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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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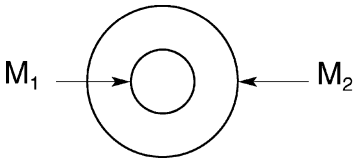
work, but – like TRAVAIL – it can also be used in the wider sense of *work in general*. The case can be illustrated by the following Venn diagram. (The meaning of LABOUR corresponds to both areas M_1 and area M_2, while the meaning of TRAVAIL corresponds only to area M_2.)



Secondly, the court has gone further and asked whether the difference in meaning between the English and French texts might possibly be removed through an application of VCLT articles 31 and 32. Apparently, this is indeed the case. Using the context, the court has been able to eliminate one of the two possible ordinary meanings of the expression "labour"; hence, area M_1 can be disregarded. The argument might be summarised in the following manner:

> The text of European Convention article 4 § 2 contains the expression "labour". The ordinary meaning of the word LABOUR is ambiguous: in one sense, it can be used to refer to blue-collar work only, in another sense it can be used to refer to *work in general*. According to article 4 § 3 of the European Convention, the extension of the expression "forced or compulsory labour" shall not be understood to include "work or service which forms part of normal civic obligations". The expression "any work or service" shall be understood to mean not only blue-collar work but *work in general*, *white collar-work included*. Hence, given interpretation rule no. 3 – according to which a treaty provision shall be understood in such a way that it does not logically contradict those other provisions contained in said treaty – the expression "labour" in article 4 § 2 shall also be understood to mean *work in general*.

If it is often the case, that by applying VCLT articles 31 and 32 appliers will be able to reconcile the different authenticated texts of a treaty, then there are also situations where the usual rules of interpretation do not suffice. It is a simple fact, that application of articles 31 and 32 will not always result in all authenticated texts being understood to have the same meaning. According to the provisions of Vienna article 33 § 4, two additional methods of reconciliation remain. The choice depends on the situation at hand.

A first situation arises when "the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail" (Fr. *"le traité ... dispose ou ... les parties ... conviennent qu'en cas de divergence un texte déterminé l'emportera"*; Sp. *"el tratado disponga o las partes convengan que en caso de discrepancia prevalecerá uno de los textos")*. In practice, we can envision two cases: (1) the parties have agreed that one of the authenticated texts shall prevail;[12] or (2) the parties have agreed that another, unauthenticated text shall prevail.[13] In legal terms, the effect is the same. If the parties to a treaty have not only authenticated the treaty in two or more different language versions, but have also had the foresight to provide a solution for any eventual differences found in the authenticated texts, then naturally we must respect such agreements. After all, the rules of interpretation laid down in international law are *jus dispositivum* – they apply only on the condition, and to the extent, that the parties to a treaty have not come to agree among themselves on something else.

A second situation arises when the parties have left open the issue of priority among the various texts, or have expressly agreed that all texts shall be equally valid.[14] As a last resort, "the meaning which best reconciles the texts, having regard to the object and purpose of the treaty", shall then be adopted (Fr. *"on adoptera le sens qui*, *compte tenu de l'objet et du but du traité, concilie le mieux ces textes"*; Sp. *"se adoptará el sentido que mejor concilie esos textos, habida cuenta del objeto y del fin del tratado")*. With that, we arrive at a provision which, judging from the literature, seems to have been the cause of great uncertainty.[15] Through the years, several questions have been discussed:

- In the terminology of the Vienna Convention, what do we mean when we say that two texts shall be *reconciled*?
- What does the Vienna Convention mean by instructing appliers to adopt the meaning which "best" reconciles the authenticated texts?
- What role is intended for "the object and purpose of the treaty" in process of reconciliation?

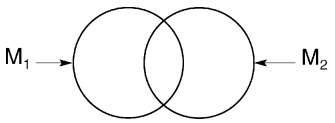
No great elucidation in these issues has been achieved. On the whole, the opinions expressed in the literature appear to confuse more than clarify. My judgment is that to a large part, the whole discourse is built on a misunderstanding and on a lack of familiarity with the rules laid down in VCLT articles 31–32 in general. Perhaps the wording of article 33 § 4 is not entirely fortunate. However, it is hardly as problematic as some authors would like us to think. The task for Sections 2 and 3 of this chapter is to see if some greater clarity can be achieved.

2 REGARDING THE METHOD DESCRIBED IN VCLT ARTICLE 33 § 4

What does the Vienna Convention mean by instructing appliers to adopt the meaning "which best reconciles the [authenticated] texts, having regard to the object and purpose of the treaty"? Let us begin by simplifying the analysis; we disregard the clause "having regard to the object and purpose of the treaty". The task of appliers would then be to adopt "the meaning which best reconciles the [authenticated] texts". Much of the confusion around VCLT article 33 § 4 seems to have originated in a misconception of what it actually means, when appliers are told to *reconcile* two or more authenticated texts of a treaty. Assume that a text of a treaty imposes upon each party P the obligation to take a certain type of action A within a specified period of time T, given that some kind of state-of-affairs S can be shown to exist. Now assume that the treaty has been authenticated in two different languages, English and French:

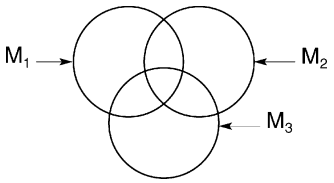
Everyone arrested or detained ... shall be brought *promptly* before a judge [...].
Toute personne arrêtée ou détenue ... doit être *aussitôt* traduite devant un juge [...].[16]

Lastly, assume that an applier has compared the two authenticated texts, and that he has found a difference in meaning that cannot possibly be removed through the application of VCLT articles 31 and 32: the French expression *"aussitôt"* appears to place the parties under greater time pressure than the English "promptly".[17] The difference can be illustrated by the following Venn diagram. (M_1 corresponds to the extension of the expression "[e]veryone arrested or detained is brought promptly before a judge"; M_2 corresponds to the extension of the expression *"[t]oute personne arrêtée ou détenue ... est aussitôt traduite devant un juge"*.)



How should an applier approach the task of reconciling the *meanings* M_1 and M_2? Obviously, the applier cannot just adopt either M_1 or M_2. To reconcile two meanings is to make them compatible in terms of their content. The applier cannot make M_1 and M_2 compatible content-wise by simply adopting M_1, since M_1 does not include all the referents of M_2. Nor can the applier simply adopt M_2, since M_2 does not include all the referents of M_1. It appears the applier must seek some other solution. One possibility would be for the applier to

adopt the meaning (M_1+M_2), which corresponds to the combined areas of M_1 and M_2. Another possibility would be to adopt the meaning (M_1.M_2), which corresponds to the area shared by M_1 and M_2. A third possibility would be for the applier to find some other meaning, for example M_3, which relates to M_1 and M_2 in some other way.



After this little experiment, we can turn our attention once again to the provisions of Vienna Convention article 33 § 4. Let me repeat: "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".[18] Clearly, it is not the *meanings* M_1 and M_2, which the Vienna Convention directs the applier to reconcile. The task of the applier is to reconcile the *texts* in which the meanings M_1 and M_2 are expressed. The difference may seem trivial. The consequences are of undoubtable significance.

Suppose once again the scenario I just described. In what way can an applier reconcile the English and French texts? To reconcile two texts is to make their respective contents compatible; it is to arrange in some way so that both texts convey the same meaning. Of course, one way to make the English and French treaty texts compatible in terms of their content is to assume meaning M_1 or M_2. Another way is to assume M_3; a third is to assume M_1+M_2; yet another way is to assume M_1.M_2 – indeed, it seems the applier can assume any meaning. The English and French treaty texts appear equally compatible in terms of their content regardless of the meaning chosen. In such a situation, it is naturally pertinent to enquire about the specific options available to the applier. According to the provisions of VCLT article 33 § 4, the applier must make some kind of comparison. The applier's task is to set side by side a number of alternative meanings, and then choose the one "which best reconciles the [authenticated] texts". The exact scope of this comparison, however, remains unclear. Shall the applier be compelled to limit her comparison to the meanings already given, that is, meanings M_1 and M_2? Or – as some commentators seem to suggest – shall the applier be free to seek other solutions beyond M_1 and M_2, if for any reason she finds a meaning that better reconciles the authenticated texts?[19]

Let us assume the latter alternative. Suppose an applier who is faced with the task of identifying the meaning that best reconciles the authenticated texts of a multi-language treaty; and suppose that applier can choose not only among the meanings already given, but also among other meanings. A question immediately comes to mind: How shall these other meanings be "found"? The Vienna Convention contains nothing to enlighten us. Nevertheless, it is difficult to believe the parties to the Convention truly wished to leave this task of identification completely to the applier. Anyone who can influence the content of the selection available to the applier – that group of meanings from which the applier shall choose the one that best reconciles the authenticated texts – is clearly also provided with an opportunity to influence the result of the entire reconciliation process. As noted earlier, an applier can reconcile the texts of a multi-language treaty by adopting any meaning; no meaning is such that it cannot be included in the applier's selection. Hence, if we assume that an applier can himself determine the selection of meanings, then we must also accept that the applier is fully capable of deciding the outcome of the entire reconciliation process. Judicial application becomes just as arbitrary and difficult to predict as if VCLT article 33 § 4 had not existed. Such an interpretation is clearly at odds with interpretation rule no. 16:

> If it can be shown that the interpretation of a treaty provision in accordance with interpretation rule no. 1 leads to conflicting results, and that somewhere in the text of that treaty a norm is expressed, which – in light of the provision interpreted – in one of the two possible ordinary meanings can be considered in practice to be normatively useless, while in the other it cannot, then the latter meaning shall be adopted.[20]

All things considered, there seems to be good reason to greet the assumption described with a large dose of scepticism. One cannot reasonably assume the parties to the Vienna Convention to have envisioned the meaning of VCLT article 33 § 4 in such a way, that an applier – seeking to identify the meaning that best reconciles the authenticated texts – can choose not only a meaning already given, but also other possible meanings. Comparison must be limited to the meanings already given.

Accordingly, the applier's problem would be reduced considerably. The only question remaining to be answered is this: The applier wishes to find the meaning that best reconciles the authenticated texts – which of those meanings already given shall he adopt? Suppose an applier finds himself in a situation similar to that described in the example above – the applier must choose between meaning M_1 and meaning M_2. Suppose also that the applier (for whatever reason) selects M_1. By so doing, it is obvious that the applier makes the English and French texts compatible in terms of content; but they would be just as compatible had the applier chosen to adopt M_2. As long as it

is the applier's task to reconcile the authenticated texts, and nothing else, both meanings are equally good. One cannot be said to be better than the other.

With that, it is time to insert once again the clause "having regard to the object and purpose of the treaty". If the applier is compelled to choose either M_1 or M_2 as the meaning "which best reconciles [the authenticated] texts", but both meanings reconcile the authenticated texts equally well, there must be some additional aspect in which M_1 and M_2 can be compared. The applier requires some criterion that can help him determine whether to choose M_1 or M_2. Of course, the idea is that "the object and purpose of the treaty" shall be this criterion. When the Vienna Convention directs an applier to adopt the meaning "which best reconciles the [authenticated] texts, having regard to the object and purpose of the treaty", then it is quite simply the applier's task to choose the meaning that, better than any other, leads to a realisation of the treaty's object and purpose. The Convention can hardly be read in any other way.

3 REGARDING THE METHOD DESCRIBED IN VCLT ARTICLE 33 § 4 (CONT'D)

Let us step back a bit from VCLT article 33 § 4 and consider the provision from a broader perspective. Let us consider the provisions contained in article 33 § 4 in light of the "normal" rules of interpretation laid down in articles 31 and 32. It is a notable fact that the rules of interpretation laid down in the Vienna Convention contain two references to "the object and purpose" of an interpreted treaty. Anyone assuming the task of interpreting a multi-language treaty obviously runs the risk of having to use this means of interpretation more than once: first, when according to VCLT article 31 § 1, the applier interprets the treaty using "the object and purpose" of the treaty; and second, when according to article 33 § 4, the applier adopts the meaning "which, having regard to the object and purpose of the treaty, best reconciles the [authenticated] texts".

From a practical point of view, one may question whether it can indeed be considered warranted to interpret a treaty twice using the same means of interpretation. A number of authors are absolutely sceptical to this idea.[21] "Es ist nicht recht einleuchtend", writes Meinhard Hilf, for example, ...

> ... warum trotz einer Ausrichtung am Vertragsgegenstand und -zweck in einem Fall sich eine Textdivergenz als unauflösbar darstellen kann, während im anderen Fall die erneute Berücksichtigung des Vertragszweckes offensichtlich eine Auflösung soll herbeiführen können.[22]

Waldemar Hummer is more explicit:

> The repeated introduction of the "object" and "purpose" of a treaty as "points of reference" seems to be at first glimpse a redundant formulation since the reconciliation of the texts has

to be hammered out, "having regard to the object and purpose of the treaty", a formulation which seems to be most similar to the operation under Art. 31 para. 1 of the Vienna Convention; but how can it be carried out since the difference of meaning which has to be removed by reconciling the texts is one "which the application of Articles 31 and 32 does not remove" (!) ?[23]

My judgment is that Hilf and Hummer – the authors must excuse my using them as representatives for a larger group of authors – have somewhat misinterpreted the rules of the Vienna Convention, and that the scepticism uttered is therefore unfounded. Both authors seem to have built their statements on two assumptions. First, they appear to assume that it is the exact same act of interpretation the applier performs, when first – according to the provisions of article 31 § 1 – interpreting a multi-language treaty using the treaty's object and purpose, and then – according to the provisions of article 33 § 4 – when adopting the meaning "which, having regard to the object and purpose of the treaty, best reconciles the [authenticated] texts". Secondly, the authors seem to take for granted that an application of article 33 § 4 can never lead to a result different from that obtained through an application of article 31 § 1; all texts that can be reconciled through an application of the former provision can also be reconciled through an application of the latter. Neither assumption can be said to hold true. The fact is that article 33 § 4 has a unique role to play in the reconciliation of multi-language treaties. This role differs from that played by article 31 § 1; it is a role of which article 31 § 1 is not even capable – this is my assertion. I shall now elaborate.

Consider first the Hilf-Hummer assumption that appliers perform two identical acts of interpretation when first – according to the provisions of article 31 § 1 – interpreting a multi-language treaty using the object and purpose of the interpreted treaty, and second – according to the provisions of article 33 § 4 – when adopting the meaning "which, having regard to the object and purpose of the treaty, best reconciles the [authenticated] texts". Clearly, the authors have a picture of the different acts of interpretation that does not correspond to the one presented in this work. When appliers interpret a treaty according to the provisions of VCLT article 31 § 1, the object and purpose can be used only relative to conventional language ("the ordinary meaning").[24] 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 broader interpretation process. The question has arisen whether a given complex of facts shall be considered to fall 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 proved insufficient. The ordinary meaning of the treaty provision P is either vague or ambiguous – the

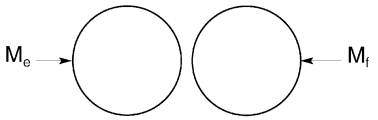
use of conventional language leads to conflicting results. The act in question has quite simply resulted in multiple ordinary meanings. According to VCLT article 31 § 1, in such a case the applier shall also interpret P using the object and purpose of the treaty. In so doing the applier first determines the object and purpose of P; then the applier compares the alternative ordinary meanings relative to the object and purpose of P; and finally, the applier adopts the meaning through which the object and purpose are best realised.

When appliers interpret a treaty provision P, according to VCLT article 33 § 4, and they adopt the meaning "which, having regard to the object and purpose of the treaty, best reconciles the [authenticated] texts", appliers proceed in much the same way as when they interpret the provision, according to VCLT article 31 § 1, using the treaty's object and purpose, as long as nothing but the intellectual process is considered. The applier first determines the object and purpose of P; then the applier compares a number of given interpretation alternatives relative to the object and purpose of P; and finally, the applier chooses the alternative through which the object and purpose of P is best realised. The difference lies in the respective starting points for the two acts of interpretation. When appliers interpret a treaty provision P – according to VCLT article 31 § 1 – using the object and purpose of said treaty, they never have more than one language version (at a time) to examine. The appliers' basis for work is the alternative meanings found to exist, when interpreting P "in accordance with the ordinary meaning of the terms of the treaty". When appliers – according to VCLT article 33 § 4 – adopt the meaning "which, having regard to the object and purpose of the treaty, best reconciles the [authenticated] texts", they always have multiple texts to consider. The basis is the alternative meanings found by appliers when they interpreted the treaty in accordance with VCLT articles 31 and 32. At the application of article 31 § 1, appliers always work with a material consisting of several meanings ascribed to one text; at the application of article 33 § 4, appliers have several meanings to examine, but also several texts, and more than one meaning is never ascribed to a text. Clearly, the two acts of interpretation are not identical, when an applier first – according to the provisions of article 31 § 1 – interprets a multi-language treaty using the object and purpose of the treaty, and then – according to the provisions of article 33 § 4 – adopts the meaning "which, having regard to the object and purpose of the treaty, best reconciles the [authenticated] texts".

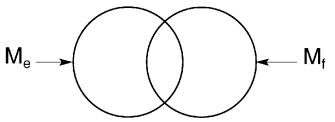
If it is now clear that Hilf and Hummer have little support for their first assumption, the same can be said about the second assumption as well. All texts that can be reconciled by applying VCLT article 33 § 4 cannot be reconciled by applying article 31 § 1, as Hilf and Hummer seem to believe. Suppose that a multi-language treaty has been authenticated in two

languages – English and French. Suppose also that an applier has compared the two texts and discovered that they bear a difference in meaning, which cannot be removed using conventional language. Finally, for the sake of simplicity, let us suppose the ordinary meaning of both the English and French texts to be unambiguous.[25] The following four situations are possible.

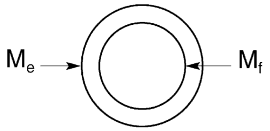
(1) No one referent of the English text is a referent of the French text, and no one referent of the French text is a referent of the English text. (For example, the English expression "cow" can never be used to refer to a referent of the French "cheval", and vice versa.) Let area M_e correspond to the ordinary meaning of the English text, and area M_f correspond to the ordinary meaning of the French text, and the situation may be illustrated as follows:



(2) Some (but not all) referents of the English text are referents of the French text, and some (but not all) referents of the French are referents of the English text. (For example, the English expression "[e]veryone arrested or detained is brought promptly before a judge" can in some (but not all) cases be used to refer to the referents of the French expression *"[t]oute personne arrêtée ou détenue ... est aussitôt traduite devant un juge",* and vice versa.[26])

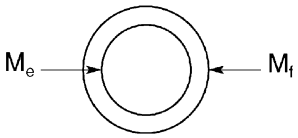


(3) All referents of the French text are referents of the English text, but only some referents of the English text are referents of the French text. (For example, the English expression "industrial conditions" can in all cases be used to refer to the referents of the French *"conditions industrielle"*, but only in some cases can the French *"conditions industrielle"* be used to refer to the referents of the English "industrial conditions".[27])



(4) All referents of the English text are referents of the French text, but only some referents of the French text are referents of the English text. (For example, the French *"tout accusé"* can in all cases be used to

refer to the referents of the English "everyone charged with a criminal offence", but only in some cases can the French *"tout accusé"* be used to refer to the referents of the English "everyone charged with a criminal offence".[28])



All in all, it seems the ordinary meanings of the English and French texts could relate to one another in four different ways. Hence, the cases we confront are of four types only. Let us examine these four cases more closely to see whether in each case the English and French texts can be reconciled – first, through an application of VCLT article 33 § 4, and then through an application of article 31 § 1.

From the start it is clear that the English and French texts can always be reconciled through an application of VCLT article 33 § 4; this is true regardless of whether M_e and M_f are related to one another as in cases (1), (2), (3) or (4). All the applier has to do is identify the meaning, M_e or M_f, which best leads to a realisation of the treaty's object and purpose, and then discard the other. The question is whether the two texts can be reconciled just as easily through an application of article 31 § 1. The answer must be in the negative. When appliers interpret a treaty – according to VCLT article 31 § 1 – using its object and purpose, a result cannot ever be obtained that cannot in any way be reconciled with the ordinary meaning of the interpreted treaty. The appliers' task is to compare the alternative ordinary meanings that resulted upon interpretation of the treaty using conventional language; they shall then adopt the one through which the treaty's object and purpose are best realised. In order for appliers to be at all able to reconcile two authenticated texts of a treaty using its object and purpose, at least one of the alternative ordinary meanings must be common for both texts. This is not so in the first of the four cases above. The ordinary meaning of the English text does not refer to a single one of the referents of the French text, and the ordinary meaning of the French text does not refer to a single one of the referents of the English text. In the second case, it might be that the English and French texts can be reconciled; this is so if the ordinary meaning of at least one of the texts can be considered vague. If the ordinary meanings of both the English and the French texts are completely precise, reconciliation cannot be achieved.[29] In the third case, it might be that the English and French texts can be reconciled; this is so if the ordinary meaning of the *English* text can be considered vague. Lastly, in the fourth case, it might be that the two

texts can be reconciled; this is if the ordinary meaning of the *French* text can be considered vague.

In contrast to what other authors have argued, we can therefore maintain that appliers will not always be able to reconcile the authenticated texts of multi-language treaty using that treaty's object and purpose, in accordance with the provisions of article 31 § 1. Given that authenticated texts of a multi-language treaty can always be reconciled through an application of VCLT article 33 § 4, the application of VCLT article 33 § 4 *can* indeed lead to results different from those obtained through an application of article 31 § 1. This is precisely the proposition I wished to establish.

4 CONCLUSIONS

When appliers compare two authenticated texts of a multi-lingual treaty and the comparison discloses a difference in meaning, the texts must be reconciled. It is the purpose of this chapter to describe the various methods through which such reconciliation shall be obtained, according to the provisions of VCLT article 33. Based on the observations made in this chapter, the following two rules of interpretation can be established:

Rule no. 43
If it can be shown (i) that a treaty has been authenticated in two or more languages, (ii) that two of the authenticated texts, by applying interpretation rules nos. 1–42, will still have to be understood in two different meanings, and (iii) that by applying the treaty in the one meaning, the object and purpose of the treaty will be realised to a greater extent than in the other, then the former meaning shall be adopted, except for those cases where interpretation rule no. 44 applies.

Rule no. 44
If it can be shown (i) that a treaty has been authenticated in two or more languages, (ii) that two of the authenticated texts, by applying interpretation rules nos. 1–42, will still have to be understood in two different meanings, and (iii) that the parties have agreed that in such cases a particular text shall prevail, then the treaty shall be understood in accordance with the meaning conveyed by that text.

NOTES

1. It is important to distinguish between an authenticated text of treaty and official translations of that treaty. In the relationship between the parties to a treaty, only the authenticated text can be considered valid. For more on the concept of *authentication*

(Fr. *athentification*; Sp. *autentificación*), see VCLT article 10. See also *Oppenheim's International Law*, pp. 1223–1224; Verdross and Simma, pp. 452–454; Rosenne, 1983, pp. 759–784; FitzGerald, pp. 364–371.

2. Cf. Shelton, pp. 613–618; Hilf, pp. 27–34; Tabory, pp. 36–39; Verzijl, pp. 181–201.
3. See *Review of the Multilateral Treaty-Making Process* (1985), passim.
4. Cf. e.g. Aceves, pp. 187ff.; Shelton, pp. 623–627; Rosenne, 1987, pp. 417–431.
5. Cf. Hilf, pp. 20–26.
6. In at least two cases, these differences in meaning have been formally handled by the European Court of Human Rights. (See *Pakelli*, *Publ. ECHR*, Ser. A, Vol. 64, p. 15, § 31; *Öztürk*, *Publ. ECHR*, Ser. A, Vol. 73, p. 17, §§ 46–47.)
7. My italics and emphasis.
8. See Kuner, pp. 953–964; Germer, pp. 412–414; Tabory, pp. 196–200.
9. See e.g. *La Grand Case*, *ICJ Reports*, 2001, pp. 502–506, §§ 101–109; *Niemetz v. Germany*, *Publ. ECHR*, Ser. A, Vol. 251-B, §§ 30–31; *Border and Transborder Armed Actions*, *ILR*, Vol. 84, p. 244, § 45; *ELSI*, ibid., pp. 373–377, §§ 113–119; *Nicaragua v. USA (Jurisdiction)*, *ILR*, Vol. 76, pp. 117ff., §§ 30ff.; *Öztürk*, *Publ. ECHR*, Ser. A, Vol. 73, § 47; *Van der Mussele*, *Publ. ECHR*, Ser. A, Vol. 70, § 33; *De Wilde*, *Ooms and Versyp* , *Publ. ECHR*, Ser. A, Vol. 12, § 76; *Delcourt*, *Publ. ECHR*, Ser. A, Vol. 11, § 25. Cf. however, *Prosecutor v. Blaskic*, *ILR*, Vol. 109–110, § 326.
10. Van der Mussele Case, Judgment of 23 November 1983, *Publ. ECHR*, Vol. 70.
11. Ibid., p. 17, § 33.
12. See e.g. *International Telecommunication Convention* and its final clause: "IN WITNESS WHEREOF the respective plenipotentiaries have signed the Convention in each of the Chinese, English, French, Russian and Spanish languages, in a single copy in which, in case of dispute, the French text shall prevail".
13. Cf. VCLT article 33 § 2.
14. Cf. e.g. *the European Convention for the Protection of Human Rights and Fundamental Freedoms* and final clause: "Done at Rome this 4th day of November 1950, in English and in French, both texts being equally authentic".
15. See e.g. Urueña, pp. 217–220; Sinclair, 1984, pp. 147–152; Tabory, pp. 176–178, 195–208; Yasseen, pp. 104–110; Hummer, pp. 114–123; Mössner, pp. 273–302; Hilf, in particular pp. 48–103; Germer, pp. 400–427.
16. *The European Convention for the Protection of Human Rights and Fundamental Freedoms*, article 5 § 3. (My italics.)
17. Cf. the European Court of Human Rights in the *Brogan and Others* case: "'[P]romptly' in paragraph 3 may be understood as having a broader significance than '*aussitôt*', which literally means immediately". (*Publ. ECHR*, Ser. A, Vol. 145-B, p. 32, § 59.)
18. My italics.
19. See Sinclair, 1984, p. 152; Mössner, pp. 301–302; Tabory, p. 202. See also joint diss. op. Robinson, Bathurst and Monguilan, *Young Loan*, *ILR*, Vol. 59, p. 578.
20. See p. 228 of this work.
21. In addition to the authorities cited in the main text, see Urueña, p. 219; Germer, pp. 425–427; Yasseen, p. 107.
22. Hilf, pp. 101–102.
23. Hummer, p. 122. (Footnote omitted.)
24. See the introduction to Ch. 7 of this work.
25. Of course, when the ordinary meanings of the texts are both ambiguous and vague, additional results are possible.

26. Cf. *Brogan and Others*, *Publ. ECHR*, Ser. A, Vol. 145-B, p. 32, § 59.
27. Cf. *Competence of the ILO for Agriculture*, *PCIJ*, Ser. B, No. 2–3, pp. 33–37.
28. Cf. *Öztürk*, *Publ. ECHR*, Ser. A, Vol. 73, p. 17, § 47.
29. A point of clarification might be warranted. In each of the four diagrams, the reader finds two circular areas, which are intended to correspond to the ordinary meanings of the English and French texts. These areas shall be understood so that in a situation where the ordinary meaning ascribed to a text remains vague, then all the alternative ordinary meanings fall *inside* the circle. In my experience, a reader will always be able to say how the ordinary meanings of two texts relate to one another, even though one or both meanings happen to be vague. For example, if the ordinary meanings of two texts relate to one another as in case 3 above, then the reader would be able to say that the meaning of the one text is more restrictive than the other.

CHAPTER 12

REFLECTING ON THE OUTCOME: INTERNATIONAL LAW ON A SCALE BETWEEN RADICAL LEGAL SKEPTICISM AND THE ONE-RIGHT-ANSWER THESIS

Throughout the many pages of this work, a constant purpose has been to investigate the currently existing regime established in international law for the interpretation of treaties, as expressed in Articles 31–33 of the 1969 Vienna Convention the Law of Treaties. As stated in the introductory Chapter 1, despite the adoption of the Vienna Convention and the existence of the three articles just mentioned, it is still far from clear to what contents the international law on treaty interpretation shall be applied.[1] The design of Articles 31–33 has invited a host of different opinions.[2] As a simple way of illustrating the problem, the various views expressed by international law scholars and other commentators were placed on a scale, whose two opposing ends were said to represent either one of the two most radical positions. To facilitate reference, I have referred to them as radical legal skepticism and the one-right-answer thesis, respectively.[3]

According to radical legal skepticism, legal norms are not capable of constraining political judgment. Hence, whenever some certain understanding is advanced as the correct interpretation of some certain treaty provision, the only question to be asked in assessing the interpretation is that whether it is legitimate or not.[4] Already at an early stage of this work I recommended against accepting the ideas of radical legal skepticism. I would like to think that by the completion of this work, my recommendations stand reinforced. As shown in the above Chapters 2–11, the regime laid down in Vienna Convention Articles 31–33 is best described as a system of rules. Not only does international law provide information on the interpretation data (or means of interpretation) to be used by appliers when interpreting a treaty provision. It also instructs the appliers how, by using each datum, they shall argue to arrive at a conclusion about the meaning of the interpreted provision. Furthermore, international law to some extent also determines what weight the different data of interpretation shall be afforded when appliers discover that, depending on the specific datum they bring to bear on the interpretation process, the conclusion arrived at will be

different. Hence, it would be my assessment that in any process of interpretation, Articles 31–33 indeed constrain the scope for political judgement. As I have come to conclude, radical legal scepticism should not be accepted as a sound description of the current legal state of affairs.

On the other hand, neither would I be prepared to accept the description provided by the one-right-answer thesis. According to the one-right-answer thesis, interpretation of treaties is a field of activity leaving no room for political judgment. From this point of view, the legal regime created in international law for the interpretation of treaties is considered absolute, in the sense that appliers can interpret a treaty according to the standards of international law and be perfectly certain of always arriving at a determinate result in a completely value-free way. Whenever some certain understanding is advanced as the correct interpretation of some certain treaty provision, the only question to be asked in assessing the interpretation is that concerning its legal correctness.[5] As indicated in the above Chapters 3–11, this description is also far from reality. I my assessment, the regime laid down in Vienna Convention Articles 31–33 amounts to a system of rules, but the system would still have to be described as to some extent open-textured. The rules provide a framework for the interpretation process; but within this framework, the political judgment of each individual applier is still allowed to play a part (although, of course, not the leading part suggested by radical legal skepticism).

As I would like to think, in any process of interpretation, appliers operate under a twofold ambition. First, having adopted a certain understanding of some certain treaty, they want to be able to show the understanding to conform to what is provided in international law. They wish others to regard the understanding as legally correct. Secondly, they want to be able to present the understanding as legitimate. They wish others to regard the understanding as warranted by reasons separate from international law. Given that this idea is accepted, and given my conclusion about the system of rules laid down in VCLT Article 31–33 as being to some extent open-textured, a constructive debate on interpretation matters obviously would have to be concerned with two questions:

(1) What first- and second-order rules of interpretation can be invoked by an applier, citing the prevailing legal regime laid down in VCLT Articles 31–33?
(2) How should the open-texturedness of said rules of interpretation be used by appliers, in order to optimize legitimacy of the interpretation result?

Arguably, if ever there is going to be a rational discussion on the latter of the above two questions, it is essential that appliers realize to which factors the open-texturedness of the rules is actually owed. In the following

Sections 1–3 of the present Chapter, drawing on the earlier Chapters 3–11, I will try to identify these factors in more detail. As I will suggest, factors can be described as being of three different kinds. They concern the identification of the various means of interpretation relative to the specific treaty provision interpreted; they concern the establishment of the various relationships assumed in the rules of interpretation; and they concern the resolution of conflicts occurring in the application of the first-order rules of interpretation. The organisation of Chapter 12 will follow this categorisation.

1 DETERMINING THE CONTENTS OF THE MEANS OF INTERPRETATION

Of the several elements that contribute to the open-texturedness of the system of rules laid down in Articles 31–33 of the Vienna Convention a first factor concerns the determination of the different means of interpretation exploited in the interpretation process. According to the model established in the above Chapter 2, a first-order rule of interpretation applies on the showing of some specific kind of relationship to exist between the treaty provision interpreted and some certain means of interpretation.[6] Hence, using a first-order rule of interpretation, appliers always draw on the existence of some specific means of interpretation. Obviously, in order to apply a first-order rule of interpretation, the contents of the various means of interpretation (or set of interpretation data) relative to the specific treaty provision interpreted will have to be determined. Sometimes, such a task insists upon value judgment. To some extent, this was indicated already in the course of my investigations contained in the above Chapters 3–9. However, recapitulating the contents of the various first-order rules of interpretation, I will now try to bring out the point more clearly.

Invoking Rule no. 1, appliers draw on the existence of a conventional language. For the purpose of Rule no. 1, conventional language means all varieties used within the larger language community, including those referred to as technical languages. As experience has repeatedly shown, when interpretation concerns the meaning of a term belonging to a technical language, that term may not always be listed in a dictionary. Sometimes, the contents of the technical language will have to be determined by the applier herself, on the basis of the various uses of the term interpreted, relying on inductive reasoning. Such reasoning entails value judgment. Moreover, in choosing between a language employed at the time of the interpreted treaty's conclusion and a language employed at the time of interpretation, the applier will sometimes have to determine whether or not the thing interpreted is a generic referring expression with a referent assumed by the treaty parties to

be alterable.[7] This requires a separate process of interpretation – one that cannot be justified invoking VCLT Articles 31–33.

Invoking any one of Rules nos. 2–6, appliers would have to be prepared to define the extension of the larger treaty text, a provision of which is interpreted.[8] As already noted in the above Chapter 4, the question sometimes arises whether two instruments shall be considered as integral parts of a single treaty, or whether they shall be considered as two separate treaties.[9] Once again, the applier will then have to fall back on the parties' intentions. For the purpose of Rules nos. 2–6, the text of a treaty refers to whatever the parties to the treaty consider the treaty to be comprised of. Obviously, in order to determine the contents of this means of interpretation relative to the specific provision interpreted, a separate process of interpretation might on occasion be needed.[10] For the justification of this process, the rules laid down in VCLT Articles 31–33 are of no help.

Invoking Rules nos. 7 and 8, appliers draw on the existence of an agreement relating to the treaty interpreted, made between its parties in connection with the treaty's conclusion.[11] For the purpose of these two rules, an agreement relates to a treaty if (and only if) the parties consider the agreement and the treaty exceedingly closely connected.[12] As stated in the above Chapter 5, the agreement has to be binding under international law.[13] However, the form of the agreement is not important, and consequently, for the purpose of Rules no. 7 and 8, an agreement can be written or non-written.[14] Quite clearly, in the application of said rules, value judgments may sometimes be needed to determine whether an agreement exist between the parties to the treaty interpreted, and whether it is binding or not; especially so in the case of non-written agreements. Furthermore, value judgments may be needed to determine whether an agreement established to exist *relates* to the interpreted treaty or not.

Invoking Rules nos. 9 and 10, appliers draw on the existence of an instrument made by one or more parties to the interpreted treaty in connection with its conclusion, and accepted by the other parties as an instrument related to said treaty.[15] Arguably, the existence of an instrument can be objectively determined. But in order for Rules nos. 9 and 10 to be brought into play, appliers will also need to determine whether the instrument has been accepted by all as related to the treaty or not. As indicated in the above Chapter 5, the phenomena typically falling within the scope of application of Rules nos. 9 and 10 are the reservations and interpretative declarations made by states, either at the time of signature, or contained in their instruments of ratification or accession.[16] In those cases, the relationship between treaty and instrument will never be a point of dispute. However, Rules no. 9 and 10 clearly allow for the use of other

kinds of instruments as well, as long as they are made in connection with the interpreted treaty's conclusion (whatever that is).[17] Hence, and given that the meaning of "instrument" can only be defined generically, the possibility that in some instances at least, value judgment may be called for in the determination of whether or not an instrument has been accepted as related to the treaty seems difficult to rule out altogether.

Invoking Rule no. 11 or Rule no. 12, appliers draw on the existence of an agreement entered into by the parties to the treaty interpreted, regarding the interpretation of said treaty or the application of its provisions.[18] For the purpose of these rules, an agreement has to be binding under international law.[19] The form of the agreement is not important, and consequently, like in case of Rules no. 7 and 8, an agreement can be written or non-written.[20] Arguably, in order to determine whether in the sense of Rules nos. 11 and 12 an agreement exists or not, appliers will sometimes have to be bring value judgments to bear on the interpretation process; especially so in the case of non-written agreements.

Invoking Rule no. 13, appliers draw on the fact that in the application of the interpreted treaty, a practice has developed, establishing an agreement between the parties regarding its interpretation.[21] In the course of the above Chapter 6, I suggested that for the purpose of Rule no. 13, a practice can be formed by any number of applications, one as well as many.[22] Accepting this suggestion, determining the existence of an agreement would still have to be seen as a matter leaving scope for subjectivities. By share necessity, an applier who wishes to establish an agreement on the basis of a practice will have to rely on inductive reasoning. As noted before, such reasoning entails value judgment.

Invoking Rule no. 14, appliers draw on the existence of a rule of international law applicable in the relations between the parties to the interpreted treaty.[23] For the purpose of Rule no. 14, "a rule of international law" refers to any and all rules whose origin can be traced to a formal source of international law.[24] Not only other international agreements can come within the scope of application of Rule no. 14, but also rules belonging to the realm of customary international law and general principles recognized by civilized nations. In principle, if establishing an agreement on the basis of a practice calls for value judgment on the part of the applier, so does the establishment of a customary international law and a general principle, for the very same reason. With regard to the establishment of the contents of an in international agreement – once again principally speaking – it too will leave scope for subjectivities. From a more practical point of view, it seems that using Rule no. 14, appliers will typically fall back on rules, the contents and existences of which are beyond all serious doubt. To that extent,

determining the contents of this means of interpretation will not really be a point of dispute. On the other hand, value judgment will often be required for other reasons. As stated in the above Chapter 6, in choosing between the rules applicable between the parties at the time of the interpreted treaty's conclusion and the rules applicable at the time of interpretation, the applier will sometimes have to determine whether or not the thing interpreted is a generic referring expression with a referent assumed by the treaty parties to be alterable.[25] And – let me repeat – this requires a separate process of interpretation, and one that cannot be justified invoking VCLT Articles 31–33.

Invoking Rule no. 15 or Rule no. 30, appliers draw on the fact that a certain *telos* has been conferred on the interpreted treaty.[26] For the purpose of Rules nos. 15 and 30, the *telos* of a treaty means the state-of-affairs, which according to the parties, should be attained by applying the interpreted provision.[27] Depending on whether or not the thing interpreted is a generic referring expression with a referent assumed by the treaty parties to be alterable, the *telos* of a treaty is determined based upon the intentions held by the parties either at the time of interpretation, or at the time of the interpreted treaty's conclusion.[28] Obviously, *for two reasons*, in order to determine the *telos* of a treaty, appliers will often need to have recourse to a separate process of interpretation. As indicated in the above Chapter 7, in the justification of this process, VCLT Articles 31–33 are of no help.[29]

Invoking Rule no. 16 or Rule no. 31,[30] or any one of Rules nos. 32–37,[31] appliers draw on the normative contents – the meaning – of some particular provision included in the interpreted treaty. In principle, as we know, the meaning of a treaty will often have to be established through interpretation. In other words, in order to determine the contents of the means of interpretation exploited, appliers will need to have recourse to the rules of interpretation laid down in VCLT Articles 31–33, which in turn will often insist upon value judgments to be made. In practice – like in the case of Rule no. 14 – it seems that the applier using any of the rules referred to above will typically fall back on the treaty, only to the extent that its meaning can be considered clear. As long as this is the case, determining the contents of this means of interpretation will not really be a point of dispute.

Invoking Rules nos. 19 and 20, appliers would have to be prepared to identify a state of affairs as a circumstance of the interpreted treaty's conclusion.[32] For the purpose of Rules nos. 19 and 20, a circumstance of a treaty's conclusion means a state of affairs, whose existence at least partially caused the conclusion of the interpreted treaty.[33] Obviously, in order for an applier to determine whether some certain state of affairs fits this description

or not, he has to make an assumption about the states of mind of the treaty parties at the time preceding the conclusion. By share necessity, such an assumption calls for value judgement.

Invoking Rules nos. 25 and 26, appliers once again draw on the existence of an element coming within the scope of application of VCLT Article 31 § 2 or § 3.[34] Consequently, for the very same reason as value judgments are required in the application of Rules nos. 6–14, such judgments will be required in the application of Rules nos. 25 and 26 as well.

2 ESTABLISHING RELATIONSHIPS ASSUMED IN THE RULES OF INTERPRETATION

Considering the way many rules of interpretation are constructed, their use will require the applier to make an assumption. In the case of the first-order rules of interpretation, the assumption concerns the relationship held between on the one hand the means of interpretation exploited, and on the other hand either the interpreted provision or the two possible ordinary meanings earlier established. In the case of the second-order rules of interpretation, the assumption concerns the relationship held between two conflicting interpretations. In both cases, the assumption will often insist on value judgment.

In some cases, value judgments are required because the assumption made concerns the meaning of some particular expression or provision contained in a treaty. To facilitate reference, I will refer to this as a type-B assumption. In principle, when appliers confer meaning on a treaty, they will have to be prepared to defend their understanding on the basis of the rules of interpretation laid down in VCLT Articles 31–33. As repeatedly stated, these rules are not capable of always offering sufficient justification for the understanding of a treaty. Hence, it cannot be excluded that partly a type-B assumption will have to be based on reasons beyond international law. In practice, however, it seems that an applier drawing on a type-B assumption will typically fall back on the meaning of a treaty only to the extent that it can be considered clear. As long as this is the case, type-B assumptions will not be a point of dispute. In other cases, value judgments are required because the assumption made concerns matters that fall entirely outside the scope of VCLT Articles 31–33. Since, obviously, the justification of such assumptions poses a greater problem for appliers, I will refer to them as type-A assumptions.

Recapitulating the contents of the various first- and second-order rules of interpretation laid down in international law, I will now put down in clear writing to what extent they insist on type-A and type-B assumptions being made.

Rule no. 2 invites appliers to compare the meanings of two words or phrases used in the interpreted treaty. Drawing upon the result of this comparison, they arrive at the conclusion that, considering the provision interpreted, in one of its two possible ordinary meanings, the usage of the word or phrase will be consistent, whereas in the other possible ordinary meaning it will not.[35] The conclusion turns on a type-B assumption about the meaning given in the treaty to the word or phrase that provides the basis for comparison relative to the two existing interpretation alternatives.

Rule no. 3 calls upon appliers to compare two norms contained in the interpreted treaty. Drawing upon the results of this comparison, they arrive at the conclusion that considered the provision interpreted, in one of its two possible ordinary meanings, the treaty will entail a logical contradiction, whereas in the other possible ordinary meaning it will not.[36] The conclusion turns on a type-B assumption about the contents and existence of the norm that provides the basis for comparison relative to the two existing interpretation alternatives.

Rule no. 4 invites appliers to compare the meaning of two expressions used in the interpreted treaty. Drawing upon the results of this comparison, they arrive at the conclusion that considered the provision interpreted, in one of its two possible ordinary meanings, the treaty will entail a pleonasm, whereas in the other possible ordinary meaning it will not.[37] The conclusion turns on a type-B assumption about the meaning given in the treaty to the expression that provides the basis for comparison relative to the two existing interpretation alternatives.

Rule no. 5 invites appliers to compare the meanings of two words or phrases used in the interpreted treaty. Drawing upon the result of this comparison, they arrive at the conclusion that, considering the provision interpreted, in one of its two possible ordinary meanings, the usage of the word or phrase will differ, whereas in the other possible ordinary meaning it will not.[38] The conclusion turns on a type-B assumption about the meaning given in the treaty to the word or phrase that provides the basis for comparison relative to the two existing interpretation alternatives.

Rule no. 6 calls upon appliers to compare two norms contained in the interpreted treaty. Drawing upon the results of this comparison, they arrive at the conclusion that considered the provision interpreted, in one of its two possible ordinary meanings, the treaty will entail a logical tautology, whereas in the other possible ordinary meaning it will not.[39] The conclusion turns on a type-B assumption about the contents and existence of the norm that provides the basis for comparison relative to the two existing interpretation alternatives.

Rules nos. 7–8 and 11–12 invite appliers to compare the contents of the interpreted treaty provision with the contents of an agreement. Drawing upon the results of this comparison, in the case of Rules nos. 7 and 11, they arrive at the conclusion that in one of its two possible ordinary meanings, the interpreted provision logically contradicts the agreement, whereas in the other possible ordinary meaning it does not.[40] In the case of Rules nos. 8 and 12, they arrive at the conclusion that in one of its two possible ordinary meanings, the interpreted provision expresses a norm, which is also contained in the agreement – so that one of them will appear superfluous – whereas in the other possible ordinary meaning the tautology does not occur.[41] The conclusion turns on an assumption about the contents of the agreement relative to the two existing interpretation alternatives. Depending on the form of the agreement – written or non-written – the assumption will either be of type B or type A.

Rules nos. 9 and 10 invite appliers to compare the contents of the interpreted treaty provision with the contents of an instrument made in connection with the conclusion of said treaty, one or more parties made an instrument, which was later accepted by the other parties as related to the treaty. Drawing upon the results of this comparison, in the case of Rule no. 9, they arrive at the conclusion that in one of its two possible ordinary meanings, the interpreted provision logically contradicts the instrument, whereas in the other possible ordinary meaning it does not.[42] In the case of Rule no. 10, they arrive at the conclusion that in one of its two possible ordinary meanings, the interpreted provision expresses a norm, which is also contained in the instrument – so that one of them will appear superfluous – whereas in the other possible ordinary meaning the tautology does not occur.[43] Depending on the kind of instrument – forming a treaty or not – the assumption will either be of type B or type A.

Rule no. 13 calls upon appliers to compare the contents of the interpreted treaty provision with the contents of an agreement developed between the treaty parties in the application of the treaty. Drawing upon the results of this comparison, they arrive at the conclusion that in one of its two possible ordinary meanings, the interpreted provision logically contradicts the agreement, whereas in the other possible ordinary meaning it does not.[44] The conclusion turns on a type-A assumption about the contents of the agreement relative to the two existing interpretation alternatives.

Rule no. 14 calls upon appliers to compare the contents of the interpreted treaty provision with the contents of a rule of international law. Drawing upon the results of this comparison, they arrive at the conclusion that in one of its two possible ordinary meanings, the interpreted provision logically contradicts the rule, whereas in the other possible ordinary meaning it does

not. The conclusion turns on an assumption about the contents of the rule that provides the basis for comparison relative to the two existing interpretation alternatives.[45] Depending on whether the rule is one contained in a treaty, or one belonging to the realm of customary international law or to the general principles, the assumption will either be of type B or type A.

Rule no. 15 invites appliers to compare the contents of the interpreted treaty provision with one of the treaty's *teloi*. Drawing upon the results of this comparison, they arrive at the conclusion that depending on in which of its two possible ordinary meanings the interpreted provision is applied, the *telos* will be realised to a greater or lesser extent.[46] The conclusion turns on a type-A assumption about the instrumental relationship held between the interpreted treaty provision and its *telos* relative to the two existing interpretation alternatives.

Rule no. 16 calls upon appliers to compare two norms contained in the interpreted treaty. Drawing upon the results of this comparison, they arrive at the conclusion that considered the interpreted provision, in one of its two possible ordinary meanings, the other norm will be emptied of all practical contents, whereas in the other possible ordinary meaning it will not.[47] The conclusion turns on a type-A assumption about the significance of the two possible meanings for the application of the norm that forms the basis of comparison in all future cases.

Rules nos. 17–26 invite appliers to compare the contents of the interpreted treaty provision with a concordance established using a supplementary means of interpretation, being either the *travaux préparatoires*, the circumstances of the interpreted treaty's conclusion, a ratification work, a treaty *in pari materia*, or an element belonging to the context as defined in VCLT Article 31 §§ 2–3. Drawing upon the results of this comparison, they arrive at the conclusion that depending on in which of several possible meanings the interpreted provision is applied, the provision will logically either be compatible with the concordance or not.[48] The conclusion turns on a type-A assumption about the significance of the supplementary means of interpretation as indicator of a concordance between the treaty parties relative to the meaning of the interpreted provision.

Rules nos. 27–29 invites appliers to compare the different effects that the two possible ordinary meanings will have for the extension of the interpreted treaty provision. Drawing upon the result of this comparison, they arrive at the conclusion that, that depending on in which of the two ordinary meanings the provision is applied, its extension will be greater or lesser.[49] The conclusion turns on a type-A assumption about the significance of the two possible ordinary meanings for the application of the interpreted treaty provision in all future cases.

Rule no. 30 calls upon appliers to compare the contents of the interpreted treaty provision with one of the treaty's *teloi*. Drawing upon the results of this comparison, they arrive at the conclusion that depending on whether a meaning is implicitly read into the provision or not, the *telos* will be either be realised to some extent, or not at all.[50] The conclusion turns on a type-A assumption about the instrumental relationship held between the interpreted treaty provision and its *telos* relative to the two existing interpretation alternatives.

Rule no. 31 calls upon appliers to compare the contents of the interpreted treaty provision with yet another norm contained in the interpreted treaty. Drawing upon the results of this comparison, they arrive at the conclusion that depending on whether a meaning is implicitly read into the interpreted treaty provision or not, the norm that provides the basis for comparison will either be emptied of all practical contents or not.[51] The conclusion turns on a type-A assumption about the significance of the two possible meanings for the application of this other norm in all future cases.

Rules nos. 32–37 invite appliers to compare two states of affairs (S_1 and S_2), the one of which (S_1) comes within the scope of application of the interpreted treaty provision. Drawing upon the results of this comparison, they arrive at the conclusion that depending on in which of the several possible meanings the interpreted provision is applied, the other state of affairs (S_2) will either come within its scope of application or not.[52] The conclusion turns on a type-B assumption about the meaning of the interpreted provision relative to the state of affairs that provides the basis for comparison (S_1).

Rule no. 39 calls upon appliers to compare two expressions (E_1 and E_2). Drawing upon the results of this comparison, they arrive at the conclusion that depending on in which of several possible meanings the interpreted provision is applied, all referents of the one expression (E_1) will either be limited to the generically defined class referred to by the other expression (E_2), or not.[53] The conclusion turns on a type-B assumption about the meaning given in the treaty to this latter expression (E_2) relative to the possible meaning given to the former expression (E_1).

Rule no. 40 invites appliers to compare the different results obtained by interpreting a treaty provision applying two first-order rules of interpretation. Drawing upon the results of this comparison, they arrive at the conclusion that the communicative assumption underlying the application of the former rule is significantly weaker than the communicative assumption underlying the application of the latter.[54] The conclusion turns on a type-A assumption about the relative weight of the two communicative assumptions.

3 RESOLVING CONFLICTS OCCURRING IN THE APPLICATION OF THE FIRST-ORDER RULES OF INTERPRETATION

Invoking the first-order rules of interpretation laid down in international law, appliers will often be left with conflicting results. One way or another, such conflicts need to be resolved. Of course, the natural way for the applier to proceed would be to exhaust the possibilities offered in international law, drawing on some possible second-order rule of interpretation. As noted in the above Chapter 10, Rules nos. 40 and 41 will resolve the conflict where two first-order rules of interpretation are involved, the one belonging to the group ranging from no. 1 to no. 16, the other to the group ranging from no. 17 to no. 39. Rule no. 42 will resolve the conflict where two first-order rules of interpretation are involved, the one being rule no. 1, the other belonging to the group ranging from no. 2 to no. 16. The problem is that by invoking Rules nos. 40–42, appliers will not be able to resolve all possible conflicts occurring in the application of the various first-order rules of interpretation. So will they not be able to resolve conflicts occurring between any two rules in the group ranging from no. 2 to no. 16; and the same applies to conflicts occurring between any two rules in the group ranging from no. 17 to no. 39. Faced with such a situation, having no second-order rule of interpretation to resolve the conflict confronted, appliers will have to decide themselves which alternative is the weightier. Value judgments will then be called for.

To make the picture complete, it should be observed that invoking the second-order rules of interpretation laid down in international law, neither will appliers be able to resolve a conflict where only one first-order rule of interpretation is involved. Due to the construction of some first-order rules of interpretation, single rules may sometimes be invoked in support of two conflicting results. The obvious example would be Rule no. 1. When conventional language is ambiguous, applying Rule no. 1 may lead to conflicting results depending on the specific meaning drawn upon. The same applies to other rules of interpretation, as for instance Rule no. 15 – considering that more than *telos* may be conferred on a treaty, and considering that the use of different *teloi* may sometimes lead to different interpretation results.

Some such conflicts are less of a problem. This is because the one application of the rule nullifies the justificatory force of the other application, and vice versa.[55] One good example of this would be Rule no. 2:

> If it can be shown that the interpretation of a treaty provision in accordance with interpretation rule no. 1 leads to conflicting results, and that not only in the provision interpreted, but also in some other part of the text of said treaty, a word or phrase is included, the usage of which in one of the two possible ordinary meanings can be considered consistent, while in the other it cannot, then the former meaning shall be adopted.[56]