[2] A simple situation arises when there are only two states concluding a treaty. In drafting a bilateral treaty, states usually authenticate the text of that treaty in two language versions, one in each party's respective language, with the possible addition of a third version written in one of the so-called "international languages". Other solutions are applied when the parties number three or more. It does happen that in the drafting of multilateral treaties, the negotiating states authenticate enough texts so that each of the parties receives the treaty in its native language – this is especially so when drafting involves a small number of states, or when the negotiating states represent a limited number of languages. When negotiating states represent a larger number of languages, they almost always agree to limit the number of authenticated texts. Here, the most common solution is to authenticate the treaty in one or more "international languages"; or, if the treaty is drafted under the auspices of an international organisation, in the official language of that organisation. Today, for example, all treaties adopted by the UN General Assembly are authenticated in six languages: Arabic, Chinese, English, French, Russian and Spanish.[3]

Drafting a treaty in several languages is a difficult task that requires particular attention to detail and great care.[4] Not only must the negotiating states arrive at an agreement that can be accepted by all; they must also

ensure that texts authenticated later are equivalent in meaning. The result is not always the desired one. Actually, it seems to be more the rule than the exception that a comparison of the authenticated texts of a treaty discloses a difference in meaning. Often, this is brought about more by the inherent characteristics of human languages than by anything else; many words are simply impossible to translate from one language to another without at least some change in meaning.[5] Nevertheless, at times one finds discrepancies so glaring that they cannot be anything but the product of oversight. An excellent example is article 6 §§ 2 and 3(c) of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*.[6]

2. *Everyone charged with a criminal offence* shall be presumed innocent until proved guilty according to law.
3. *Everyone charged with a criminal offence* has the following minimum rights: ... (c) to defend himself in person or through legal assistance of his own choosing **or**, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require; [...].

2. *Toute personne accusée d'une infraction* est présumée innocente jusqu'à ce que sa culpabilité ait été légalement établie.
3. *Tout accusé* a droit notamment à: ... (c) se défendre lui-même ou avoir l'assistence d'un défenseur de son choix **et**, s'il n'a pas les moyens de rémunérer un défenseur, pouvoir être assisté gratuitement par un avocat d'office, lorsque les intérêts de la justice l'exigent; [...].[7]

If a comparison of the different authenticated texts of a treaty discloses a difference in meaning, special interpretation problems arise. According to VCLT article 33 § 3, the terms of a treaty shall be presumed to have the same meaning in each authenticated text. The idea is that when we apply a multi-language treaty, normally there should be no need to scrutinise and compare all of the authenticated texts, considering all the time and effort inherent in such an examination. On the contrary, we should be able to select one of the texts – in principle, any one of them – and rely upon it.[8]However, the situation will be entirely changed once a difference in meaning has been discovered. A treaty is and always will be a single agreement, comprised of a single set of provisions, even if the treaty happens to be expressed in several different languages. If the treaty is applied, and the parties do not heed the difference in meaning detected, then of course this is at odds with the idea of the treaty as a single, integrated unit. The only correct thing to do is to ensure that the authenticated texts all convey the same meaning. The texts must be reconciled. It is the purpose of this chapter to describe how such reconciliation shall be achieved.

Our starting point is the rule in article 33 of the Vienna Convention, the heading of which is "Interpretation of treaties authenticated in two or more languages". I cite from § 4:

Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.

Sauf le cas où un texte déterminé l'emporte conformément au paragraph 1, lorsque la comparaison des textes authentiques fait apparaître une différence de sens que l'application des articles 31 et 32 ne permet pas d'éliminer, on adoptera le sens qui, compte tenu de l'objet et du but du traité, concilie le mieux ces textes.

Salvo en el caso en que prevalezca en texto determinado conforme a lo previsto en el párrafo 1, cuando la comparación de los textos auténticos revele una diferencia de sentido que no pueda resolverse con la aplicación de los artículos 31 y 32, se adoptará el sentido que mejor concilie esos textos, habida cuenta del objeto y del fin del tratado.

Considering the purpose of this chapter, § 1 also seems relevant:

When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.

Lorsqu'un traité a été authentifié en deux ou plusieurs langues, son texte fait foi dans chacune de ces langues, à moins que le traité ne dispose ou que les parties ne conviennent qu'en cas de divergence un texte déterminé l'emportera.

Cuando un tratado haya sido autenticado en dos o más idiomas, el texto hará igualmente fe en cada idioma, a menos que el tratado disponga o las partes convengan que en caso de discrepancia prevalecerá uno de los textos.

One thing is clear upon reading the text of the Vienna Convention. If a multi-language treaty must be applied, and two authenticated texts cannot be compared without a difference in meaning revealing itself, several methods of reconciliation are available; all attempts at harmonisation must be performed in a predetermined order. First, the applier shall investigate whether the difference in meaning cannot be removed through the application of VCLT articles 31 and 32. Second – should the first method be insufficient – the applier shall establish whether the treaty provides, or the parties agree, that in case of divergence, a particular text shall prevail. Third – should this second method, too, be insufficient – "the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted". I have organised this chapter so that in Section 1, I begin by trying to clarify the various modes of reconciliation provided in VCLT article 33. In Sections 2 and 3, I will then pay particular attention to the method that, for authors in the literature, seems to have presented the most problems, namely the third of the above-mentioned methods.

1 GENERAL OBSERVATIONS ON THE METHODS OF RECONCILIATION

Assume that an applier sets out to interpret a multi-language treaty, but that he soon discovers that the authenticated texts cannot be compared without the comparison disclosing a difference in meaning. According to the provisions of VCLT article 33 § 4, the applier shall then first ensure that the difference is one "which the application of article 31 and 32 does not remove" (Fr. *"que l'application des articles 31 et 32 ne permet pas d'éliminer"*; Sp. *"que no pueda resolverse con la aplicación de los artículos 31 y 32")*. The applier shall determine by an application of the usual rules of interpretation what should be considered the correct meaning of the treaty. In fact, most differences in meaning can be eliminated using this first method of reconciliation.[9] An example of this is the judgment of the European Court of Human Rights in the *Van der Mussele* case.[10]

In 1976, Eric Van der Mussele, a young Belgian, completed his law degree and began working as a trainee *("avocat stagiaire")* at a Belgian law firm. His purpose was to obtain the practical experience needed to seek membership in the Belgian bar *("l'Ordre des avocats")*. During his trainee period, Van der Mussele was required to defend several clients without receiving any compensation for his work. The question arose whether these duties fell within the bounds set out in the *European Convention for the Protection of Human Rights and Fundamental Freedoms* . Van der Mussele maintained this was not the case and lodged a complaint with the European Commission, citing among other things European Convention, article 4 § 2:

> No one shall be required to perform forced or compulsory labour.

Belgium took the opposing view, and in time the case was turned over to the European Court. The issue gave the court an occasion to explore the meaning of the expression "labour" (Fr. *"travail")*:

> It is true that the English word "labour" is often used in the narrow sense of manual work, but it also bears the broad meaning of the French word *"travail"* and it is the latter that should be adopted in the present context. The Court finds corroboration of this in the definition included ... in Article 4 § 3(d) of the European Convention ("any work or service", *"tout travail ou service*") [...].[11]

Let us examine this statement more closely.

First, it is clear that upon comparing the English text of article 4 § 2 with the French text, the court discovered a difference in meaning. The French word TRAVAIL is unambiguous. It is used in the widest sense to mean *work in general*, that is, both blue-collar and white-collar work. The English word LABOUR is ambiguous. It can be used in the narrow sense of *blue-collar*