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On the Interpretation of Treaties

The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties

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resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
(a) leaves the meaning ambiguous or obscure; or
(b) leads to a result which is manifestly absurd or unreasonable.

Article 33. Interpretation of treaties authenticated in two or more languages
1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.
2. A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.
3. The terms of the treaty are presumed to have the same meaning in each authentic text.
4. Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.

Certainly, with the existence of Vienna Convention Articles 31–33 many of the major controversies illustrated by the twentieth century international law literature must be considered as finally resolved. Hence, we can now clearly say of the norms laid down in international law that they are not merely guidelines, as sometimes suggested.[5] The norms *shall* be applied;[6] they establish obligations. Further – despite what certain French authors have suggested[7] – we can easily conclude that according to general international law, separate rules of interpretation do not apply for separate kinds of treaties. The exact same rules shall apply regardless of whether the treaty interpreted can be characterised as a *traité-loi* or as a *traité-contrat*.[8]

On the other hand, the importance of the Vienna Convention should not be exaggerated. Despite the adoption of the Convention and the codification accomplished, it is still far from clear to what content the norms of international law shall be applied.[9] On closer scrutiny, this uncertainty would seem to be due mainly to the way articles 31–33 are designed. Overall, the provisions of the Convention do not address in a direct and straightforward fashion the question of how to understand a treaty in need of interpretation. Rather, they address questions concerning which means of interpretation an applier shall be using in the interpretation process, and in which order. Obviously, such a law-making strategy has the advantage of making the law of the treaty more flexible. To some extent, the process of interpretation may be adjusted to suit the needs of specific treaties or situations, and the adaptation of law over time will be greatly facilitated. Hopefully, when new patterns of interpretative behaviour develop, they can still be accounted for within the framework originally established. On the negative side, the textual cast used for Vienna Convention articles 31–33 has rendered possible a wide variety of opinions as to their normative contents.

As a simple way of illustrating the problem, the various opinions expressed in the international law literature may be placed on a scale, whose two opposing ends would then be seen to represent either one of the two most radical positions. According to the one position – typically expressed by the sentence that interpretation of treaties is a matter of art, and not science – interpretation is a political exercise.[10] I will refer to this as radical legal skepticism. In the conceptual world of radical legal skepticism, legal norms capable of constraining political judgment simply do not exist. Hence, whenever a certain understanding is advanced as the correct interpretation of a certain treaty provision, the only question to be asked is whether the interpretation is legitimate or not. Stated somewhat differently, according to radical legal skepticism, the only aspect to be considered in assessing the interpretation is that of its political correctness.

According to the opposite, equally radical position, treaty interpretation is a field of activity governed entirely by rules of law. I will refer to this as the one-right-answer thesis. In the view of the one-right-answer thesis, the legal regime created in international law for the interpretation of treaties is an absolute one, in the sense that an applier can interpret a treaty by applying a number of legal rules and be perfectly certain of always arriving at a determinate result in a completely value-free way. There is no room for political judgment. Whenever a certain understanding is advanced as the correct interpretation of a certain treaty provision, the only question to be asked is whether the interpretation conforms to the standards laid down in international law or not. Stated differently, according to the one-right-answer thesis, the only aspect to be considered in assessing the interpretation is that of its legal correctness.

It is the purpose of this work to investigate the contents of the currently existing regime established by international law for the interpretation of treaties. In so doing, I will address the two most radical positions just delineated, my conclusion being that in the final analysis neither can be taken as a sound description of the prevailing legal state of affairs.[11] On the one hand – contrary to what radical legal skepticism suggests – in a discussion about the correct interpretation of a treaty, legal rules capable of constraining political judgment certainly do exist. As this work will show, not only does international law provide information on the interpretation data (or means of interpretation) to be used by appliers when interpreting a treaty provision. It also instructs the appliers how, by using each datum, they shall argue to arrive at a conclusion about the meaning of the interpreted provision. Furthermore, international law to some extent also determines what weight the different data of interpretation shall be afforded when appliers discover that, depending on the specific datum they bring to bear

on the interpretation process, the conclusion arrived at will be different. In consequence of this, the currently existing regime established in international law for the interpretation of treaties will have to be described as a system of rules. The rules are of two kinds; they will henceforth be referred to as first-order-rules and second-order-rules of interpretation, respectively.[12] A first-order-rule of interpretation tells appliers how they shall understand an interpreted treaty provision, in a case where the provisions have been shown to be unclear. A second-order-rule of interpretation tells appliers how they shall understand an interpreted treaty provision when two first-order rules of interpretation have been shown to be in conflict with one another. Hence, the question investigated in the course of the present work is the following:

> What first- and second-order rules of interpretation can be invoked by an applier, in accordance with the currently existing regime established by international law for the interpretation of treaties?

On the other hand, in almost any process of interpretation questions are bound to arise which concern matters beyond the reach of international law. As this work will show, the rules of interpretation currently existing in international law are far from the self-sufficing regime suggested by the one-right-answer thesis. The rules of interpretation provide a framework for the interpretation process; but within this framework, appliers are often left with what could be called a certain freedom of action. The important question is how this freedom of action should be used.

Obviously, on a scale between radical legal skepticism and the one-right-answer thesis, a correct description of the prevailing legal state of affairs would have to be placed somewhere in the middle. Typically, whether a certain understanding of a treaty will be perceived as correct or not is a matter partly of whether the understanding can be shown to conform to the standards laid down in international law, partly of whether it can be shown to be legitimate. Hence, if appliers of international law wish to improve upon the prevailing state of affairs and make a disagreement on interpretation matters look more the exception than the rule, then clearly, a constructive debate on these matters needs to be concerned with two things. First of all, it needs to be concerned with the purely legal question: What are the contents of the currently existing regime established by international law for the interpretation of treaties? Second on the agenda comes the political question: Given that, according to the prevailing legal regime, certain issues of interpretation are left to be decided upon by appliers on the basis of reasons other than international law, how should that freedom of action be used?

Of course, the answer to the one question depends on the answer given to the other. If appliers are largely uncertain about the contents of the rules of interpretation laid down in international law, then obviously, they are also uncertain about the freedom of action left to them under said rules. As it seems, I have actually two good reasons for investigating the contents of international law. Not only will such investigations contribute to reducing disagreement among appliers with regard to the contents of international law. They will also provide the foundation for a constructive and more rational discussion concerning how the freedom of action left to the appliers under international law should be used. And there you have it, in just two sentences: the motivating idea for this work in a nutshell.

2 THE LEGAL REGIME FOR THE INTERPRETATION OF TREATIES AS A SYSTEM OF RULES

Earlier in this work, I ventured a proposition that will have inevitable effects on how this work will be performed. I suggested that the currently existing legal regime for the interpretation of treaties is best described as a system of rules. This is a proposition I would now like to establish properly. Section 2 will be spent on this task.

As I stated earlier, in the sphere of activities dealt with in this work, we benefit greatly from the existence of the 1969 Vienna Convention on the Law of Treaties. The Vienna Convention – in this work simply referred to as the VCLT – is one of those significant international agreements created during the last 60 years under the aegis of the United Nations. The idea of "a treaty on treaties" was first expressed in 1947, when the International Law Commission (ILC) was created and assigned with the task to "promote the progressive development of international law and its codification".[13] One of the first steps taken by the ILC was to produce a list of areas particularly suited for codification.[14] On this list, the law of treaties was one of the three priorities.[15] Nevertheless, it took years to complete a draft convention that could be used as a basis for an international diplomatic conference, and it was not until 1966 that such a conference could be called by the UN General Assembly.[16] Two sessions were held in Vienna; the first from 26 March to 24 May 1968, and the second from 9 April to 22 May 1969. On 22 May 1969, the Conference completed its work, and the Convention was adopted as definite;[17] the following day, the Vienna Convention on the Law of Treaties was declared open for signature. Another 11 years passed before the Convention entered into force on 27 January 1980.[18] As of 11 June 2007, 108 states were parties to the Vienna Convention.

Whenever appliers set out to interpret a treaty, they should consider VCLT articles 31–33 as a starting-point. Support for this proposition is not so much the Vienna Convention as such, in its capacity of a written international agreement. Formally speaking, the rules laid down in the Convention can rarely be applied. First of all, the provisions of VCLT articles 31–33 are binding only for the parties to the convention. In addition to this, the provisions have no retroactive effect. According to the provisions of VCLT article 4, "the Convention applies only to treaties which are concluded by States after the entry into force of the present Convention with regard to such States".[19] As support for the proposition expressed, I would rather direct the reader's attention to the Vienna Convention in its capacity of a contribution to state practice. Parallel to the rules of interpretation laid down in articles 31–33, customary law also contains a set of rules to be used for this purpose. These rules of international custom are identical to the rules laid down in the Vienna Convention – nowadays, a fact on which not only states,[20] but also authors,[21] as well as international courts and tribunals,[22] seem to be in agreement. Articles 31–33 of the Vienna Convention on the Law of Treaties should therefore be seen as evidence, not only of the rules of interpretation that apply according to the convention between its parties, but also of the rules that apply according to customary international law between states in general.

If it is the purpose of this work to establish the content of the currently existing rules for the interpretation of treaties laid down in international law, the starting-point for this investigation should be articles 31–33 of the Vienna Convention. The question is how the content of these articles should best be described. The provisions of the VCLT articles 31–33 tell appliers how to proceed to determine what they shall regard as the correct meaning of an interpreted treaty provision, considered from the point of view of international law. In principle, this could be done in two different ways. One way is to state the rules of interpretation to be observed by the applier.[23] In this case, VCLT articles 31–33 would indicate, first, the interpretation data to be used by appliers when interpreting a treaty provision; second, how appliers, by using each datum, shall argue to arrive at a conclusion about the meaning of the interpreted provision. Another way is to simply authorise the use of certain interpretation data.[24] In this case, VCLT would only indicate the different interpretation data to be used by appliers when interpreting a treaty provision.[25] How the applier, by using each datum, shall argue to arrive at a conclusion about the meaning of the interpreted treaty provision, would be left to the discretion of the applier.

In order to describe the provisions of VCLT articles 31–33 as simply authorising a set of interpretation data, we must not only identify the relevant

set of interpretation data. In addition, we need to establish as a fact that each datum, independently of the other authorised data, and without qualifications attached, on each occasion of use allows appliers to reach an interpretation result, which they can regard as conclusive, considered from the point of view of international law. This seems an impossible task, considering the wording of the Vienna Convention. First, it is evident that the parties to the Vienna Convention have authorised a set of interpretation data, although in the text of the Convention they are termed as MEANS OF INTERPRETATION. These means of interpretation include conventional language ("the ordinary meaning"), the context, the object and purpose, the preparatory work of the treaty, and so forth. However, from the wording of the Convention, it is evident that not every means of interpretation can be used independently of the others; and it is certainly not in every case a question of an unqualified use. Some means of interpretation have no independent function at all; they can be used only relative to other means. Consider for example the case where an applier interprets a treaty using the context, according to the provisions of VCLT article 31. The context can be used only in relation to conventional language. "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" – this is how the text of article 31 § 1 reads. Other means of interpretation can certainly be used independently, but then the usage of them is still qualified in some way or another. For example, the preparatory work of a treaty can be used independently of other means of interpretation, but only to confirm a meaning resulting from the application of article 31, or to determine the meaning of the interpreted treaty when an application of article 31 either leaves the meaning ambiguous or obscure, or leads to a result which is manifestly absurd or unreasonable – this is clearly expressed in VCLT article 32. Apparently, in order to correctly describe the contents of the rules laid down in VCLT articles 31–33, we need to explain in more detail how each and every means of interpretation shall be used in relation to all the others. We need to describe, first, which means are used relative to which. Second, we need to state the particular conditions under which the means shall be brought into relation with one another. And, third, for each and every case where we find that two or more means shall be brought into relation with one another, we need to specify how the different means interrelate. This cannot be done, as long as the provisions of VCLT articles 31–33 are described as simply authorising a set of interpretation data.

Secondly, not all means of interpretation can be used in accordance with the provisions of VCLT articles 31–33 so that on each occasion of use, appliers are able to reach an interpretation result, which they can regard as conclusive, considered from the point of view of international law. We

know from experience that when an applier uses more than one means of interpretation, the results obtained will sometimes conflict. If such is the situation, a conclusive result can be obtained only on the assumption that the authority to be conferred on the one means is greater than that to be conferred on the other. The Vienna Convention provides the framework, within which such assumptions shall be made. According to what is provided, given that certain conditions are shown to exist, some means shall be considered to have an authority greater than that possessed by others. For example, conventional language ("the ordinary meaning") shall be considered to have an authority greater than that possessed by the preparatory work of the treaty, lest it can be shown that by using conventional language the applier will be left, either with a meaning which is ambiguous or obscure, or with a result which is manifestly absurd or unreasonable – this follows from the provisions of article 32. Apparently, in order to correctly describe the contents of the rules laid down in VCLT articles 31–33, we need to explain how the different means of interpretation are to be used when they have shown to be in conflict with one another. This cannot be done, as long as the provisions of VCLT articles 31–33 are described as simply authorising a set of interpretation data. All things considered, I have difficulty coming to a conclusion other than this: the contents of VCLT articles 31–33 are laid out in such detail, that we cannot describe them as simply authorising a set of interpretation data. We must accept that in fact, the contents of VCLT articles 31–33 amount to something more, namely a more or less coherent system of rules. The same could then be said about the contents of the identically similar rules of interpretation laid down in customary international law.

3 BASIC CONCEPTS DEFINED

Among the many concepts assumed in this work, two in particular press for attention. I will now make an attempt to define them. A first basic concept is that of a *treaty*. Different meanings can be conveyed by the word TREATY. According to article 2 § 1(a) of the 1969 Vienna Convention, TREATY "means an international agreement concluded between States in written form and governed by international law". What does not fit this description is a group of international agreements, which in recent years have become increasingly more significant (if not nearly as important as the agreements described in VCLT article 2 § 1). The agreements referred to are those concluded between states and other subjects of international law, or between other subjects of international law *inter se*.[26] My guess is that the rules to be applied for the interpretation of treaties concluded between states

are exactly the same as those to be applied for the interpretation of treaties concluded between states and other subjects of international law, or between other subjects inter se. An indication of this is the 1986 *Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations*,[27] which includes provisions for the interpretation of treaties exactly matching those of VCLT articles 31–33. Still, a guess cannot serve as a basis for a work of this kind; and any attempt to find conclusive reasons to support it would simply require too much work. Hence, I have chosen to leave the issue of whether or not my guess is correct, and I will instead strictly limit the subject matter of this work to the interpretation of treaties, in the sense of article 2 § 1(a) of the 1969 Vienna Convention.

A second concept that urges to be defined more precisely is that of *interpretation*. The word INTERPRETATION is ambiguous; and what is more, it is ambiguous with regard to several aspects of its meaning. First of all, INTERPRETATION is ambiguous owing to the distinction between the concepts of *interpreting* a text and *understanding* it. In one sense, we can say that we are engaged in an act of INTERPRETATION each time we are faced with a text, to which we (consciously or unconsciously) attach a certain meaning. Regardless of how carefully the text of a treaty is drafted, no one expression contained in the treaty can be regarded as clear until it has gone through interpretation. In this sense, INTERPRETATION is the only way to an understanding of a treaty. In another sense, it is only when we have already read a text, and the text has shown to be unclear, that we can say that we then INTERPRET it. The text of a treaty does not always have to be interpreted, and when a treaty is interpreted it can be so to a greater or lesser extent, depending upon how much of the text we have earlier considered clear and how much we have considered unclear. In this sense, INTERPRETATION is but one of many ways to understand of the text of a treaty. It has been said that, in the context of reading and understanding laws and legally binding agreements, INTERPRETATION is used in the latter sense.[28] In any case, this is clearly the way the word is used in the 1969 Vienna Convention on the Law of Treaties. This is obvious if nowhere else in article 33 § 4: "...when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove ...".[29] Hence, in this work, whenever I speak about the INTERPRETATION of treaties, the term is used in its more limited sense, meaning the *clarification of an unclear text of a treaty*.

Secondly, the word INTERPRETATION is ambiguous due to the distinction between *the result of a clarifying operation* and *the clarifying operation as such*. INTERPRETATION can be used in the sense of *act of interpretation or interpretation process*; *the activity through which the meaning of a text is supposed to be clarified*. But it can also be used in the sense of *interpretation*

result; *the meaning of a text as clarified through one or more acts of interpretation*. The provisions of Vienna Convention articles 31–33 can be seen to contain rules for the INTERPRETATION of treaties in both senses of the word.[30] Therefore, if someone says he will try to identify the rules of interpretation that can be applied according to present-day international law, then this person has the possibility to approach his task from two completely different perspectives. In the one case, the task is to explain the concept of a correct *interpretation process*, considered from the point of view of international law. The problem we are studying can be described as follows: a person is uncertain over the meaning of a treaty provision; she wishes to know what steps best to take, in order that her line of action will be considered correct from the point of view of international law. The following questions must be answered:

- When shall an interpretation process be initiated?
- What rules of interpretation shall be applied to determine the meaning of an interpreted treaty provision?
- In what order shall the various rules of interpretation be applied?
- At what point shall an interpretation process be ended?

In the second case, the task is to explain the concept of a correct *interpretation result*, considered from the point of view of international law. This is the problem investigated: a person is faced with an assertion concerning the meaning of a treaty provision, what we will henceforth term as an *interpretation proposition*; the person wishes to know whether, from the point of view of international law, the proposition can be regarded as correct or not. The only question that needs to be answered is the following:

- What rules of interpretation shall be applied to determine the meaning of an interpreted treaty provision?

When I investigate the contents of Vienna Convention articles 31–33, and of the identical rules laid down in customary international law, this latter perspective is the one from which I approach my task. My intention is only to explain the concept of a correct interpretation result (or proposition), considered from the point of view of international law. This is not to say that this work cannot be used as a guideline in the event that the reader wishes to learn more about the rules that govern the interpretation process as such. The rules that govern the result of the interpretation process are strongly dependent on those that govern the interpretation process as such; and vice versa. It is impossible to explain the concept of a correct interpretation proposition, considered from the point of view of international law, without indirectly examining the concept of a correct interpretation process. Hence, it is my strong belief that the conclusions drawn from this work – if they indeed relate to the concept of a correct interpretation proposition – may also

be used to shed light on the rules that govern the interpretation process. At least, the conclusions can be used as a basis for reconstructing these rules.

Thirdly, the word INTERPRETATION is ambiguous depending upon *who* interprets. In the literature, authors sometimes distinguish between operative and doctrinal interpretation.[31] Operative interpretation is performed by national courts, police, immigration authorities, civil servants, military officials, diplomatic personnel, international courts and arbitration tribunals, international organisations, and other authorities empowered to decide on issues concerning the application of international agreements. Doctrinal interpretation is typically performed by the legal scholar, either in the capacity of an independent researcher, or in the function of a legal adviser to a government. In this work, attention will be focused on operative interpretation of treaties. The idea is to make an attempt to create some assumedly greater certainty among the appliers of international law with regard to the content of the currently existing legal regime for the interpretation of treaties. This is not to say that the conclusions drawn in this work are of no interest to legal scholars; quite the opposite. Certainly, the provisions of VCLT articles 31–33 appear to be designed primarily with the situation of operative interpretation in mind.[32] However, the contents of the provisions have an effect on operative and doctrinal interpretation alike. If a legal scholar assumes the task to determine through interpretation how a state shall (or, alternatively, should) be conducting itself according to some certain written international agreement, and this legal scholar wishes to be taken seriously, then naturally he must be careful not to exceed the legal framework, within which the agreement will have to be *applied*. On the other hand, even if the activity we refer to as operative interpretation is premised on conditions partly identical to those of doctrinal interpretation, we must not forget its unique characteristics. Two such characteristics should be noticed in particular.

My first remark concerns the validity of the interpretation result. When appliers interpret a treaty, and find themselves in a situation of operative interpretation, they are faced with a specific issue concerning the application of the treaty. The task is to determine the legal effects of the treaty on some certain set of facts – a specific case. This places relatively little demand on the validity of the interpretation result. The meaning of the interpreted treaty need not be clarified to a greater extent than that required by the specific case at hand. When a treaty is subjected to doctrinal interpretation, it might be that the interpreter has his mind set on some certain specific situation, but this is not necessarily the case. A legal scholar may interpret a treaty in order to produce an opinion regarding the pending settlement of a specific case, or to criticise some such settlement already decided upon.

But he may also engage in interpretation for the purpose of bringing to order the seemingly contradictory opinions expressed in the literature or in the practice of international courts and tribunals; or he may be set on recommending some sort of measures – for example, the enactment of new law, the issuing of further administrative regulations, or the drawing up of a new foreign policy. If the former is the situation, the demands upon the validity of the interpretation result are just as low as in the case of operative interpretation. The one thing that needs to be clarified is the meaning of the interpreted treaty text in relation to the specific case at hand. If the latter is the situation, the requirements are more exacting. The meaning of the interpreted treaty must be determined in relation to an unspecified number of cases of a similar kind.

My second remark concerns the "precision" of the interpretation results. When appliers interpret a treaty, and find themselves in a situation of operative interpretation, they are faced with a specific question that needs to be solved. They must determine whether a specific line of action of a specific state agree with the obligations incumbent upon that state according to some certain written international agreement, and if not, what consequences arise from breaching the agreement. This places relatively substantial demands on the "precision" of the interpretation results. The meaning of the interpreted treaty must be conclusively determined. The process of interpretation must not lead to a result leaving the meaning of the interpreted treaty unclear, so that the legal effects of the treaty cannot be determined. When a treaty is subjected to doctrinal interpretation, it is because the interpreter wishes to engage in a discourse on the legal effects of the treaty in question. The task is to provide suggestions for how the treaty shall (or, alternatively, should) be applied, either for the settlement of a specific situation of application, or for the settlement of an unspecified number of cases of a similar kind. This means that the requirements put on the "precision" of the interpretation result are relatively low. A legal scholar can opt to conclusively clarify the meaning of the interpreted treaty, but he is never forced to do so. Depending upon the individual policy of the particular scholar, he can always be content with stating the possible interpretation alternatives, together with the various reasons supporting them, and then leave the final choice to the appliers or to the political decision makers.

4 METHOD

Before I introduce my method of research, some further concepts need to be commented upon. In jurisprudence, the concept of *method* is closely related to that of *legal sources*. The problem is that the term LEGAL SOURCE

is ambiguous. In one sense, LEGAL SOURCE can be used to refer to the *source from which a legal norm originates*; *the source from which a norm must derive*, *in order to be considered legally binding*. In another sense, LEGAL SOURCE can be used to refer to *the source to which one resorts to obtain knowledge about the existence of legally binding norms and their contents*. In this work, legal sources in the former sense will be termed as FORMAL SOURCES OF LAW; legal sources in the latter sense will be termed as MATERIAL SOURCES OF LAW.[33] Secondly, the term LEGAL SOURCES in the sense of material sources of law can be used in at least two different ways. Scandinavian legal literature, and perhaps Swedish literature in particular, has traditionally reflected a rather liberal view as to the legitimacy of different material sources of law. In part, this flexible attitude could be explained by the fact that no great division has been made between the use of legal sources for the discovery of legal norms and their justification.[34] LEGAL SOURCE, in the sense of a material source of law, would then seem to be ambiguous depending on whether by this term we mean the material actually used by a judge to discover the contents of law, or the material through which the discovery made by the judge can be justified.[35] To further clarify what has been stated above, I would like to point out that it is in the latter sense that I speak of a MATERIAL SOURCE OF LAW, not the former. The purpose set for this section of the introductory Chapter 1 is not to explain how I actually arrived at conclusions about the contents of international law. The purpose is to explain how I believe the conclusions can be justified.

Two sets of rules for the interpretation of treaties will be examined in this work, deriving from two separate formal sources of law. The first set of rules takes the form of a written, international agreement. I refer to the rules laid down in articles 31–33 of the Vienna Convention. The other set of rules takes the form of an international custom accepted as law: the rules of customary international law, which – as we earlier noted – are identical to those laid down in VCLT articles 31–33. The question is how the investigation should be organised, so that I can be sure to obtain well-founded knowledge about the contents of these two sets of rules. What material sources of law should be used? What authority should be conferred on each source of law in relation to the others? And in what order should the sources be used? These are the questions I will now try to answer.

What material sources of law should be used? To answer this question I will use as my starting-point the *Statute of the International Court of Justice*, article 38 § 1:

> The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

(a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
(b) international custom, as evidence of a general practice accepted as law;
(c) the general principles of law recognized by civilized nations;
(d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Formally speaking, article 38 § 1 simply contains a list of the material sources of law to be used by the International Court of Justice in settling disputes submitted to it. However, on the more informal level, the article clearly bears a greater significance. Most experts agree that Article 38 § 1 is also reflective of the norms laid down in customary international law: each and every source of law that the International Court of Justice shall use, according to its Statute, shall also be used by appliers in general according to customary international law.[36] We should note that the list contained in article 38 § 1 has been criticised by several authors for being incomplete; the argument is that more sources of law can be used by appliers than those listed in the article.[37] However, none of the alternative lists presented have received any greater recognition. Without taking sides as to whether the list contained in article 38 § 1 should be expanded, and if so, what additional sources should possibly be considered, I have decided to strictly limit myself to the list such as it is.

This means that, all in all, four kinds of sources will be used for this work. To determine the contents of VCLT articles 31–33, I will use the text of the Convention as finally adopted. Further, I will use "judicial decisions", including not only decisions made by international courts and arbitration tribunals, but also decisions made by domestic courts insofar as they are based on rules and principles of international law.[38] And, lastly, I will use "the teachings of the most highly qualified publicists of the various nations", that is, international law literature. To determine the contents of the rules of interpretation laid down in customary international law, I will use general practice, as evidence of an international custom accepted as law;[39] I will use "judicial decisions"; and I will use international law literature.

The Vienna Convention has been authenticated in five languages, of which no one version – according to what the Convention provides – shall have precedence.[40] Of these five language versions, I will only be able to consider those in English, French, and Spanish.[41] Of course, in reading the text of the Convention we will often be faced with the situation that the text is of no use at all until interpreted. When we interpret the text of the Vienna Convention this must be done with consideration for the rules of interpretation established in international law. A legal scholar who interprets a treaty to determine its meaning must always be careful not

to exceed the legal framework, within which the agreement will have to be applied; otherwise, he will not be taken seriously. The problem is that the typical reader of this work probably will begin reading it with only a dim picture of what those rules of interpretation contain; indeed, that is the very motive inspiring this work. Naturally, being the author of this work, I have a clearer idea of the subject, having worked with it now for several years. When I write this text, it is in order to justify a series of conclusions, which some way or another I have drawn before commencing to write. In principle, I cannot see why, in a work of this nature, it would not be possible, already at the beginning of *the text*, to presuppose the answer to a question, which – considered the sequence of *the text* – will be answered only later. From a pedagogical perspective, however, this is of course not the best of approaches. Trying to balance these seemingly conflicting considerations, I have organised my inquiry so that in the earlier chapters of the work, I refer to the rules of interpretation laid down in international law, but only when I think this can be done without suffering pedagogical losses disproportionate to what I might gain in terms of a convincing argument. As the work proceeds, references to the rules in questions will be more frequent.

In the area of treaty interpretation, state practice chiefly takes the forms of (1) diplomatic and other official correspondence containing arguments for the resolution of a specific dispute involving questions of interpretation; (2) written memorials submitted in connection with the settlement of a dispute by an international court or tribunal, and records of oral pleadings; (3) decisions made by domestic courts; (4) drafts of statutes, reports and other similar parliamentary material originating from the process of states' ratification of the Vienna Convention; (5) the preparatory work of the Vienna Convention; and (6) the text of the Vienna Convention, as finally adopted.[42] In many respects this collection of material seems rather difficult to handle. The problem with the forms enumerated as (1), (2), (3), and (4) is that practice is scattered over many separate documents, and therefore presents a relatively demanding task to collect. In addition, it is not particularly representative for the international community as a whole. State practice is a conglomerate of acts, to which not all states contribute; and of those that do, some contribute more than others. The problem with the two forms enumerated as (1) and (4) is that they are often difficult to access. In cases where the material is at all accessible for scientific study, it is often difficult to penetrate for linguistic reasons. The forms enumerated as (2) and (3) are accessible via international publications, but only in a limited selection. This further reinforces the argument that practice of this kind lacks the representative characteristics required. Therefore, of all the possible forms of state practice that could be used to determine the contents of the rules of

interpretation laid down in international law, I have chosen to use above all those two forms enumerated as (5) and (6), that is, the text of the Vienna Convention and its preparatory work. The forms enumerated as (1) and (4) – official correspondence and parliamentary material – I have chosen not to use at all. The forms enumerated as (2) and (3) – memorials and pleadings, and decisions made by domestic courts – will be used, but only when absolutely necessary and always with greatest caution.

By the PREPARATORY WORK of a treaty (TRAVAUX PRÉPARATOIRES) international lawyers usually mean the documents directly related to the drafting of a treaty.[43] Many documents can be said to have influenced the process leading up to the adoption of the Vienna Convention as definite: (1) summary records from the 1968/69 Diplomatic Conference held in Vienna;[44] (2) reports from meetings of the Sixth Committee of the UN General Assembly;[45] (3) *Draft Articles With Commentaries* adopted by the International Law Commission in 1966 and presented to the UN General Assembly;[46] (4) comments by governments on the ILC Draft Articles;[47] (5) *Summary Records* of ILC meetings;[48] (6) reports prepared by the ILC Special Rapporteur, containing drafts and commentaries;[49] (7) a resolution on the interpretation of treaties, adopted by the Institute for International Law (*l'Institut de droit international*),[50] and an article treating that same subject,[51] written by Gerald Fitzmaurice – both documents, from which the Special Rapporteur expressly stated that he had taken inspiration for his first draft.[52] Not all of these documents can be considered comprised in the extension of the PREPARATORY WORK of the Vienna Convention, at least not in the context of this work – when I speak of the PREPARATORY WORK of the Vienna Convention it is because it is supposed to form part of a state practice.[53] The question is how the concept should be defined. The definition I have chosen to use is rather a broad one. In the preparatory work of the Vienna Convention, I will not only include texts emanating from the states themselves, but also other texts, insofar as states can arguably be said to have had a possibility and a reasonable cause to comment upon them. Therefore, the *preparatory work* of the Vienna Convention will be used to include all those documents denoted by the numbers (1) to (4), but not those denoted by the numbers (5) to (7).[54]

What authority should be conferred on each source of law in relation to the others? The sources I have chosen to use do not all share the same level of authority. First, greater authority will have to be conferred on the text of the Vienna Convention and on state practice than on judicial decisions and international law literature.[55] According to the Statute of the International Court of Justice, article 38 § 1, judicial decisions and legal literature shall be taken into account "as subsidiary means for the determination of rules of

law". Primary means are limited to include only "international conventions", "international custom", and "the general principles of law recognized by civilized nations".[56] Secondly, it seems a sound approach that a more recent source should be considered to have greater authority than an older one. The content of a legal norm is not necessarily constant over time; and this applies regardless of whether the norm takes the form of a written, international agreement or an international custom accepted as law. The older the source I consult, the greater the risk that the picture of international law provided by that source is no longer accurate. The purpose set for this work is not to describe the contents of those rules of interpretation that might have existed in international law at some time in the past. The purpose is to make a description of the rules that exist today.

One suggestion voiced in the literature is that as a rule, judicial decisions must be considered to have greater authority than the opinions expressed in the international law literature.[57] To my mind, this is only partially correct. Actually, a great deal must depend upon the volume of the particular source considered and its consistency. In addition, the origins of the particular source are important – some authors and judicial bodies have great authority, others have less.[58] My judgment is that, *generally speaking*, greater authority must be conferred on judicial decisions than on the opinions expressed in the literature, but that, ultimately, the relationship held between two particular sources cannot be determined other than on a case-by-case basis.

In what order should the various sources of law be used? Not all material sources of law used for this work are equally accessible. Naturally, the easiest source to access is the text of the Vienna Convention. Of the remaining sources, it appears that international law literature and the preparatory work of the VCLT are more easily accessible than the judicial opinions expressed in courts and tribunals and the arguments advanced by states in international judicial proceedings. With consideration for the relative accessibility of the sources and their relative authority, I have decided to use them in the following order. As a first step, I will resort to the text of the Vienna Convention. As a second step, I will have recourse to the international law literature and the preparatory work of the Vienna Convention – a more recent material will always be considered prior to an older one. Of course, a condition is that regardless of what can be derived from a particular source, support must be found in the text of the Vienna Convention considered in light of the rules of interpretation laid down in international law. As a third step, I will use the judicial opinions expressed in international courts and tribunals; opinions more recently expressed will be consulted before older ones. The condition laid down for stage two applies to this stage as well. As a fourth and last step, I will have recourse to the judicial opinions expressed in domestic courts, and to the arguments advanced

by states in international judicial proceedings. However, I will do so with the limited purpose of lending greater support to a conclusion that, for one or another reason, I deem to be in need of confirmation. Under no circumstances will I make use of more material than necessary. If I pore over a particular selection of sources, and discover that based on these sources, I am fully able to form a satisfactory hypothesis about the answer to the specific question at hand, then I will assume that the answer is correct and that the interpretation process can be concluded. When I find that a particular selection of sources leads to a result, which is either obscure or ambiguous, or manifestly absurd or unreasonable,[59] only then will I draw upon additional sources.

5 ORGANISATION OF WORK

Earlier, I stated that the ultimate purpose of this work is to investigate whether, and to what extent, greater clarity can be achieved with regard to the content of the currently existing regime for the interpretation of treaties established by international law. It is a basic assumption that this legal regime can only be described in terms of a more or less coherent system of rules. What rules of interpretation can be invoked by an applier, in accordance with the currently existing regime for the interpretation of treaties established by international law? This is the question I intend to answer. Up to this point, I have not said a great deal about the concept of the rule of interpretation as such. I have noted that in international law – as in domestic legal systems – we will benefit greatly from distinguishing between first- and second-order rules of interpretation. A first-order-rule of interpretation tells appliers how they shall understand an interpreted treaty provision where it has shown to be unclear. A second-order-rule of interpretation tells appliers how they shall understand an interpreted treaty provision where two first-order rules of interpretation have shown to be in conflict with one another. To my mind this is far from sufficient. If I am to succeed in reconstructing the system of rules laid down in international law for the interpretation of treaties, then I believe it is necessary for me first to establish more closely what a rule of interpretation is. I believe it is necessary for me to establish a model that in general terms describes the contents of the rules of interpretation laid down in international law. This will be the task in Chapter 2.

Chapters 3 through 11 will then be devoted entirely to the more direct investigation of the law. For this part of my work, I have elected to adhere to the outline of the Vienna Convention, as much as possible. Hence, in Chapters 3–6, I will describe what it means to interpret a treaty using the interpretation data described in VCLT article 31, what we will henceforth

be terming as PRIMARY MEANS OF INTERPRETATION.[60] In the terminology of this work, describing what it means to interpret a treaty using some certain means of interpretation will then be tantamount to clarifying and putting to words those first-order rules of interpretation, through which the usage has to be effectuated. In Chapter 3 I shall describe what it means to interpret a treaty using conventional language ("the ordinary meaning"). In Chapters 4, 5 and 6, I shall describe what it means to interpret a treaty using "the context": first – in Chapter 4 – I will treat the contextual element termed as "the text" of the treaty; second – in Chapter 5 – I will treat the two elements set out in VCLT article 31 § 2(a) and (b); finally – in Chapter 6 – I will treat the three elements set out in VCLT article 31 § 3. In Chapter 7 I shall describe what it means to interpret a treaty using its "object and purpose".

In Chapters 8 and 9, I shall describe what it means to interpret a treaty using the interpretation data authorised by VCLT article 32, what we will henceforth be terming as SUPPLEMENTARY MEANS OF INTERPRETATION. In Chapter 8, I shall describe what it means to interpret a treaty text using supplementary means of interpretation, in the sense of the *set of elements* that can be used to supplement the means of interpretation listed in VCLT article 31.[61] In Chapter 9, I shall describe what it means to interpret a treaty using supplementary means of interpretation, in the sense of *the rules of interpretation* that can be applied according to VCLT article 32.[62] In Chapter 10, I shall describe the relationship that shall be assumed to hold between the different means of interpretation recognised by the Vienna Convention. Describing the relationship that shall be assumed to hold between any two means of interpretation is tantamount to clarifying and putting to words those second-order rules of interpretation that shall be applied according to international law. Hence, a first task will be to determine the relationship that shall be assumed to hold between primary and supplementary means of interpretation. A second task will be to determine the relationship that shall be assumed to hold among the primary and supplementary means of interpretation, respectively. Lastly, in Chapter 11, I have taken on the task of clarifying and putting to words the contents of the special rules laid down in VCLT article 33 for the interpretation of treaties authenticated in two or more languages.

6 TYPOGRAPHICAL CONVENTIONS ADHERED TO IN THIS WORK

Writing about interpretation is difficult, if we demand that it be done with clarity and precision. Repeatedly, the author finds himself in the situation where he must simultaneously handle various concepts, whose different

shades of meaning are difficult to communicate in any adequate manner. It is as if language itself was not sufficient. To improve understanding, I will have recourse to a few typographic conventions. *Expressions* are enclosed by quotation marks.[63] *Words and lexicalised phrases* – where there is a risk that a word or a lexicalised phrase might be misunderstood to represent an expression or the meaning of an expression – will be denoted using capital letters. *The meaning of words and lexicalised phrases* – in those exceptional cases where I think it important to emphasise that what I refer to is not the word or the lexicalised phrase as such – will be denoted using italics. Italics – according to tradition in Anglo-American literature – will also be used for foreign words, phrases, and expressions appearing in the main text. It is hoped that these typographical conventions will enhance clarity and thus make this work easier to read.

NOTES

1. Cf. the following statement by Anthony Aust: "Most disputes submitted to international adjudication involve some problem of treaty interpretation. Just as the interpretation of legislation is the constant concern of any government lawyer, treaty interpretation forms a significant part of the day-to-day work of a foreign ministry legal advisor" (p. 184). See also the 40-year old statement by Robert Jennings: "There are few aspects of international law more important than the interpretation of treaties. A very large proportion indeed of practical problems and disputes have this question at the core of the matter" (p. 544).
2. See e.g. Mehrish: "The interpretation of treaties is among the most confused and controversial subjects in international law" (p. 39). See also Köck: "Die Auslegung völkerrechtlicher Verträge – das tägliche Brot der zur Anwendung Berufenen (grundsätzlich die Auβenämter der Vertragsstaaten, daneben vor allem internationale Gerichte und Schiedsgerichte) – macht in der Praxis oft groβe Schwierigkeiten und gibt auch der Lehre eine bisher noch immer (wie es scheint) nicht völlig bewältigte Problematik auf" (pp. 17–18; footnotes omitted).
3. Examples include: Fenwick, pp. 331–337; Yü, in extenso; Ehrlich, pp. 1–145; Wright, pp. 94–107; McNair, 1930, pp. 100–118; M.O. Hudson, pp. 543–573; Lauterpacht, 1934, pp. 713–815; Jokl, in extenso; Harvard Law Research in International Law, Part 3, pp. 939ff.; Cheng, in extenso; Sørensen, 1946, pp. 210–236; Lauterpacht, 1949, pp. 48–85; Institut de droit international, Session de Bath (1950), Session de Sienne (1952), Session d'Aix-en-Provence (1954), Session de Grenade (1956), *Annuaire de l'Institut de droit international*, Vol. 43:1, pp. 366–460, Vol. 44:1, pp. 197–221, Vol. 44:2, pp. 359–406, Vol. 45:1, pp. 225–230, Vol. 46, pp. 317–368; Fitzmaurice, 1951, pp. 1–28; Hambro, pp. 235–256; Stone, pp. 344–368; Grossen, pp. 102–131; Schwarzenberger, 1957, pp. 488–532; Fitzmaurice, 1957, pp. 205–238; Soubeyrol, pp. 687–759; Favre, 1960, pp. 75–98; Hogg (I), pp. 369–441; Hogg (II), pp. 5–73; McNair, 1961, pp. 364–473; Fitzmaurice, 1963, pp. 136–167; Degan, 1963, in extenso; Bernhardt, 1963, in extenso; De Visscher, 1963, pp. 13–162; Gordon, pp. 794–833; Berlia, pp. 287–331; Tammelo, in extenso; McDougal, pp. 992–1000; Fitzmaurice and Vallat, pp. 302–313; Voïcu, in extenso.

4. UNTS, Vol. 1155, pp. 331ff.
5. For the earlier literature, see e.g. Yü, p. 203; Anzilotti, p. 82; Lauterpacht, 1934, pp. 713–714; Harvard Law Research in International Law, Part III, pp. 939ff.; Sørensen, 1946, pp. 220–222; Kelsen, p. xiv; McNair, 1961, p. 366; Degan, 1963, pp. 162–164. For the more contemporary literature, see e.g. Klabbers, 2002, p. 204; Restatement of the American Law Institute, 1986, p. 196; Favre, 1974, p. 251; Elias, 1974, p. 72.
6. Cf. e.g. the wording of article 31 § 1 of the 1969 Vienna Convention on the Law of Treaties. The word "shall" is not to be perceived as implying that the rules of interpretation laid down in international law are considered to be of a peremptory character. (For a detailed discussion of this issue, see Leonetti, pp. 95–98. For a discussion on the concept of *jus cogens* in general, see e.g. Hannikainen, in extenso; Sztucki, in extenso.) The rules of interpretation laid down in international law are *jus dispositivum* – they apply only on the condition, and to the extent, that the parties to a treaty have not, among themselves, come to agree on something else.
7. The suggestion that separate rules of interpretation apply depending on whether the interpreted treaty is considered a *traité-loi* or a *traité-contrat* has often been made, mainly in the French international law literature. (See e.g. Rousseau, pp. 292ff.; Cavaré, pp. 138–157; Favre, 1960, pp. 75–98; Cheng, pp. 85ff. See also McNair, 1930, pp. 100–118.)
8. Another question is whether the distinction between a *traité-loi* and a *traité-contrat* is even valid. Some authors are inclined to answer in the negative. (See e.g. Lauterpacht, 1950, pp. 374–375.)
9. See e.g. O'Connell (although I do not entirely share his scepticism): "Articles 31–33 of the Vienna Convention on the Law of Treaties are concerned with treaty interpretation, and they have the effect of transforming logical positions into rules of law. However, the priorities inherent in the application of these rules are not clearly indicated, and the rules themselves are in part so general that it is necessary to review traditional methods whenever interpreting a treaty — More controversy is likely to be aroused by them than allayed" (p. 253). See also Torres Bernárdez: "*[T]he Vienna rules on treaty interpretation are not susceptible of being inscribed or enrolled in any one of the schools or doctrines on treaty interpretation that existed prior to the 1969 Vienna Convention and ... consequently*, *their* mise en ouevre *requires new practical methods of application which are yet to be fully developed* " (p. 734).
10. For an analysis of the statement that treaty interpretation is a matter of art and not science, see Linderfalk, forthcoming, 2007(b).
11. See infra, Chapter 12.
12. I draw entirely on the terminology established by Wróblewski. (See Wróblewski, 1963, p. 414; for more detail, Wróblewski, 1969, pp. 9–10.) Today, the distinction between first- and second-order rules of interpretation seems to be widely accepted. (See e.g. Ost and Van der Kerchove, p. 39; McCormick and Summers, pp. 511–544; Simon, pp. 133–134, cit. Ziembinski, p. 241.)
13. The decision to establish the International Law Commission was taken by the UN General Assembly on 21 November 1947 by adoption of res. 174 (II). The mandate of the commission is stated in the Statute of the ILC. (See the annex to said resolution, especially article 1 paragraph 1.)
14. See the *ILC Yrbk*, 1949, p. 58.
15. Loc. cit.

16. The Diplomatic Conference on the Law of Treaties was held in accordance with GA res. 2166 (XXI) of 5 December 1966, and GA res. 2287 (XXII) of 6 December 1967. For a more detailed description of the conference, see Rosenne, 1989, pp. 364–376; Neuhold, 1971/1972, pp. 1–55; Rosenne, 1970(a), pp. 30–94; Reuter, 1970, in extenso; Nahlik, pp. 24–53; Sinclair, 1970, pp. 47–69; Neuhold, 1969, pp. 59ff.
17. Of those states present, 79 voted for and 1 (France) against the proposal; 19 states (including the entire Eastern Bloc) abstained.
18. According to VCLT article 84, the Convention shall come into effect on the thirtieth day after the 35th ratification or accession instrument is deposited at the office of the UN General Secretary.
19. It should be noted that different opinions have been expressed as to how this provision should be interpreted. According to some authors, the article shall be considered to contain a *general participation clause*. The provisions of the Convention – this is the suggestion – are applicable in the relationship between states, with regard to a treaty concluded after the point in time when the VCLT entered into force for those states, but only under the condition that all states, which are parties to that same treaty, are also parties to the VCLT. (See e.g. O'Connell, p. 205; Thirlway, 1972, p. 108). According to others, the provisions of the Convention are applicable in the relationship between states, with regard to a treaty concluded after the point in time when the VCLT entered into force for those states, regardless of whether the other parties to the treaty are parties to the VCLT. (See e.g. Sinclair, 1984, p. 8; Vierdag, 1982, pp. 779–801; McDade, pp. 449–511; Rosenne, 1970(b), pp. 21–22.) I will not further engage in this debate.
20. See e.g. Indonesia and Malaysia, *Sovereignty over Pulau Ligitan and Pulau Sipadan*, § 37 (at the time of writing, the decision is available only through the web-page of the ICJ: http://www.icj-cij.org); Botswana and Namibia, *Kasikili/Sedudu Island*, ICJ Reports, 1999(II), p. 1059, § 18; USA and Canada, *Canadian Agricultural Tariffs*, *ILR*, Vol. 110, pp. 575–576, § 119; New Zealand and France, *Rainbow Warrior Arbitration*, *ILR*, Vol. 82, p. 584; USA and Italy, *ELSI*, *ILR*, Vol. 84, p. 403; Argentina and Chile, *Beagle Channel Arbitration*, *ILR*, Vol. 52, p. 124; USA and Iran, *Award of the Iran-United States Claims Tribunal in Case No. A/18*, *ILR*, Vol. 75, p. 187; Canada and France, *La Bretagne Arbitration*, *ILR*, Vol. 82, pp. 611–612; Guinea and Guinea-Bissau, *Guinea – Guinea-Bissau Maritime Delimitation*, *ILR*, Vol. 77, p. 658; Belgium, France, Switzerland, Great Britain, USA and The Republic of Germany, *Young Loan Arbitration*, *ILR*, Vol. 59, p. 529; Sweden, *Swedish Engine Driver's Union*, *Publ. ECHR*, Ser. B, No. 18, p. 89; Finland, *Namibia*, *ICJ Pleadings*, 1970, Vol. 2, p. 65; The Netherlands, ibid., p. 124; South Africa, ibid., pp. 191, 194, 197; Ireland, *OSPAR*, § 81, available through the web-page of the PCA: http://www.pca-cpa.org; Canada, *Bouzari*, *ILR*, Vol. 124, p. 439, § 48.
21. See e.g. Criddle, p. 438 et seq.; Wessel, p. 162; Bernhardt, 1999, p. 13; Torres Bernárdez, p. 747; Ress, p. 30; Golsong, pp. 147–148; Matscher, 1993, p. 63; Ris, pp. 116–117; Davidson, p. 130, n. 6; Sinclair, 1984, p. 19; Jiménez de Aréchaga, p. 42; Elias, 1974, p. 13; Haraszti, p. 206; Sur, p. 285; Reuter, 1970, p. 7; Vallat, p. xxiv.
22. See e.g. the International Court of Justice, *Bosnia Genocide*, § 160, available through the web-page of the ICJ: http://www.icj-cij.org; *Avena Mexican Nationals*, § 83; ibid.; *Construction of a Wall*, § 94, ibid.; *Pulau Ligitan and Pulau Sipadan*, § 37, ibid.; *Oil Platforms (Merits)*, § 41, ibid.; *La Grand Case*, *ICJ Reports*, 2001, pp. 501–502, §§ 99, 101; *Oil Platforms (Jurisdiction)*, *ICJ Reports*, 1996 (II), p. 812, § 23;

Nuclear Weapons – WHO Request, *ILR*, Vol. 110, p. 15, § 19; *Quatar v. Bahrain*, *Jurisdiction and Admissibility (Second Decision)*, *ILR*, Vol. 102, p. 59; *Territorial Dispute (Libya/Chad)*, *ILR*, Vol. 100, pp. 20–21; *Guinea-Bissau v. Senegal*, *ILR*, Vol. 92, p. 46; NAFTA Arbitration Panel, *Loewen*, ILR, Vol. 128, p. 351; *Mondev*, ILR, Vol. 125, p. 123; *Canadian Agricultural Tariffs*, *ILR*, Vol. 110, pp. 575–576, § 119; ICSID Arbitration Tribunal, *Salini*, p. 175; *AAPL v. Sri Lanka*, *ILR*, Vol. 106, p. 437; Ireland-United Kingdom Arbitration Tribunal, *Ijzeren Rijn*, § 45, available through the web-page of the PCA: http://www.pca-cpa.org; Arbitral Tribunal, *EMBL v. Germany*, *ILR*, Vol. 105, p. 25; France-New Zealand Arbitration Tribunal, *Rainbow Warrior Arbitration*, *ILR*, Vol. 82, p. 548; Canada-France Arbitration Tribunal, *La Bretagne Arbitration*, *ILR*, Vol. 82, pp. 611–612; Iran-United States Claims Tribunal, *Award of the Iran-United States Claims Tribunal in Case No. A/18*, *ILR*, Vol. 75, p. 187; Guinea – Guinea-Bissau Court of Arbitration, *Guinea – Guinea-Bissau Maritime Delimitation*, *ILR*, Vol. 77, p. 658; Arbitral Tribunal for the Agreement on German External Debts, *Young Loan Arbitration*, *ILR*, Vol. 59, p. 529; Inter-American Court of Human Rights, *Habeas Corpus in Emergency Situations*, *Human Rights Law Journal*, Vol. 9, p. 97; *Restrictions to the Death Penalty*, *Human Rights Law Journal*, Vol. 4, p. 352; European Court of Human Rights, *Bankovic*, § 55; *Golder*, *Publ. ECHR*, Ser. A, Vol. 18, p. 14, § 29; Appellate Body of the WTO, *US-Gasoline*, p. 17; available through the web-page of the WTO: http://www.wto.org; *Japan-Alcoholic Beverages*, pp. 10–12, ibid.

23. Note that in the literature, the terminology is not consistently used. To refer to what I call a RULE (Fr. RÈGLE; Ger. REGEL), authors sometimes use terms such as NORM (Fr. SCNORME; Ger. NORM), PRINCIPLE (Fr. PRINCIPE; Ger. PRINZIP), MAXIM (Fr. MAXIME; Ger. MAXIME), DIRECTIVE (Fr. DIRECTIVE), AXIOM (Fr. AXIOME), and CANON (Fr. CANON). I have chosen throughout to speak of RULES of interpretation. In comparison with other terms, the word RULE seems the most neutral and appropriate.
24. This could be categorised as a variant of *topic theory*. (Cf. Alexy, 1989, pp. 20–24.) An outspoken supporter of *topic theory* is professor Tammelo. (See Tammelo, in particular pp. 36–55.)
25. The idea that the contents of VCLT articles 31–33 should be described as simply authorising a set of interpretation data is a view apparently supported by a number of authors. (See e.g. Klabbers, 2002, p. 204; Wolf, p. 1025, n. 11; Tammelo, pp. 36–55.) Other authors seem to assume some sort of mixture, in the sense that the contents of articles 31–33 should partly be described as simply authorising a set of interpretation data, partly as a coherent system of rules. (See e.g. *Starke's International Law*, pp. 435–438; Brownlie, pp. 626–632; Elias, 1974, pp. 71–87; Verzijl, pp. 314–328.) It can be seriously questioned whether this latter approach is at all defensible.
26. Examples of other agreements that also do not fit the description set out in VCLT article 2 § 1(a) Vienna Convention include: (a) international agreements governed by domestic law; (b) instruments which are not agreements, at least not in the sense of the Vienna Convention, e.g. reservations, unilateral declarations, and non-binding agreements.
27. UN Doc. A/CONF.129/15. As of 13 January 2005, the convention has still not entered into force.
28. See Dascal and Wróblewski, pp. 203–205; Alexy, 1995, p. 73.
29. How could a difference in meaning otherwise be disclosed, previous to the application of articles 31 and 32?

30. Clearly, this is fact which does not enjoy sufficient recognition among authors of international law. (See e.g. Klabbers, 2003, p. 272.) I dare say that this is one of the more important reasons why the literature on treaty interpretation sometimes exhibits such a degree of confusion. See e.g. VCLT article 31 § 4: "A special meaning shall be given to a term if it is established that the parties so intended." The sole function of this text is to establish a burden of proof: an expression contained in a treaty shall be understood in accordance with conventional language, as long as there is insufficient reason to believe that the parties to the treaty used the expression in another (i.e. special) meaning. Of course, this rule holds no interest for us when we ask whether, from the point of view of international law, a proposition of interpretation can be considered correct or not. The rule is, however, highly relevant when we ask how appliers should proceed, so that their chosen line of action will be considered correct from the point of view of international law. None of the authors that dwell on the contents of VCLT article 31 § 4 have taken up this issue.
31. See e.g. Wróblewski, 1985, pp. 244–246, cit. Ferrajoli. In the literature, authors sometimes speak of a third type of interpretation, termed as authentic interpretation. An authentic interpretation exists when *all* parties to a treaty reach an agreement, governed by international law, to henceforth understand the treaty in some specific way. However, this is not interpretation in the sense of an activity performed in accordance with the rules of interpretation set forth in international law.
32. Articles 31–33 are included in Part III of the Convention, headlined "Observance, Application and Interpretation of Treaties".
33. Cf. e.g. *Oppenheim's International Law*, p. 23; Danilenko, pp. 16ff.
34. See e.g. Agge: "Alla faktorer som faktiskt påverka domstolarna (och andra myndigheter) att, medvetet eller omedvetet, uppställa och följa en viss modell för sitt handlande, äro att uppfatta som rättskällor" (p. 45). "All factors that truly stimulate the courts (and other authorities) to establish, consciously or unconsciously, and abide by a particular model for their actions are to be considered as sources of law" (authors translation). In parallel to this, we may notice that authors in the international law literature do not always distinguish in a clear fashion between the act of discovering the meaning of a treaty and the act of justifying a meaning already discovered. An example of this is the often used statement that interpretation is to some extent an art, not an exact science. (See e.g. Klabbers, 2003, p. 272; Aust, 184.)
35. Cf. the distinction between *context of discovery* and *context of justification*. For a more detailed discussion of these concepts in the legal context, see e.g. Golding, pp. 124–140; Wróblewski, 1992, pp. 14–16; Wasserstom, pp. 25–31.
36. See e.g. Malanczuk, p. 36; Higgins, 1994, pp. 17–18; *Oppenheim's International Law*, p. 24; Shaw, p. 59; Akehurst, 1987, p. 23; Bos, 1977, p. 18.
37. See e.g. *Oppenheim's International Law*, p. 45; Akehurst, 1987, p. 23; Bos, 1977, p. 18.
38. See e.g. Thirlway, 1991, pp. 127–128; *Oppenheim's International Law*, p. 41; Shaw, p. 91; Akehurst, 1987, p. 37; O'Connell, p. 35.
39. According to article 38 § 1 of the ICJ Statute, the Court shall apply "international custom, as evidence of a general practice accepted as law". However, most authors seem to think of general practice as something that serves as evidence for an international custom, and not the opposite. (See e.g. Higgins, 1994, pp. 18–19; *Oppenheim's International Law*, p. 26; Akehurst, 1987, pp. 25–26; Bos, 1977, p. 25; O'Connell, p. 9; Schwarzenberger, 1957, p. 39.)
40. See VCLT article 85.

41. Apart from English, French, and Spanish, the Convention is authenticated in Chinese and Russian. For whatever it is worth, it may be noted that the Vienna Conference worked with only three languages, namely English, French, and Spanish.
42. Cf. Villiger, pp. 4–5, 334–338.
43. See e.g. Van Hoof, p. 220.
44. Summary records of the plenary meetings and of the meetings of the Committee of the Whole, United Nations Conference on the Law of Treaties, First session, Vienna, 26 March–24 May 1968, *Official Records*, pp. 166–185, 188–190, 441–443; Summary records of the plenary meetings and of the meetings of the Committee of the Whole, United Nations Conference on the Law of Treaties, Second session, Vienna, 9 April–22 May 1969, *Official Records*, pp. 57–59; Documents of the Conference, United Nations Conference on the Law of Treaties, First and second sessions, Vienna, 26 March–24 May 1968 and 9 April–22 May 1969, *Official Records*, pp. 148–152.
45. Report of the Sixth Committee, 4 November 1965 (UN Doc. A/6090), *Official Records of the United Nations General Assembly*, 20th session, Annexes, Agenda item 87, p. 11, §§ 50–52; Report of the Sixth Committee, 21 November 1966 (UN Doc. A/6516), *Official Records of the United Nations General Assembly*, 21st session, Annexes, Agenda item 84, p. 23, § 72; Report of the Sixth Committee, 24 November 1967 (UN Doc. A/6913), 22nd session, Annexes, Agenda item 86, p. 33, § 33.
46. Report of the International Law Commission covering the work of its sixteenth session, *ILC Yrbk*, 1964, Vol. 2, pp. 199–208; Report of the International Law Commission on the second part of its seventeenth session and on its eighteenth session, Part II, *ILC Yrbk*, 1966, Vol. 2, pp. 217–226.
47. Comments by Governments on Parts I, II and III of the draft articles on the law of treaties drawn up by the Commission at its fourteenth, fifteenth and sixteenth sessions (UN Docs. A/CN.4/175 and Add.1–5; A/CN.4/182 and Add. 1–3), *ILC Yrbk* , 1966, Vol. 2, pp. 279–361; Comments on the final draft articles on the law of treaties prepared by the International Law Commission at its eighteenth session, Report of the Secretary General (UN Doc. A/6827 and Add. 1 and 2), *Official Records of the United Nations General Assembly*, 22nd session, Annexes, Agenda item 86, pp. 1–28.
48. Summary records of the sixteenth session, *ILC Yrbk*, 1964, Vol. 1, 726th meeting, §§ 2–39, 765th–766th meeting, 767th meeting, §§ 34–75, 769th meeting, §§ 3–81, 770th meeting, §§ 11–49, 54–68, 774th meeting, §§ 50–57; Summary records of the eighteenth session, 4 May–19 July 1966, *ILC Yrbk*, 1966, Vol. 1, Part 2, 869th meeting, §§ 52–70, 870th–872nd meeting, 873rd meeting, §§ 1–47, 874th meeting, §§ 1–43, 883rd meeting, §§ 90–102, 884th meeting, §§ 1–49, 893rd meeting, §§ 7–43, 894th meeting, §§ 87–94, 162–181.
49. Waldock, Third Report on the Law of Treaties, *ILC Yrbk*, 1964, Vol. 2, pp. 52–65; Waldock, Sixth Report on the Law of Treaties, *ILC Yrbk* , 1966, Vol. 2, pp. 91–103.
50. Résolution adoptée par l'Institut à la Session de Grenade, II. – L'intérpretation des traités, 19 april 1956, *Annuaire de l'Institut de droit international*, Vol. 46, pp. 364–365.
51. Fitzmaurice, 1957, pp. 203ff.
52. "Articles 70–73 take their inspiration from the 1956 resolution of the Institute of International Law and from Sir G. Fitzmaurice's formulation of the 'major principles' of interpretation in an article on the law and procedure of the International Court published in 1957." (Waldock, Third Report on the Law of Treaties, *ILC Yrbk*, 1964, Vol. 2, p. 55; footnotes omitted.)

53. It should be noted that according to VCLT article 32, the preparatory work of the Vienna Convention can also be used as a supplementary means of interpretation. In this case the concept is somewhat extended. For more on this subject, see Chapter 7 of this work.
54. Of course, nothing stops me from using the documents denoted by the numbers (5), (6) and (7) as part of the international law literature.
55. See *Starke's International Law*, p. 54; Shaw, p. 98; Bos, 1977, p. 59; Akehurst, 1974/1975, p. 280; Schwarzenberger, 1957, pp. 26–28.
56. See e.g. Akehurst, 1987, p. 40; Schwarzenberger, 1957, p. 58.
57. See e.g. Van Hoof, p. 177, cit. Fitzmaurice, 1958, pp. 171–172.
58. Cf. Akehurst, 1974/1975, p. 280.
59. Cf. VCLT article 32.
60. Cf. e.g. Ris, p. 117; Villiger, p. 345; Verdross and Simma, p. 493; Jiménez de Aréchaga, p. 46; Elias, 1974, p. 80; Mehrish, p. 62; Sharma, p. 386; Jacobs, p. 326; Tunkin, at the eighteenth session, 872nd meeting of the International Law Commission, *ILC Yrbk*, 1966, Vol. 1, Part 2, p. 201, § 43; Ago, at the same meeting, ibid., p. 202, § 50; Waldock, Third Report on the Law of Treaties, *ILC Yrbk*, 1964, Vol. 2, p. 99, § 19.
61. For further explanations, see the introduction to Chapter 8 of this work.
62. Loc. cit.
63. For a more detailed description of the concept *expression*, see Chapter 2 of this work.