Interpretation and Implied (Tacit) Modification of Treaties

Comments on Arts. 27, 28, 29 and 38 of the ILC's 1966 Draft Articles on the Law of Treaties

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I

(1) There are many reasons in favour of a codification of international treaty law, but also some against. The prominent members of the International Law Commission have discussed all possible aspects for many years[1]), weighing them one against the other, as a result of which the majority of the member States of the United Nations seems to consider a codification to be appropriate. This decision should be respected. Moreover, the ILC has proved that a codification is possible by producing a detailed draft on treaty law. However, the question could and should be asked whether all sections of the draft are appropriate, not only in the details, but whether they can profitably become part of a codification at all. This question applies above all to the rules contained in the Commission's Draft on the interpretation of international treaties. The Commission has realized the existence of this question and answered it in the affirmative, but it must be briefly raised here once more.

Since Grotius[2]) and Vattel[3]) international law and international lawyers have made innumerable pronouncements on interpretation of trea-

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[1]) Any attempt at reproducing the numerous suggestions and comments of the members of the Commission must here be given up because of the mass of the Commission's work and material. This study must be confined to the final text, as completed by the Commission.

[2]) De iure belli ac pacis libri tres, Lib. II Cap. XVI.

[3]) Le droit des gens ou principes de la loi naturelle, 1758, Liv. II Chap. XVII.

ties[4]). The statements regarding the rules of interpretation in the various branches of internal law are even more numerous. Up to now no generally accepted views have developed, nor has there even been agreement on fundamentals. A preliminary, basic and still disputed question is whether, when considering the maxims and rules of interpretation, we are concerned with legal rules. Leading international lawyers have denied this[5]) and

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[4]) Most of the opinions can be found in my 1963 work on »Die Auslegung völkerrechtlicher Verträge insbesondere in der neueren Rechtsprechung internationaler Gerichte« (Beiträge zum ausländischen öffentlichen Recht und Völkerrecht, 40) p. 197 *et seq.* There are now the following more recent works, though this does not claim to be a complete list: V. D. Degan, L'interprétation des accords en droit international (1963); Alan H. Schechter, Interpretation of Ambiguous Documents by Administrative Tribunals (1964); Morse, Schools of Approach to the Interpretation of Treaties, The Catholic University of America Law Review, vol. 9 (1960), p. 36 *et seq.;* Moreira da Silva Cunha, A interpretação dos tratados na jurisprudencia e na doutrina, Revista da Faculdade de Direito da Universidade de Lisbõa, vol. 14 (1960), p. 85 *et seq.;* C. F. Ophüls, Über die Auslegung der Europäischen Gemeinschaftsverträge, in: Wirtschaft, Gesellschaft und Kultur, Festgabe für Alfred Müller-Armack (1961), p. 279 *et seq.*; Castanos, Les rapports de la volonté dans les traités-lois et les traités-contrats, Mélanges Séfériadès, vol. I (1961), p. 351 *et seq.*; J. F. McMahon, The Court of the European Communities: Judicial Interpretation and International Organization, BYBIL vol. 37 (1961), p. 320 *et seq.*; I. M. Sinclair, The Principles of Treaty Interpretation and their Application by the English Courts, ICLQ vol. 12 (1963), p. 508 *et seq.*; Shabtai Rosenne, Travaux préparatoires, ICLQ vol. 12 (1963), p. 1378 *et seq.*; Telchini, L'interpretazione di norme comunitarie et le giurisdizioni nazionali, Diritto Internazionale, vol. 17 (1963), p. 247 *et seq.*; Roger-Michel Chevallier, Methods and Reasoning of the European Court in its Interpretation of Community Law, Common Market Law Review, vol. 2 (1964), p. 21 *et seq.*; M. Mushkat, De quelques problèmes relatifs à l'interprétation de la Charte et aux transformations de structure des Nations Unies, Revue Hellénique de droit international, vol. 17 (1964), p. 240 *et seq.*; R. Monaco, Les principes d'interprétation suivis par la Cour de Justice des Communautés européennes, Mélanges offerts à Henri Rolin (1964), p. 217 *et seq.*; Ervin P. Hexner, Teleological Interpretation of Basic Instruments of Public International Organizations, in: Law, State and International Legal Order, Essays in Honor of Hans Kelsen (1964), p. 119 *et seq.*; Oscar Schachter, Interpretation of the Charter in the Political Organs of the United Nations, *ibid.*, p. 269 *et seq.;* Edward Gordon, The World Court and the Interpretation of Constitutive Treaties. Some Observations on the Development of an International Constitutional Law, AJIL vol. 59 (1965), p. 794 *et seq.*; Georges Berlia, Contribution à l'interprétation des traités, RdC vol. 114 (1965 I), p. 285 *et seq.*; V. D. Degan, Procédés d'interprétation tirés de la jurisprudence de la Cour de Justice des Communautés européennes, Revue trimestrielle de droit européen, vol. 2 (1966), p. 189 *et seq.*; Jean-Pierre Cot, La conduite subséquente des parties à un traité, Revue générale de droit international public, vol. 70 (1966), p. 632 *et seq.*; Shabtai Rosenne, Interpretation of Treaties in the Restatement and the International Law Commission's Draft Articles: A Comparison, The Columbia Journal of Transnational Law, vol. 5 (1966), p. 205 *et seq.*

[5]) Cf. especially Anzilotti, Lehrbuch des Völkerrechts, vol. 1 (German edition 1929), p. 82; Oppenheim-Lauterpacht, International Law, vol. 1 (8th ed. 1955), p. 950 *et seq.;* Kelsen, The Law of the United Nations (1950), p. XIV; Charles De Visscher, Problèmes d'interprétation (1963), pp. 18 *et seq.*, 51, 69 *et seq.*

ascribed the principles of interpretation to meta-juristic spheres, as it were, to the logic or "art" of intuitive perception[6]). This dispute over the position of the rules of interpretation in present-day international law could, however, only be a hindrance to their future codification if it were utterly impossible to fix the rules legally. But this must be disputed with the International Law Commission. It is in no way logically or practically excluded that the parties to a treaty and international judges should receive compulsory instruction from a codification as to which aspects they must give priority to in the interpretation of treaties, which they are to consider only subsidiary, and which they are not permitted to take into account. Such rules and regulations, if accepted in a valid agreement, would be genuine legal rules; although they do not contain direct norms for the conduct of the parties to the treaty, they are still compulsory aids for determining the obligations of the treaty and thereby legally ascertainable. A codification of the rules of interpretation does not therefore become meaningless, merely because they could not be legally conceived and formulated.

Another question which arises for all the provisions in the draft and which cannot be considered here at length, is how a conflict between a codification which has come into force and a later bilateral or multilateral treaty should be solved. The draft contains some express regulations providing that its rules are subordinate to a contrary agreement between the parties, but apart from this the following question must be raised: could and may the parties to a later treaty declare authoritative other maxims of interpretation than those contained in the code previously approved by them? This problem is connected with the question of the possibility and content of *ius cogens*[7]), but as above stated, it is principally outside the scope of this present article.

(2) Even if one considers the laying down of compulsory rules of interpretation to be legally possible, there is the further problem whether such an attempt would be expedient and useful[8]). Too inflexible rules could be a hindrance to the application and development of law, while too vague

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[6]) Cf. also the remark by Paul Reuter on June 15, 1966, in the ILC (A/CN. 4/SR. 870): «M. Reuter estime que l'on peut toujours hésiter à insérer dans le projet des dispositions concernant l'interprétation des traités, car l'interprétation est un art et non une science». See likewise the Commentary of the Commission on arts. 27 and 28 of the draft, UN-Doc. A/6309/Rev. 1 (AJIL vol. 61 [1967], p. 350).

[7]) Cf. on this art. 50 of the draft and the paper by Ulrich Scheuner, supra p. 520.

[8]) The ILC has, of course, seen this problem, cf. the remarks of the rapporteur Waldock to the American suggestion for interpretation that only "guide lines" should be laid down: UN-Doc. A/CN. 4/186/Add. 6, p. 8.

and elastic rules might be meaningless and easily manipulated. Is there any realistic middle ground? Is it possible at the present time to draw up rules which would give workable directions and assistance to the authority which has to interpret rules in the individual case without forcing it into a Procrustes' bed, making it impossible to do justice to the peculiarities of the specific case? This question can only be answered after a closer examination of the draft's provisions, but it should be kept constantly in mind during the work of codification. If there should only be the alternative between drawing up either too inflexible or too elastic rules, the whole project should be abandoned. Too inflexible rules are unacceptable in the interest of some legal developments. Too vague rules will not get rid of the current uncertainty in the field of treaty interpretation but will merely increase it.

(3) Is it either possible or wise to draw up uniform rules of interpretation for all categories of treaties? Do rules exist which are equally useful for a bilateral extradition treaty, a treaty establishing a customs union, a defense alliance, or the statutes of international world-wide organizations, especially the Charter of the United Nations? The final draft of the ILC contains such uniform rules of interpretation, authoritative for all treaties. In art. 4, there is merely a general reservation as regards the relationship of the codification of treaty law to the "constituent instruments of an international organization": "The application of the present articles to treaties which are constituent instruments of an international organization or are adopted within an international organization shall be subject to any relevant rule of the organization"[9]). According to this, special rules of interpretation which are laid down in the constituent instruments of an international organization would certainly take precedence over the codification of treaty law. This seems fair, for in this way the special aspects of every organization, as laid down in the constituent instruments, can best be taken into account. However, art. 4 goes even further and proclaims the precedence of all "relevant rules" of the organization. This terminology can include procedural regulations as well as *ad hoc* decisions by the organs of an international organization adopted by majority or unanimity vote. If this view supported by the text of art. 4 is correct, then the interpretation of "organization treaties" is only determined by the rules of the draft when the organs make no other decision themselves. This seems to be a doubtful solution, for the constituent instruments and the interpretation by objective criteria take precedence over the actions of their organs. Art. 4 of the draft is in my opinion not acceptable as far as it concerns the

[9]) The emphasis here and in the following pages is the author's.

rules of interpretation; on the contrary, only rules contained in the constituent instruments and not "any relevant rules" should take precedence. Apart from this, art. 27 of the draft should be supplemented so that a uniform and undisputed practice not only of the parties to a treaty, but also of an international organization would constitute an independent means of interpretation[10]).

Here also one can see that the relationship of the codification to discrepant provisions and maxims in the treaty concerned has by no means been satisfactorily clarified. This problem is treated in more detail in the paper by Volker Haak[11]). Here it seems appropriate to mention that the whole codification only takes on a meaning if it contributes to the certainty and clarity of the law. This is hardly the case when the rules of the codification contain vague reservations ("unless it is otherwise established", "otherwise agreed", "any relevant rules", etc.). It would be better in my opinion if only express regulations in individual treaties were to take precedence over the rules of the draft, in so far as the latter are not intended to be compulsory. Altogether this is a problem which is not limited to the rules of interpretation. However, for these rules the general reservation of art. 4 is problematical.

If, as suggested above, a special regulation for a particular category of treaties is provided at all in the framework of rules of interpretation, then one should not use so disputed and uncertain a term as "law-making treaties" or other similar phrases. It can only apply to the constituent instruments of international organizations, which instruments should be designated as such.

(4) One further basic question must first be answered. Should the various rules of interpretation be put together without any classification and order of precedence with the result that whoever is interpreting a treaty may select and apply freely those rules which he considers most suitable, or should an order of precedence be drawn up? The ILC has rightly decided in favour of the second alternative[12]). A codification of the rules of interpretation would only be useful if a certain degree of order were brought into the anarchy of the various points of view: A mere listing of the rules would in my opinion be unnecessary if not harmful.

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[10]) But against treating the later conduct of the parties and of international organs on an equal level, see recently Jean-Pierre, Cot, *op. cit.* above note 4, p. 635.

[11]) Cf. *supra* p. 540.

[12]) This is only true for the relationship of art. 27 to art. 28. The various rules of interpretation in art. 27, on the contrary, are considered by the Commission to be of equal rank among themselves, cf. the Commentary on arts. 27 and 28, para. 9 (AJIL vol. 61 [1967], p. 353).

To establish an order of precedence for the rules of interpretation presupposes, on the other hand, some clarity with regard to how the cardinal question of interpretation should be answered: Which has precedence, the text of the treaty or the ("real") intentions of the parties? The draft of the Commission, in agreement with the most prominent opinions of international courts[13]), has decided for the precedence of the text of the treaty, and one must agree with this. A codification of the rules of interpretation, if it is to be of any use, must draw up an order of precedence, and in the interests of legal certainty this order can only ascribe precedence to the text of the treaty as opposed to those uncertain and problematic intentions of the parties expressed outside the treaty. Any other solution would be unsatisfactory, and rather than choose it, one should forgo drafting provisions on this subject.

(5) A particularly difficult question in treaty interpretation, where a clear answer is scarcely possible, may be formulated as follows: Should the interpretation be based exclusively on the intentions of the parties and the circumstances at the time when the treaty was concluded? Or should the later development of international law as well as of social and actual realities be taken into account? Expressed more simply: static or dynamic interpretation? This alternative can be devided up into various sub-questions: Should the general meaning of an expression at the time when the treaty is concluded be authoritative[14]), or should one take account of a change in linguistic usage and the general understanding of an expression? Can the later conduct of the parties (perhaps also of international organizations and their organs) be considered only in so far as it throws light on the original intentions of the parties[15]), or should one observe later conduct in general? How far should changes in general international law since the conclusion of the treaty be taken into account? The draft does not show a clear and uniform attitude on these questions, but all the same, it permits a dynamic interpretation in certain provisions. In particular, the later conduct of the parties is recognized as a factor in interpretation without any limitations. In addition the clause requiring that general international law should be observed permits the taking into account of a later development in the law. On the other hand, the rules suggested by the ILC are based predominantly on the original intentions of the parties. Taken as a whole, the attitude of the draft is contradictory and perhaps unsatisfactory, but

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[13]) References are to be found in my work (p. 59 *et seq.*) mentioned above in note 4.

[14]) Thus the International Court of Justice: U.S. Nationals in Morocco, I.C.J. Reports 1952, pp. 176 (189).

[15]) Cf. P.C.I.J. Series B No. 12 (Frontier between Turkey and Iraq), p. 24.

an acceptable alternative can hardly be found. A legal community, such as the international one, which builds both now and in the past on the sovereignty and free powers of decision of its members and in which treaty obligations most often are only undertaken after careful examination, cannot in general leave treaty interpretation to the dynamic development of the international community; such a ruling would also undermine the fundamental maxim *pacta sunt servanda.* However, a careful consideration of the development of the international community, in so far as it can be found in the conduct of the parties and the norms of general international law, can and should be made. Thus, one can agree with the basic attitude of the draft.

II

(6) The above remarks already refer to the basic conceptions of the draft's regulations on interpretation of treaties; however, they should be studied and evaluated in greater detail. Part III section 3 of the draft contains in art. 27 the general and primary rules for interpretation of treaties, in art. 28 those only to be applied subsidiarily or as an aid ("supplementary means of interpretation"), and in art. 29 special regulations dealing with any divergence in the texts of treaties drawn up in more than one language. The basic distinction between primary and secondary rules of interpretation is, after what has already been said, to be approved, and the same is true for the drawing up of rules for the special problems of plurilingual treaties. There is therefore no objection to the basic conception of the draft – given that one approves the fixing of rules of interpretation at all. There remains the question whether the details are also satisfactory.

(7) Art. 27 section 1 contains the basic regulation:

> "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".

This basic rule in my opinion should be welcomed. It establishes the precedence of the treaty text over the intentions of the parties, at any rate in so far, as the latter have not been laid down in the text. This solution alone gives certainty and clarity to the law, and it conforms with the prevailing view in jurisprudence and legal theory. One can also approve of the appeal to *bona fides* (good faith) and the emphasis on the ordinary meaning of words as the authoritative criterion. (For determining the ordinary meaning of words, the linguistic use current at the time the treaty was made may be decisive, cf. *supra* no. (5)). One can, morever, have no objection to the connexion of "ordinary meaning" of the terms with the "context" and

the "object and purpose" of the treaty. The interpreter of a treaty, if he wishes to be true to his task, is always compelled to consider the wording of a single term in the context of the whole treaty and, thereby, take into account the object and purpose of the treaty, at any rate in so far, as they are laid down in the text. This is well expressed in art. 27 section 1.

Art. 27 section 2 is more problematical. In this regulation the meaning of "context" in the sense used in section 1 is defined and broadened. The express mention of the preamble and the annexes of a treaty as constituent parts of its text would not be absolutely necessary, but it does no harm and may prevent doubts. The same cannot be said for the other provisions of section 2. According to them, "any agreement" between all parties to the treaty in connexion with its conclusion should be observed in the same manner as "any instrument" of one or more parties which has been accepted by the other parties. What do "agreement" and "instrument" mean here? Is an oral agreement sufficient? Is a unilateral document which the other parties have not expressly contradicted enough? What does "in connexion with the conclusion of the treaty" mean?, etc. The aim of the authors of the draft is understandable and justified. Occasionally agreements are made in connexion with the conclusion of the treaty as to how a provision is to be understood, without this agreement itself being made part of the text[16]). To disregard such agreements would hardly be admissible because in that case the declared intentions of the parties would quite often be neglected. Nevertheless, in the interests of clarity and legal certainty a formulation with fewer unknown quantities should be attempted. In my opinion, it would be preferable to say that (only) written documents drawn up in connexion with the conclusion of the treaty should be considered, in so far as they show clearly the agreement of all parties regarding the meaning of the treaty. Suggested provision:

> The context shall comprise, in addition to the text of the treaty, including its preamble and annexes, any written document made in connexion with the conclusion of the treaty and accepted by all the parties.

(8) Art. 27, section 3 goes beyond the text of the treaty and demands under (a) and (b) that subsequent agreements of the parties concerning the interpretation of the treaty be considered the same as "any subsequent practice in the application of the treaty which establishes the understanding

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[16]) The best known – though disputed – example is perhaps the agreement of the Great Powers of June 7, 1945, on voting procedure in the Security Council, UNCIO Documents vol. 11, pp. 711–4.

of the parties regarding its interpretation"[17]). This demand brings a dynamic element into the interpretation of the treaty text, a fact which is principally to be welcomed. But in the details, the solution is only partially satisfying.

The main question must be again: what does "agreement" mean? A real treaty only not concluded in the same form perhaps as was the treaty which is to be interpreted? What characterizes such an agreement? Is a tacit, a concludent agreement sufficient? Is it a case of authentic interpretation? And what distinguishes the "subsequent practice in the application of the treaty which establishes the understanding of the parties regarding its interpretation" from a tacit agreement? And moreover, what is the difference between art. 27, section 3 on the one hand and art. 38 on the other? Art. 38 of the draft declares: "A treaty may be modified by subsequent practice in the application of the treaty establishing the agreement of the parties to modify its provisions".

One will probably have to depart from the fact that neither art. 27, section 3 nor art. 38 envisages a formal treaty; for formal subsequent treaties concluded by the original parties other rules of the draft are controlling, especially art. 26, section 3 and art. 56. Art. 27 and art. 38 can only mean concludent agreements and a practice, which have not found expression in a formal treaty. However, what distinguishes both these rules from one another, is not clearly evident from the draft. It is true and generally known that the limits between both an authentic interpretation and modification of a treaty are fluid. In my opinion, a plausible delimitation can only be found by determining whether or not the treaty text has been respected in later practice. Within the framework of art. 27 any action of the contracting parties after the conclusion of the treaty should be considered independent of its form (whether "agreement" or "subsequent practice") in so far as this is approved by all parties and the action is compatible with the treaty text to be interpreted. For a practice violating the text of the treaty, art. 38 would have to come into play. Proposition for art. 27, section 3:

> There shall be taken into account, together with the context, any subsequent agreement or practice compatible with the text of the treaty and accepted by all the parties.

The provision should, as already suggested above, be expanded further so that the practice of international organizations is expressly recognized

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[17]) Cf. now the detailed analysis of Jean-Pierre Cot, *op. cit.* above note 4 pp. 632–666.

as a factor in interpretation; compare the formulation at the end of this paper.

(9) Art. 27, section 3 declares under (c) that "any relevant rules of international law applicable in the relations between the parties" should be taken into account. Here a systematic objection must first be made. The same section declares earlier under (a) and (b) that the conduct of the parties after the conclusion of the treaty is relevant. These subsections have only a very loose relationship with subsection (c), according to which rules of international law should be taken into account in interpretation; these rules have a quite independent meaning, apart from and equivalent to practice. It seems to me better to lay down in a special section of the article that the rules of international law are to be taken into account as far as possible in interpretation. In addition to this, the relationship to art. 26 ("Application of successive treaties relating to the same subject-matter") and to art. 50 (*ius cogens*) is not clear. What does "any relevant rules of international law" mean? And why should only the rules of international law applicable in the relations between the parties to the treaty be considered? Is it not appropriate to interpret treaties, when in doubt, so that they also do not conflict with prior treaties which the parties have made with other States? If the parties clearly intend to disregard other treaty obligations, the dispute cannot be settled by means of interpretation. However, when a treaty can be interpreted so that it is consistent with the other obligations of one or more of the parties, this interpretation should take precedence in order to avoid conflicting treaty obligations. There is much to be said, in my opinion, for a rule of interpretation according to which other international obligations of one or more of the parties – whether from customary law or from prior treaties – should generally be taken into account in so far as they are consistent with the text of the treaty. On the other hand, where there is inconsistency, either art. 26 or art. 50 is applicable. Suggested provision:

> There shall also be taken into account any existing international obligations of one or more of the parties.

(10) Art. 27, section 4, contains a departure from the principle stated in section 1 that the ordinary meaning of terms should be applicable in interpretation: "A special meaning shall be given to a term if it is established that the parties so intended". Here, the vague formulation "if it is established" is particularly disturbing, as is also the reference to the intention of the parties without any explanation as to how this intention is to be recognized and determined. According to this formulation, and obviously also accord-

ing to the intentions of its authors, any aids to interpretation, including those mentioned in art. 28, can be used in order to establish a usage different from the ordinary meaning[18]). This is a dangerous provision; it can reverse the whole systematic order in arts. 27 and 28, and it can, in my opinion, produce the unacceptable result that the rules of interpretation are rendered useless. Even when a provision in a treaty seems completely clear according to the ordinary meaning of terms and in light of the context and purpose of the treaty, the rule of art. 27, section 4, as it now stands, makes it possible to demand another interpretation by appealing to the preparatory work, the circumstances accompanying the conclusion of the treaty, etc., because only that interpretation reflects the intentions of the parties to the treaty. One must seriously consider whether the suggested regulation does not jeopardize the whole structure of arts. 27 and 28. The desire to deviate from the ordinary meaning of terms for special reasons is quite understandable, and within limits justified, but in order to determine the meaning of a term which differs from ordinary usage the general rules of interpretation in art. 27 should be authoritative, *i. e.*, the special meaning must emerge from the context or from documents accompanying the conclusion of the treaty or also from the conduct of the parties. Suggested provision:

> A special meaning shall be given to a term if this is indicated by the application of the foregoing principles.

(10) To summarize: Art. 27 appears to be basically acceptable, but some clarifications are appropriate and possible. The basic rule in section 1 can and should stand. On the other hand, the possibility of consulting "instruments" which come into existence in connexion with the conclusion of the treaty, should be expressly limited to written documents approved by all parties. The taking into account of the conduct of the parties following the conclusion of the treaty should be provided for in section 3 but should be expressly limited to cases where the practice is consistent with the text of the treaty; any practice inconsistent with the text would come under art. 38. A provision should be added stating that the practice of international organizations should be taken into account in interpretation in so far as it is approved by the member States. – Apart from this, it should be provided that other international obligations of the parties, existing at the time the treaty is concluded, should be respected as far as possible in interpretation. – Finally, the possibility of attributing to the words of a treaty a meaning which departs from normal usage, should

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[18]) Cf. also UN-Doc. A/CN. 4/SR. 873 (June 20, 1966), pp. 9, 14.

be provided only, where this is required by the previously discussed rules of interpretation in the individual case.

III

(12) In the draft of the ILC the points to be taken only subsidiarily into account are clearly separated from the rules of interpretation previously dealt with (art. 28), and rightly so. The question arises once more whether the details of the suggested provisions are satisfactory. Here, there are two subquestions: Which "supplementary means" can be used? In which cases are they to be used?

(13) Art. 28 reads in part:

> "Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion . . .".

The formulation shows that the preparatory work and the circumstances of the conclusion of the treaty are certainly the most important, but not the only supplementary means in the interpretation of treaties. The draft does not say expressly what other means may be used. This might well be an implied reference to all other maxims of interpretation existing in international law practice and doctrine, for example, the principle of State sovereignty, perhaps also general maxims of legal technique, such as analogy or *argumentum e contrario*. No means are expressly excluded by the draft; emphasis is merely given to two means of interpretation, obviously of a special importance, the preparatory work and the accompanying circumstances. This "open" rule seems unsatisfactory, but I can see no reasonable alternative. On the one hand, it is scarcely appropriate in doubtful cases to permit the use of only a few means of interpretation, in this way preventing the use of all possible sources of information to remove the doubt. On the other hand, it is not possible to enumerate the supplementary rules of interpretation clearly and in full due to their great number and variety. In this situation much is to be said for the procedure taken by the Commission of stating the most important means, but not excluding others.

(14) According to the draft the supplementary means of interpretation may be used in three cases. First they may be used to add force to a result already reached by means of the "primary" rules of interpretation. This maxim is, in my opinion, neither necessary nor harmful. If the interpretation according to art. 27 leads to a clear result, it may still seem appropriate to emphasize this result in some other way and, thus, to increase the

authority of the verdict and the authority which has undertaken the interpretation. In the previous practice of international courts, this has at various times been done[19]), and therefore something can be said for expressly permitting the use of supplementary means of interpretation to confirm results already reached in conformity with art. 27.

The supplementary means are further to be used "to determine the meaning when the interpretation according to article 27: (a) leaves the meaning ambiguous or obscure...". Little can be added to this. This is actually the interesting and important case. If the primary rules of interpretation give no further help and do not lead to a clear conclusion, then there is no alternative other than to consult other sources of information and assistance. Of course, in the future as in the past there will be the danger that a party to a treaty, for whom the primary rules of interpretation – above all, a clear text – are disadvantageous in the concrete case, will appeal to obscurities in the text and in this way will attempt to have the supplementary means applied; art. 28 as formulated does not eliminate this danger. But this possibility of abuse must be tolerated, for supplementary sources of information have to be adduced when the treaty text is obscure, as is not infrequently the case.

The third case in which, according to the draft, recourse may be had to the supplementary means is "when the interpretation according to article 27: ... (b) leads to a result which is manifestly absurd or unreasonable". This is a formula as traditional[20]) as it is both theoretically and practically problematical. Manifestly absurd or unreasonable results will be very rare if the rules of interpretation in art. 27 are taken seriously and particularly if the context and purpose of a treaty are considered. Apart from this the abuse of such a formula is most likely to be caused by a party wishing to avoid the "clear" obligations of the treaty. However, there is much to be said for preserving the regulation. The case of an absurd and intolerable result cannot be excluded[21]) an provision should be made for it.

IV

(15) It remains to be asked whether the draft of the ILC shows any substantial gaps as regards the rules of interpretation. The question requires

[19]) Cf. Fitzmaurice, The Law and Procedure of the International Court of Justice 1951–4: Treaty Interpretation and Other Treaty Points, BYBIL vol. 33 (1957), pp. 203–293 (220).

[20]) Cf. as early as Grotius, De iure belli ac pacis, Lib. II Cap. XVI § 6; Vattel, Le droit des gens..., Liv. II Chap. XVII §§ 282 *et seq.*

[21]) Cf. South West Africa Cases (*Ethiopia* v. *South Africa; Liberia* v. *South Africa*), Preliminary Objections, Judgment of 21 December 1962: I.C.J. Reports 1962, pp. 319 (336).

a short comment. It is well known that the number of possible criteria in interpretation is legion, and they can certainly not all be mentioned and declared worthy of consideration. However, have any basically important rules been left out?

Among the prior maxims of interpretation, the principle of effectivity is missing, *i.e.*, the frequently declared proposition that provisions of a treaty should be interpreted so that they have the greatest possible effect (*ut res magis valeat quam pereat*). Parts of the maxim are contained in the requirement (art. 27, section 1 of the draft) to interpret the treaty "in the light of its object and purpose". The purpose of the treaty, in so far as it can be recognized, is therefore certainly to be considered. (The purpose sometimes can be to create a mere apparent solution instead of an effective arrangement.) Beyond that, the draft has rightly abstained from drawing up a general rule saying that the interpretation which should always, or at any rate in doubtful cases, be favoured is that which promises the greatest effects[22]). A maxim such as this may well be desirable in the distant future, but in the present state of the rules of international law, with the lack of homogenity between the members of the community of nations and with numerous treaties in which the parties in no way aspire to a really effective order, the principle of effectivity cannot be established as a general rule. The silence of the draft is hence so far justified.

The restrictive interpretation of treaty obligations with regard to State sovereignty is, in my opinion, even now no longer a generally accepted principle, and so it is rightly not to be found among the primary rules of interpretation. This maxim, however, can also be brought within the general clause of art. 28 of the draft (see above no. (13)) so that subsidiary recourse to this is not excluded. Art. 28 – apart from the expressly mentioned preparatory work and accompanying circumstances – refers generally to all other "supplementary means of interpretation". What they are, must be gathered from the present and future state of international relations and the general theory of interpretation. If State sovereignty were still among the criteria to be observed, then it would be included in art. 28. The same is true for other outmoded maxims, as, for example the postulate to interpret *contra proferentem*, or the rule requiring restrictive interpretation of exceptions, etc. The draft has in my opinion been correct in omitting to include *expressis verbis* these or other maxims which are dubious and disputed; in so far as it is appropriate to use them, this can be done in the framework of the general clause of art. 28.

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[22]) Cf. the reasons given by the Commission in the Commentary on arts. 27 and 28 (AJIL vol. 61 [1967], p. 361 *et seq.*).

Altogether, there are no serious gaps to be found in the provisions concerning the interpretation of treaties.

V

(16) Art. 29 of the draft contains regulations on the interpretation of texts in two or more languages. These will only be commented upon briefly here, as there are recent detailed analyses on the subject[23]).

Art. 29 outlines in sections 1 and 2 which of several linguistic versions of a treaty is authentic and authoritative. The rules for this are relatively simple. Precedence is always given to any express agreement of the parties. This can provide that all versions are equally binding, or it can declare only one version binding, or it can, in the case of texts in themselves equal, declare one version authoritative in case of divergence. If there is no agreement between the parties, the draft provides that all versions in which a treaty was finally formulated, should be equally binding; if the treaty was formulated in only one language, then versions in other languages (above all and in particular therefore official translations), would not be authoritative – always given the lack of other agreements.

Particular problems of interpretation exist where there are several official versions which do not agree. Previous international law practice and doctrine have developed several rules here which sometimes conflict with one another. According to one view, the version in which the treaty negotiations were conducted and the text first drawn up, is to be preferred[24]); this solution perhaps comes closest to the intentions of the parties, in so far as this has found expression in the negotiations. But it is also possible to apply the common minimum of all versions – in this way State sovereignty is most protected. The attitude of the draft, in my opinion, shows discrepancies and is unsatisfactory. First, it creates the presumption that the words in all versions have the same meaning. This, thereby, effectively fixes the precedence of the version which uses unequivocal expressions, so far as its meaning is included in the unclear provisions of the other texts. If, on the contrary, the various texts are all ambiguous, the presumption does not give further help. The question of the relative importance of the different texts remains unsolved.

If divergences between the texts persist, they should, according to the

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[23]) Cf. especially Jean Hardy, The Interpretation of Plurilingual Treaties by International Courts and Tribunals, BYBIL vol. 37 (1961), pp. 72–155. A detailed treatment of this subject is expected shortly from A. N. Makarov.

[24]) Cf. on the practice of the United Nations in preparing multilingual texts: Préparation des traités multilingues, Mémoire du Secrétariat, A/CN. 4/187 (May 3, 1966).

draft, be overcome with the help of the rules of interpretation in arts. 27 and 28. If that also leads no further, then "a meaning which as far as possible reconciles the texts . . ." is authoritative according to the draft.

In my opinion, the third section of art. 29 should be abbreviated. To overcome divergences in the text, a reference to arts. 27 and 28 is sufficient, and one should merely add that, if doubts persist, an interpretation should be preferred which is fair to all texts as far as possible.

VI

(17) Finally, the question should be repeated whether a codification of the rules of interpretation in the way provided is desirable and useful. This is, in my opinion, to be answered in the affirmative as regards the relevant regulations of the draft of the ILC, at any rate, if they are made more precise. But if, on the other hand, at a State conference important changes and concessions are made to the draft and the provisions of the draft are watered down, then it would, in my opinion, be preferable to abandon any attempt to formulate rules for treaty interpretation.

(18) After what has already been said, art. 27 of the draft could and should, in my opinion, be modified as follows:

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 in this sense shall comprise, in addition to the text, including its preamble and annexes, any written document made in connexion with the conclusion of the treaty and accepted by all the parties.

3. There shall be taken into account, together with the context, any subsequent agreement and any subsequent practice (including that of an international organization) compatible with the text of the treaty and accepted by all the parties.

4. There shall also be taken into account any existing international obligations of one or more of the parties.

5. A special meaning shall be given to a term if this is indicated by the applications of the foregoing principles.

Art. 28 of the draft can, in my opinion, remain as it now stands. Art. 29 should be modified as proposed above under no. (16).