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Commentary on the 1969 Vienna Convention on the Law of Treaties

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Section 3. Interpretation of Treaties

Article 31
General rule of interpretation

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 and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

* * *

Article 31 Règle générale d'interprétation

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

2. Aux fins de l'interprétation d'un traité, le contexte comprend, outre le texte, préambule et annexes inclus:

a) tout accord ayant rapport au traité et qui est intervenu entre toutes les parties à l'occasion de la conclusion du traité;

b) tout instrument établi par une ou plusieurs parties à l'occasion de la conclusion du traité et accepté par les autres parties en tant qu'instrument ayant rapport au traité.

3. Il sera tenu compte, en même temps que du contexte:

a) de tout accord ultérieur intervenu entre les parties au sujet de l'interprétation du traité ou de l'application de ses dispositions;

b) de toute pratique ultérieurement suivie dans l'application du traité par laquelle est établi l'accord des parties à l'égard de l'interprétation du traité;

c) de toute règle pertinente de droit international applicable dans les relations entre les parties.

4. Un terme sera entendu dans un sens particulier s'il est établi que telle était l'intention des parties.

* * *

Artikel 31 Allgemeine Auslegungsregel

1. Ein Vertrag ist nach Treu und Glauben in Übereinstimmung mit der gewöhnlichen, seinen Bestimmungen in ihrem Zusammenhang zukommenden Bedeutung und im Lichte seines Zieles und Zweckes auszulegen.

2. Für die Auslegung eines Vertrags bedeutet der Zusammenhang ausser dem Vertragswortlaut samt Präambel und Anlagen:

a) jede sich auf den Vertrag beziehende Übereinkunft, die zwischen allen Vertragsparteien anlässlich des Vertragsabschlusses getroffen wurde;

b) jede Urkunde, die von einer oder mehreren Vertragsparteien anlässlich des Vertragsabschlusses abgefasst und von den anderen Vertragsparteien als eine sich auf den Vertrag beziehende Urkunde angenommen wurde.

3. Ausser dem Zusammenhang sind in gleicher Weise zu berücksichtigen:

a) jede spätere Übereinkunft zwischen den Vertragsparteien über die Auslegung des Vertrags oder die Anwendung seiner Bestimmungen;

b) jede spätere Übung bei der Anwendung des Vertrags, aus der die Übereinstimmung der Vertragsparteien über seine Auslegung hervorgeht;

c) jeder in den Beziehungen zwischen den Vertragsparteien anwendbarer einschlägiger Völkerrechtssatz.

4. Eine besondere Bedeutung ist einem Ausdruck beizulegen, wenn feststeht, dass die Vertragsparteien dies beabsichtigt haben.

* * *

ILC Draft 1966

Article 27—General rule of interpretation

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 and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

   (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

   (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account together, with the context:

   (a) any subsequent agreement between the parties regarding the interpretation of the treaty;

   (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

   (c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

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Materials:

Waldock Report III: Articles 56, 70, 71 and 72.
Minutes: YBILC 1964 I 33 ff, 275 ff, 308 ff, 340 f.
ILC Draft 1964: Articles 69, 70 and 71.

Waldock Report VI: Articles 69 and 70.
Minutes: YBILC 1966 I/2 183 ff, 267 ff, 328 ff, 346 ff.
ILC Draft 1966: Article 27.
Minutes: OR 1968 CoW 166 ff, 441 f; OR 1969 Plenary 57 f.

Vienna Conference Vote: 97:0:0

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A. Background

1. Introduction

Five methods have traditionally played a role in the theory of interpretation: (*i*) the subjective or historical method, of which Sir Hersch Lauterpacht was a prominent exponent,[1] seeks to identify, when interpreting a treaty, the "real" intentions of the drafters and, consequently, encourages recourse to the treaty's *travaux préparatoires*;[2] (*ii*) the latter have less significance for the textual or grammatical method. This method concentrates on the treaty text 1

[1] See, *e.g.*, H. Lauterpacht, Development of the Law of International Organization (1976) 26 ff, 116 ff; and his reports to the *Institut, inter alia*, in Annuaire IDI 43 (1950 I) 366 ff.
[2] *E.g.*, Guggenheim, Traité I 252; Sørensen, Sources 214.

which is, in Max Huber's words, "la seule et la plus récente expression de la volonté commune des parties";[3] (*iii*) the contextual or systematic method, reflected in the 1956 resolution of the *Institut,* appreciates the meaning of terms in their nearer and wider context;[4] (*iv*) the teleological or functional method was most clearly stated in Article 19, para. (a) of the 1935 Harvard Draft on the Law of Treaties.[5] It concentrates on the object and purpose of a treaty and will, if necessary, transgress the confines of the treaty text; (*v*) finally, the logical method favours rational techniques of reasoning and such abstract principles as *per analogiam, e contrario, contra proferentem, ejusdem generis* and *expressio unius est exclusio alterius*.[6]

2 Authors seldom adhere to single methods, and indeed, some have propounded combinations of various means of interpretation.[7] Others have denied altogether the existence or legal character of rules of interpretation.[8]

> The New Haven-approach has criticised textualism in interpretation "as a violation of the human dignity to choose freely".[9] This approach aims at elucidating, against the whole background of international relations, shared expectations that the parties to the relevant communication succeeded in creating in each other. Müller's *Vertrauensschutztheorie* seeks to protect legitimate expectations of parties arising out of their reasonable interpretation of the treaty text.[10]

3 Pre-1969 case-law supports an equally wide variety of approaches to interpretation.[11] The World Court, at times, permitted recourse to the *travaux préparatoires*, but did not usually follow the subjective approach.[12] The

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[3] Annuaire IDI 44 (1952 I) 199; Rousseau, Droit international public I 269.
[4] Annuaire IDI 46 (1956) 317 ff, 364 ff; and YBILC 1964 II 55; McNair, Law of Treaties 365.
[5] AJIL 29 (1935) Supplement 937 ff.
[6] Waldock Report III, YBILC 1964 II 54, para. 5.
[7] For instance, Schwarzenberger, International Law I 491 ff, mentions seven techniques.
[8] J.Stone, Fictional Elements in Treaty Interpretation, Sydney LR 1 (1955) 344 ff.
[9] M.S. McDougal/H.D. Lasswell/J.C. Miller, The Interpretation of Agreements and World Public Order. Principles of Content and Procedure (1967), *xvii*, *xix*, 44, 111, and *passim*; see also R. Falk, On Treaty Interpretation and the New Haven Approach, Virginia JIL 8 (1968) 323 ff; critically G. Fitzmaurice, *Vae victis* or Woe to the Negotiators! Your Treaty or our "Interpretation" of it? AJIL 65 (1971) 358 ff.
[10] Vertrauensschutz 134 ff, and *passim*.
[11] Waldock Report III, YBILC 1964 II 54, paras. 5 ff.
[12] See, *inter alia*, the *Lotus Case*, PCIJ (1927) Series A no. 10, 16 ("there is no occasion to have regard to preparatory work if the text of a convention is sufficiently clear in itself"). *Per contra* its *Advisory Opinions* on the *Admission of a State to UN Membership*, ICJ Reports 1950 8 f; and in *Employment of Women during the Night*, PCIJ (1932) Series A/B no. 50, 378, and 380.

Court often adhered to the contextual method,[13] while emphasising the teleological approach in the interpretation of constitutions of international organisations.[14]

> Sir Gerald Fitzmaurice's study of the major principles of interpretation which the Court employed, qualified its approach to interpretation as being mainly contextual, since he established the following three primary principles of interpretation: (*i*) actuality (or textuality); (*ii*) the natural and ordinary meaning of a term; and (*iii*) integration. The principles of effectiveness (emphasising the treaty's object and purpose), subsequent practice, and contemporaneity were subject to the primary means and, hence, appeared to be of a supplementary nature.[15]

2. History

The ILC took up the subject at a relatively late stage in 1964. After a preliminary debate in which it acknowledged the legal quality of rules on interpretation and the desirability of their written formulation, Waldock Report III introduced draft articles Articles 70–72 which were clearly inspired by the 1957 articles on interpretation of the *Institut* (N. 1).[16] These provisions proceeded from the "primacy of the text" and granted a certain discretion in the choice of approach to interpretation. In the opinion of most Commission members in 1964, these rules found support in international law and embodied the contextual approach to interpretation.[17] Articles 69–71 of the ILC Draft 1964 contained the nucleus of the present Articles 31 and 32.[18] It was only at this stage that the "objects and purposes" and the "subsequent practice" came to constitute integral parts of the "General Rule".[19] In 1966 there was a consensus in the ILC that the ordinary meaning of terms was relevant, but constituted only the starting point of a wider inquiry. The discussion focused on the arrangement of means listed in the General Rule, 4

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[13] See its *Admission to UN Membership Advisory Opinion, ibid.* ("[i]f the relevant words in their natural and ordinary meaning make sense in their context, that is an end to the matter").

[14] See, typically, its *Advisory Opinions* on the *Judgment of the ILO Administrative Tribunal*, ICJ Reports 1956 98 ("the Court has relied on the wording of the texts in question as well as on their spirit, namely, the purpose for which they were adopted"); and, with regard to "implied powers", on *Reparation for Injuries*, ICJ Reports 1949 182.

[15] BYBIL 33 (1957) 203 ff, 211 f; also in YBILC 1964 II 55, para. 12; Thirlway, BYBIL 62 (1991) 15 ff.

[16] YBILC 1964 II 8 ff, 52 ff; *i.e.*, Article 70 on the General Rule; Article 71 on the Application of General Rules; Article 72 on the Effective Interpretation of the Terms; Article 56 on Intertemporal Law; and Article 73 on the Effects of a Later Customary Rule or a Later Agreement on Interpretation of a Treaty. The preliminary debate is reproduced at YBILC 1964 I 20 ff.

[17] YBILC 1964 I 275 ff.

[18] *Ibid.* 308 ff.

[19] The ILC Report 1964 is reproduced at YBILC 1964 II 199 ff.

and on questions of context and the special meaning of terms.[20] The ILC then adopted Articles 27 and 28 of the ILC Draft 1966.[21]

> These materials suggest three conclusions: (i) the ILC clearly acknowledged the legal quality of rules on interpretation;[22] (*ii*) the ILC found substantial support in case-law for some means of interpretation;[23] (*iii*) the ILC materials indicate considerable uncertainty on the part of the ILC, at least originally, on other means such as the position and function of subsequent practice; the treaty's object and purpose; and the equal value and interrelation of all the means of the General Rule; this would indicate the originally innovative nature of these means.

5 At the 1968 Vienna Conference the *US* delegation tabled an amendment suggesting eight "relevant factors" to be considered in the interpretation of treaty terms.[24] McDougal of the delegation directed trenchant criticism towards the alleged textuality of Articles 27 and 28 of the ILC Draft 1966 which in his view "would prove totally unworkable",[25] whereas the US amendment would restore a well established process of interpretation, permitting recourse to factors extrinsic to the treaty text. The amendment was rejected by 66 votes to eight with ten abstentions.[26] In 1969 the Conference adopted today's Articles 31 and 32 (which had remained unchanged in Vienna), respectively, with 97 votes to none, and 101 votes to none.[27]

> Of the 38 delegations which commented on ILC Draft Articles 27 and 28, 31 favoured these articles, and seven criticised them. Most delegations endorsed the legal quality of rules of interpretation, their remarks concentrating principally on the merits of various approaches to interpretation. Seven delegations deemed the articles to reflect international law, five regarded them as being new. Seven delegations concurred with the ILC that Article 27 established a parity of all means of interpretation, whereas 19 delegations viewed the article as entrenching the classical textual approach. Similar patterns can be detected with regard to Article 28 where eight delegations supported

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[20] YBILC 1966 I/2 183 ff, 267 ff, 328 f, and 346 f.

[21] *Ibid*. 270; Article 27 was adopted by 16 votes to none; Article 28 by 15 votes to none. The articles are reproduced at YBILC 1966 II 217 ff.

[22] *E.g.*, the statement by Verdross in the ILC, YBILC 1964 I 21, para. 15.

[23] *E.g.*, Waldock in the ILC, YBILC 1966 I/2 206, para. 38; Waldock Report VI, YBILC 1966 II 95, para. 5.

[24] Reproduced in OR Documents 149 f. Altogether 15 States submitted amendments, *ibid*.

[25] OR 1968 CoW 167, para. 44, and *ibid.* paras. 38 ff. But see the statement by the *UK* delegation in Vienna, *ibid.* 178, para. 10, for whom the *US* text "actually placed primary emphasis on the text of the treaty" (see N. 41 *i.f.*).

[26] *Ibid.* 185, para. 75.

[27] OR 1969 Plenary 57 f. See the statement by the Chairman of the Vienna Conference, Ago, *ibid*. 59, para. 7 ("the Conference had successfully disposed of the most controversial and difficult subject in the whole field of the law of treaties").

the ILC's intention to admit liberal recourse to the "supplementary means", whereas for 15 delegations the use of these means was restricted.[28]

On the whole, it is significant that in Vienna no State proposed the deletion of the ILC Draft articles on interpretation. In fact, a substantial majority of States endorsed the ILC Draft articles, though it may be noted that claims emphasising the declaratory nature of these rules were balanced by statements that the rules were innovatory. Opinions of States on the content of the respective rules were equally divided. It is thus doubtful whether the unanimity of vote in Vienna sufficed *per se* to corroborate a *communis opinio juris* upon the respective articles.

B. Interpretation of Article 31

1. Good Faith (Para. 1)

Article 31 gives pride of place in its opening sentence in para. 1 to **good faith** (*bona fides*) which is "one of the basic principles governing the creation and performance of legal obligations".[29] The notion is also referred to in the *third* preambular para. (*Preamble*, N. 10) and in *Article 26* on *pacta sunt servanda* (*q.v.*, N. 5, 8). The crucial link is thus established between the interpretation of a treaty and its performance.[30] However, good faith as such has no normative quality (*Article 26*, N. 5).[31] 6

When interpreting a treaty, good faith raises at the outset the presumption that the treaty terms were intended to mean something, rather than nothing.[32] Furthermore, good faith requires the parties to a treaty to act honestly, fairly and reasonably, and to refrain from taking unfair advantage.[33] Legitimate 7

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[28] See on this section Villiger, Customary International Law N. 482. The minutes are reproduced at OR 1968 CoW 166 ff, and 441 f; and OR 1969 Plenary 57 f.

[29] *Nuclear Tests Cases*, ICJ Reports 1974 268, para. 46.

[30] See the ILC Report 1966, YBILC 1966 II 221, para. 12.

[31] See the *UK* Government's Memorandum of 31 May 1990 in the *US/UK Arbitration Concerning Heathrow Airport User Charges,* BYBIL 63 (1992) 707 f ("[g]ood faith is not . . . an independent legal principle so much as a standard against which the conduct of a subject of the law can be measured . . . [T]he concept of good faith, as a general principle of law, has only marginal value as an autonomous source of rights and duties"); the *Border and Transborder Armed Actions (Nicaragua/Honduras) Case*, ICJ Reports 1988 105, para. 94; see also the 1981 *Interpretation of the Algerian Declarations of 19 January 1981* by the *Iran-US* Claims Tribunal, ILR 62 (1982) 605 f ("good faith is not only a rule of morality but a part of codified international law").

[32] See the Minority Opinion in the *Iran-US Claims Arbitration* (1981), ILR 62 (1982) 603; Jacobs, ICLQ 18 (1969) 333.

[33] See the 1981 *Interpretation of the Algerian Declarations of 19 January 1981* by the *Iran-US* Claims Tribunal, ILR 62 (1982) 605 f ("spirit of honesty and respect for law"). See generally A. d'Amato, Good Faith, EPIL 2 (1995) 599 ff.

expectations raised in other parties shall be honoured (*Vertrauensschutz*).[34] A right which has been forfeited may no longer be claimed (*venire contra factum proprium*). The prohibition of the abuse of rights, flowing from good faith, prevents a party from evading its obligations and from exercising its rights in such a way as to cause injury to the other party.[35]

8 Article 31 envisages good faith as being at the centre of the application of the General Rule. The notion prevails throughout the process of interpretation.[36]

> Good faith prevents an excessively literal interpretation of a term by requiring consideration of its context (N. 9) and of other means of interpretation.[37] In particular, good faith implies consideration of the object and purpose of a treaty (N. 12). It plays a part in establishing the "acceptance" in subpara. 2(b) (N. 19) and in evaluating subsequent practice as in subpara. 3(b) (N. 22). Finally, good faith assists in determining recourse to the supplementary means of interpretation in *Article 32* (*q.v.*, N. 11).

2. Ordinary Meaning in Context (Para. 1)

9 According to Article 31, para.1, a treaty shall be determined **in accordance with the ordinary meaning**. The ordinary meaning is the starting point of the process of interpretation. This is its current and normal (regular, usual) meaning. A term may have a number of ordinary meanings, which may even change over time.[38] This relativist view of hermeneutics underlies Article 31 which in para. 1 requires the ordinary meaning **to be given** by the interpreter in good faith (N. 6–8) **to the terms of the treaty**.[39] In other words, that particular ordinary meaning will be established which is the common intention of the parties.[40] The relativity of the meaning of a term is confirmed by para. 4 which envisages the possibility of a "special" meaning going beyond the ordinary meaning of terms (N. 26–27).

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[34] Müller, Vertrauensschutz 128 "[good faith] fordert ein an objektiven Massstäben gegenseitiger Rücksichtnahme orientiertes Verhalten".

[35] See the *avis de droit* of the *Swiss* Federal Department of Foreign Affairs, SJIR 32 (1976) 79 ff, 82; the Swiss Federal Court, *ibid.* 28 (1972) 214.

[36] Yasseen, RC 151 (1976 III) 22 f.

[37] ILC Report 1966, YBILC 1966 II 211, para. 2; differently Zoller, Bonne foi 214, N. 231.

[38] This intertemporal aspect is essentially a matter of good faith, depending on the intentions of the parties; see Waldock Report VI, 1966 II 96, para. 7; 97, para. 13; *per contra* the 1980 *Young Loan Arbitration*, ILR 59 (1980) 530, para. 19; Yasseen, RC 151 (1976 III) 27, para. 7 (but see para. 9). It may have been the intention of the parties to "freeze" the meaning of the terms; see Thirlway, BYBIL 62 (1991) 57.

[39] Waldock Report VI, YBILC 1966 II 94, paras. 2 f.

[40] See the ILC Report 1966, YBILC 1966 II 220, para. 11.

The limits of this means of interpretation lie "in a meaning incompatible with the spirit, purpose and context of the clause or instrument in which the words are contained".[41]

Para. 1 envisages the ordinary meaning to be given to the terms of the treaty **in their context**. Treaty terms are not drafted in isolation, and their meaning can only be determined by considering the entire treaty text. The context will include the remaining terms of the sentence and of the paragraph; the entire article at issue; and the remainder of the treaty, *i.e.*, **its text, including its preamble** (*Preamble* N. 5) **and annexes** (*e.g.*, maps) and the other means mentioned in paras. 2 and 3.[42] The annexes to the Convention are listed in the *Final Act* (*q.v.*; see also *Article 85*, N. 1). Article 31 thus embodies the contextual or systematic means of interpretation which aims at avoiding inconsistencies of the individual term with its surroundings.[43] Reference to the context in para. 1 confirms the relativity of the ordinary meaning (N. 9).[44] 10

3. Object and Purpose (Para. 1)

Next, the ordinary meaning of a term of the treaty will be determined **in the light of its** (*i.e.*, the treaty's) **object and purpose**.[45] The terms are used as a combined whole[46] and include a treaty's aims, its nature and its end. Indeed, a treaty may have many objects and purposes.[47] One of the objects and purposes will certainly be to maintain the balance of rights and obligations created by the treaty.[48] Article 31 thus also entrenches the teleological or functional approach.[49] It enables consideration of the different aims of particular types of treaties. 11

For instance, the intentions of the parties are often emphasised when interpreting bilateral, "contractual" treaties. By contrast, teleological interpretation has traditionally played a part in the interpretation of constitutions of international organisations (and

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[41] *South West Africa (Preliminary Objections) Cases*, ICJ Reports 1962 335 f; Jennings/Watts N. 632.

[42] Delbrück/Wolfrum III 642; for Bernhardt, ZaöRV 27 (1967) 498, reference to the "preamble and annexes" would not have been "absolutely necessary".

[43] Bleckmann, Völkerrecht N. 354.

[44] Emphatically the ILC Report 1966, YBILC 1966 II 221, para. 12: "the ordinary meaning of a term is not to be determined in the abstract but in the context of the treaty".

[45] See on the topic Crnic-Grotic, Asian YBIL 7 (1997) 155 ff; Buffard/Zemanek, Austrian RIEL 3 (1998) 311 ff, 322 ff; Linderfalk, Nordic JIL 72 (2003) 429 ff; J. Klabbers, Some Problems Regarding the Object and Purpose of Treaties, Finnish YBIL 8 (1997) 138 ff.

[46] Yasseen, RC 151 (1976 III) 57; Linderfalk, *ibid.* 433 ("perfectly synonymous"); Carreau, Droit international public N. 363 ("difficile à préciser").

[47] See the statement by Tsuruoka in the ILC 1966, YBILC 1966 I 326, para. 91 ("both singular and plural had the same meaning").

[48] Treviranus, GYBIL 25 (1982) 520.

[49] O'Connell, International Law I 255.

their implied powers) and other multilateral, "legislative" conventions.[50] The object and purpose also plays a particular part in the interpretation of human rights treaties.[51]

12 Consideration of a treaty's object and purpose together with good faith will ensure the effectiveness of its terms (*ut res magis valeat quam pereat,* the *effet utile*).

As the ILC Report 1966 expounded: "[w]hen a treaty is open to two interpretations one of which does and the other does not enable the treaty to have appropriate effects, good faith and the objects and purposes of the treaty demand that the former interpretation should be adopted".[52]

13 Article 31 does not state where the object and purpose may be sought. Traditionally, the preamble (*Preamble*, N. 1–2) is resorted to, or a general clause at the beginning of the treaty. The structure of Article 31 as a General Rule leaves no doubt that all the elements of Article 31 as well as the supplementary means of interpretation in Article 32 contribute to this end.[53]

14 Interpretation in the light of a treaty's object and purpose finds its limits in the treaty text itself. One of the (originally many possible) ordinary meanings will eventually prevail. In other words, Article 31 avoids an extreme functional interpretation which may, in fact, lead to "legislation" or the revision of a treaty.[54]

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[50] *Nuclear Weapons Advisory Opinion*, ICJ Reports 1996 74 f, para. 18.

[51] See the case-law of the European Court of Human Rights cited in Villiger, Festschrift Ress 325 f; the Inter-American Human Rights Court in the 1987 *Velasquez Rodriguez (Preliminary Objection) Case*, ILR 95 (1994) 243 f, para. 30 ("[the Inter-American Human Rights] Convention must… be interpreted so as to give it its full meaning"); and in the 1984 *Costa Rica Naturalization Provisions Advisory Opinion*, ILR 79 (1989) 292, para. 24 ("the interpretation to be adopted may not lead to a result that weakens the system of protection established by the [Inter-American Human Rights Convention]").

[52] YBILC 1966 II 219, para. 6.

[53] In the *Sovereignty Over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia) Case*, the ICJ had recourse to the "very scheme" of the convention at issue, ICJ Reports 2002 652, para. 51. See Müller, Vertrauensschutz 130 f; similarly (but with emphasis on the text), Yasseen, RC 151 (1976 III) 57, para. 6; Bleckmann, Völkerrecht N. 362; the comment by Verdross in the ILC, YBILC 1966 1/2 186, para. 14. *Contra* McDougal, AJIL 61 (1967) 993 f.

[54] ILC Report 1966, YBILC 1966 II 219, para. 6, and 220, para. 11; the *Interpretation of Peace Treaties Advisory Opinion*, ICJ Reports 1950 229; also the statement in Vienna by Jiménez de Aréchaga of the *Uruguayan* delegation, OR 1968 CoW 170, para. 67; Yasseen, RC 151 (1976 III) 57, para. 4.

4. Authentic Interpretation (Para. 2 and Subparas. 3[a] and [b])

a) Scope

Article 31 lists additional means **for the purpose of the interpretation of a treaty** which are defined as part of the context (para. 2), or shall be taken into account together with the context (para. 3). These means of interpretation serve together with the means of para. 1 to establish the meaning of a particular treaty term. The means in paras. 2 and 3 can only be invoked if **all the parties** to the treaty have been involved in the interpretation of a particular meaning of a treaty term by means of an **agreement** (N. 18, 21); or if **one or more** of the **parties** have been involved by means of an **instrument** (N. 19) or **subsequent practice** (N. 22) to which the other parties have agreed. Article 31, paras. 2 and 3 thus envisage a uniform interpretation of the treaty by the parties and for the parties. 15

> The situation may arise that only some treaty parties *inter se* reach an agreement, or establish a practice. Neither paras. 2 and 3 nor other provisions of the Convention can exclude such agreements or such practice (*Article 41*, *q.v.*). On the other hand, the agreement or practice remains *res inter alios acta* for the other States which are not bound (*Article 34*, *q.v.*) as long as they do not expressly or tacitly agree thereto. However, an agreement or practice of States *inter se* may play a role under *Article 32* (*q.v.*, N. 5).

Para. 2 and subparas. 3(a) and (b) represent forms of authentic interpretation whereby all parties themselves agree on (or at least accept) the interpretation of treaty terms by means which are extrinsic to the treaty. As a result, the parties' authentic interpretation of the treaty terms is not only particularly reliable,[55] it is also endowed with binding force. It provides *ex hypothesi* the "correct" interpretation among the parties in that it determines which of the various ordinary meanings shall apply. It has been argued above that Article 31, para. 1 does not permit the interpreter to legislate or to revise the treaty (N. 14). Authentic interpretation presents a different situation, since the parties to the treaty are their own masters. Thus, the parties may by means of the instruments, agreements or practice mentioned in para. 2 and subparas. 3(a) and (b) not only give a special meaning to the term at issue (N. 26–27) but also amend, extend or delete a text. 16

b) Upon Conclusion of the Treaty (Para. 2)

The **agreement** or **instrument** mentioned in para. 2 as a means of interpretation will concern a subject-matter of the treaty (and in particular the treaty term to be interpreted) and are, or were, "germane" to the treaty,[56] *i.e.*, they 17

[55] Carreau, Droit international public N. 374 ("l'un des moyens les plus classiques et les plus sûrs pour déterminer le sens exact des dispositions d'un traité").

[56] Statements by Waldock in the ILC, YBILC 1964 I 313, para. 53; and by the *Australian* delegation in Vienna, OR 1968 CoW 169, para. 59, and 442, para. 30. These terms have

stand in some **connection with the conclusion** of the treaty (but need not necessarily have eventuated at the time of the conclusion of the treaty).[57] Statements at a diplomatic conference appear irrelevant in this context,[58] as it is then not clear whether the treaty will be concluded and which States will become parties.

18 Subpara. 2(a) mentions **any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty**. The agreement may, for instance, relate to the treaty's implementation or even have as its object the interpretation of certain treaty terms.[59] The agreement, implying a contract, may correspond with the notion of a "treaty" in *Article 2, subpara. 1(a)* (*q.v.*, N. 4–20), but the term "agreement" is clearly wider and covers any contractual instrument, in particular also agreements not in written form.[60]

19 Subpara. 2(b) refers as a further means of interpretation to **any instrument which was made by one or more parties in connection with the conclusion of the treaty**. The instrument will include agreements *inter se* between certain parties or unilateral statements, *e.g.*, interpretative declarations upon ratification or accession.[61] Final acts of a conference and explanatory reports would fall to be considered under subpara. 2(b), if prepared by governmental experts.[62] As a particular condition, the instrument must have been **accepted by the other parties as an instrument related to the treaty**. The other parties need at least to have acquiesced in the instrument.[63] (In the case of a contractual agreement, subpara. 2[a] applies, N. 18.) Whether or not the parties have acquiesced, will be determined, *inter alia*, in good faith (N. 6–8).

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been criticised as being unclear by Bernhardt, ZaRV 27 (1967) 498 f. Agreements made before the conclusion of the treaty are covered by Article 31, subpara. 3(c) (N. 24–25).

[57] Jennings/Watts N. 632.

[58] They may be relevant as State practice, Villiger, Manual N. 20 ff, or as *travaux préparatoires* (*Article 32*, N. 5), Bernhardt, GYBIL 42 (1999) 14.

[59] See the examples in Aust, Modern Treaty Law 236 ff.

[60] Statement by Waldock in the ILC, YBILC 1964 I 311, para. 23; Ago (Chairman), *ibid.* 287, para. 63; Yasseen, RC 151 (1976 III) 37, para. 13. *Per contra* the comments in Vienna by the delegations of *Kenya*, OR 1968 CoW 180, para. 30 ("only written documents"); *Sierra Leone*, *ibid.* 174, para. 29; and the *Federal Republic of Germany*, OR 1969 Plenary 57, para. 64; also Bernhardt, ZaöRV 27 (1967) 498 f.

[61] Sapienza, RGDIP 103 (1999) 601 ff.

[62] As opposed to reports of an independent drafting body, such as the ILC. See Aust, Modern Treaty Law 237 f.

[63] With reference to Article 31 para. 2, the *German* Federal Constitutional Court viewed, in the 1975 case concerning the Ostverträge with the USSR and Poland, as relevant Poland's passive conduct in relation to a declaration of the German Federal Foreign Minister, BVerfGE 40, 176.

The acceptance by the other parties is directed towards two points: (*i*) the content of the particular instrument (concerning the treaty term to be interpreted); and (*ii*) the particular instrument relates to the treaty.[64]

The *Declaration* appended to *Article 52* (*Article 52—Declaration*, N. 3), providing a "supplementary" interpretation of Article 52, serves as an example of an authentic means of interpretation according to subpara. 2(b).

c) After Conclusion of the Treaty (Subparas. 3[a] and [b])

The means of interpretation mentioned in subparas. 3(a) and (b) differ from para. 2 (N. 17–19) in that they originate after the conclusion of the treaty,[65] while equally concerning a subject-matter of the treaty. 20

Subpara. 3(a) mentions **any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions**.[66] 21

Subpara. 3(b) concerns **any subsequent practice in the application of the treaty**.[67] This provision resembles subpara. 2(b) (N. 19) in that it requires active practice of some parties to the treaty. The active practice should be consistent rather than haphazard and it should have occurred with a certain frequency.[68] However, the subsequent practice must **establish the agreement of the parties regarding its interpretation**. Thus, it will have been acquiesced in by the other parties; and no other party will have raised an objection.[69] 22

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[64] Waldock Report VI, YBILC 1966 II 98, para. 16, as to acquiescence; but see Bernhardt, ZaöRV 27 (1967) 498 f; the comments in the ILC by Castren, YBILC 1966 I/2 189, para. 54; and Rosenne, YBILC 1964 I 313, para. 52.

[65] See the ILC Report 1966, YBILC 1966 II 221, para. 14. As to the written form, see the comments in Vienna by the *Federal Republic of Germany*, OR 1969 Plenary 57, paras. 64 f; *Sierra Leone*, OR 1968 CoW 174, para. 29; also Yasseen, RC 151 (1976 III) 45, para. 5.

[66] See N. 18 as to the term "agreement"; Aust, Modern Treaty Law 191 f ("[p]rovided the purpose is clear, the agreement can take varius forms, including a decision adopted by a meeting of the parties", *footnotes omitted*).

[67] The application of a treaty always presupposes its interpretation. See Distefano, AFDI 40 (1994) 41 ff; Karl, Vertrag 188 ff. Aust, *ibid*. 242 f, refers to the well known example of subsequent practice in respect of Article 27, para. 3 of the UN Charter; R. Kolb, La modification d'un traité par la pratique subséquente des parties. Note sur l'affaire relative au régime fiscal des pensions versées aux fonctionnaires retraités de l'UNESCO résidant en France; sentence du 14 janvier 2003, Revue Suisse 14 (2004) 9 ff.

[68] See the statement in Vienna by the delegation of *Argentina*, OR 1968 CoW 180, para. 23; Waldock Report III, YBILC 1964 II 59, para. 24; the *avis de droit* of the *Swiss* Federal Department for Foreign Affairs, SJIR 38 (1982) 86, according to which two *règlements* of the WHO were insufficient in this respect. On the subject also J.-P. Cot, La conduite subséquente des parties à un traité, RGDIP 70 (1966) 632 ff.

[69] Emphatically Waldock Report VI, YBILC 1966 II 99, para. 18; the ILC Report 1966, *ibid*. 222, para. 15; the observation by the *US* Government to the ILC, *ibid*. 359. See the 1977 *Beagle Channel Arbitration*, ILR 52 (1979) 224, para. 172, and 169; the 1980 *Young Loan Arbitration*, *ibid*. 59 (1980) 541, para. 31 ("tacit subsequent understanding"); the

(If these conditions are not met, such practice may still serve as a supplementary means of interpretation according to *Article 32*, *q.v.*).[70]

> This means of interpretation is well established in the practice of the Court. The latter employed the subsequent practice of the parties as a means of interpretation in the *Nulear Weapons Advisory Opinion*; and in the *Kasikili/Sedudu Island (Botswana/Namibia) Case*.[71]

23 Authentic interpretation in subpara. 3(b) is of a dynamic nature in that it may alter the original ordinary meaning of a term by both contractual and customary means: (*i*) subsequent practice may modify a treaty provision contractually *qua* authoritative interpretation (*Article 39*, N. 14). The ILC foresaw that there was no preconceived delimitation between the old and the new rule;[72] and (*ii*) parties may in their practice gradually wander from interpretation (as in subpara. 3[b]) to customary modification of the treaty (*Issues of Customary International Law*, N. 30–33).

5. Other Rules of International Law (Subpara. 3[c])

24 Subpara. 3(c) envisages treaty interpretation against the whole background of international law. Thus, the meaning of a treaty term will correspond with **any relevant rules of international law applicable in the relations between the parties**. These rules need have no particular relationship with the treaty other than assisting in the interpretation of its terms. On the whole, they will provide a contemporary interpretation of the ordinary meaning of a term.[73]

> As the Court pointed out in its *Namibia Advisory Opinion* with regard to the concepts embodied in Article 22 of the League of Nations Covenant: "[m]indful as the Court is of the primary necessity of interpreting an instrument in accordance with the intentions of the parties at the time of its conclusion, the Court must take into consideration the changes which have occurred in the supervening half-century, and its interpretation cannot remain unaffected by the subsequent development of law, through the Charter

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1963 *Air Transport Arbitration* (*France/US*), *ibid.* 38 (1969) 249 f. This qualified passive conduct approximates to customary law, Müller, Vertrauensschutz 132.

[70] Torres Bernárdez, *Liber Amicorum* Seidl-Hohenveldern 726 f.

[71] Respectively, ICJ Reports 1996 75, para. 19, and 76, para. 22; and ICJ Reports 1999 1075, para. 48.

[72] Bernhardt, ZaöRV 27 (1967) 499. See the *German* Federal Constitutional Court in the 1994 *International Military Operations Case*, ILR 106 (1997) 338 f ("[i]n practice, international law is characterized by a fluid transition from treaty interpretation to treaty amendment… [I]n certain cases this practice can have the same effect on a treaty as a proper amendment"); see also the 1982 *Aminoil Arbitration*, ILM 21 (1982) 1023, paras. 97 ff.

[73] On the subject, see also the Report of the ILC Study Group on the Fragmentation of International Law, which includes a Section on Article 31, subpara. 3(c), YBILC 2006 II 413 ff, para. 251, subparas. (17) ff.

of the United Nations and by way of customary law. Moreover, an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation".[74]

The **rules of international law** are one of the means of interpretation of the General Rule in Article 31 (N. 29).[75] They correspond with the notion of the sources of international law as in Article 38 para. 1 of the ICJ-Statute.[76] Furthermore, they are **applicable in the relations between the parties**, *i.e.,* binding on all the parties to the treaty at issue.[77] The term **"applicable"** leaves no room for doubt: *non*-binding rules cannot be relied upon. The rules to be resorted to may be general, regional or local customary rules, as well as bilateral or multilateral treaties, and even general principles of international law.[78] It is assumed that in entering treaty obligations, the parties did not intend to act inconsistently with other previous obligations.[79] The applicable rules are those in force at the time of the interpretation of the treaty.[80] Furthermore, the rules will have to be **relevant**, *i.e.*, concern the subject-matter of the treaty term at issue.[81] In the case of customary rules, these may even be identical with, and run parallel to, the treaty rule. Non-identical customary rules on the same subject-matter may lead to a modification of the treaty term as a result of subsequent practice running counter to the treaty provision (N. 23).[82] 25

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[74] ICJ Reports 1971 31; see also Thirlway, BYBIL 62 (1991) 60 ff; the case-law cited in McLachlan, ICLQ 54 (2005) 293 ff.

[75] McLachlan, *ibid.* 290.

[76] Waldock Report VI, YBILC 1966 II 97, para. 10; Waldock in the ILC, YBILC 1964 I 310, para. 10; and 316, paras. 13 and 17; Verdross, YBILC 1966 I/2 91 f, para. 74 (*i.e.*, that the provision only envisaged customary law); Amado, *ibid*. 191, para. 80; Bartos, *ibid*. 192, para. 92 (apparently only *jus cogens*); Yasseen, *ibid*. 197, para. 52.

[77] See the position of the delegation of the *Federal Republic of Germany* in Vienna, OR 1969 CoW 172, para. 395. In the *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt Advisory Opinion*, ICJ Reports 1980 126, Judge Mosler considered in his sep. op. other agreements which shared with the WHO/Egypt Agreement of 1951 the same, or a similar, object and purpose.

[78] ILC Report 1964, YBILC 1964 II 202 f, para. 11 ("general rule"); statement by Castren in the ILC, YBILC 1966 I/2 188, para. 49; Yasseen, RC 151 (1976 III) 62 ff, 66 ff.

[79] McLachlan, ICLQ 54 (2005) 290; Jennings/Watts N. 632.

[80] The ILC deleted in 1966 the words "in force at the time of its conclusion" previously included in its 1964 Draft (N. 4) YBILC 1966 II 222, para. 167; see the Declaration by Judge Robinson in the 2000 *Prosecutor v. Furundzija Case* of the International Criminal Court for Former Yugoslavia, ILR 121 (2001) 360 f.

[81] See the *Mutual Assistance in Criminal Matters (Djibouti/France) Care*, ICJ Reports 2008 para. 112. See also the statements in the ILC by Tunkin, YBILC 1964 I 310; Waldock, *ibid*. para. 10; *versus* Reuter, YBILC 1966 I/2 195, para. 22; by the *German* delegation in Vienna, OR 1969 CoW 172, para. 10. In 1977, the *German* Federal Constitutional Court stated that, in doubt, a treaty text had to be interpreted in the light of the relevant rules and principles of international law, BVerfGE 46, 342 ff.

[82] See Villiger, Manual N. 302 ff.

In the *Oil Platforms (Iran/US) Case*, the Court was confronted with Article XX, subpara. 1(d) of the US/Iran Treaty of amity, economic relations and consular rights of 1955 which "[did] not preclude the application of measures . . . necessary to fulfill the obligations of a High Contracting Party for the maintenance or restoration of international peace and security". The *US* had maintained that in view of this provision it was unnecessary to examine issues of self-defence under general international law. The Court, on the other hand, considered with reference to subpara. 3(c) that it "[could not] accept that [Article XX] was intended to operate wholly independently of the relevant rules of international law on the use of force, so as to be capable of being successfully invoked, even in the limited context of a claim for a breach of the Treaty, in relation to an unlawful use of force".[83]

In the 2004 *Mamatkulov and Askarov v. Turkey Case*, the European Human Rights Court was confronted with the question whether *interim* measures issued under Rule 39 of its Rules of Procedure were endowed with binding force. For its affirmative reply it had recourse, *inter alia*, to subpara. 3(c) and, in this context, to such measures of other human rights instruments. The Court concluded: "the International Court of Justice, the Inter-American Court of Human Rights, the Human Rights Committee and the Committee against Torture of the United Nations, although operating under different treaty provisions to those of the Court, have confirmed in their reasoning in recent decisions that the preservation of the asserted rights of the parties in the face of the risk of irreparable damage represents an essential objective of interim measures in international law".[84] In fact, the European Court regarded these means of interpretation as subsidiary ("confirmed", as in *Article 32*, N. 8), rather than primary and mandatory as in Article 31 (N. 29).

6. Special Meanings (Para. 4)

26 Para. 4 provides that **a special meaning shall be given to a term if it is established that the parties so intended**. The **special meaning** goes beyond, and no longer corresponds with, the apparent ordinary meanings of the term (N. 9). Special meanings are often found in technical or historical contexts

[83] ICJ Reports 2003 182, para. 41. See the sep. op. of Judge Higgins, *ibid*. 237, para. 46, namely, that the context of the treaty at issue was "clearly that of an economic and commercial treaty" rather than one of self-defence under general international law; critically, Berman, Yale JIL 29 (2004) 320, and *passim*.

[84] ECHR—2004. On the European Court's case-law on subpara. 3(c) generally, see Villiger, Festschrift Ress 326 f. See also the 1983 *Esphahanian Claimant v. Bank Tejarat Case*, in which the Iran-US Claims Tribunal stated with reference to subpara. 3(c): "[t]here is a considerable body of law, precedents and legal literature, anlysed herein, which leads to the conclusion that the applicable rule of international law is that of dominant and effective nationality"; ILR 72 (1987) 483 f; in the 1986 *La Bretagne (Canada/France) Arbtiration*, the parties to the dispute invoked within the context of subpara. 3(c) the provisions of the UN Law of the Sea Convention of 1982, *ibid*. 82 (1990) 627, para. 429.

or in specialised treaties.[85] The catalogue of definitions in *Article 2* (*q.v.*, N. 1) provides an example of such special meanings.[86]

This provision does not *per se* provide for a burden of proof.[87] It merely recalls the autonomy of the parties according to which the parties may have intended a special meaning. The latter will be established in the same manner as the ordinary meaning.[88] (For these reasons, some ILC members even regarded para. 4 as redundant.)[89] It is likely that the required **intention** of the parties to employ a special term will transpire in good faith from one of the authentic means of interpretation in para. 2 or subparas. 3(a) and (b) (N. 15–23). 27

7. Manner of Employing Means of Interpretation

a) "General Rule of Interpretation"

Having examined the various means of interpretation in Article 31 (N. 6–27), their general position in the process of interpretation must now be considered. The text gives the following indications as to the manner in which they shall be employed. Its title speaks of the **general rule** of interpretation. Para. 1 states that "**a treaty shall be interpreted** . . . **in accordance with** . . . **and in the light of** . . .". According to para. 2, "**the context shall comprise** . . .". According to para. 3, "**there shall be taken into account together with the context** . . .". 28

It transpires from these formulations that the various means mentioned in Article 31 are all of equal value; none are of an inferior character.[90] As the singular in the heading "General Rule" indicates, all means will be considered in one and the same, single process of application. No one particular means mentioned in Article 31 dominates the others.[91] There is no hierarchy of 29

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[85] Possibly in human rights treaties. But see the criticism of Golsong, in Macdonald/Matscher/Petzold, 147 ff, 151, and *passim*, as regards the "exorbitant interpretation" given to the ordinary meaning of certain terms of the European Human Rights Convention; Bernhardt, ZaöRV 27 (1967) 500 f, who finds para. 4 "particularly disturbing".

[86] Delbrück/Wolfrum III 635.

[87] See the ILC Report 1966, YBILC 1966 II 222, para. 17; the *Western Sahara Advisory Opinion*, ICJ Reports 1975 44 f, para. 116.

[88] See the statement in Vienna by the Expert Consultant, Sir Humphrey Waldock, OR 1968 CoW 184, paras. 70 f; Bernhardt, ZaöRV 27 (1967) 493; *contra* the *Austrian* delegation, *ibid.* 178, para. 14; see also the joint diss. op. in the *Young Loan Arbitration*, ILR 59 (1980) 552, para. 2.

[89] Waldock in Vienna, *ibid.* para. 70.

[90] Jennings/Watts N. 632.

[91] ILC Report 1966, YBILC 1966 II 219 f, para. 8; 220, para. 9; Delbrück/Wolfrum III 640 ("unter sich nicht in einer festen Rangordnung").

rules in Article 31.[92] In particular, it does not entrench the "*in claris non fit interpretatio*" or textual method of interpretation.[93]

> This interpretation of Article 31 is confirmed by the ILC Report 1966 which stated: "[t]he application of the means of interpretation in the article would be a single combined operation. All the elements, as they were present in any given case, would be thrown into the crucible, and their interaction would give the legally relevant interpretation . . . [T]he article, when read as a whole, cannot properly be regarded as laying down a legal hierarchy of norms for the interpretation of treaties".[94]

30 In what order should the various means be considered for the process of interpretation? The ordinary meaning of a term serves as a natural starting point, since interpretation turns on the meaning and scope of written words (N. 9).[95] There follow on an equal level consideration of the context; the object and purpose; any authentic means of interpretation; and any relevant rules of international law. All means in Article 31 should be considered (N. 9–27). However, not every means will necessarily yield a result as to the interpretation of the treaty term.

> States parties to a treaty are free to agree in the treaty or subsequently to select only some of the means of interpretation mentioned in Articles 31 and 32 and/or to employ different means of interpretation (N. 35).

31 The order chosen in Article 31 among the various means appears to be that of logic, proceeding from the intrinsic to the extrinsic, from the immediate to the remote.[96] A majority of means in Article 31 are in fact extrinsic to the treaty text.

b) Practice

32 Practice of States and courts disclose different approaches as to the means of interpretation in Article 31.[97] As the list below indicates, only some instances of practice confirm the single process of application of all the means of the General Rule (N. 9–27). Other instances of State practice, and even the practice of the ICJ, are ambivalent. At times, the General Rule in Article 31 is reduced to its para. 1, or even to the ordinary meaning of a term, the other means being regarded as discretionary or supplementary.

> *International Court of Justice*. In the *Territorial Dispute (Libya/Chad) Case*, it held that "[according to Article 31] a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its

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[92] Jennings/Watts N. 632 and *ibid.* at n. 6.
[93] Torres Bernárdez, *Liber Amicorum* Seidl-Hohenveldern 733.
[94] ILC Report 1966, YBILC 1966 II. 219, para, 8; and 220, para. 9, respectively.
[95] *Ibid.* 220, para. 9.
[96] *Ibid*; see Aust, Modern Treaty Law 234 ("logical progression").
[97] Similarly. Torres Bernárdez, *Liber Amicorum* Seidl-Hohenveldern 721 ff.

object and purpose. Interpretation must be based above all upon the text of the treaty".[98] A similar statement can be found in the *Maritime Delimitation and Territorial Questions (Qatar v. Bahrain) (Jurisdiction and Admissibility) Case*.[99] In the *Nuclear Weapons Advisory Opinion*, the Court examined subsequent practice as in subpara. 3(b).[100] In the *Oil Platforms (Iran/US) (Preliminary Objections) Case*, the Court resorted again to para. 1: "a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose".[101] In the *Kasikili/Sedudu Island (Botswana/Namibia) Case*, the Court invoked paras. 1 and 2 and then examined subparas. 3(a) and (b).[102] But in the *Legality of Use of Force (Serbia and Montenegro/Belgium) (Preliminary Objections) Case*, the Court again considered that "interpretation must be based above all upon the text of the treaty".[103]

Other international courts.[104] The *European Human Rights Court* has consistently employed all means of interpretation in Articles 31 and 32.[105] Conversely, the *Inter-American Human Rights Court* has traditionally referred solely to the means of Article 31, para. 1.[106] Similarly, the Court of Arbitration in the 1977 *Beagle Channel Arbitration (Argentina v. Chile)* resorted "in the first place [to] an analysis of the text",[107] and the Arbitral Tribunal in the 1986 *La Bretagne (Canada/France) Arbitration* referred to the means in Article 31, para. 1.[108] In the 1985 *Maritime Delimitation (Guinea/Guinea-Bissau) Arbitral Award*, the Court of Arbitration found that "[the text] must be interpreted in good faith, with each word being given its ordinary meaning within the context and in the light of the object and purpose of the Convention".[109]

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[98] ICJ Reports 1994 21, para. 41. On the development of the Court's case-law on Article 31, see generally Torres Bernárdez, *ibid*. *passim*, for whom the Court's judgments indicate a development from a textually oriented interpretation to one of "unreserved recognition" of Articles 31 and 32.

[99] *Ibid*. 1995 18, para. 33.

[100] *Ibid*. 1996 75, para. 19.

[101] *Ibid*. 1996 812, para. 23.

[102] *Ibid*. 1999 1059 ff.

[103] *Ibid*. 2004 318, para. 100.

[104] See also the instances of judicial practice mentioned in Villiger, Customary International Law N. 501–505.

[105] Villiger, Festschrift Ress *passim*. See, *e.g.*, the 1975 *Golder v. UK judgment*, Series A, no. 18, para. 30, in which the European Court referred to the means of interpretation in Article 31 as constituting a "unity".

[106] See, *e.g.*, the 1984 *Costa Rica Naturalization Provisions Advisory Opinion*, ILR 79 (1989) 292, para. 22; the 1986 *Right to Reply Advisory Opinion*, *ibid*. 79 (1989) 342; the 1985 *Meaning of "Laws" Advisory Opinion*, *ibid*. 79 (1989) 329, para. 13; the 1987 *Velasquez Rodriguez (Preliminary Objections) Case*, *ibid*. 95 (1994) 243 f, para. 30; and the 1987 *Habeas Corpus in Emergency Situations Advisory Opinion*, *ibid*. 96 (1994) 396 f, para. 14.

[107] *Ibid*. 52 (1977) 127; see also Villiger, Customary International Law N. 503.

[108] ILR 82 (1990) 620, para. 37.

[109] ILR 77 (1988) 658, para. 46; see *ibid*. para. 57, the reference to paras. 2 and 3.

State practice is inconsistent.[110] Some examples—*e.g.*, courts of *Canada*[111]—seem to confirm a broad use of all means of interpretation in Article 31. Other examples—*e.g.*, practice from *Israel*,[112] *Italy*,[113] *Switzerland*,[114] the *UK*[115] and apparently also the *US*[116]—appear to indicate that courts rely mainly on para. 1 of Article 31.

33 The predominance of the treaty text is confirmed by the comparatively small number of cases on interpretation reported in the compilations of domestic practice.

Since every treaty application presupposes treaty interpretation, reported cases should actually be abundant. The fact that they are not suggests that, in most cases, courts view the treaty terms as "clear" and, in the light of the clear (*i.e.*, ordinary) meaning-rule, do not consider that the case in question calls for interpretation.

34 Three reasons appear to account for these developments:

(i) various approaches can be read into Articles 31 and 32 precisely because the ILC intended them to serve as a compromise to satisfy textualists, subjectivists and teleologists; *(ii)* the original Waldock Report III did indeed have a certain textual predisposition (N. 4); *(iii)* somewhat unfortunately, the forceful *US* campaign in Vienna led to this conclusion (N. 5): Because the US delegation criticised the alleged textuality of Articles 31 and 32, a *rejection* of the US amendment implied that the articles were textual (N. 5).

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[110] See Villiger, Customary International Law N. 484–498.

[111] See, *e.g.*, the 1990 *Hagermann v. US and Others Case*, Canadian Court of Appeal, ILR 92 (1993) 725; Emmanuelli/Slosar RJT 13 (1978) 69 ff ("le juge canadien . . . tient compte de la pratique des Etats qui a trait au texte interprété, conformément aux dispositions de l'art. 31 al. 2 et 3").

[112] See, *e.g.*, the 1988 judgment of the *Israel* Supreme Court, ILR 83 (1990) 131 f.

[113] See, *e.g.*, the 1987 judgment of the *Italian* Court of Cassation, *ibid*. 101 (1995) 377, 379.

[114] See, *e.g.*, the 1986 and 1997 judgments of the *Swiss* Federal Court, BGE 112 V 341, and 123 I 121, respectively. While the latter judgment refers to the means in subparas. 3(b) and (c), it qualifies them (only) as "d'importants moyens auxiliaries d'interprétation".

[115] See, *e.g.*, the statement of the Minister of State, Foreign and Commonwealth Office in Parliament, BYBIL 57 (1986) 559 f; the *UK* Government's Memorandum of 31 May 1990 in the *US/UK Arbitration Concerning Heathrow Airport User Charges,* BYBIL 63 (1992) 709, referred to the "object and purpose of a treaty [as] a secondary or ancillary process in the application of the general rule".

[116] See Bedermann, UCLALR 41 (1994) 972, for whom "[t]here is greater conflict today than ever before between U.S. practice and more international approaches to treaty interpretation"; see also *ibid*. 973: "resort to extrinsic evidence of the parties' intent . . . is meant to be only an exceptional occurrence".

C. Context

1. Relationship to Other Provisions

All other Convention provisions must be interpreted according to Article 31, including this provision itself (*Issues of Customary International Law* N. 26).[117] *Article 32* (*q.v.*) is part of the General Rule in that it provides for supplementary means of interpretation. *Article 33* concerns the interpretation of treaties authenticated in two or more languages. According to its para. 4 (*q.v.,* N. 11), resort may be had, *inter alia*, to Articles 31 and 32 when attempting to remove a difference of meanings of the different languages. 35

2. Matters Not Dealt With

Article 31 does not list all possible means of interpretation. In particular, the rational techniques of logical interpretation (N. 1) have not been included.[118] Furthermore, agreements and practice among a subgroup of parties fall outside para. 2 and subparas. 3(a) and (b) (N. 17–23). These means may nevertheless play a part under *Article 32* (*q.v.,* N. 6). Finally, subpara. 3(b) (N. 23) must be distinguished from the modification of a treaty by subsequent practice, as originally envisaged by the ILC in Article 38 of its ILC Report 1966 (*Article 39*, N. 14). 36

3. Customary Basis of Article 31

In view of the unsettled pre-ILC situation, in particular the various methods of interpretation, a customary rule on interpretation could not have arisen before the ILC took up the matter (N. 4). The ILC, while attempting to "isolate and codify the basic rules of interpretation", reached consensus only at an advanced stage on the (hence originally innovative) structure of the General Rule in Article 31.[119] At the Vienna Conference, the provision was adopted unanimously (N. 5). Since 1969 there has been a growing conviction among States and courts[120] that Article 31 is declaratory of customary 37

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[117] Thus, Article 31 applies to all treaties within the meaning of *Article 2, subpara. 1(a)* (*q.v.*, N. 4–20), but not, for instance, to declarations of acceptance of the compulsory jurisdiction of the Court (Optional Clause) or only "analogously to the extent compatible with the *sui generis* character of the unilateral acceptance of the Court's jurisdiction", *Fisheries Jurisdiction* (*Spain/Canada) Case*, ICJ Reports 1998 453, para. 46.

[118] See the various means listed in Verdross/Simma N. 493 ff. For Bernhardt, ZaöRV 27 (1967) 495, the relationship between Article 31 and these maxims is unclear.

[119] YBILC 1966 II 219, para. 7.

[120] See, in addition to the references in Villiger, Customary International Law N. 484–506, the 1987 *Habeas Corpus in Emergency Situations Advisory Opinion* of the Inter-American Court of Human Rights, ILR 96 (1994) 3967 f, para. 14 ("rules of interpretation set out

law. The Court has been adamant in its view that Articles 31 and 32 reflect customary international law.[121] Authors differ in their views.[122]

38 It can be concluded that there is indeed emerging customary law on the means of interpretation in Article 31 which originated in Vienna in 1968/1969 on the basis of the 1966 ILC Draft articles. However, the picture is not sufficiently unequivocal, particularly since Article 31 leaves considerable flexibility to the interpreting agency.

39 A different conclusion may be drawn in respect of the customary nature of the structure of the General Rule. The ILC intended the General Rule as a "crucible" in which the text served as a starting point, and all means were of equal value and had to be equally employed (N. 28–31). In actual fact, States and courts have at times come to see in Article 31 a predominance of the text and a relatively subsidiary position of other means (N. 32–34). Hence, the important qualification is that the emerging customary rule does not appear to conform to the text of Article 31. If and when such a customary rule will have developed, there is even the possibility that it may actually have modified the original provision (*Issues of Customary International Law*, N. 26). Whatever customary rule emerges, it is doubtful that it will settle soon in view of the fact that the practice itself is, as yet, comparatively inconsistent.

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in the [Convention] may be deemed to state the relevant international law principles"); the *Australian* High Court in the *Commonwealth of Australia* et al. *v. Tasmania* et al. *Case* (Gibbs C.J.), *ibid*. 68 (1985) 304 ("[Articles 31 and 32] do no more than endorse or confirm the existing practice"); and the *Swiss* Federal Court, ATF 122 II 238, for whom Article 31 is codificatory. According to Gardiner, ICLQ 44 (1995) 620 ff, 622, *British* court practice accepts Articles 31 and 32 as customary. *Contra* Vandevelde, California JTL 21 (1988) 296 ("it is unclear that courts in practice really adhere to international law as codified in articles 31 and 32"):

[121] See, *e.g.*, the *Legality of Use of Force (Serbia and Montenegro/Belgium)(Preliminary Objections) Case*, ICJ Reports 2004 318, para. 100 ("customary international law, reflected in Article 31"); the *LaGrand (Germany/USA) Case*, ICJ Reports 2001 501, para. 99 ("customary international law . . . reflected in Article 31"); the *Kasikili/Sedudu Island (Botswana/Namibia) Case, ibid*. 1999 1059, para. 18 ("neither Botswana nor Nambia are parties to the [Convention], but . . . both of them consider that Article 31 . . . is applicable inasmuch as it reflects customary international law"); the 1991 *Arbitral Award of 31 July 1989 (Guinea-Bissau/Senegal) Case*, *ibid*. 1991 69 f, para. 48 ("Articles 31 and 32 . . . may in many respects be considered a codification of existing customary international law on the point").

[122] For instance, Köck, Vertragsinterpretation *passim*; Vitzthum, in: Vitzthum (ed.), Völkerrecht N. 123; Barile, RC 161 (1978 III) 86, and Ress, Berichte DGVR 23 (1982) 12 f, regard Article 31 as *customary*. Schwarzenberger, Virginia JIL 9 (1968) 8 ff, 19 para. 1, sees therein a departure from customary concepts; Yasseen, RC 151 (1976 III) 16, para. 24, sees progressive development in Article 31.

D. Appreciation

The ILC can be commended for its courage in devising norms on interpretation the codification of which remains unknown even to many domestic legal orders. Articles 31 and 32 lie at the center of the Convention; arguably, they are its most important provisions. Thanks to Articles 31 and 32, "the doctrinal discussion on the utility and even the existence of rules of international law governing the interpretation of treaties is now a thing of the past".[123] Article 31 transpires as a masterpiece of precise drafting,[124] combining the various important means of interpretation. States remain free to agree to employ other means of interpretation. The General Rule provides the interpreting agency with considerable flexibility, enabling it in particular to adapt the various means of interpretation to the type of treaty (bi- and multilateral treaties, human rights treaties, etc.).[125] This flexibility would nevertheless not appear to erode the legal certainty which *jus scriptum* is intended to provide. 40

> As Sinclair has aptly put it, "[Articles 31 and 32] reflect an attempt to assess the relative value and weight of the elements to describe the process of interpretation rather than to describe the process of interpretation itself".

Courts have only with difficulty accepted the various means in Articles 31 and 32 as constituting the mandatory rule of interpretation.[126] The interesting development, that States and courts may come to regard the General Rule as corresponding with Article 31, para. 1, or even Article 31 as embodying solely the textual approach (N. 32–34), goes back to the *US* delegation's forceful intervention in Vienna and can only be explained, as Briggs has noted, with an overly textual interpretation of Article 31 itself.[127] 41

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123 Torres Bernárdez, *Liber Amicorum* Seidl-Hohenveldern 721; *contra* and critical of the legal nature of such rules, Köck, ZöR 53 (1998) 217 ff.

124 See the *UK* Government's Memorandum of 31 May 1990 in the *US/UK Arbitration Concerning Heathrow Airport User Charges*, BYBIL 63 (1992) 707 ("lapidary formula"). For a different line of argument, see Kearney/Dalton, AJIL 64 (1970)520 ("[t]he adoption by the [Vienna] Conference of [Articles 31 and 32] which the [US] viewed as somewhat archaic and unduly rigid does not seriously weaken the value of the convention").

125 McLachlan, ICLQ 54 (2005) 291.

126 On the ICJ, see Torres Bernárdez, *Liber Amicorum* Seidl-Hohenveldern 722 ("initial silence"). See Johnstone who in 1991 in a learned article on the interpretation of international treaties did not appear to refer to Articles 31 and 32, Michigan JIL 12 (1991) 371 ff.

127 AJIL 65 (1971) 709 f.