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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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CHAPTER 2

THE RULE OF INTERPRETATION

In this chapter, I will set up a model which describes in general terms the contents of the rules laid down in international law for the interpretation of treaties.¹ To make the task more manageable, I think it suitable at the start of this chapter to establish some sort of definition. As a starting point for discussion of the rules of interpretation laid down in international law, anyone should be able to accept the following uncontroversial statement:

The rules of interpretation laid down in international law contain a description of the way an applier shall be proceeding to determine the correct meaning of a treaty provision considered from the point of view of international law.

However uncontroversial this definition may be, it is bound to raise the following questions:

- (1) What is meant by “the correct meaning of a treaty provision considered from the point of view of international law”?
- (2) How can we best describe the way an applier shall proceed to determine the correct meaning of a treaty provision considered from the point of view of international law?

These are the questions I will now try to answer. The chapter is organised so that in Section 1, I begin by answering question (1). In Sections 2–4, I shall then proceed to answer question (2). In the last two sections of the chapter, Sections 5 and 6, drawing upon the observations made in the earlier sections, I shall examine the consequences of these answers. As stated before, the idea is to establish a model that in general terms describes the contents of the rules laid down in international law for the interpretation of treaties.

1 THE CORRECT MEANING

What is meant by “the correct meaning of a treaty provision considered from the point of view of international law”? In principle, we have only three kinds of meanings to choose from whenever we speak about the meaning of a text.² First, there is the *utterance meaning* of the text, that is, the contents of the utterance or utterances expressed in the text. By an

utterance we mean the use of a specific subject in a specific occurrence of a specific piece of spoken or written language,³ for example a word or a phrase.⁴ The determining factor for the contents of an utterance is the information associated with that utterance according to the intentions of the utterer.⁵ Secondly, there is the *sentence meaning* of the text, that is to say, the contents of the sentence or sentences that make up the text. By a sentence we mean an ideal succession of words linked together according to the grammar of the language assumed.⁶ The content of a sentence is tantamount to the information associated with that sentence according to the underlying linguistic system.⁷ Thirdly, there is the *receiver meaning* of a text – the contents of the text as received. The content of a text as received is much the same as the purely personal associations which the text creates in the reader or listener,⁸ who is not necessarily a specific person, but can also be a reader or listener of a specific type.⁹

According to the rules of interpretation laid down in international law, the correct meaning of a treaty does not correspond to the sentence meaning of that treaty – this much is evident from the literature. Nor does the correct meaning of a treaty correspond to its receiver meaning. In the literature, most of the authors who have participated in the discussion about the rules of interpretation and their content express a view on the ultimate purpose of interpretation. These statements are strikingly similar: when an applier interprets a treaty by applying the rules of interpretation laid down in international law, the purpose is to establish *the intention of the parties*.¹⁰ Considering this, I can only draw the conclusion that the correct meaning of a treaty corresponds to the utterance meaning of that treaty. This is not to say that we can consider the issue decided. We can say that the correct meaning of a treaty is a meaning of the kind previously defined as its utterance meaning, but the statement cannot be made without some reservation. For three reasons we are forced to define our positions more precisely.

A first reason is the fact that a treaty is never an expression of a single utterance. A treaty is always an expression of multiple utterances, often derived from a variety of different subjects. Broadly speaking, we can say that a treaty gives voice to utterances derived from each and every individual who participated in the drafting process leading to the adoption of that treaty. Among the individuals who take part in the drafting of a treaty, we will always have to include representatives of states, but sometimes individuals may participate in the capacity of independent experts or representatives of non-governmental organisations.¹¹ Of course, all these utterances cannot serve as decisive for what is to be considered as the correct meaning of the treaty in question. Clearly, the correct meaning of a treaty does not correspond to the contents of utterances other than those derived from states.

The question is which states we are talking about. In principle, I can think of three alternatives. According to a first alternative, account is taken of any and all states that participated in the drafting of a treaty; consequently, we ignore those states that did *not* participate in the drafting but are nevertheless parties to the treaty – it may be open for accession, for example. According to a second alternative, account is taken of any and all states that participated in the drafting of the treaty and for which the treaty has already entered into force; consequently, we ignore those states that did *not* participate in the drafting, as well as those that are (still) not parties. According to a third alternative, account is taken of any and all states for which the treaty has already entered into force, regardless of whether they participated in the drafting of the treaty or not; consequently, we ignore those states that participated in the drafting but are (still) not parties.

The rules of interpretation laid down in the Vienna Convention contain expressions that can be said to support the third alternative. Article 31 § 2 speaks of “any agreement relating to the treaty which was made between all the *parties* in connexion with the conclusion of the treaty”, and of “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”.¹² Article 31 § 3 speaks of “any subsequent agreement between the *parties* regarding the interpretation of the treaty or the application of its provisions”; “subsequent practice in the application of the treaty which establishes the agreement of the *parties* regarding its interpretation”; and “relevant rules of international law applicable in the relations between the *parties*”.¹³ Further clarity is provided in the provisions of article 31 § 4: “A special meaning shall be given to a term if it is established that the *parties* so intended”.¹⁴ PARTY, according to the terminology of the Vienna Convention, means “a state which has consented to be bound by the treaty and for which the treaty is in force”.¹⁵ This third alternative also appears to have the support of the literature. Most authors confirm the idea that the correct meaning of a treaty corresponds to the contents of those utterances that derive from “the parties”. Some uncertainty remains with regard to the meaning of this expression. Some authors seem to limit the extension of “the parties” to include only those states that participated in the drafting of a treaty.¹⁶ However, The meaning ascribed to the expression in the language of international law in general is the same as the one assumed in the text of the Vienna Convention. Hence, all things considered, I arrive at the following conclusion: the correct meaning of a treaty corresponds to the contents of the utterances expressed by that treaty, excluding from consideration anything but the utterances that derive from states which are parties to the treaty.

A second reason that makes it impossible to unreservedly say of the correct meaning of a treaty, that it corresponds to the utterance meaning conveyed by that treaty, is the fact that it does not necessarily carry information with regard to one, simple matter only. Depending on the intentions held by the parties, there can be many layers of information linked to a treaty.¹⁷ It can be a piece of information concerning the reference of specific expressions; it can be a piece of information concerning the norm content of the treaty; a piece of information concerning the different instruments comprised by the treaty; a piece of information concerning the relationship held between the contents of the treaty and other norms laid down in international law; a piece of information concerning the relationship held between the treaty and some certain values external to the treaty; concerning its object and purpose; and so forth.¹⁸ All this information cannot possibly determine the correct meaning of the treaty; this much is clear. The question is which information we should take into account. At least in this work, the answer must be considered a given. The subject matter of this work is the operative interpretation of treaties.¹⁹ When appliers interpret a treaty, and find themselves in a situation of operative interpretation, they are faced with a specific situation concerning the application of the treaty. The task is to establish a basis that can subsequently be used for the application of the treaty. What the applier uses is the norm content of the treaty. Considering this, the correct meaning of a treaty must be tantamount to the piece of information conveyed by that treaty with regard to its norm content.

A third reason situation that forces us to more precisely define our positions is the fact that a treaty is not only the expression of different utterances, as stated earlier. The different utterances conveyed by a treaty can also be of different content: it may be the case that for different parties the text of a treaty carries different pieces of information. It is a widely known fact that negotiating states, already at the point when a treaty is adopted, can have different views with regard to the contents of that treaty. According to what some authors seem to think, the obligations held by a state under a treaty stem from the single will of that state, as expressed in the treaty.²⁰ For these authors, the correct meaning of the treaty would be seen to correspond to the piece of information conveyed by a treaty, according to the intentions held by each individual party, *regardless of the information conveyed by the treaty according to the intentions held by other parties*. This is certainly a position I have difficulty accepting. As noted earlier, when appliers interpret a treaty, and find themselves in a situation of operative interpretation, it is their task to establish a basis that can subsequently be used for the application of the treaty. In this case, what is used is the norm content of the interpreted treaty text; that is, the agreement expressed by the

text. What the applier uses is the norm content of the treaty, that is to say, the agreement confirmed in the treaty. An agreement concluded between two parties is constituted by an offer followed by a concurring acceptance. Hence, the utterance meaning of a treaty cannot possibly be tantamount to the pieces of information conveyed by a treaty, according to the intentions held by each individual party *separately*. Arguably, the correct meaning of a treaty should be identified with the pieces of information conveyed by the treaty, according to the intentions held by each individual party, but only insofar as they can be considered *mutually* held.²¹

All things considered, it appears we are able to define the correct meaning of a treaty provision, considered from the point of view of international law, as follows:

The correct meaning of a treaty should be identified with the pieces of information conveyed by that treaty with regard to its norm content, according to the intentions of the treaty parties – all those states, for which the treaty is in force – insofar as these intentions can be considered mutually held.

Thus, the first of the two questions posed at the beginning of this chapter seems to have an answer. We will now move on to the second.

2 HOW TO DETERMINE THE CORRECT MEANING

How can we best describe the way an applier shall proceed to determine the correct meaning of a treaty, considered from the point of view of international law? On the face of it, the answer to this question is rather simple. The correct meaning of a treaty classifies as of the kind earlier defined as its utterance meaning. Hence, it seems a reasonable answer to say that to determine the correct meaning of a treaty, the applier should proceed in the exact same way as any common reader would proceed to determine the utterance meaning of any text. However, on a closer inspection, we must admit the insufficiency of this answer, since the following difficult question remains:

How can we best describe the way the common reader proceeds to determine the utterance meaning of a text?

Since I want to establish a more definite description of the rules of interpretation laid down in international law, I must seek support in some general theory of verbal communication. Of course, an utterance is not an end in itself. Whenever a written utterance is produced, it is because some specific subject (a writer) has some particular piece of information that he wishes

to convey to some other particular subject (a reader). When the writer succeeds, communication is achieved; we can say that the reader understands the utterance expressed by the writer. The question is how a writer and a reader succeed in understanding each other. How is verbal communication achieved?

As an answer to this question, linguistics offers two explanatory models.²² From antiquity to modern semiotics, scholars have worked with the hypothesis that verbal communication is merely a matter of coding and decoding messages;²³ this is what we can call the *code model*.²⁴ A fundamental idea is that all acts of communication – regardless of mode – comprise three elements, namely, a message, a signal, and a code.²⁵ In this instance, a code is defined as a system through which specific kinds of messages can be linked to specific kinds of signals. A message is defined as a piece of information stored in the brain of a human being; it has no existence outside of the internal world of that human being. Lastly, a signal is defined as a modification of the sensory world, whose principal distinctive feature is that it can be produced by an encoder and received by a decoder. According to the code model, the following events occur when two people communicate with one another: a person (X) wishes to convey a message to another person (Y); X encodes the message into a signal using an encoder; the encoder sends the signal over some particular communication channel to a decoder; the decoder decodes the signal into a message, which it passes on to the intended receiver of the message, the person Y.²⁶

This general description can be simplified somewhat, if we choose to concentrate on the situation where X and Y communicate in a strictly verbal manner by means of a text. Then the encoder can be described as identical with the original sender of the message (X), and the decoder can be described as identical with its receiver (Y). Coding and decoding occur when X and Y make use of their respective linguistic abilities. The communication channel can be described as identical with a text. The signal can be described as identical with an utterance. Hence, the communication involving the two persons X and Y can be described as follows: a person (X) wishes to convey a message to another person (Y); X encodes the message into an utterance; the utterance is sent to Y using a text, after which Y decodes the utterance and partakes of its content, that is to say, the message from X.²⁷

A distinguishing characteristic of the code model is the importance placed on the utterance as a conveyor of messages. In the code model, the utterance is a fact, through which the receiver (in our case the reader) can immediately form a true opinion of what the sender (the writer) wished to convey with that utterance; the only thing required is that the reader has access to the right code. In recent times, philosophers have come to question whether,

in the understanding process, the role of the utterance (and perhaps also the role of the writer) has in fact not been exaggerated; as a consequence, some authors have begun developing a different model.²⁸ In this model, the utterance is just a piece of indirect evidence. The utterance is a fact, from which the receiver-reader can only *infer* what the sender-writer wished to convey. The receiver-reader must insert the utterance into some sort of context. Only by drawing on a context is it possible for the reader to arrive at a conclusion with regard to the content of the utterance; this is what we will call the *inferential model*.²⁹ According to the inferential model, the following events occur when a writer makes himself understood by a reader using a text: a person (X) has a message, a piece of information, that she wishes to convey to another person (Y); X indicates the message by producing an utterance; the utterance is transferred to Y via a text; Y notices the text, then inserts it into a context, through which the utterance – the message from X – can subsequently be inferred.³⁰

The decided difficulty with the inferential model is the concept of context. By a CONTEXT we would have to understand something that belongs exclusively to the intellect of the reader – this much is clear. When trying to understand an utterance, it is not the physical world as such that a reader brings to bear on the understanding process, but the mental representations he makes of the physical world. We would then have to accept that CONTEXT is defined as the entire set of assumptions about the world in general, that a reader – through decoding, through inference, through direct perception or through using his memory – has access to when reading a text.³¹ Consider the example of a reader, an insurance adjuster, confronted with the following passage in a written notification of damage: “Anders ran after the dog with false teeth in his mouth”. The notification, written by one Britta Andersson, describes how her husband’s false teeth came to be damaged. Now, assume that the reader draws the conclusion that the dog and not the man Anders has the false teeth in his mouth, though both alternatives are fully possible from a grammatical point of view. It is then conceivable that the reader (consciously or unconsciously) argues along the following lines:

Premise (1): Either the man Anders or the dog has the false teeth in his mouth.

Premise (2): Somehow the dog has got hold of Anders’s false teeth.

Premise (3): If the dog gets Anders’s false teeth, he puts them in his mouth.

Conclusion: It is the dog that has the false teeth in his mouth.

The first premise is the result of decoding. It has its basis partly in the reader’s perception of existing grammatical rules, and partly in the reader’s

assumption that Britta expresses herself in accordance with the rules of grammar. The second premise represents the result of inference. It has its basis partly in the reader's assumption that, in some way, Anders's false teeth have become damaged, and partly in the application of a proposition of generalised knowledge; if the dog gets hold of Anders Andersson's false teeth, then the teeth will very likely be damaged.³² The third premise also represents the application of a proposition of generalised knowledge. It is based partly on the reader's collected experiences of dogs in general, and partly on the reader's assumption that dogs will be dogs.

The problem with describing the understanding of utterances as dependent on a context is that it can only partially explain how understanding is actually achieved. The scope of a context borders on the infinite. Any reader faced with an utterance has access to countless assumptions. In principle, any assumptions could be used as a premise for the reader's inference. Naturally, however, not all of the assumptions will lead the reader to the true content of the utterance. The question arises: considering that a reader has access to thousands and thousands of contextual assumptions, how can she succeed in selecting the ones that lead to understanding? According to the answer offered by linguistics, the reader resorts to a second-order assumption. The reader assumes about the utterer (the writer) that he is communicating in a rational manner. In other words, the utterer is assumed to be conforming to some certain communicative standards.³³ It is this communicative assumption *together* with the context that makes it possible for the reader to successfully establish the content of an utterance.

As a suitable illustration, we can return to the notification of damage and the passage "Anders ran after the dog with false teeth in his mouth". The reader understands the utterance to express that it is the dog and not the man Anders who has the false teeth in his mouth. The reader's premises are those earlier denoted as (1), (2) and (3). Of course, these are not the only premises available to the reader. Among other things, the reader should typically also have access to the two assumptions denoted as (4) and (5) in the syllogism stated below. Used in the manner illustrated in the syllogism, these assumptions lead the reader to the conclusion that it is the man Anders and not the dog who has the false teeth in his mouth.

Premise (1): Either the man Anders or the dog has the false teeth in his mouth.

Premise (4): Anders owns false teeth.

Premise (5): If Anders owns false teeth, then he has them in his mouth.

Conclusion: It is the man Anders who has the false teeth in his mouth.

So what is it that compels the reader to use contextual premises (2) and (3), and not premises (4) and (5)? One possible answer could be that, according to an assumption held by the reader, the writer (Britta) has expressed herself according to the communicative standard stated below:

If a person produces an utterance taking the form of a written notification of damage, then the notification should be drawn up, so that its entire content appears fully relevant.

For what is the point of uttering the passage “Anders ran after the dog with false teeth in his mouth”, if it does not in some way explain the damage to the false teeth?

Now, the question of relevance for this work is how these two models – the code model and the inferential model – should be approached. Both models are intended to offer an explanation of how a writer and a reader succeed in communicating using a text. The problem is that the explanations provided by the two models are different. The code model and the inferential model would then have to be seen as competing models. Given the question I intend to answer in this chapter – How can we best describe the way an applier shall proceed to determine the correct meaning of a treaty provision, considered from the point of view of international law? – and given that I wish to provide a definite answer, it is apparent that I cannot apply both. I need to make a choice. This choice will determine the direction taken in the subsequent chapters of this work, the purpose set for those chapters being to clarify and put to words all those rules laid down in international law for the interpretation of treaties. The question is whether the code model or the inferential model should be seen as the better description of the way an applier shall proceed to determine the correct meaning of a treaty provision, considered from the point of view of international law. If the code model is better, then an important task will be to identify the code presupposed by the rules of interpretation laid down in international law. If the inferential model is better, then the task will be to determine what those rules of interpretation presuppose in terms of communicative assumptions.³⁴

In my opinion, the inferential model should be seen as the better description in the sense stated above. Two lines of argument support this conclusion. The first line of argument is one about language in general. Circumstances indicate that only the inferential model could be seen as a correct description of the way the common reader proceeds to determine the utterance meaning of a text. In modern linguistics, the code model has come under so much criticism that it must be questioned whether this model should be regarded at all as valid. In Section 3 of this chapter, I will describe the main points of this criticism, drawing heavily on a piece of work written

by the two British linguists Dan Sperber and Deirdre Wilson.³⁵ The second line of argument that supports my conclusion is an argument about language considered from the point of view of the Vienna Convention. Circumstances indicate that only the inferential model could be seen as a correct description of the way an applier shall proceed to determine the correct meaning of a treaty provision, according to the rules laid down in international law. Regardless of whether the code model should be considered valid or not, strong arguments suggest that this model should at least not be regarded as valid for the very specific purposes we have in mind. In Section 4 of this Chapter, these arguments will be presented in more detail.

3 HOW TO DETERMINE THE CORRECT MEANING (CONT'D)

In order for the code model to be accepted as a valid description of the way the common reader proceeds to determine the utterance meaning of a text, it must be possible to establish the existence of a code – but not just any code. The code must be such that a written utterance can always be paired with what the utterance contains – a specific message. One suggestion is that this code can be identified with the lexicon and grammar of a language – what we call semantics.³⁶ This is a sound suggestion insofar as the semantics of a language actually can be seen to form a code. The problem is that semantics is not a code in the very sense implied by the code model. The rules of semantics form a code, according to which sentences can be linked with sentence meanings. For the conclusion to be tenable, that a reader is able to use the rules of semantics to pair the production of a written utterance with a specific message, it must be possible first to regard the production of an utterance on a piece of paper as amounting to much the same as the production of a sentence; second, it must be possible to regard the sentence meaning of a text as always corresponding to a specific message. These are conditions that cannot possibly be considered fulfilled. It is conceivable to say that there is a close resemblance between the production of a sentence on a piece of paper and the production of a written utterance.³⁷ When a written utterance is produced, it is through the production of a sentence or a series of sentences on a piece of paper. What cannot as easily be overcome are the differences between the content of an utterance and the sentence meaning of a text.³⁸ Let us cite Sperber and Wilson:

An utterance has a variety of properties, both linguistic and non-linguistic. It may contain the word “shoe”, or a reflexive pronoun, or a trisyllabic adjective; it may be spoken on top of a bus, by someone with a heavy cold, addressing a close friend ... [G]rammars abstract out the purely linguistic properties of utterances and describe a common linguistic structure, the sentence, shared by a variety of utterances which differ only in their non-linguistic

properties. By definition, the semantic representation of a sentence, as assigned to it by a ... grammar, can take no account of such non-linguistic properties as, for example, the time and place of utterance, the identity of the speaker, the speaker's intentions, and so on. The semantic representation of a sentence deals with a sort of common core of meaning shared by every utterance of it. However, different utterances of the same sentence may differ in their interpretation; and indeed they usually do.³⁹

Of course, it is a possibility that we are dealing with a code, which contains the rules of semantics but only as part of a larger signal system more comprehensive in kind. "Much recent work in pragmatics", state Sperber and Wilson, ...

... [has assumed] that there are rules of pragmatic interpretation much as there are rules of semantic interpretation, and that these rules form a system which is a supplement to a grammar as traditionally understood.⁴⁰

This assumption is only partially correct. Indisputably, rules of pragmatics exist, and among the many kinds of utterances that cannot be fully comprehended by a reader applying the rules of semantics, there are indeed those that can be comprehended using pragmatics. Consider the example of the woman, Mrs. K, who comes home from work one evening and finds a note from her husband on the kitchen table:

(1) "I am at a meeting with the PTA (Parent-Teacher Association)".

Mrs. K can instantly comprehend what Mr. K wishes to express, namely that *Mr. K* is at a meeting with the PTA. The reason is that a basic rule of pragmatics can be brought to bear on the text written, according to which the "I" in an utterance typically refers to the utterer. In order for pragmatics and semantics to function as a code in the sense of the code model, something more is required: each and every one of the great number of utterances that cannot be fully comprehended by a reader applying the rules of semantics, needs to be such that it can be comprehended using pragmatics. Clearly, this is a requirement that pragmatics cannot live up to.⁴¹ Take for example the following utterance:

(2) "Here comes Mrs. K. She has egg on her blouse."

Certainly, everyone can understand that it is Mrs. K who has egg on her blouse. Using English grammar we can easily conclude that the pronoun "she" refers to a person of female gender. But – and this is where utterance (2) differs from utterance (1) – no pragmatic rule can be brought to bear on the utterance that allows us to identify the person being referred to, that is, Mrs. K. Apparently, in order for a reader to understand utterance (2), something more is required than just semantics and pragmatics.

Several linguists have described understanding as an inferential process, while still assuming the code model to provide the framework for a general theory of verbal communication. The underlying assumption is that a process of inference can be part of a larger decoding process.⁴² This notion that the understanding of utterances is a process at least partially based on inference squares well with our everyday experiences. The problem with the idea is that it greatly underestimates the difference between a decoding process and a process of inference. A decoding process begins with a signal and results in a message, which is linked to the signal using a code. A process of inference starts with a set of premises and results in a conclusion linked to the premises using ordinary rules of deductive reasoning. For a reader to be able to decode a written utterance and comprehend the message that the writer wishes to convey, it must be possible for the reader to use that very same code, which was earlier used by the writer to encode the message. Hence, whoever assumes that a process of inference can be comprised in a decoding process is forced also to assume that a reader and a writer can be simultaneously working on the basis of an identical set of assumptions. This assumption is obviously difficult to defend.⁴³ The premises used by a reader for the understanding of a written utterance are drawn from a context.⁴⁴ According to what we stated earlier, CONTEXT is the entire set of assumptions about the world in general that a reader has access to when reading a text.⁴⁵ Of course, the problem is that it is impossible to find two people who hold two identical sets of assumptions about the world in general. Different people have different experiences, and different experiences inevitably lead to the development of different assumptions. Even in cases where two people happen to share an experience it cannot be taken for granted that they will develop identical assumptions with regard to that common experience. Tests have shown that two people witnessing the same event can still have completely different ideas of what actually happened.⁴⁶

Of course, some assumptions held by two people will always be shared. Hence, if a reader and writer wish to understand one another, they would only have to ensure that nothing but shared assumptions are used.⁴⁷ Naturally, the reader and the writer must be able to distinguish the assumptions they share from those that they do not share – a requirement not easily met. For a reader and a writer to be *certain* that they share a given set of assumptions $\{A_1, A_2, A_3\}$, the reader would have to *know* that the writer holds the assumptions $\{A_1, A_2, A_3\}$, and the writer must know that the reader holds those same assumptions; but this is not all. The reader and the writer must *mutually* know that they hold the assumptions $\{A_1, A_2, \text{and } A_3\}$.⁴⁸ The reader must know that the writer knows that the reader holds the assumptions $\{A_1, A_2, A_3\}$, and that the writer knows that the reader knows that the writer holds the

assumptions $\{A_1, A_2, A_3\}$, and that the writer knows that the reader knows that the writer knows that the reader holds the assumptions $\{A_1, A_2, A_3\}$, and so forth into infinity. In the same way the writer must know that the reader knows that the writer holds the assumptions $\{A_1, A_2, A_3\}$, and the reader must know that the writer knows that the reader holds the assumptions $\{A_1, A_2, A_3\}$, and that the reader knows that the writer knows that the reader knows that the writer holds the assumptions $\{A_1, A_2, A_3\}$, and so forth into infinity. This condition is impossible to meet.⁴⁹ A reader and a writer can never *know for sure*, that they share a given set of assumptions. They can only *assume* that this is the case.⁵⁰

It seems to be the natural way for supporters of the code model who wish to avoid this dilemma, to give up the requirement of mutual knowledge and instead replace it with a requirement of mutual *assumption*: the reader and the writer must mutually *assume* that they share a given set of assumptions.⁵¹ But even this more realistic requirement gives pause. The problem is that the greater the number of assumptions linked together in a chain of the kind discussed here, the less likely the assumption found at the end of the chain.⁵² For example, a reader may assume with a probability approaching certainty, that a writer holds a given set of assumptions $\{A_1, A_2, A_3\}$; the reader should be less certain, that the writer assumes that the reader holds the assumptions $\{A_1, A_2, A_3\}$, and even less certain that the writer assumes that the reader assumes that the writer holds the assumptions $\{A_1, A_2, A_3\}$; and so forth. The weakest probability of all should be the one conferred on the assumption that the reader and the writer mutually assume that they share the assumptions $\{A_1, A_2, A_3\}$, being the last link in the reader's chain of assumptions. The reader's and writer's respective chains of assumption are always infinitely long. Considering this, the question arises how it is ever possible for a reader and a writer to even begin meeting the requirement of not using assumptions other than those that are shared. The question remains unanswered.⁵³

Let us summarise. A person who advocates the code model as an explanation of the way any common reader would proceed to determine the utterance meaning of a text will quite clearly have difficulties justifying her position. In order for the code model to be considered justified, it must be possible to show the existence of a code, through which a written utterance can be linked with a specific message. The rules of conventional language are themselves incapable of functioning as such a code – this is something that even supporters of the code model have come to realise. Hence, supporters of the code model contend that the rules of conventional language are to be seen as forming only a part of the larger signal system, which also includes the mutual assumptions held by the reader and the writer with regard to the

world in general. In order for the mutual assumptions held by reader and writer to perform the functions of a code, reader and writer must be able to distinguish the assumptions they share from those they do not share. As of this date, no one has been able to show how this requirement can ever be met in practice. The conclusion that immediately presents itself is that the code model should be dismissed. If we wish to describe the way any common reader would proceed to determine the utterance meaning of a text, then the inferential model is our only remaining choice.

Nevertheless, the choice of the inferential model also poses certain problems of justification. It cannot be denied, that when a reader understands a written utterance, decoding will be involved to some extent.⁵⁴ Decoding occurs whenever the reader takes assistance from the linguistic rules of a language – i.e. from semantics and pragmatics – to pair the utterance with some certain linguistic meaning. Wishing to defend our choice of the inferential model, we are obviously faced with the task of trying to explain how decoding can be a part of a process of inference, despite the fact that a decoding process and a process of inference are two completely different things.⁵⁵ The explanation is quite simple. All we need to do is consider the result of decoding as a piece of indirect evidence, based on which a reader can only *infer* what the writer wished to convey.⁵⁶ When a reader has noticed an utterance, and she has realised the linguistic system used by the writer, it is only logical that the reader should start by drawing upon the rules of that same system to see how far it gets her. Any of the following two results may be obtained. First, it may be that the linguistic meaning of the text is indeterminate, the conclusion being that the writer's message obviously must be something else than what is shown by a mere application of linguistic rules. To determine conclusively what the writer wishes to convey, the reader would then be forced to continue her efforts, inserting the utterance into a context. Second, it may be that the linguistic meaning of the text is determinate. It is possible that the reader then decides that she has obtained the writer's message, and that the process of understanding can be concluded. The thing is, however, that the reader can never be completely sure of actually having obtained the writer's message. It might be that the writer made a grammatical error, or it might be that something is implied. The reader can only assume that the true message is the one obtained by an application of linguistic rules. In both cases, the reader's understanding of the utterance is a matter of decoding; but in neither case is the linguistic meaning of the utterance itself decisive for the reader's conclusion. The linguistic meaning is nothing but a piece of indirect evidence, based on which the reader can only infer what the writer is trying to convey.⁵⁷

4 HOW TO DETERMINE THE CORRECT MEANING (CONT'D)

Regardless of whether the code model should be considered as valid or not, strong arguments suggest that this model should at least not be regarded as valid for the very specific purposes that we have in mind. It is a fact that the rules of interpretation laid down in international law are not always sufficient to generate a determinate interpretation result.⁵⁸ If appliers interpret a treaty, and several rules of interpretation can be applied, the results obtained will sometimes conflict. In international law, there are rules for resolving some of these conflicts. Not only does international law comprise a number of first-order rules of interpretation, but also a few second-order rules are provided.⁵⁹ A first-order rule of interpretation tells appliers how an interpreted treaty provision shall be understood, in cases where the provision has shown to be unclear. A second-order rule of interpretation tells appliers how an interpreted treaty provision shall be understood, in cases where two first-order rules of interpretation have shown themselves to be in conflict with one another. However, not every conflict between two first-order rules of interpretation can be resolved merely by applying a legally binding second-order rule of interpretation. We have to accept that, although a treaty may have been interpreted in full accordance with the rules of interpretation laid down in international law, there will nevertheless be situations where two conflicting interpretation results must both be regarded as legally correct. This is a fact that can be reconciled with the inferential model, but hardly with the code model.

Let us assume that the procedure to be used for determining the correct meaning of a treaty provision, according to the rules of interpretation laid down in international law, is the one described by the inferential model. In the inferential model, an interpretation result is always an assumption. The understanding of a written utterance is dependent upon a context. It has been stated earlier that according to the inferential model, the following events occur when a writer (X) and a reader (Y) communicate using a text: a person (X) has a message, a piece of information, that he wishes to convey to another person (Y); X indicates the message by producing an utterance; the utterance is transferred to Y via a text; Y notices the text, then inserts it into a context, through which the utterance – the message from X – can subsequently be inferred.⁶⁰ We have also observed that we would have to understand context to represent the entire set of assumptions about the world in general to which a reader has access when reading a text.⁶¹ An assumption is neither true nor false; it is measured in terms of its strength. Hence, given that a conclusion obtained through deduction is never stronger than the weakest premise, then according to the inferential model, an interpretation

result can only be described as more or less strong or well-founded. This is a fact that causes little concern. In the situation where two conflicting interpretation results are both to be regarded as correct, considered from the point of view of international law, we can still defend our claim that they are both *prima facie* warranted.

Now, let us assume instead that the procedure to be used for determining the correct meaning of a treaty provision, according to the rules of interpretation laid down in international law, is the one described by the code model. In the code model, an interpretation result will always have a truth value. The understanding of a written utterance is dependent upon the existence of a specific state of affairs, namely that the reader and the writer have access to the exact same code. According to the code model, the following events occur when a writer (X) and a reader communicate using a text (Y): a person (X) wishes to convey a message to another person (Y); X encodes the message into an utterance; the utterance is sent to Y using a text, after which Y decodes the utterance and partakes of its content, that is to say, the message from X.⁶² A state of affairs either exists, or it does not. A writer and a reader either have access to the right code, or not; no other alternatives are available. Therefore, according to the code model, an interpretation result must be either true or false. As earlier stated, there are situations where two conflicting interpretation results will both have to be regarded as correct, considered from the point of view of international law. Given the assumption that the code presupposed by the code model will have to be found in the rules of interpretation laid down in international law, and in those rules alone, it seems we would also be forced to accept the proposition that two conflicting interpretation results can be equally true. Of course, this is a proposition we cannot accept.

Naturally, if someone says that the procedure to be used for determining the correct meaning of a treaty provision, according to the rules of interpretation laid down in international law, is the one described by the code model, then this is not necessarily tantamount to saying that the code presupposed by the code model will have to be found in the rules of interpretation laid down in international law, and in those rules alone. It might be the case that we are speaking of a code of which the rules of interpretation are only a part. The code could be comprised partly by the rules of interpretation laid down in international law, and partly by some other norm or norms of international law. The question is which other norm or norms this could possibly be. One answer could be *the principle of good faith*. According to what is provided in VCLT article 31 § 1, “[a] treaty shall be interpreted in good faith” (Fr. “*de bonne foi*”; Sp. “*de buena fe*”).⁶³ Judging from the literature, this principle of good faith is a norm that guides the entire interpretation

process.⁶⁴ Consequently, the principle should be seen to influence not only the contents of the rules of interpretation. They should also be seen to play a part *above and beyond these rules*.⁶⁵ In the situation where two first-order rules of interpretation are in conflict with one another, and the conflict cannot be resolved through the application of a legally binding second-order rule of interpretation, one should still have to ensure that the treaty in question is interpreted in good faith.

Good faith has been defined in the following manner:

Bona fides (good faith). A person acts in *bona fides* when he acts honestly, not knowing nor having reason to believe that his claim is unjustified ... *Bona fides* ends when the person becomes aware, or should have become aware, of facts which indicate the lack of legal justification for his claim.⁶⁶

Translated to the context of treaty interpretation and to the legal regime laid down in international law, the idea of good faith can be expressed more precisely. An applier can be said to act in good faith, if she chooses to understand a treaty in accordance with a first-order rule of interpretation, as long as the application of that rule does not leave the meaning of the treaty unclear.⁶⁷ If an applier chooses to understand a treaty in accordance with a first-order rule of interpretation, although the application of that rule leaves the meaning of the treaty unclear, she cannot be said to have acted in good faith. The concept of clarity assumed for the regime of interpretation laid down in international law is the one expressed in VCLT article 32. Saying that a treaty provision is clear is tantamount to saying that the provision can be understood in such a way that its meaning will neither be considered “ambiguous or obscure”, nor will it be regarded as amounting to a result which is “manifestly absurd or unreasonable”.⁶⁸ The Vienna Convention’s call on appliers to always interpret a treaty in good faith could therefore be rephrased in the following manner:

If it can be shown that a treaty provision, according to whatever first-order rule of interpretation is applied, cannot be understood in such a way that its meaning will not be considered “ambiguous or obscure”, or will not amount to a result which is “manifestly absurd or unreasonable”, then the provision should not be understood according to this rule.⁶⁹

Saying that the meaning of a treaty is “ambiguous” is tantamount to saying that the first-order rules of interpretation laid down in international law can be used to support two conflicting interpretation results.⁷⁰ If a meaning is “obscure”, it means that none of the first-order rules of interpretation laid down in international law are applicable.⁷¹ If a meaning is “absurd or unreasonable”, it means that it cannot be rationally defended.⁷² The expression

“manifestly” embodies a requirement on significance.⁷³ Saying that a treaty provision T cannot be interpreted according to a specified first-order rule of interpretation (R_1), without it leading to a result which is “manifestly absurd or unreasonable”, then this would obviously be tantamount to saying the following: the reasons for not understanding treaty provision T in accordance with the rule of interpretation R_1 are significantly stronger than the reasons for the opposite.⁷⁴ What we are discussing here is the situation where two first-order rules of interpretation conflict with one another, without there being any legally binding second-order rule of interpretation that can be applied for resolving the conflict. In such a situation, a treaty provision cannot be understood in such a way in accordance with a first-order rule of interpretation, so that its meaning will not be considered “ambiguous or obscure”.⁷⁵ Obviously, in the situation confronted, the principle of good faith (as it has earlier been described) can then be simplified:

If a treaty needs to be interpreted, and it can be shown that two first-order rules of interpretation are in conflict with one another, and that the reasons for understanding the treaty in accordance with the one rule are significantly stronger than the reasons for understanding the treaty in accordance with the other, then the treaty should not be understood in accordance with this other rule of interpretation.

It is now clear that the principle of good faith does not fit well with a theory, according to which the rules laid down in international law for the interpretation of treaties are to be given a description based on the code model. Assume that we interpret a treaty (T) by applying two different first-order rules of interpretation (R_1 and R_2). Assume also that the rules R_1 and R_2 have shown themselves to be in conflict with one another, and that no legally binding second-order rule of interpretation can be applied for resolving the conflict. In order for us to be able to resolve the conflict by applying the principle of good faith, the reasons for understanding the treaty T in accordance with either of the rules R_1 or R_2 , must be sufficiently stronger than those for understanding the treaty in accordance with the other rule. Two things make this task appear problematic. First, it appears that the principle of good faith would involve questions of an explanatory nature equally difficult to handle as those questions occasioned by the code model in general. Considered the way the principle of good faith has been defined earlier, we are forced to identify the reasons for understanding a treaty in accordance with the rules of interpretation R_1 and R_2 . Obviously, these reasons must be other than those represented by the rules themselves. We cannot possibly say about the two rules R_1 and R_2 , that the one is significantly stronger than the other; both are part of international law, and

as such equally strong. The question is whether we even know what reasons we are speaking about. The principle of good faith appears to be based on an answer to the question, to which even linguistics has been forced to resign: how can the code required by the code model be described?

Secondly, the principle of good faith does not seem enough powerful to be used for the purpose here at hand. If the procedure to be used for determining the correct meaning of a treaty provision, according to the rules of interpretation laid down in international law, is the one described by the code model, then a conflict between two first-order rules of interpretation must be resolved – two conflicting interpretation results cannot both be true. As it appears, this is a requirement that the principle of good faith cannot possibly meet. It is true that at this juncture we cannot really say what the code model implies, when it refers to the reasons for understanding a treaty according to a first-order rule of interpretation. However, from general practical reasoning we know for a fact that a conflict of norms is not always easy to resolve. Situations do arise where two conflicting norms are supported by reasons, of which the reasons supporting the one norm can be said to be significantly stronger than the reasons supporting the other. But we are also often faced with situations where the reasons supporting two conflicting norms will have to be regarded as more or less equally strong. I cannot see why this would not also be the case when the conflict concerns the norms constituted by the rules of interpretation laid down in international law. All things considered, it seems that the principle of good faith can hardly be the missing piece that we need for our explanation, in order to defend a description of the rules laid down in international law for the interpretation of treaties being based on the code model. For the same reason, I maintain that I have good grounds for drawing this conclusion: the procedure to be used for determining the correct meaning of a treaty provision, according to the rules of interpretation laid down in international law, is the one described by the inferential model.

5 THE CONCEPT OF A FIRST-ORDER RULE OF INTERPRETATION

It seems it is time to summarise. Two questions were raised in the introduction to this chapter:

- (1) What is meant by “the correct meaning of a treaty provision considered from the point of view of international law”?
- (2) How can we best describe the way an applier shall proceed to determine the correct meaning of a treaty provision, considered from the point of view of international law?

We can now consider these questions answered. The first of the two questions was the one I addressed in Section 1 of this chapter. The correct meaning of a treaty, considered from the point of view of international law, must be categorised as of the kind earlier defined as its utterance meaning. The correct meaning of a treaty can be identified with the pieces of information with regard to its norm content, according to the intentions of the treaty parties – all those states, for which the treaty is in force – insofar as these intentions can be considered mutually held. The second question was the one addressed in Sections 2, 3 and 4. To determine the correct meaning of a treaty, appliers should proceed in the exact same way as any common reader would proceed to determine the utterance meaning of any text. According to linguistics, we would then have to choose between two explanatory models.⁷⁶ The one is the code model, the other is the inferential model. As I have tried to establish, the procedure to be used for determining the correct meaning of a treaty provision, according to the rules of interpretation laid down in international law, is definitely the one described by the inferential model. When appliers interpret a treaty provision according to the rules laid down in international law, the provision is inserted into a context, from which the meaning of the provision is subsequently inferred. Let us now examine what possible consequences might ensue from these observations.

International law distinguishes between correct and incorrect interpretation results. Not all interpretation results can be considered correct from the point of view of international law. The only results that can be considered correct are those that can be justified by reference to the rules of interpretation laid down in international law. As we stated earlier, when an applier interprets a treaty provision in accordance with the rules of interpretation laid down in international law, she starts by inserting the provision into a context; then, using inference, she draws on the context to arrive at a conclusion about the meaning of the interpreted provision. We also noted that *CONTEXT* means the entire set of assumptions about the world in general that a reader has access to when reading a text; we have termed these as *CONTEXTUAL ASSUMPTIONS*. Hence, it appears that in order to distinguish between correct and incorrect interpretation results, we would have to single out some contextual assumptions as being acceptable and some as unacceptable.

If we examine articles 31–33 of the Vienna Convention on the Law of Treaties, the idea is expressed somewhat differently. The provisions of the convention do not address so much the idea of acceptable and unacceptable contextual assumption; rather, they address the idea of acceptable and unacceptable means of interpretation. However, on closer inspection, this

must be seen to amount to very much the same thing. When we say that a reader inserts a written utterance – a text – into a context, this is much the same as saying that the reader obtains an idea – that is, he develops an assumption – about the relationship held between the utterance and the world in general. A means of interpretation can be said to correspond to a more or less distinctly defined part of the world in general. The list of acceptable means of interpretation includes conventional language, “the context”, the object and purpose of the interpreted treaty, and *travaux préparatoires*. All things considered, it is apparent that when the Vienna Convention categorises means of interpretation as either acceptable or unacceptable, this can be seen indirectly to imply a corresponding categorisation of contextual assumptions. Of all those contextual assumptions that can possibly be made by appliers with regard to the relationship held between an interpreted treaty provision and the world in general, the only ones that *may* be used, according to the convention, are those regarding the relationship held between the provision and the means of interpretation recognised as acceptable.

However, this is not the only limitation international law sets for the use of contextual assumptions. Take for example the following syllogism:

Premise 1: According to what is stated in article 4 § 1 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, “[n]o one shall be held in slavery or servitude”.

Premise 2: In conventional language, the meaning ascribed to the word PIG is *greedy, dirty or unpleasant person*.

Premise 3: In article 4 § 1 of the European Convention, the meaning conferred on the term NO ONE is the same meaning as the meaning ascribed to the word PIG in conventional language.

Conclusion: According to article 4 § 1 of the European Convention, a greedy, dirty or unpleasant person shall be held in slavery or servitude

Three premises are used for the deduction. The first premise is an assumption about the existence of a written utterance – the text denoted as article 4 § 1 of the European Convention. The second premise is an assumption about the content of a particular means of interpretation recognised as acceptable by international law – the one denoted as conventional language. The third premise is an assumption about the relationship held between a written utterance (article 4 § 1 of the European Convention) and a particular means of interpretation recognised as acceptable by international law (conventional language). All three assumptions cannot be regarded as acceptable, considered from the point of view of international law. Such is the case if we consider the legal regime established by international law for the

interpretation of treaties as merely authorising a set of interpretation data. But international law does not just authorise a set of interpretation data. As we stated earlier, the content of the legal regime established by international law amounts to a more or less coherent system of rules. International law indicates for the appliers not only what particular means of interpretation they are allowed to use for the interpretation of a treaty, but also how appliers, by using each means, shall argue to arrive at an acceptable conclusion about the meaning of said treaty. The implications of this are easily seen: of all those assumptions that can possibly be made by appliers with regard to the relationship held between an interpreted treaty provision and a means of interpretation recognised by international law as acceptable, not all can be said to be acceptable considered from the point of view of international law.

The only way to further limit the use of contextual assumptions is to limit the use of *communicative assumptions*. As earlier stated, when a reader selects, from among the many possible contextual assumptions available, those particular assumptions to be used for the interpreting of a text, she does so on the basis of a communicative assumption. The following is an example of a communicative assumption:

The parties to the European Convention have produced their respective utterances in such a way, that in article 4 § 1 the meaning of the expression “[n]o one” agrees with conventional language.

If it is indeed the case, that international law distinguishes between those contextual assumptions that are acceptable and those that are not, then clearly, the rules of interpretation laid down in international law should best be described as if they were authorising a set of communicative assumptions. The only acceptable communicative assumptions are those that can be categorised as being of certain kinds – simply stated, this is what the rules of interpretation provide.

Considered that we are interested in providing a general description of the contents of the rules of interpretation laid down in international law, it would then appear that we should also be interested in the question of how a general description of the content of a communicative assumption could possibly be provided. That being the case, we need only remind ourselves of what we have already stated. We noted earlier that a communicative assumption is one that limits the use of contextual assumptions. In our case, limits are set on the use of contextual assumptions with regard to the relationship held between an interpreted treaty provision and a means of interpretation recognised as acceptable by international law. A communicative assumption has been defined earlier as the assumption of a particular reader that a particular

writer expresses herself in accordance with some particular communicative standard. The type of communicative assumption we wish to identify here must then be an assumption to the effect, that the relationship held between an interpreted treaty provision and some particular means of interpretation is of a particular kind – the relationship held is a kind that conforms to a particular communicative standard. Schematically, this can be described in the following way:

The parties to the treaty have expressed themselves in such a way, that the relationship held between the interpreted provision and the means of interpretation M conforms to the communicative standard S.

If we wish to establish a model, which describes in general terms the contents of the rules laid down in international law for the interpretation of treaties, it could be stated as follows:

If it can be shown that between an interpreted treaty provision and any given means of interpretation M, there is a relationship governed by the communicative standard S, then the provision shall be understood as if the relationship conformed to this standard.

This model will be of great help when I address the purposes set for Chapters 3–9. 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. 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 what we have earlier termed as supplementary means of interpretation. In the terminology used for this work, describing what it means to interpret a treaty using some specific means of interpretation M is tantamount to clarifying and putting to words those first-order rules of interpretation, through which the usage has to be effectuated.⁷⁷ Drawing upon the model stated above, we can now define this task more precisely. Considering my intention to describe what it means to interpret a treaty using some specific means of interpretation M, if I wish to be successful I must determine the contents of the means of interpretation M. (The question is: what is meant by “M”?) Moreover, I must determine the contents of the communicative standard or standards that govern the relationship held between an interpreted treaty and the means of interpretation M. (The question is: what communicative standard or standards shall the parties to a treaty be assumed to have followed, when an applier interprets a treaty using the means of interpretation M?)

This being said, we can now move on to our last task in this chapter. As stated earlier, the rules laid down in international law for the interpretation

of treaties include rules of two kinds; they have been termed as first-order rules and second-order rules of interpretation, respectively. A first-order rule of interpretation tells appliers how an interpreted treaty provision shall be understood, in cases where it has shown to be unclear. A second-order rule of interpretation tells appliers how an interpreted treaty provision shall be understood in cases where two first-order rules of interpretation have shown themselves to be in conflict with one another. What I have described in the present Section 5 is only the concept of a first-order rule of interpretation. I have still to describe the concept of the second-order rule of interpretation. This will be the task in Section 6.

6 THE CONCEPT OF A SECOND-ORDER RULE OF INTERPRETATION

First of all, I need to refine the terminology used in Section 5 of this chapter. As we have noted, a first-order rule of interpretation tells appliers how an interpreted treaty provision shall be understood in cases where it has shown to be unclear. It indicates the type of relationship that, according to a specific communicative standard, shall be assumed to hold between an interpreted treaty provision and a given means of interpretation. An assumption to the effect, that the relationship held between an interpreted treaty provision and some particular means of interpretation is of a kind that conforms to a particular communicative standard, is what we have hitherto been terming as a communicative assumption. We shall now be more specific; we shall call this a first-order communicative assumption. Accordingly, a first-order rule of interpretation can be described to authorise a set of first-order communicative assumptions.

A second-order rule of interpretation tells appliers how an interpreted treaty provision shall be understood in cases where two first-order rules of interpretation have shown themselves to be in conflict with one another. Assume that a reader intends to conclusively determine the meaning of treaty provision T. The reader applies the rules of interpretation laid down in international law, but he discovers a conflict exists between two first-order rules of interpretation – the application of the two first-order rules of interpretation leads to different results. In such a situation, the interpretation of the treaty provision T immediately becomes more complicated. If the application of two different first-order rules of interpretation leads to different results, then this is ultimately because different rules of interpretation allow the use of different contextual assumptions – this is something we have already established. As we have also established, if different first-order rules of interpretation allow the use of different contextual assumptions, then this

is because different rules of interpretation allow the use of different first-order communicative assumptions. The question is what an applier is to do upon the discovery that, firstly, the rules of interpretation laid down in international law allow the simultaneous use of two different first-order communicative assumptions (A_1 and A_2); and secondly, that the assumptions A_1 and A_2 collide, in the sense that the use of assumption A_1 ultimately leads to a different conclusion about the meaning of the interpreted treaty provision T than does the use of assumption A_2 . The answer to the question is that the applier must make an additional assumption – an assumption that further limits the use of contextual assumptions. The applier must make an assumption about the relationship held between the two assumptions A_1 and A_2 . Such an assumption will henceforth be termed as a second-order communicative assumption.

If it is the case, that a second-order rule of interpretation tells appliers how an interpreted treaty provision shall be understood in cases where two first-order rules of interpretation are shown to be in conflict with one another, then – just as with a first-order rule of interpretation – a second-order rule of interpretation could be described as authorising a set of communicative assumptions. First-order rules of interpretation have earlier been described as authorising a set of first-order communicative assumptions. By the same token, second-order rules of interpretation can be described as authorising a set of second-order communicative assumptions. The only acceptable second-order communicative assumptions are those that can be categorised as being of certain kinds – simply stated, this is what the rules of interpretation provide. As shown earlier, providing a general description of those first-order rules of interpretation laid down in international law is a question of how to describe in general terms the contents of an acceptable first-order communicative assumption. Similarly, providing a general description of the second-order rules of interpretation must then be a question of how to describe in general terms the contents of an acceptable second-order communicative assumption.

To facilitate such a description, it may be suitable to present an example. Hence, let us once again assume that, during the interpretation of treaty provision T , a reader discovers two things: first, that the rules of interpretation laid down in international law allow the simultaneous use of two different first-order communicative assumptions (A_1 and A_2), and second, that the assumptions A_1 and A_2 collide, in the sense that the use of assumption A_1 ultimately leads to a different conclusion about the meaning of the interpreted treaty provision T than does the use of assumption A_2 . Assumption A_1 is allowed by the rule of interpretation R_1 :