"Unless the Treaty otherwise provides" and Similar Clauses in the International Law Commission's 1966 Draft Articles on the Law of Treaties

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Introduction

(1) In many articles [1]) of the 1966 draft prepared by the International Law Commission (ILC) on the law of treaties, the rules formulated are subject to reservations such as "unless the treaty otherwise provides", "unless a different intention appears from the treaty or is otherwise established", "unless the treaty provides or the parties agree that . . .". Members of the

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[1]) This paper deals with the following draft articles in the following paragraphs and footnotes (**bold** figures refer to main treatment):

article	paragraph(s)	footnote(s)	article	paragraph(s)	footnote(s)
8 § 2		35	29 § 1	11, 38	
10		15	29 § 2	11, 38	
11		15	33 § 1		14, 16, 73
12		15	35	12, 28	
13	6, 11, **20**		36	29–33	
14	11, 38		37 § 1		15
15		35	37 § 2	34	
16	23		38	12	
17 §§ 1, 2	24		41 § 1	11, 38	
17 § 3	25		52	35	
20 § 1	**2**, 3, **26**		53	6–10, 16	
20 § 2	**2**, 4, 6, 11, **20**		55		15
21 §§ 1, 2	27, 38		56		15
21 § 3	27		57	36	
22		15	68 § 1	11, 38	
24	6–10, 38		71 § 1		15
25	6–10, 38		72 § 1	18	
27	6–10, 13–14		72 § 1 (a)		15, **36**
28	6–10, 13–14		73	19	

For a survey of the clauses dealt with in this paper see paras. 3–4.

Commission repeatedly urged [2]) a comprehensive study of such "escape clauses" as one might call them, and it may be guessed from a comparison of the final draft and earlier versions that the formulae eventually adopted are the result of some effort of systematization. No details, however, appear from the summary records of the final session held at Geneva.

(2) Art. 20 of the draft is particularly well suited to serve as an example for the purposes of this introduction since it contains two different escape clauses: the one (§ 1) refers to the "treaty" alone, whereas the other (§ 2) is worded in a way to include an "agreement" in addition to the treaty. Art. 20 reads [3]):

> § 1: "Unless the treaty otherwise provides, a reservation may be withdrawn at any time and the consent of a State which has accepted the reservation is not required for its withdrawal".
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> § 2: "Unless the treaty otherwise provides or it is otherwise agreed, the withdrawal becomes operative only when notice of it has been received by the other contracting States".

Art. 22 of the provisional draft (1962) [4]) which preceded art. 20 on the subject matter of the withdrawal of reservations did not contain any escape clause whatsoever. In his fourth report submitted in 1965 in preparation of the final draft the Special Rapporteur, Sir Humphrey Waldock, noted that treaties rarely contain express provisions on the withdrawal of reservations but that, in case such provisions did exist, they should prevail over the rules laid down in the draft articles on that matter [5]). He therefore proposed that the draft rules should be given a merely residual character, and that this should be accomplished by subjecting them to the (single!) escape clause: "unless the treaty otherwise provides" [6]). In his introductory remarks to the 800th meeting where this proposal was considered, he expressed the opinion that the matter could be transferred to the Drafting

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[2]) Waldock, Yearbook of the International Law Commission (YBILC) 1964, vol. II, p. 54 para. 8 (3rd report); YBILC 1965, vol. II, p. 9 at 1 ("Terminology and definitions") (4th report); Reuter, YBILC 1966, vol. I part II, p. 47 para. 93; Rosenne, YBILC 1966, vol. I part II, p. 200 paras. 30–32, 42, but see also p. 205 para. 31; Jiménez de Aréchaga, YBILC 1966, vol. I part II, p. 206 para. 33; Briggs, YBILC 1966, vol. I part II, p. 290 para. 36.

[3]) Emphasis supplied.

[4]) See Official Records of the General Assembly (hereinafter referred to as GAOR), Seventeenth Session, Supplement No. 9 (A/5209), pp. 24–25.

[5]) YBILC 1965, vol. II, p. 56 at 1. When introducing the Commission's discussion on the subject he pointed out that the idea of establishing a mere residual rule was first expressed by governments (YBILC 1965, vol. I, p. 174 para. 45). But no such government proposal with respect to this particular point, *i. e.* the withdrawal of reservations, is to be found (cf. YBILC 1965, vol. II, pp. 55–56.

[6]) YBILC 1965, vol. II, p. 56 at 5.

Committee without fuller discussion by the Commission [7]). Subsequently in this meeting Mr. Ruda [8]) and Mr. Tunkin [9]) spoke in favour of an escape clause. In his summary Sir Humphrey Waldock underlined the unanimous support of members for adding the (single!) clause "unless the treaty otherwise provides" [10]). The matter was then transferred to the Drafting Committee. When the Commission again considered this article in its 814th meeting it had before it the Drafting Committee's proposal [11]) which, however, contained two types of escape clauses: "unless the treaty otherwise provides" and "unless the treaty otherwise provides or it is otherwise agreed". The Drafting Committee's proposal as to the escape clauses was the one eventually adopted (see above), but no explanation was given as to the reasons for introducing a different clause for each section [12]).

I

Do escape clauses expand the means of treaty interpretation?

(3) Suppose a government official, for example, has to determine whether his State may withdraw a reservation which it had made to a given treaty in force between twenty States. The residual rule according to draft article 20 § 1 is that it may be withdrawn "at any time" and without the consent of other States that had accepted the reservation. The official will have to determine whether the given treaty does in fact provide for a different rule (draft art. 20 § 1: "unless the treaty otherwise provides"). He will have to interpret the treaty and, for that purpose, he will resort to the general rules of interpretation as set out in the Convention on the Law of Treaties (draft arts. 27 and 28) [13]). "Single clauses" similar to the

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[7]) YBILC 1965, vol. I, p. 174 para. 45.

[8]) *Loc. cit.* at p. 176 para. 57.

[9]) *Loc. cit.* at para. 66.

[10]) *Loc. cit.* at p. 177 para. 77.

[11]) *Loc. cit.* at p. 272 para. 22.

[12]) See also the escape clauses qualifying the rules on the application of a treaty in point of time and territory (now arts. 24 and 25). At the end of the 867th meeting (see YBILC 1966, vol. I part II, pp. 169–170 paras. 4–10, 11–13) they still read "unless it otherwise appears from the treaty". Yet, in the 893rd meeting (YBILC 1966, vol. I part II, p. 327 para. 2) the final version ("unless a different intention appears from the treaty or is otherwise established") was adopted with no reasons being given for the change.

[13]) Art. 27 reads: "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

art. 20 § 1 clause are to be found as well in arts. 16; 17 § 1, § 3; 21 § 3; 35 cl. 2; 36 § 1; 37 § 2; 52; 57 § 4; 72 § 1; 73[14]).

(4) As to the further question of when the withdrawal of the reservation becomes operative, the official has before him the residual rule that it becomes operative "only when notice of it has been received by the other contracting States" (art. 20 § 2). The escape clause qualifying this rule would seem to require him to make an additional determination: *i. e.* not only whether "the treaty otherwise provides" but also whether "it is otherwise agreed". One might call such escape clauses "twin clauses". Under such a clause, it looks as if our government official will have to look somewhere beyond the general rules of treaty interpretation. This seems to be an exception to the general rules of interpretation as laid down in draft articles 27 and 28 in the sense that more consideration will be attached to the intentions of the parties to the treaty than is required in general. Twin clauses comparable to the art. 20 § 2 clause appear in arts. 13 (c); 14 § 1; 21 §§ 1 and 2; 24; 25; 29 §§ 1 and 2; 41 § 1; 53; 68 § 1. Formulations of twin clauses vary considerably. Part of the escape clause in arts. 24 and 25 reads "unless a different intention appears from the treaty". In arts. 24, 25 and 53 reference is made to the treaty and an "intention otherwise established". Formulae like "unless the treaty otherwise provides or it is otherwise agreed" are to be found in arts. 13 (c) and 20 § 2. Arts. 14 § 1; 21 §§ 1 and 2; 29 §§ 1 and 2; 41 § 1; 68 § 1 contain the same clause termed in the

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the treaty which was made between all the parties in connexion with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connexion 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 understanding 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".

Art. 28 reads: "Recourse may be had to supplementary means of interpretation including the preparatory work of the treaty and the circumstances of its conclusion in order to confirm the meaning resulting from the application of article 27, or to determine the meaning when the interpretation according to article 27: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable".

[14]) Art. 33 § 1 also has a single clause which, however, does not refer to the "treaty". It reads: "unless it is established that they had otherwise agreed". See below at notes 16 and 73.

active voice [15]). The different formulations may reflect different deviations from the general rules of interpretation (arts. 27 and 28) as will be discussed in the following three sections.

1. The formulation: "unless a different intention appears from the treaty"

(5) The formulation "unless a different intention appears from the treaty" (arts. 24 and 25) does not imply a deviation from the general rules of treaty interpretation as laid down in arts. 27 and 28. Art. 27 § 1 is couched in terms broad enough (*i. e.:* "in their context") to allow a rule to be derived from the treaty as a whole though not expressly formulated in any single provision.

2. Formulations such as: "unless a different intention appears from the treaty or is otherwise established"

(6) Escape clauses which include both a reference to the "treaty" and a reference to an "intention otherwise established" (arts. 24, 25, 53) appear to specifically refer to extrinsic evidence prior to the conclusion of the treaty [16]). The formulation "unless the treaty otherwise provides or it is otherwise agreed" (arts. 13 subsection (c); 20 § 2) would also seem to stress that evidence. Under the general rules of interpretation (arts. 27 and 28) such evidence seems to be granted a minor rôle since the "preparatory work" is only to be a "supplementary means of interpretation" (art. 28). The above mentioned clauses would appear to increase that rôle. It remains to be seen, however, what is meant by "preparatory work".

(7) Much of what is normally conceived of as "preparatory work" is in fact given a primary function by art. 27 §§ 1 and 2. Art. 27 § 1 refers to the terms of the treaty "in their context" and, according to § 2 subsec-

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[15]) Articles of a purely descriptive character are not dealt with in this paper. For example, arts. 10 and 11 are confined to describing the various ways in which the consent of a State to be bound by a treaty may be expressed. The ILC deliberately decided not to lay down a residual rule which could have been formulated: "the consent of a State to be bound by a treaty is expressed by ratification unless the treaty otherwise provides". See Commentary to art. 11, (2) *et seq.*, GAOR 21st Session, Supplement No. 9 (A/6309/Rev. 1), hereinafter referred to as "Commentary". For more examples see arts. 12; 22; 71 § 1; 72 § 1 subsection (a) ("if entrusted to it", see below at note 36).

Furthermore, no account is taken of articles viewing the relation between two treaties (arts. 37 § 1; 55; 56) and not the relation between a treaty rule and a rule laid down in the Convention on the Law of Treaties.

[16]) Art. 33 § 1 ("unless it is established that they had otherwise agreed") is obviously so worded ("agreed") for the purpose of including the consent of the third State who is not a party to the "treaty" (art. 31), not for the purpose of adding to the material normally used for "treaty" interpretation (see below at note 73).

tion (a), the "context" shall comprise, "in addition to the text" [17]), "any agreement ... made ... in connexion with the conclusion of the treaty". The term "agreement", in turn, lends itself to very broad interpretation. The contrast to the term "treaty" as defined by art. 2 § 1 subsection (a) ("an agreement concluded in written form") implies that such an agreement may have been written down immediately or later on in a document of more or less evidential value, that it may be even oral or tacit [18]). The breadth of the term "agreement" is shown by an example cited during the ILC's discussions of art. 27 § 2 subsection (a), *i. e.* that "agreements" included a report of a committee at an international conference [19]).

(8) Thus, the above mentioned escape clauses might at most increase the importance of whatever is left as supplementary means of interpretation under art. 28. It remains to be seen whether the drafters could reasonably have intended such an effect.

(9) Suppose, in the case of art. 24, it is clear from the primary means of interpretation (art. 27) that a given treaty has no retroactive effect, but there is nevertheless some other evidence that the parties intended such an effect. To give priority to such evidence over the terms of the treaty and the other means of interpretation as of art. 27 would lead to great insecurity. It is certainly not what the ILC aimed at when writing into art. 24 "unless a different intention appears from the treaty or is otherwise established". Thus the "preparatory work" has to retain a certain degree of a supplementary character.

(10) Suppose, on the other hand, in the art. 24 situation, an examination according to art. 27 leads to the result that the question of the retroactive effect of the treaty has in fact not been decided at all. Since the application

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[17]) *I. e.*, text and context are of equal importance and there is no rule that the latter might be taken into account only in so far as it has found some expression in the former. This is what Jiménez de Aréchaga (YBILC 1966, vol. I part II, p. 269 para. 21) probably overlooks when saying that it is a matter of "documents which were not actually part of a treaty, but which shed light on its terms".

[18]) For an example of an oral agreement see the "Ihlen declaration" which was recognized to have legal effect by the Permanent Court of International Justice, Series A./B. no. 53, p. 71 (Legal Status of Eastern Greenland). For the exact characterization of that declaration cf. Dahm, Völkerrecht, vol. 3 (1961), pp. 73–74 (an oral treaty), McNair, The Law of Treaties (1961), p. 7 *et seq.* (agreement, though not a treaty), O'Connell, International Law, vol. 1 (1965), p. 219 *et seq.* (a case of estoppel).

[19]) The report on the right to withdraw from the United Nations, dating from June 24, 1945, delivered by the 1st Commission of the San Francisco Conference (Doc. 1179, UNCIO Doc., vol. VI, p. 249 was cited by Jiménez de Aréchaga (YBILC 1966, vol. I part II, p. 269 para. 21). – For the narrow concept of "preparatory work" under art. 28 see Waldock, YBILC 1964, vol. II, p. 57 *et seq.*, para. 19, discussing decisions of the International Court of Justice.

of a treaty in point of time is an essential of any treaty, one will have to look upon such a result as being "unreasonable" within the meaning of art. 28 *lit.* b[20]). In fact, it is the very nature of the rules on the law of treaties to deal with such essentials of every treaty so that the lack of treaty law *ad hoc* appears to be unreasonable. In case there is some evidence outside the purview of art. 27 pointing to an intention of the parties in favour of retroactivity, effect will be given to that intention by virtue of art. 28 *lit.* b ("unreasonable"). On the other hand, if there is no such evidence the residual rule laid down in art. 24 will apply; *i. e.* there will be no retroactivity. Thus, there is no reason for the escape clauses mentioned above at para. (6) to be interpreted as exceeding the reach of article 28.

3. *Formulations such as: "unless the treaty otherwise provides or the parties otherwise agree"*

(11) As was pointed out under section no. (2) (paras. 6 to 10) above, the second part of the formulation "unless the treaty otherwise provides or it is otherwise agreed" (arts. 13 subsection (c); 20 § 2) apparently includes a reference to the period p r i o r to the conclusion of the treaty. On the other hand, that reference to an agreement also points to the period a f t e r the conclusion of the treaty – as does the formulation drafted in the active voice ("may agree" or the like) in arts. 14 §1[21]); 21 §§ 1 and 2; 29 §§ 1 and 2; 41 § 1; 68 § 1. Most of these articles, *i. e.* arts. 20 § 2 (withdrawal of reservations), 29 (treaties in two or more languages), 41 § 1 (separability of treaty provisions with respect to withdrawal etc.) and 68 § 1 (consequences of the suspension of the operation of a treaty), deal only with questions arising after the conclusion of the treaty. Thus with respect to these articles it is particularly clear that this period has to be taken into account by the government official who has to ascertain what solution the parties have provided for such questions.

(12) This period after the conclusion of a treaty is dealt with in art. 27 § 3[22]) pointing to "subsequent agreements" as a general means of interpretation. Agreements within the meaning of § 3 subsection (a) do not f o r m p a r t of the "context" which in turn contributes to the "ordinary meaning",

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[20]) See above note 13.

[21]) Contrary to other articles, art. 14 § 1 has a positive ("only") instead of a negative ("unless") version. Put into negative terms, the rule reads "the consent of a State to be bound by part of a treaty is not effective" and the escape clause reads "unless the treaty so permits or the other contracting States so agree". Compare the similar art. 41 § 1 which contains the negative version.

[22]) See above note 13.

such agreements only "shall be taken into account[23]), together with the context". Moreover, they are to be considered only in so far as they regard the "interpretation of the treaty". While these phrases would seem to restrict the admissible evidence, such restrictions are definitely removed by arts. 35 and 38 allowing for amendment and modification of treaties by subsequent "agreements" [24]). It is therefore evident that formulations such as "unless the parties otherwise agree" cannot be meant to add to what is implied in the terms "unless the treaty (as 'interpreted', as 'amended', as 'modified') otherwise provides".

II

Do escape clauses restrict the means of treaty interpretation?

(13) Starting anew on the effort to make sense out of the variety of escape clauses that are contained in the draft articles, one may consider an explanation quite different from the one discussed in part I above. Imagine, again, a government official who has to determine whether a reservation made by his Government to a given treaty may be withdrawn (art. 20 § 1) [25]) and when the withdrawal becomes operative (art. 20 § 2) [25]). The twin clause (art. 20 § 2: "unless the treaty otherwise provides or it is otherwise agreed") seems, in fact, to require more evidential material to be taken into

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[23]) Emphasis supplied.

[24]) This is particularly clear from the wording of art. 38: "A treaty may be modified by subsequent practice in the application of the treaty establishing the agreement of the parties to modify its provisions". Art. 35 reads: "A treaty may be amended by agreement between the parties. The rules laid down in part II apply to such agreement except in so far as the treaty may otherwise provide". Art. 35 cl. 2 is somewhat misleading in that it seems to require that, as a matter of principle, a treaty could be amended only by a treaty. The so-called theory of the *contrarius actus* was expressly rejected by the ILC, see Commentary to art. 35 (4). The preceding version (GAOR, 19th Session, Supplement No. 9, A/5809, art. 65 cl. 2) was clearer. It read: "If it is in writing, the rules laid down in part ... apply to such agreement except in so far as the treaty ... may otherwise provide". The final version was proposed by the Special Rapporteur, Sir Humphrey Waldock, in his sixth report (A/CN. 4/186/Add. 4 english, p. 3). He thereby followed the argument put forward by the Israeli and Dutch Governments that no particular emphasis should be placed on oral and tacit amendments. The ILC noted that the legal force of such amendments would be preserved by art. 3 subsection (b), see Commentary to art. 35 (4). That way, however, it may be objected, a rule of a treaty once amended by oral agreement may no more be labeled as a "treaty rule". Accordingly, one might argue that escape clauses should indeed be couched in terms of "or otherwise agree" in order to point to such informal amendments. But that would in turn be unnecessary since the draft rules do not affect the legal force of such agreements anyway (art. 3 subsection (b)). For further details and a suggestion for amendment see para. 28 below.

[25]) For the wording see above at para. 2.

account than does the single clause (art. 20 § 1: "unless the treaty otherwise provides"). The fact that the twin clause refers to some material in addition to the "treaty" suggests that such material is not implied by the term "treaty". In part I it was shown that arts. 27, 28, 35 and 38 are so comprehensive that it would be practically impossible for the government official to look to any further evidence beyond what he finds in those articles. Therefore, such official may reach the conclusion that while the twin clause (art. 20 § 2) refers to all the available evidence, the single clause (art. 20 § 1) must imply a restriction upon that evidence, the term "treaty" being used in a special sense comprising less than is suggested by arts. 27, 28, 35, 38. In his fourth report, Sir Humphrey Waldock declared "it to be of cardinal importance to re-examine these expressions (*i. e.* the escape clauses) in the light of the rules for the interpretation of treaties ... and to make it crystal clear in the drafts exactly whether reference is being made only to the text of the treaty or to the treaty as interpreted in the light of the preparatory work and surrounding circumstances, etc." [26]). Our government official may think that "treaty" within the meaning of single clauses, such as found in art. 20 § 1, means "text of the treaty" and that he is to apply, therefore, only the "ordinary meaning to be given to the terms of the treaty" (art. 27 § 1).

(14) From the point of view of terminology such a use of the term "treaty" is fairly doubtful. There is, indeed, some danger of confusion. "Treaty" may be understood as "text", meaning a written document as such. But "treaty" may as well signify the intangible legal transaction between the parties including the rules they lay down for their future conduct, their respective rights and duties [27]). The fear expressed by certain members of the ILC of unforeseeable consequences resulting from a plurality of concepts [28]) seems fairly unjustified. What is

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[26]) YBILC 1965, vol. II, p. 9 at 1 ("Terminology and definitions").

[27]) See Brierly (1st report, A/CN. 4/23) and Fitzmaurice (1st report, A/CN. 4/101). For the similar concept, in civil law, of a "contract" see *e. g.* Williston on Contracts, 3d ed. § 1 note 1. On the other hand, one may distinguish between the treaty as a whole of rules and the treaty as a legal act by which such rules are produced, see *e. g.* Kelsen, General Theory of Law and State (1949), pp. 32–33, 204, 351–353, who emphasizes the distinction between the contractual (especially: treaty) "norm, obligating and authorizing the contracting parties" (*i. e.* their rights and obligations) and the "procedure by which it (the norm) is created". That latter distinction is not important for the purposes of this paper.

[28]) Compare the discussion of the ILC during its 884th meeeting (YBILC 1966, vol. I part II, p. 268 *et seq.*, paras. 5 *et seq.*). See, in particular, the comments of Reuter (paras. 5–6), Waldock (para. 19), Jiménez de Aréchaga (paras. 20–21), Tunkin (para. 23).

subject to initialling and signature within the meaning of art. 10, for example, is, of course, the document. On the other hand, the above mentioned government official will have to look at the intangible rules laid down by the parties and, for that purpose, he will have to interpret the treaty (arts. 27, 28) and to look for amendments and modifications (arts. 35, 38). For him, "treaty" is what he ascertains the treaty to be from using (all!) the means of interpretation (including the document) and looking at amendments and modifications. In this latter context, the word "text" may be used in a somewhat different way, *i. e.* as the (intangible) result of resorting to no more evidence than the written document ("the ordinary meaning [29]) to be given to the terms of the treaty", art. 27 § 1). As to the escape clauses referring to the "treaty" alone (*i. e.* single clauses), what is meant might still be the "ordinary meaning to be given to the terms of the treaty" though, in that case, it would be highly advisable to use that very formula or "text" or "terms of the treaty" instead of "treaty".

(15) In the following, such a limited meaning of the term "treaty" in the escape clauses will be assumed and possible justifications for such restrictions of the available evidence will be examined. The main object of this examination will be the single clauses. To some extent, the twin clauses will also have to be studied since they might be understood to allow, in addition to the terms of the treaty, only for part of the remaining evidence to be considered. The escape clause in art. 20 § 2 reads: "unless the treaty otherwise provides or it is otherwise agreed". "If so agreed" may mean that, in addition to the terms of the treaty, only "agreements" (art. 27 § 1 subsection (a)) should be considered while the "preparatory work" in its limited sense (art. 28) [30]) should be disregarded. No access to preparatory work whatsoever may be permitted by formulations emphasizing subsequent agreements (see *e. g.* arts. 29, 41 § 1) [31]).

(16) In order to determine whether a restriction of the evidence is justified for the escape clauses, it is essential to note that, by so disregarding a part of the evidence, an agreement of the parties on a certain point which is only reflected in that material will be disregarded as well. For example, the First Committee of the San Francisco Conference in its Report of June 26, 1945 [32]) enumerated certain grounds for withdrawal from the

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[29]) Emphasis supplied.

[30]) See paras. 6–8 above.

[31]) See para. 11 above.

[32]) Doc. 1179, UNCIO Doc., vol. VI, p. 249. Mr. Jiménez de Aréchaga expressly quoted this report as an example of an "agreement" within the meaning of art. 27 § 2 subsection (a), cf. above at note 19.

United Nations. The Charter is silent on that matter [33]). Art. 53 § 1 of the draft on the law of treaties reads:

> "A treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal unless it is established that the parties intended to admit the possibility of denunciation or withdrawal".

The broad formulation of the escape clause allows for any piece of evidence to be considered including the above mentioned report. Suppose, however, art. 53 § 1 to read: "A treaty is not subject to denunciation or withdrawal unless the terms of the treaty provide for the possibility of denunciation or withdrawal". In that case the Committee Report on the right to withdraw would have to be disregarded, as would the agreement of the delegates expressed by that report. Such rules of the envisaged Convention on the Law of Treaties, though not enjoying full priority over a later treaty rule – an express treaty provision would prevail – nevertheless show some features of peremptory law in that they supersede part of the treaty (when conceived as an intangible whole of rules formed in accordance to arts. 27, 28, 35, 38) [34]). In that respect they are stronger than ordinary residual rules. One might call them "quasi-peremptory" rules. In a way, the Convention on the Law of Treaties, being itself a "treaty", will thus determine, by itself [35]), its position *vis-à-vis* its object, the later treaty, and will assume at least some priority over the later treaty.

(17) It will depend on the inherent qualities of the draft rules in question whether they deserve such a higher degree of legal force. There may be rules that serve the primary purpose of promoting order and clarity in the law. It follows from the very purpose of these rules of *ius strictum* that States should be forced to use the express terms of the treaty whenever they want to depart from these rules (see section no. 1 below). On the other hand, there may be rules that, for their inherent reasonableness, almost deserve to

[33]) As to the (temporal) "withdrawal" of Indonesia see F. Münch, Tätigkeit der Vereinten Nationen in völkerrechtlichen Fragen, Archiv des Völkerrechts, vol. 13 (1967), p. 296.

[34]) Cf. para. 14 above.

[35]) The more general question whether this convention on the very law of treaties will be on a higher order with respect to ordinary treaties will be left undecided in this paper. See *e. g.* the discussions on the question whether it is advisable to lay down the law of treaties in a treaty, *e. g.* GAOR 21st Session, Supplement no. 9, A/6309/Rev. 1, p. 8, paras. 23 *et seq.*, pp. 107–108 (Austria), pp. 161–162 (Sweden).

Other points left undecided in this paper are: whether the draft articles that do not, at present, contain an escape clause should be so amended (art. 8 § 2, see Reuter, YBILC 1965, vol. I, p. 44, paras. 22 *et seq.;* for art. 15 see the paper by Morvay in this issue); whether residual rules should be transformed into peremptory rules; whether descriptive rules should be changed into residual or peremptory rules.

be attributed true peremptory force or in fact should be given that force but are denied it for some external reason. The residual rules of the draft articles on the law of treaties will be studied at section no. 2 below with a view to determining whether they are of such an importance as to deserve, at least, a quasi-peremptory force.

1. Rules promoting clarity and certainty in the law

(18) Art. 72 deals with the functions of depositaries [36]). The depositary need not be a party to the treaty. He cannot be expected to search through the preparatory work and to inquire about oral or tacit amendments in order to get to know his duties. Actually, this article has the very purpose to promote clarity in the law as to the functions of depositaries. States should therefore be f o r c e d t o w r i t e other functions they may want to impose on a depositary i n t o t h e t e x t of the treaty. It thus follows from the very purpose of art. 72 that it should be given quasi-peremptory effect. In view of the fact that the word "treaty" in its ordinary meaning refers to all means of interpretation [37]), that article should read more clearly "unless the terms [38]) of the treaty otherwise provide" and "in conformity with the terms of the treaty" [39]).

(19) Art. 73 on notifications and communications [40]) has the function of promoting order and clarity in the law. The rules laid down in that article should therefore be protected from the uncertainties of interpretation as to what the parties to a treaty may intend to put in the place of such rules. If they want to replace them, they should write their rules into the very text of their treaty. The article should therefore read at the outset as follows: "except as the terms of the treaty . . ." [41]).

(20) In this context, one might think of other articles on notifications such as art. 13 subsection (c) and 20 § 2. The twin clauses used in these articles [42]), however, suggest that the ILC did not want to restrict the means

[36]) Art. 72 § 1 subsection (a) ("keeping the custody of the original text of the treaty") contains a merely descriptive rule about what may be the duty of a depositary. That follows from the clause "if entrusted to it". For the difference between residual rules and merely descriptive ones see above note 15.

[37]) See above at paras. 3 and 14.

[38]) The draft itself uses that formulation in art. 39 § 2.

[39]) Whether the ILC really intended such a restriction is not so important and will not be discussed in this paper.

[40]) Relating to the "life of the treaty", see Commentary to art. 73 (2).

[41]) There is some support for such a formulation in the Commentary to the article (7): "Clearly, if the treaty, as not infrequently happens, contains any s p e c i f i c provisions regarding notification or communication, these will prevail". Emphasis supplied.

[42]) Art. 20 § 2: "unless the treaty otherwise provides or it is otherwise agreed". Art. 13 is similar, reference to a "treaty" provision is made at the beginning of the article.

of interpretation. One might argue, it is true, that by expressly referring to the "treaty" and to an "agreement" these articles mean to exclude, by implication, the "preparatory work" within the meaning of art. 28 [43]). But once any extrinsic evidence at all is to be taken into account there is no true *ius strictum* left. Arts. 13 subsection (c) and 20 § 2 [44]) should be so termed as to make it clear that all means of interpretation are to be taken into account, and that may best be achieved by referring to the "treaty" alone. Art. 13 (c) should therefore read as follows: "Unless the treaty otherwise provides, instruments of ratification ... establish the consent of a State to be bound by a treaty upon: (a) their exchange between the contracting States; (b) ...; or (c) their notification to the contracting States or to the depositary". Art. 20 § 2 should read: "Unless the treaty otherwise provides, the withdrawal ..." [45]).

(21) The number of restrictions with regard to the means of interpretation as suggested for arts. 72 and 73 should indeed remain limited. The international legislation involved in the creation of *ius strictum* should be used with caution.

2. Rules possessing a high degree of persuasiveness

(22) As was announced above at para. 17 we will now have to see whether there are other rules deserving quasi-peremptory force – not for their special technical function but for their inherent reasonableness.

a) (23) Art. 16 reads:

"A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless:

(a) the reservation is prohibited by the treaty;

(b) the treaty authorizes specified reservations which do not include the reservation in question; or

(c) in cases where the treaty contains no provisions regarding reservations, the reservation is incompatible with the object and purpose of the treaty".

It appears from subsection (c) that the article actually contains the residual rule that a State may formulate reservations except such as are incompatible with the object and purpose of the treaty. As a matter of fact,

[43]) See above at paras. 6–8.

[44]) In the 814th meeting of the ILC Sir Humphrey Waldock said that the only difficulties as to art. 20 had been encountered as far as its § 2 was concerned, YBILC 1965, vol. I, p. 272, para. 23; for the discussions see *ibid.*, p. 272 *et seq.* (the comments by Briggs and Rosenne are particularly interesting). The broad version of the escape clause may have served as a compromise formulation to reconcile the conflicting views as to the subject matter.

[45]) For the remainder of the text see para. 2 above.

the object and purpose of a treaty are themselves elements of its interpretation (art. 27 § 1), *i. e.* the rule in fact says no more than that reservations may be formulated. As to the escape clause, subsection (b) allows a prohibition to be implied from the fact that the reservation in question is not one of those specifically authorized. Thus, there is a twofold addition to the ordinary escape clause "unless the treaty otherwise provides". The implication within the meaning of subsection (b) and the "object and purpose" (subsection (c)) are specifically mentioned as a means of interpretation. One might argue that, besides these and the terms of the treaty, no further interpretative arguments ought to prevail over the residual rule. In case this is the true meaning of the escape clause of art. 16 it should be rewritten in a way to bring the point out more clearly. The rule would then assume a somewhat limited quasi-peremptory effect. That effect would be justifiable only if the rule ("reservations may be formulated") possesses an especially high degree of persuasion which the author of this paper feels it does not [46]). Hence there is no reason for replacing the word "treaty" by the words "terms of the treaty" (in subsections (a) and (b) and at the beginning of subsection (c)). The best way to exclude possible confusion would indeed consist in rewriting the article to read simply: "A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless the treaty otherwise provides". But the present version may be kept for the purpose of emphasizing two specific means of interpretation while not excluding others.

b) (24) The same is true for art. 17 §§ 1 and 2. The residual rule reads that a "reservation expressly or impliedly authorized by the treaty does not require any subsequent acceptances by the other contracting States" (§ 1). That rule is qualified by the clause "unless the treaty so provides" (§ 1) and a rather detailed reference as to the object and purpose of the treaty (§ 2). In addition to what was said with respect to art. 16, one should note that it will be hard to find a treaty which only by implication authorizes a reservation but expressly requires its acceptance by the other contracting States – unless it is from this very requirement that the permissibility of a reservation is inferred. – The present version may be kept as far as the limited aspects of this paper are concerned.

c) (25) While the escape clauses dealt with at a) and b) above contain some hints at an interpretation going beyond the mere terms of a treaty, art. 17 § 3 [47]) refers only to the "treaty". The very difference with regard

[46]) The latter question cannot be dealt with more fully in this paper which is devoted to all the escape clauses. As to reservations in particular, compare the paper by Tomuschat in this issue.

[47]) "When a treaty is a constituent instrument of an international organization, the

to the foregoing sections of the same article and art. 16 might suggest that what is meant is a reference to the mere "terms of the treaty". It might be argued in favour of such a "quasi-peremptory" effect that constituent instruments of international organizations require a higher degree of evidence and that the rule laid down here as to the intervention of the competent organ of the organization is especially convincing. But the ILC simply wanted the members of the organization (through the competent organ) to decide on the integrity of the instrument [48]). Since the will of the parties to the treaty is declared to be decisive, it should be irrelevant by what means and at what stage that will is expressed [49]). Art. 17 § 3 should therefore remain unchanged.

d) (26) Art. 20 presents two different versions of the escape clause: "unless the treaty otherwise provides" (§ 1) and "unless the treaty otherwise provides or it is otherwise agreed" (§ 2) [50]). That difference might suggest that § 1 is intended to refer to the terms of the treaty alone. The residual rule laid down by § 1 reads that "a reservation may be withdrawn at any time and the consent of a State which has accepted the reservation is not required for its withdrawal". Mr. Rosenne [51]) declared he could not conceive of a treaty reservations to which were not subject to withdrawal. Mr. Bartoš [52]) and Sir Humphrey Waldock [53]) replied that partners of the reserving State might be interested in not being confronted with unexpected situations resulting from a withdrawal. Basically, what argues in favour of the rule of § 1 is the value judgment that the integrity of the multilateral instrument is preferred. That argument, however, is hardly strong enough to imply that States should be forced to disclose their dissent through the very terms of the treaty. Suppose State "A" accepts a reservation put forward by State "B". "A" may be very interested in seeing that reservation maintained and it may so inform "B" in view of the fact that "A" has itself made a reservation (perhaps with regard to a different part of the treaty). "A" may in fact wish not to be the only State to qualify the

reservation requires the acceptance of the competent organ of that organization, unless the treaty otherwise provides".

[48]) Commentary to art. 17 (20).

[49]) For subsequent agreements on the content of a constituent instrument (though not a content dealt with by the draft articles on the law of treaties) see the decisions made by the European Economic Community Council of Ministers on January 29, 1966, at its extraordinary meeting held in Luxembourg. See Mosler, National- und Gemeinschaftsinteressen im Verfahren des EWG-Ministerrats (National and Community Interests in the Procedure of the Council of Ministers of the EEC), ZaöRV, vol. 26 (1966), p. 23.

[50]) For the complete wording see above para. 2.

[51]) YBILC 1965, vol. I, p. 285 para. 69.

[52]) *Ibid.* para. 70.

[53]) *Ibid.* para. 71.

multilateral *régime* and to be exposed to the resulting adverse world public opinion. The other parties to the treaty may consider the participation of "A" and "B" to be crucial, and they may therefore be inclined to more or less readily consenting to an understanding that "B" may not withdraw its reservation without the consent of "A". However, there may well be considerable objection to writing such understandings into the text of the treaty. Art. 20 § 1 should allow for such arrangements. Hence, the escape clause in its present form should be maintained while by other means (as will be shown later on in these pages) [54]) it should be made clear that "treaty" refers to the whole of the available means of interpretation.

e) (27) Art. 21 reads:

"1. A treaty enters into force in such manner and upon such date as it may provide or as the negotiating States may agree.

2. Failing any such provision or agreement, a treaty enters into force as soon as consent to be bound by the treaty has been established for all the negotiating States.

3. When the consent of a State to be bound is established after a treaty has come into force, the treaty enters into force for that State on the date when its consent was established unless the treaty otherwise provides" [55]).

The "single" [56]) clause of § 3 differs from the "twin" [56]) clause of §§ 1 and 2. One may guess from this difference that the escape clause of § 3 has regard only to the terms of the treaty. Whether such a restriction of the evidence and the resulting quasi-peremptory force is in fact justified depends upon what degree of persuasiveness is presented by the residual rule. The residual rules laid down by art. 21 §§ 2 and 3 may be summarized as follows: A treaty enters into force under § 2 for all States (under § 3 for the new party) as soon as consent to be bound by the treaty has been established under § 2 for all the negotiating States (under § 3 for the new party). Not infrequently a treaty enters into force before or after consent to be bound by the treaty has been established for all the negotiating States. Less often it may occur that a treaty already in force for the negotiating States does not enter into force for the new party immediately upon that party's consent to be bound by the treaty. But it is not wholly unreasonable to imagine that States depart from both § 2 and § 3 by providing, for example, a certain time-lag between the consent to be bound (for example when the consent is filed with a depositary) and the entry into force for both the negotiating

[54]) See para. 39 below.
[55]) Emphasis supplied.
[56]) For this expression cf. paras. 3–4 above.

States and the new party (*i.e.* its effective participation in the treaty)[57]). Both rules are indeed not particularly reasonable but at best constitute the statistical majority of treaties. Moreover, the ILC itself noted that there is an increasing tendency to provide for a time-lag[58]). A departure from these rules as shown by the above example may be agreed upon outside the terms of the treaty. It would be unjustifiable to give that agreement effect only as to the rule of § 2 and not as to the rule of § 3. The escape clause in § 3 should therefore refer to all the means of interpretation. That is virtually achieved by the reference to the "treaty" and the present formulation should therefore be retained. It would come out more clearly once the twin clauses in §§ 1 and 2 were abolished.

f) (28) Art. 35[59]) presents the unique feature that it itself contains one of the elements to be taken into account during the process of searching for the treaty rule applicable at a certain time. If "treaty" in cl. 2 should mean "terms of the treaty", it would seem as if the theory of the *contrarius actus* were sanctioned here by a quasi-peremptory rule: a treaty could be amended only by treaty unless it expressly provides otherwise. It is true that, according to art. 3 subsection (b), "the fact that the present articles do not relate . . . to international agreements not in written form shall not affect the legal force of such agreements". But by expressly referring to an agreement (cl. 1) and by laying down, immediately thereafter in cl. 2, special requirements for such an agreement, art. 35 gives indeed the impression of a *lex specialis* with respect to art. 3. The original version[60]) should therefore be restored. As to the possibility of escaping from the "rules laid down in part II" States should be able to make use of that possibility without being compelled to write their dissent into the text of the treaty.

g) (29) The residual rules set out in art. 36[61]) §§ 2–5 regarding amendment of multilateral treaties are reasonable. §§ 2 and 3 prohibit the dis-

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[57]) As to the use of the term "entry into force" for the commencement of a new party's participation in a treaty already "in force" see Commentary to art. 21 (4).

[58]) Commentary to art. 21 (5), pointing to the Geneva Conventions on the Law of the Sea and the Vienna Conventions on Diplomatic and Consular Relations as examples.

[59]) See note 24 above.

[60]) See above at note 24.

[61]) Art. 36 reads: "1. Unless the treaty otherwise provides, the amendment of multilateral treaties shall be governed by the following paragraphs.

2. Any proposal to amend a multilateral treaty as between all the parties must be notified to every party each one of which shall have the right to take part in:

(a) the decision as to the action to be taken in regard to such proposal;

(b) the negotiation and conclusion of any agreement for the amendment of the treaty.

3. Every State entitled to become a party to the treaty shall also be entitled to become a party to the treaty as amended.

4. The amending agreement does not bind any State already a party to the treaty which

crimination of particular parties to a treaty, § 4 opts against majority legislation, § 5 deals with the case where a State becomes a party to a treaty after an amendment has already entered into force.

(30) With regard to discrimination, the ILC felt that there might be circumstances in which discrimination might be permitted, *e. g.* in the case of an aggressor State [62]). Most of the time, however, such circumstances will not be couched in terms of a rule laid down in the text of the treaty. They may at best be derived from all the evidence available including the circumstances of the treaty's conclusion. In most cases, however, resort must be made to general international law.

(31) Contrary to the residual rule laid down in § 4 there is an increasing tendency towards majority legislation. Examples in addition to those given by the ILC in its Commentary [63]) are the constituent instruments of international organizations (see arts. 108, 109 of the Charter of the United Nations) and, of late, what has been reported in the daily newspapers with regard to a provisional draft of a non-proliferation treaty [64]).

(32) § 5 refers to the "intentions" of the new party. In accordance thereto the intentions of all the parties should be fully taken into consideration.

(33) Summing up the discussion of the residual rules laid down in §§ 2–5, it appears that the escape clause set out in § 1 should refer to all possible means of interpretation.

h) (34) Art. 37 § 2 shows some similarity with art. 36 § 2, it should also not be vested with quasi-peremptory force.

i) (35) Art. 52 reads:

> "Unless the treaty otherwise provides, a multilateral treaty does not terminate by reason only of the fact that the number of the parties falls below the number specified in the treaty as necessary for its entry into force".

There is no particular degree of inherent persuasiveness in this rule. It exclusively draws on the presumed intentions of the States parties to the

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does not become a party to the amending agreement; and article 26, paragraph 4 (b) applies in relation to such State.

5. Any State which becomes a party to the treaty after the entry into force of the amending agreement shall, failing an expression of a different intention by that State: (a) be considered as a party to the treaty as amended; and (b) be considered as a party to the unamended treaty in relation to any party to the treaty not bound by the amending agreement".

[62]) Commentary to art. 36 (9).

[63]) *Ibid.* (11): art. 3 of the Geneva Convention on Road Traffic (1949); art. 16 of the International Convention to Facilitate the Crossing of Frontiers for Goods Carried by Rail.

[64]) A "secret" draft of January 4, 1967 was published by the Frankfurter Allgemeine Zeitung, D-Ausgabe, no. 43, D 2954 A of February 20, 1967, p. 4.

treaty. In case the States specify that a certain number of parties is necessary for the treaty's entry into force they may, as a matter of fact, want the remaining in force of the treaty to depend upon a similar condition as well. Since, however, the entry into force and the termination of a treaty are two different matters, a decision with regard to one of them will not necessarily imply a similar decision as to the other, *i. e.* the former decision cannot be regarded as conclusive evidence as to the latter. All the evidence will have to be taken into account. The word "treaty" within the meaning of the escape clause should be so understood.

j) (36) Art. 57 §§ 1 and 2 [65]) lay down residual rules on the consequences to be drawn from a material breach of a treaty. The latter concept is defined by § 3 [66]). Recourse must be had to all the evidence available in order to determine whether "a provision essential to the accomplishment of the object and purpose of the treaty" has in fact been violated. Accordingly, it should be wholly up to the parties what consequences should be attached to a breach, by whatever piece of evidence such an agreement might be established. Only where all agreement on the matter is lacking should the residual rules of §§ 1 and 2 apply. This is what § 4 actually should mean by determining that "the foregoing paragraphs are without prejudice to any provision in the treaty applicable in the event of a breach".

k) (37) At a)–j) (paras. 23–36 of this paper) only escape clauses of the single type have been dealt with. The twin clauses also may imply a restriction as to the means of interpretation, in so far as they may be understood to refer to certain means alone, *i. e.* the text and some additional

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[65]) § 1 reads: "A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part".

§ 2 reads: "A material breach of a multilateral treaty by one of the parties entitles:

(a) the other parties by unanimous agreement to suspend the operation of the treaty or to terminate it either:

(i) in the relations between themselves and the defaulting State, or

(ii) as between all the parties;

(b) a party specially affected by the breach to invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State;

(c) any other party to suspend the operation of the treaty with respect to itself if the treaty is of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty".

[66]) § 3 reads: "A material breach of a treaty, for the purposes of the present article, consists in:

(a) a repudiation of the treaty not sanctioned by the present articles; or

(b) the violation of a provision essential to the accomplishment of the object or purpose of the treaty".

piece of evidence[67]). Such restriction may be justified for the inherent reasonableness[68]) of the residual rules, the legal force of which is so increased ("quasi-peremptory")[69]).

(38) Why, for example, should the preparatory work within the broad meaning of arts. 27 § 2 subsection(a) and 28 as read together be completely disregarded as far as arts. 14 § 1; 21 §§ 1 and 2; 29 §§ 1 and 2; 41 § 1; 68 § 1 are concerned[70])? That evidence when used with caution (as art. 28 in fact requires) may at least shed some light on the text of the treaty and the remainder of the available evidence. Moreover once a resort to extrinsic evidence is permitted, there is more space for speculations and doubts anyway. Furthermore, the rules laid down in these articles actually draw upon the presumed intentions of the parties: separability of a treaty in case a State consents to part of a treaty only (art. 14 § 1), entry into force (art. 21 §§ 1 and 2), interpretation of treaties in two or more languages (art. 29 §§ 1 and 2), separability of a treaty in case of withdrawal etc. (art. 41 § 1), consequences of the suspension of the operation of a treaty (art. 68 § 1). The same is true for articles 24 (non-retroactivity of treaties), 25 (application of treaties to territory), 53 § 1 (denunciation of a treaty containing no provision regarding termination)[71]). No independent reasons are indeed involved in these articles that might justify a practice of disregarding part of the intentions of the parties inasmuch as they are expressed by some extrinsic piece of evidence alone[72]).

(39) Since these twin clauses imply neither more (see part I of this paper, paras. 3–12) nor less than all the means necessary in order to establish a treaty rule, they should be so shaped, *i. e.* to read simply "unless the treaty otherwise provides" or the like. Once the t w i n clauses are a b o l i s h e d there will be no doubt left that single clauses such as "unless the treaty otherwise provides"[73]) in fact refer to the "treaty" including all the means of interpretation and not to the mere "text of the treaty".

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[67]) For a fuller explanation of that line of thinking see para. 15 above.

[68]) For the *ius strictum* argument see above at paras. 18–21.

[69]) For a list of twin clauses see above at paras. 4, 11.

[70]) See para. 15 above.

[71]) The escape clauses contained in arts. 24, 25 and 53 § 1 emphasize reference to evidence of the period before the conclusion of the treaty (preparatory work in its broad sense), so that at a first glance one might have the impression that the subsequent practice should be more or less neglected, which would indeed make no sense at all. – With respect to arts. 13 and 20 § 2 see para. 20 above.

[72]) For that line of reasoning see above at para. 16.

[73]) Art. 33 § 1 has a single clause referring to an "agreement" for an obvious reason, see above note 16. Since it does not imply the risk of confusion as to the permissible evidence it should remain unchanged.

(40) Summarizing what has been said at a)–k) with respect to each individual rule on its deserving "quasi-peremptory" force for its inherent reasonableness, we conclude that there are no such rules in the present draft. In more general terms, one may still stress the need for clarity in the relations between States [74]) and argue in favour of attributing a quasi-peremptory force to at least some of the rules discussed here. But what is won in favour of more clarity may well be lost with regard to the facility of international transaction and, in particular, the need for a flexible adaptation to changing political situations. The lack of formalities will also favour a smooth further development of the law of treaties. Another argument of an equally general character militates against the creation of quasi-peremptory law: If part of a treaty is only subject to certain standards of interpretation while the rest may be interpreted using all the available evidence, the results may fail to harmonize. Besides, the relative importance of a certain type of evidence may vary according to particular circumstances.

Conclusion

(41) The fact that the draft contains a great variety of escape clauses, such as "unless the treaty otherwise provides", "unless a different intention appears from the treaty or is otherwise established", "unless the treaty provides or the parties agree that . . .", may well lead to confusion. Some of the speculations the government official who will have to deal with the Convention might make on the subject have been analyzed in this paper. Do formulations such as "or is otherwise established", "or the parties agree" require more evidence than has to be used for the purpose of discerning what the "treaty provides"? It was shown in part I that they don't. Trying the opposite explanation – "unless the treaty otherwise provides" allows for intrinsic evidence only (part II of this paper) – one comes across an interesting phenomenon: the "quasi-peremptory" force of a residual rule. There are only a few rules in the draft that seem to require absolute priority over conflicting rules in later treaties. The bulk of the rules laid down in the draft indicate the mere residual character they assume with respect to later

[74]) In addition, one might argue that the responsible internal authorities should be able easily to discern what the obligations of their respective States are. That may be particularly important for a parliament that, in certain cases provided for by constitutional law, takes part in the treaty-making process. In this respect it should be noted that the final draft contains no residual rule in favour of ratification (see Commentary to art. 11 (2) *et seq.*). Thus governments are not legally obliged to write into an executive agreement that it is not subject to ratification. This line of thought, however, belongs to constitutional rather than international law.

treaties by means of the very escape clauses here in question. But by restricting the interpretation of the later treaty to intrinsic evidence they might indeed take some precedence over a later expression of the intentions of States (what has been referred to in this paper as "quasi-peremptory" force).

(42) The conference on the law of treaties should be aware of that possibility. It should use it very seldom and only for rules, the main purpose of which is to promote clarity and certainty in the law. In any event, the terminology used should be crystal clear, and it is mainly for that purpose that the following amendments are suggested with respect to the escape clauses contained in the present draft.

Recommendations[75])

1. (43) The escape clauses in arts. 13; 14; 16; 17 §§ 1 and 3; 20 §§ 1 and 2; 21 §§ 1, 2 and 3; 24; 25; 29 §§ 1 and 2; 35 cl. 2; 36 § 1; 37 § 2; 41 § 1; 52; 53; 57 § 4; 68 § 1 should all read simply "unless the treaty otherwise provides" or similarly. Formulations such as "or is otherwise established" and "or the parties agree that" should be abolished.

2. (44) Art. 13 in particular should read:

> Unless the treaty otherwise provides, instruments of ratification, acceptance, approval or accession establish the consent of a State to be bound by a treaty upon:
>
> (a) their exchange between the contracting States;
>
> (b) their deposit with the depositary; or
>
> (c) their notification to the contracting States or to the depositary.

3. (45) Art. 35 cl. 2 should be formulated as follows:

> If it is in writing, the rules laid down in part II apply to such agreement expect in so far as the treaty may otherwise provide.

4. (46) Art. 72 § 1 should read at the beginning "unless the terms of the treaty otherwise provide" and at (d) "in conformity with the terms of the treaty".

5. (47) Art. 73 should read at the beginning "except as the terms of the treaty".

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[75]) For a reference to the respective paragraphs of this paper see note 1.