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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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> If it can be shown that between an interpreted treaty provision and any given means of interpretation $M_1$, there is a relationship governed by the communicative standard $S_1$, then the provision shall be understood as if the relationship conformed to this standard.

Assumption $A_2$ is allowed by the rule of interpretation $R_2$:

> If it can be shown that between an interpreted treaty provision and any given means of interpretation $M_2$, there is a relationship governed by the communicative standard $S_2$, then the provision shall be understood as if the relationship conformed to this standard.

Hence, the assumptions $A_1$ and $A_2$ could be schematically described in the following way:

> $A_1$: The parties to the treaty in question have expressed themselves in such a way, that the relationship held between the interpreted provision T and the means of interpretation $M_1$, conforms to the communicative standard $S_1$.
>
> $A_2$: The parties to the treaty in question have expressed themselves in such a way, that the relationship held between the interpreted provision T and the means of interpretation $M_2$, conforms to the communicative standard $S_2$.

In order for the reader to be able to arrive at a definite conclusion about the meaning of the interpreted treaty provision T, she must make a second-order communicative assumption. The reader must make an assumption about the relationship held between the communicative assumption $A_1$ and the communicative assumption $A_2$. Now, let us presume that the relationship held between the two assumptions $A_1$ and $A_2$, according to what the reader assumes, are such that the reader can use only assumption $A_1$. In principle, such an assumption can take on four different forms. The reader's assumption can be an *unconditional*, *conclusive reason*, to use only assumption $A_1$; the reader's assumption can be a *conditional*, *conclusive reason*, to use only assumption $A_1$; the reader's assumption can be an *unconditional reason pro tanto*, to use only assumption $A_1$; and the reader's assumption can be a *conditional reason pro tanto*, to use only assumption $A_1$.[78] This can be illustrated in the following manner:

(1) *Regardless of what particular circumstances can be shown to exist*, the parties to the treaty in question have *not* expressed themselves in such a way, that the relationship held between the interpreted treaty provision T and the means of interpretation $M_2$ will conform to the communicative standard $S_2$, if this means that the relationship held between provision T and the means of interpretation $M_1$ will *not* conform to the communicative standard $S_1$.

(2) *Given that certain particular circumstances can be shown to exist*, the parties to the treaty in question have *not* expressed themselves in such a way, that the relationship held between the interpreted treaty provision T and the means of interpretation $M_2$ will conform to the communicative standard $S_2$, if this means that the relationship held between provision T and the means of interpretation $M_1$ will *not* conform to the communicative standard $S_1$.
(3) *Regardless of what particular circumstances can be shown to exist*, the parties to the treaty in question, *rather than* expressing themselves in such a way, that the relationship held between the interpreted treaty provision T and the means of interpretation $M_2$ will conform to the communicative standard $S_2$, have expressed themselves in such a way that the relationship held between provision T and the means of interpretation $M_1$ conforms to the communicative standard $S_1$.
(4) *Given that certain particular circumstances can be shown to exist*, the parties to the treaty in question, *rather than* expressing themselves in such a way, that the relationship held between the interpreted treaty provision T and the means of interpretation $M_2$ will conform to the communicative standard $S_2$, have expressed themselves in such a way that the relationship held between provision T and the means of interpretation $M_1$ conforms to the communicative standard $S_1$.

If we wish to establish a model, which describes in general terms the contents of the second-order rules laid down in international law for the interpretation of treaties, it seems that this model must be relatively flexible. Several alternative schemes must be allowed. The second-order rules of interpretation would have to be described using one of the following four norm sentences:

(1) If it can be shown that the interpretation of a treaty provision in accordance with a first-order rule of interpretation $R_1$ leads to a result, which is different from that obtained by interpreting the provision in accordance with the first-order rule of interpretation $R_2$, then, regardless of what other particular circumstances can be shown to exist, the provision shall *not* be understood in accordance with the rule $R_2$.
(2) If it can be shown that the interpretation of a treaty provision in accordance with a first-order rule of interpretation $R_1$ leads to a result, which is different from that obtained by interpreting the provision in accordance with the first-order rule of interpretation $R_2$, then, given that certain other particular circumstances can be shown to exist, the provision shall *not* be understood in accordance with the rule $R_2$.
(3) If it can be shown that the interpretation of a treaty provision in accordance with a first-order rule of interpretation $R_1$ leads to a result, which is different from that obtained by interpreting the provision in accordance with the

first-order rule of interpretation $R_2$, then rather than with the rule $R_2$ – and regardless of what other particular circumstances can be shown to exist – the provision shall be understood in accordance with rule $R_1$.

(4) If it can be shown that the interpretation of a treaty provision in accordance with a first-order rule of interpretation $R_1$ leads to a result, which is different from that obtained by interpreting the provision in accordance with the first-order rule of interpretation $R_2$, then rather than with the rule $R_2$ – given that certain other particular circumstances can be shown to exist – the provision shall be understood in accordance with rule $R_1$.

This model will be of great help when I address the purposes set for Chapter 10 of this work. As noted earlier, the purpose of Chapter 10 is to describe the relationship that shall be assumed to hold between the means of interpretation recognised as acceptable by the Vienna Convention. This is tantamount to clarifying and putting to words those second-order rules of interpretation that shall be applied according to international law.[79] Drawing upon the model stated above, we can now define this task more precisely. If I wish to succeed in describing the second-order rules of interpretation laid down in international law, I must first define the extent to which conflicts between first-order rules of interpretation can be resolved (if at all) through the application of a second-order rule. Secondly, I must define how each particular second-order rule of interpretation is designed, considered as a reason for action. Shall the rule be considered a conclusive reason for understanding a treaty provision in accordance with some specific first-order rule of interpretation, or only as a reason *pro tanto*? Shall the rule be considered an unconditional reason for understanding a treaty provision in accordance with some specific first-order rule of interpretation, or only as a conditional reason? And if the latter is the case, what are the conditions?

## NOTES

1. I wish to extend my warmest thanks to Doctor Marianne Gullberg, of the *Max Planck Institute for Psycholinguistics* in Nijmegen, for her professional review of this chapter and her many valuable comments.
2. Cf. Endicott, p. 454; Marmor, p. 30; Hirsch, pp. 1–6; Williams, 1946, p. 392.
3. See e.g. Lyons, 1977, p. 28.
4. Cf. ibid.: "We can ... distinguish between the sentence as something that can be uttered (i.e. as the product of a bit of) language-behaviour and the sentence as an abstract, theoretical entity in the linguist's model of the language system. When it is necessary to distinguish terminologically between these two senses we will use text-sentence* for the former and system-sentence* for the latter" (p. 29). By the same token, one can define a WORD either as something one uses when writing or speaking, or as a unit in a theoretical model. When I refer to "word" and "sentence", it is in the material sense of *something one uses when writing or speaking*.

5. See e.g. Blakemore, pp. 3–10; Lyons, 1995, pp. 234ff.
6. See e.g. ibid., pp. 131ff.
7. Loc. cit.
8. See e.g. Kittang, pp. 79–106.
9. See e.g. Aarnio, pp. 29–30.
10. See e.g. McLachlan, p. 287; Naigen, p. 203; Ress, p. 30; *Oppenheim's International Law*, p. 1267; Seidl-Hohenveldern, 1992, p. 91; Brownlie, p. 627; Reuter, 1989, p. 74; Dupuy, p. 220; Greig, p. 476; Sinclair, 1984, p. 115; Jiménez de Aréchaga, p. 43; Barile, p. 85; Yasseen, p. 16; Elias, 1974, p. 73; Hummer, p. 97; O'Connell, p. 251; Köck, pp. 26–27; Sharma, p. 367; Jennings, p. 549.
11. See *Review of the Multilateral Treaty-Making Process* (1985), passim.
12. My italics.
13. My italics.
14. My italics.
15. VCLT article 1 § 1(g).
16. See e.g. *Starke's International Law*, pp. 435–436; Haraszti, p. 28. See also, implicit, Amerasinghe, p. 200.
17. It is not entirely clear what it means when we say that a collective institution (such as a state) has intentions. For further a discussion of this topic, see e.g. Hurd, pp. 968–976; McCallum, pp. 247ff.; Radin, pp. 863–885.
18. Cf. Marmor, pp. 165–172; Dickerson, pp. 69–71; McCallum, pp. 239ff. See also Chapters 3–11 of this work.
19. Regarding the concept of *operative interpretation*, see above, Ch. 1, Section 3.
20. See e.g. Shafeiei: "The obligation of States stems uniquely from their own will." (Diss. op. Shafeiei, on the issue of dual nationality, relating to Cases Nos. 157 and 211, *ILR*, Vol. 72, p. 537.)
21. See, explicitly, Seidl-Hohenveldern, 1992, p. 91; Brownlie, p. 627; Yasseen, p. 16; Barile, p. 85; Sharma, p. 367; Bernhardt, 1963, p. 34.
22. Speaking of only two explanatory models can be construed as an oversimplification. Nevertheless, the fact is that in all the attempts of linguistics to come to grips with the problem of communication, two principal approaches can be discerned. These two approaches have in turn resulted in numerous more specific variants. However, I do not see any reason to go into a more detailed discussion of linguistics than is necessary to complete this chapter. The task at hand is to construct a model that describes in general terms the contents of the rules laid down in international law for the interpretation of treaties. In principle, the only thing I need to state is that linguistics offers us explanations that, better than others, describe the way an applier shall proceed to determine the correct meaning of a treaty, considered from the point of view of international law. (For more information about this issue, see p. 41, n. 34.) The British authors Sperber and Wilson use the code and inferential model dichotomy for similar purposes of explanation. (See Sperber and Wilson, Ch. 1.) I intend to do the same.
23. Examples of works often cited in connection with the code model include Saussure, Ogden and Richards, Hjelmslev, Gazdar, and Bach and Harnish. Even Searle seems to follow a line of reasoning that in greater parts must be considered inspired by the code model. (See Searle, passim.)
24. This term has been borrowed from Sperber and Wilson. (See Sperber and Wilson, p. 2 et seq.)

25. A code model description often cited is that originally framed by Shannon and Weaver (See Shannon and Weaver, passim.)
26. Cf. e.g. Lyons, 1977, pp. 38–39.
27. Cf. Sperber and Wilson, p. 5.
28. Examples of works often cited in connection with the inferential model include Grice, 1967; Lewis, 1979; Leech; Sperber and Wilson; Levinson; and Grice, 1989.
29. This term has been borrowed from Sperber and Wilson. (See Sperber and Wilson, pp. 2ff.)
30. Cf. e.g. Blakemore, especially Ch. 1.
31. See Sperber and Wilson, pp. 81 and 81–93; also Blakemore, pp. 18, 87–88, and Blass, pp. 9, 30–31.
32. The term PROPOSITION OF GENERALISED KNOWLEDGE has been borrowed from Ekelöf. According to Ekelöf, PROPOSITION OF GENERALISED KNOWLEDGE means "an assertion about the relationship held between two phenomena, that applies for these phenomena *in general*". (Ekelöf, p. 10; my translation.)
33. According to what is often claimed, it was the linguist Paul Grice who first introduced this idea in his "William James Lectures". (See Grice, 1967.) Of course, Grice had chosen a very special linguistic phenomenon as the topic of his lectures, namely implication or implicative. What he wanted to explain was how a speaker or writer succeeds in communicating more with an utterance, than what the utterance can be said to explicitly express. More contemporary linguists, however, have discovered Grice's observations to have a broader scope of application – they can be applied to verbal communication in general.
34. Once again I wish to emphasise that my division of linguistics into two principal models should definitely be considered a simplification. One basic idea unites the supporters of the code model, namely the idea that verbal communication is something that occurs in accordance with a code. However, we must also admit that different adherents often have different opinions of what should comprise this code. Another basic idea unites supporters of the inferential model: verbal communication is something that occurs according to communicative standards. But again we must note that different supporters maintain different opinions of what these standards contain. In terms of the arguments I present in this chapter, I hold that this simplification is warranted. The only thing I am interested in stating is the following: each time a treaty is interpreted according to a rule of interpretation laid down in international law, the act of interpretation is based on the assumption that parties to the treaty expressed themselves in accordance with some specific communicative standard. Using this idea as the starting-point of my inquiry, and using legal method, I will then try to clarify the various communicative standards presupposed by the rules of interpretation laid down in international law. It is not my intention to take a position regarding whether these communicative standards must also be said to apply with regard to the understanding of (written) utterances *in general*.
35. See Sperber and Wilson, especially Ch. 1.
36. See ibid., pp. 5ff.
37. See ibid., p. 9.
38. See ibid., pp. 9–11.
39. Ibid., p. 9.
40. Ibid., p. 12.
41. See ibid., pp. 11–12.
42. See ibid., p. 14.

43. See ibid., pp. 15–21.
44. See Section 2 of this chapter.
45. Loc. cit.
46. See Sperber and Wilson, p. 16, n. 8, cit. Loftus, in extenso, and Neisser (ed.), in extenso.
47. See ibid., p. 17.
48. See Schiffer; Lewis, 1969. (Note that Lewis uses the term *common* knowledge).
49. See Sperber and Wilson, pp. 18–20. See also Green, passim.
50. See Sperber and Wilson, pp. 19–20.
51. See ibid., p. 20.
52. Loc. cit.
53. Loc. cit.
54. "[C]ases of communication", write Sperber and Wilson, "clearly achieved without the use of a code are rare, and ... the thoughts so communicated tend to be rather simple" (ibid., p. 26).
55. See ibid., pp. 26–27.
56. See ibid., pp. 26–28.
57. Loc. cit.
58. See Ch. 1, Sections 1 and 2 of this work.
59. Loc. cit.
60. See p. 37 of this chapter.
61. See pp. 37–38 of this chapter.
62. See pp. 36–37 of this chapter.
63. My italics.
64. See e.g. Ress, p. 31; Zoller, p. 202; Yasseen, pp. 22–23; Rest, p. 144, n. 1; Müller, p. 127: Schwarzenberger, 1955, p. 301; Bin Cheng, p. 105.
65. See also Tammelo, pp. 33–34.
66. *The Oxford Companion to Law* (1980).
67. Cf. the statement in Ch. 1, Section 3: when an applier engages in interpretation, it is, according to the terminology of the Vienna Convention, in order to clarify the unclear text of a treaty.
68. See, expressly, Ress, p. 37; Thirlway, 1991, pp. 24–25; *Oppenheim's International Law*, pp. 1275–1276; Brownlie, p. 630; Bernhardt, 1984, p. 322; Yasseen, pp. 81–82; Haraszti, pp. 91–102; Favre, 1974, p. 254. See also, more or less implicitly, Amerasinghe, pp. 200–201; Sinclair, 1984, p. 127; Jiménez de Aréchaga, pp. 46–47; Elihu Lauterpacht, p. 417; Köck, p. 86; Hummer, pp. 98–99; Greig, pp. 477–481; Bernhardt, 1967, p. 503.
69. Cf. *Oppenheim's International Law*, p. 1272, n. 7; Sinclair, 1984, p. 120; Rosenne, 1982, p. 356; Rest, p. 27, cit. Ehrlich, pp. 81ff.; Schwarzenberger, 1955, pp. 300–301. Cf. also sep. op. Ajibola, *Territorial Dispute (Libya/Chad)*, *ILR*, Vol. 100, p. 71, cit. Rosenne, 1982, p. 356.
70. See Ch. 10, Section 3 of this work.
71. Loc. cit.
72. See Ch. 10, Sections 4–6 of this work.
73. See Ch. 10, Section 6 of this work.
74. Loc. cit.
75. Theoretically, the only imaginable situation is where the use of conventional language ("the ordinary meaning") leads to two different interpretation results, without the applier

being able to use any other means of interpretation whatsoever. However, from a practical standpoint I have difficulty seeing how such a situation could possibly arise.

76. See the reservation on p. 35, n. 22 of this work.
77. See Ch. 1, Section 5 of this work.
78. By a "conditional", an "unconditional" and a "conclusive" reason, and a reason "*pro tanto*", I mean a reason *assumed* by the reader *to be* conditional, unconditional and conclusive, respectively, or assumed to be a reason *pro tanto* – nothing else. For a more detailed discussion of the rule of interpretation as a conclusive reason and a reason *pro tanto*, see Ch. 10 of this work.
79. See Ch. 1, Section 5 of this work.

CHAPTER 3

# USING CONVENTIONAL LANGUAGE ("THE ORDINARY MEANING")

"A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose" – this is provided in VCLT article 31 § 1.

A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

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

Un tratado deberá interpretarse de buena fe conforme al sentido corriente que haya de atribuirse a los términos del tratado en el contexto de éstos y teniendo en cuenta su objeto y fin.

The provision can be analysed as actually describing three distinct acts of interpretation. A distinguishing mark of each is the means of interpretation used. Accordingly, it appears we can speak of, in turns, interpretation using conventional language ("the ordinary meaning"); interpretation using the context; and interpretation using the object and purpose of the treaty.[1] The purpose of this chapter is to describe what it means to interpret a treaty using conventional language.

Two questions must be answered before this task can be considered completed. The first question is simple:

> What communicative standard or standards shall the parties to a treaty be assumed to have followed, when an applier interprets the treaty using conventional language ("the ordinary meaning")?

The answer is given already in the text of article 31 § 1:

> If a state makes an utterance taking the form of a treaty provision, then the provision should be drawn up so that every expression in the provision, whose form corresponds to an expression of conventional language, bears a meaning that agrees with that language.

The second question is more difficult:

> What is meant by conventional language ("the ordinary meaning")?

I shall now give what I consider to be the correct answer to this question.

## 1 INTRODUCTION; IN PARTICULAR, REGARDING THE PROBLEM CAUSED BY SOCIAL VARIATION IN LANGUAGE

By "the ordinary meaning" of the terms of a treaty, the Vienna Convention refers to the meaning ascribed to these terms in conventional language, as opposed to the meaning that can possibly be ascribed to the terms by applying principles of etymology.[2] Conventional language is the means of interpretation used by the applier when he interprets a treaty text "in accordance with the ordinary meaning to be given to the terms of the treaty". Evidently, in order for an applier to be able to interpret a treaty "in accordance with the ordinary meaning to be given to the terms of the treaty", he needs to know the conventions of the language used for the treaty. This implies the applier must be familiar, first, with the *lexicon* of the language, and second, with its underlying system of rules. By the "lexicon" of a language, we shall understand what can simply be called its vocabulary.[3] The rule system of a language can be divided into three categories of rules: morphological, syntactical, and pragmatic.[4] Morphological rules describe how words are inflected and word forms are constructed; syntactical rules describe how phrases and sentences are put together; and pragmatic rules describe how linguistic expressions are used in certain kinds of situations (not dealt with in syntax). Take for example the following passage of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*:

> Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.[5]

English morphology, together with the lexical definition of the word ARREST, helps us understand that *"arrested"* refers to an event in the past. English syntax allows us to conclude that *"promptly"* represents a qualification of the expression *"informed"*. Pragmatics makes it clear that *"he"*, *"his"*, and *"him"* all refer back to the expression *"[e]veryone"*.

Many authors use the term GRAMMATICAL INTERPRETATION to define what appliers do when they interpret a treaty "in accordance with the ordinary meaning to be given to the terms of the treaty".[6] This is a term which easilymisleads.[7] The GRAMMAR of a language is what we normally understand to be its morphology and syntax.[8] Accordingly, if someone speaks of grammatical interpretation of a treaty provision, it can first of all be construed as if the applier, in interpreting the provision, shall take no heed of the lexicon of the language. This is of course pure nonsense. It lies in the very nature of morphological and syntactical rules that they cannot be used in isolation; whenever these rules are used, a lexicon is assumed. Second, grammatical interpretation can easily be construed as synonymous with an

act of interpretation paying no regard whatsoever to the rules of pragmatics. This is also a distortion of reality. The Vienna Convention speaks of "the ordinary meaning" of the terms of a treaty without in any way qualifying the word ORDINARY. Surely, this implies that all rules of a language must be considered – and not just some of them – no matter how the rules might be classified in linguistics.

It is a distinctive quality of human languages that they change. Among other things, they change with the social context. Many linguistic communities can often be said to exist within the framework of what we would usually call a language – each having its unique set of linguistic conventions. Accordingly, we can speak not only of different languages – Swedish, English, French, and so on – but also of different *varieties* of a language.[9] One such variety is the one we somewhat loosely refer to as EVERYDAY LANGUAGE – the language all people use and most consider generally applicable.[10] In addition to this everyday form, a language possesses many less extensive varieties adapted to specific situations of use, or developed for specific purposes.[11] These more specialised forms of usage are often found within particular occupational groups or among people sharing some similar interest: the language of economists differs from that of lawyers, which in turn differs from that of computer specialists, and so on.[12] Therefore, to refer to them we often use the term TECHNICAL LANGUAGE.

The following question arises: What linguistic variety or varieties are to be taken into account by an applier when he interprets a treaty provision "in accordance with the ordinary meaning to be given to the terms of the treaty"? Obviously, everyday language cannot be left unconsidered. The principal difference between technical and everyday language is the lexicon employed. Normally, a technical language does not have a grammar of its own (i.e. a morphology and syntax), at least not one comprehensive in character.[13] Nor does it have rules of pragmatics. Therefore, it cannot arguably be assumed that "the ordinary meaning" refers to technical language, without at the same time referring to everyday language. The issue is whether it is by reference to everyday language *alone*, or by reference to everyday *as well as* technical language, that "the ordinary meaning" shall be determined. In answering this question, the Vienna Convention is of little help. The word ORDINARY (Fr. ORDINAIRE; Sp. CORRIENTE) is ambiguous. It can be used in the sense of *familiar*, *everyday*, *unexceptional*. But it can also be used in the sense of *customary; usual; regular*. Taken in the former sense, "the ordinary meaning" of a treaty shall be determined by reference to everyday language *alone*. Taken in the latter sense "the ordinary meaning" shall be determined by reference to *both* everyday *and* technical language.

Few authors deal directly with "the ordinary meaning" in the aspect at issue here. Many, however, comment upon the content of *the special meaning* referred to in VCLT article 31 § 4. "A special meaning" – this is provided in VCLT article 31 § 4 – "shall be given to a term if it is established that the parties so intended."

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

Se dará a un término un sentido especial si consta que tal fue la intención de las partes.

This is something we can exploit. The relationship between the ordinary and the special meaning is converse: a non-ordinary meaning is by definition a special meaning, and a non-special meaning is by definition an ordinary meaning.[14] If we can determine the content of the special meaning, then by exclusion we can also determine the content of the ordinary meaning.

The meaning of the terms of a treaty can be of two kinds. It can be conventional, founded on the language practised in a linguistic community of some sort. Or it can be non-conventional – neological – founded only on the parties' own semantic stipulations: the parties may have felt compelled to introduce a new term in the treaty; or – probably more likely – they may have selected a term that already exists, but for one reason or another – implicitly or explicitly – they have agreed to give the term a new semantic content, better suited to the purposes at hand. To simplify matters, I have divided conventional language into two categories, depending on whether a particular usage can be defined as being of everyday or technical character. This allows us to distinguish between three kinds of meaning: (1) everyday meaning, (2) technical meaning, and (3) neological meaning. It is obvious that everyday meaning falls within "the ordinary meaning" in the sense of VCLT article 31 § 1, and that neological meaning is a kind of SPECIAL meaning, in the sense of article 31 § 4. The question is where technical meaning belongs. Shall it be classified as "ordinary" or "special"?

Several authors refer to the ordinary meaning as a limited concept, treating the special meaning as a correspondingly broad one, so that the ordinary meaning of the terms of a treaty comes to include nothing but its everyday meaning. Haraszti may serve as an example:

[T]he ordinary meaning will not be normative for all terms. There are professional terms which have no *everyday meaning* at all, or, if taken over from the current usage, their *professional meaning* departs from everyday use. If their use in the professional sense can be established, then these terms will have to be understood in their professional meaning. This is expressly permitted by paragraph (4) of Article 31 of the Vienna Convention which agrees to a special meaning being given to a term, if it can be established that the parties have so intended.[15]

Another author to be cited is Yasseen:

"Un terme["], dit le paragraphe 4 de l'article 31, ["]sera entendu dans un sens particulier s'il est établi que telle était l'intention des parties." Il est logique de présumer que ceux qui rédigent le traité emploient les termes dans le sens ordinaire que tout le monde comprend. Mais les parties peuvent employer les termes dans un sens différent, un sens technique ou particulier.[16]

As a member first of the International Law Commission, and later of the Vienna Conference Drafting Committee (as chairman), Yasseen must have had the best possible understanding of the drafting process. His comments can of course be interpreted in different ways. In my opinion *"le sens ordinaire que tout le monde comprend"* must be understood as a reference to everyday meaning and *"un sens technique ou particulier"* as a reference to technical and neological meaning, respectively. Yasseen would then be taking a position identical to that of Haraszti.

Other authors view the issue differently. For instance, in the records of the sixteenth session, 766th meeting, of the International Law Commission, we read the following:

Mr. **RUDA** said that if — the special or extraordinary meaning of a term had been "established conclusively", then the meaning in question was perfectly clear and there should be no need to resort to auxiliary means of interpretation in order to establish that special meaning.[17]

Ruda seems to consider "special meaning" and "extraordinary meaning" as interchangeable expressions; and, in Ruda's terminology, "extraordinary meaning" appears to be the same as what has been termed in this work as neological meaning. So, according to Ruda, it appears that the special meaning is the more limited concept and the ordinary meaning the broader one. In other words, according to Ruda, the ordinary meaning of a treaty would include not only its everyday meaning but also its technical meaning. According to Rest and Gottlieb, the "parlance of lawyers" is decisive for "the ordinary meaning" of a treaty term. "Die 'ordinary meaning' ", Rest writes,

... bestimmt sich danach, welche Bedeutung einem Begriff in der allgemeinen Rechtssprache und nicht in der Laiensphäre zukommt.[18]

In a similar fashion, Gottlieb writes:

When the [International Law] Commission referred to "ordinary meaning" it presumably meant just that – ordinary meaning in the parlance of lawyers.[19]

These two statements might seem somewhat confusing. The ordinary meaning must include the everyday meaning – this is an observation we have we already made; anything else is absurd. As a consequence, I find it difficult to interpret Rest and Gottlieb to mean that legal language be the only thing an applier shall rely upon when interpreting a treaty "in

accordance with the ordinary meaning to be given to the terms of the treaty". In my assessment, what these authors wish to comment upon is not really the content of *the ordinary meaning* as such, but rather the possible existence of multiple ordinary meanings, and the rules they assume to exist for dealing with conflicts of this sort. When the terms of a treaty bear one meaning in everyday language, and another in technical language, or different meanings in different technical languages, a conflict arises. Such conflicts can be resolved in various ways. The point that Rest and Gottlieb seem to be making is that legal language *generally* shall take precedence when in conflict with other linguistic varieties, whatever their kind. Whether this is really a correct description of the legal state-of-affairs is something we will have reason to return to in later chapters of this work.[20] The only observation to be made at this juncture is the broad interpretation of "the ordinary meaning" that Rest and Gottlieb seem to imply; for it is only when "the ordinary meaning" in VCLT article 31 § 1 is interpreted as a reference to both everyday and technical meaning that conflicts arise between legal language and other linguistic varieties, already at the point when nothing but conventional language is used.

So, all in all, it seems the language used by legal authors is somewhat unresolved. According to some authors, the technical meaning of an expression is to be characterised as "special", in the sense of VCLT article 31 § 4. According to others, the technical meaning is to be characterized as "ordinary", in the sense of VCLT article 31 § 1. Support for the former group of authors can be found in the preparatory work of the Vienna Convention. The International Law Commission submitted the following short commentary to the text that the Vienna Conference later adopted as article 31 § 4:

> [Paragraph 4] provides for the somewhat exceptional case where, notwithstanding the apparent meaning of a term in its context, it is established that the parties intended it to have a special meaning. Some members doubted the need to include a special provision on this point, although they recognised that parties to a treaty not infrequently employ a term with a technical or other special meaning. They pointed out that technical or special use of the term normally appears from the context and the technical or special meaning becomes, as it were, the ordinary meaning in the particular context. Other members, while not disputing that the technical or special meaning of the term may often appear from the context, considered that there was a certain utility in laying down a specific rule on the point, if only to emphasise that the burden of proof lies on the party invoking the special meaning of the term.[21]

The interesting thing about this short commentary is that both "technical meaning" and "special meaning" are mentioned. In my judgment, the Commission uses the expression "technical meaning" as a reference to what has also been referred to in this work as technical meaning. "[T]echnical meaning", in the view of the Commission, is a sort of "special meaning" –

this is evident, if nowhere else, in the phrase "a technical or other special meaning". In the terminology used by the International Law Commission, the special meaning would accordingly be the broader concept and the ordinary meaning the more limited one, so that the special meaning of a treaty term would come to include both its neological and technical meanings.

The preparatory work of the Vienna Convention should be contrasted with international judicial opinions. From what I have found there is not one single decision emanating from an international court or arbitration tribunal from 1969 on, indicating that "the ordinary meaning", in the sense of VCLT article 31 § 1, shall not be understood as a reference to technical meaning. On the contrary, I have found a number of decisions indicating the opposite.[22] In my judgment, the practice of international courts and tribunals – because of its overwhelming unanimity and relative recentness – is of a considerably greater weight than the preparatory work of the Vienna Convention. Therefore, all in all, I can only interpret the provisions of the Vienna Convention as follows: it is by reference to both everyday and technical language that "the ordinary meaning" shall be determined. Now, it is my task to present the decisions I adduce to support this opinion. This is the purpose of Section 2.

## 2 REGARDING THE PROBLEM CAUSED BY SOCIAL VARIATION IN LANGUAGE (CONT'D)

According to the view expressed in judicial opinions from 1969 on, "the ordinary meaning" of a treaty is to be determined not by everyday language alone, but by everyday language and technical language considered as one single whole. I have four illustrative examples of this. My first example is the judgment of the International Court of Justice in the *Case Concerning Kasikili/Sedudu Island*.[23] In 1996, Botswana and Namibia jointly turned to the Court requesting a decision. On the basis of a written agreement from 1890 between the former colonial powers Germany and the United Kingdom, the Court was asked to give its opinion on the boundary to be drawn in the River Chobe between the now independent states Namibia and Botswana.[24] In particular, the parties asked the Court to pronounce on the legal status of an island located in the midst of the river; by Namibia the island was referred to as Kasikili, by Botswana as Sedudu. In article 3, paragraph 2, of the Anglo-German agreement, we find the following provision:

> In Southwest Africa the sphere in which the exercise of influence is reserved to Germany is bounded:

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2. To the east be a line commencing at the above-named point, and following the 20th degree of east longitude to the point of its intersection by the 22nd parallel of south latitude; it runs eastward along that parallel to the point of its intersection by the 21st degree of east longitude; thence it follows that degree northward to the point of its intersection by the 18 parallel of south latitude; it runs eastward along that parallel till it reaches the river Chobe, and descends the centre of the main channel [in the German agreement text: "*im Thalweg des Hauptlaufes*"] of that river to its junction with the Zambesi, where it terminates.[25]

One of the matters over which the parties were in dispute was the meaning of the expression "centre of the main channel", "*Thalweg des Hauptlaufes*". The positions of the parties have been neatly summarised by the court as follows:

Botswana maintains that, in order to establish the line of the boundary around Kasikili/Sedudu Island, it is sufficient to determine the *thalweg* of the Chobe; it is that which identifies the main channel of the river. For Botswana, the words "*des Hauptlaufes"* therefore add nothing to the text.

23. For Namibia, however, the task of the Court is first to identify the main channel of the Chobe around Kasikili/Sedudu Island, and then to determine where the centre of this channel lies:

"The 'main channel' must be found first; the 'centre' can necessarily only be found afterward. This point is equally pertinent to the German translation of the formula '*... im Thalweg des Hauptlaufes ...'* In the same way as with the English text, the search must first be for the *'Hauptlauf'* and for the *'Thalweg'* only after the *'Hauptlauf'* has been found. The *'Hauptlauf'* cannot be identified by first seeking to find the *'Thalweg'*."[26]

As a start, the court declares its adherence to the rules of interpretation expressed in the 1969 Vienna Convention on the Law of Treaties:

The Court will now proceed to interpret the provisions of the 1890 Treaty by applying the rules of interpretation set forth in the 1969 Vienna Convention. It recalls that

"a treaty must be interpreted in good faith, in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose. Interpretation must be based above all upon the text of the treaty. As a supplementary measure recourse may be had to means of interpretation such as the preparatory work of the treaty."[27]

After this, the reasoning of the Court indicates an act of interpretation described along the following lines:

The Court notes that various definitions of the term "Thalweg" are found in treaties delimiting boundaries and that the concepts of the Thalweg of watercourse and the centre of a watercourse are not equivalent. The word "Thalweg" has variously been taken to mean "the most suitable channel for navigation" on the river, the line "determined by the line of deepest soundings", or "the median line of the main channel followed by boatmen travelling downstream". Treaties or conventions which define boundaries in watercourses nowadays usually refer to the Thalweg as the boundary when the watercourse is navigable and to the median line between the two banks when it is not, although it cannot be said that practice has been fully consistent.

25. The Court further notes that at the time of the conclusion of the 1890 Treaty, it may be that the terms "centre of the [main] channel" and *"Thalweg des Hauptlaufes"* were used interchangeably. In this respect, it is of interest to note that, some three years before the conclusion of the 1890 Treaty, the Institut de droit international stated the following in Article 3, paragraph 2, of the "Draft concerning the international regulation of fluvial navigation", adopted at Heidelberg on 9 September 1887: "The boundary of States separated by a river is indicated by the Thalweg, that is to say, the median line of the channel (*Annuaire de l'Institut de droit international*, 1887–1888, p. 182)", the term "channel" being understood to refer to the passage open to navigation in the bed of the river, as is clear from the title of the draft. Indeed, the parties to the 1890 Treaty themselves used the terms "centre of the channel" and "Thalweg" as synonyms, one being understood as the translation of the other (see paragraph 46 below).

The Court observes, moreover, that in the course of the proceedings, Botswana and Namibia did not themselves express any real difference of opinion on this subject. The Court will accordingly treat the words "centre of the main channel" in Article III, paragraph 2, of the 1890 Treaty as having the same meaning as the words "Thalweg des Hauptlaufes" [...].[28]

Obviously, the means of interpretation used by the Court is the language of international law; more specifically, it is the language of international law as expressed, first, by treaties and conventions delimiting international waterways, and second, by the Institute of International Law (*L'Institut de droit international*) in its draft of 1887. Of course, it is not expressly stated that this is an act of interpretation using conventional language ("the ordinary meaning"). Nevertheless, this is the inevitable inference drawn from the context, particularly from the formulation "[t]reaties or conventions which define boundaries in watercourses nowadays *usually* refer to ...".[29] Accordingly, in the view of the Court it is obviously possible for an applier to interpret a treaty by reference to the language of international law and then justify the operation as an act of interpretation using "the ordinary meaning".

My second example is the international award in the case of *AAPL v. Sri Lanka*.[30] The case involved the application of a treaty concluded by Sri Lanka and the United Kingdom on the promotion and protection of investments.[31] The applicant had invoked article 2 § 2 of the treaty. It reads as follows:

Investments of nationals or companies of either Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party.[32]

It was argued that by using the expression "shall enjoy full protection and security", Sri Lanka and the United Kingdom had agreed to derogate from the standard of due diligence upheld by customary international law, and to replace it with a standard of strict liability. The arbitration tribunal did not accept this argument:

[T]he Claimant's construction of Article 2(2) ... cannot be justified under any of the canons of interpretation previously stated [then referred to as "the sound universally accepted rules of treaty interpretation as established in practice, ... and as codified in Article 31 of the Vienna Convention on the Law of Treaties"].[33]

The tribunal added:

[T]he words "shall enjoy full protection and security" have to be construed according to the "common use which custom has affixed" to them, their *"usus loquendi"*, "natural and obvious sense", and "fair meaning".

In fact, similar expressions, or even stronger wordings like the "most constant protection", were utilized since last century in a number of bilateral treaties concluded to encourage the flow of international economic exchanges and to provide the citizens and national companies established on the territory of the other Contracting Party with adequate treatment for them as well as to their property ("Traité d'Amitié, de Commerce et Navigation", concluded between France and Mexico on 27 November 1886 – *cf.* A. Ch. Kiss, *Répertoire de la Pratique Francaise ...*, *op. cit*., Tome III, 1965, para. 1002, p. 637; the Treaty concluded in 1861 between Italy and Venezuela, the interpretation of which became the central issue in the *Sambaggio* case adjudicated in 1903 by the Italy -Venezuela Mixed Claims Commission – *UN Reports of International Arbitral Awards*, vol. X, p. 512 ss.).

48. The Arbitration Tribunal is not aware of any case in which the obligation assumed by the host State to provide the nationals of the other Contracting State with "full protection and security" was construed as absolute obligation which guarantees that no damages will be suffered, in the sense that any violation thereof creates automatically a "strict liability" on behalf of the host State.[34]

Hence the conclusion:

Consequently, both the oldest reported arbitral precedent and the latest ICJ ruling confirm that the language imposing on the host State an obligation to provide "protection and security" or "full protection and security as required by international law" ... could not be construed according to the natural and ordinary sense of the words as creating a "strict liability".[35]

Decisive for the meaning of the Anglo-Sri Lankan treaty is quite obviously legal language, and more specifically, the language of international law. Clearly, according to the tribunal, the operation can be justified under the provisions of VCLT article 31, as an act of interpretation using conventional language. Thus, it also seems to be the Court's opinion that an applier can make use of legal language to determine the meaning of a treaty provision, and then justify the operation as an act of interpretation using "the ordinary meaning".

My third example is the international award in the case of *Guinea – Guinea-Bissau Maritime Delimitation*.[36] A court of arbitration had been constituted by the parties to perform various tasks, one of which was to give an opinion on the meaning of certain provisions contained in a treaty concluded in 1886 by the two colonial powers France and Portugal.[37] The issue was whether France and Portugal, by adopting the provisions, could be viewed as having established

a general maritime boundary between their respective possessions in West Africa. "The two Parties", the court confirms, …

> ... unconditionally accept the rule set out in Article 31, paragraph 1, of the Vienna Convention on the Law of Treaties, which is consistent with the practice of international tribunals, by virtue of which the paragraph concerned must be interpreted in good faith, with each word being given its ordinary meaning within the context and in the light of the object and purpose of the Convention.[38]

The court then starts to pin down the meaning of the Franco-Portuguese treaty by studying the terminology used. The dispute between Guinea and Guinea-Bissau, the court observes, mainly originated in the different meanings, which the parties read into the expression "limit".[39]

> Guinea holds that it is synonymous with *boundary* and remarks that it is generally used in this sense in maritime affairs, whereas Guinea-Bissau gives it a less precise meaning in this case. The Tribunal observes that the two expressions must be taken here in their spatial sense, with due regard to their legal connotations. In French as in Portuguese, and according to the definitions provided by linguistic or legal dictionaries, mentioned or not mentioned by the Parties, they are slightly ambiguous.[40]

Again, legal language is resorted to. The fact that this is an act of interpretation using conventional language ("the ordinary meaning") is not expressly stated; but this is an inference clearly to be drawn from the context; for it is clear that the court finds support for its actions in VCLT article 31 § 1. It is equally clear that neither the context, nor the object and purpose of the treaty, is the means of interpretation used by the court. So, all things considered, it appears that according to the court it is possible to make use of legal language, and then to justify the action as an act of interpretation using "the ordinary meaning".

My fourth example is the international award in the *Young Loan Case* – one of the leading cases concerning the interpretation of multilingual treaties.[41] In this case, the Arbitral Tribunal for the Agreement on German External Debts was asked to determine the meaning of certain provisions contained in the 1953 *London Debt Agreement*.[42] The treaty was authenticated in three different language versions – one English, one French, and one German – of which no one version was to be considered more authoritative than the others. Special attention was given to article 2(e) in annex 1 A of the London Agreement, and the following phrase therein: "least depreciated currency" – *"Währung mit der geringsten Abwertung" – "devise la moins dépréciée"*. The question arose whether a comparison of the German word Abwertung with the English and French words depreciation and dépréciation disclosed a difference of meaning, which the application of articles 31–32 of the Vienna Convention did not remove, making it necessary to

apply the specific rule of reconciliation laid down in VCLT article 33 § 4. The answer of the tribunal is truly informative. I cite the following excerpt:

Article 31 (1) of the VCT reads as follows:

"A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

The decisive terms to be interpreted are the words *Abwertung*, "depreciation", *dépréciation*. The Tribunal has no doubt that if it were to proceed on terminology alone and take the words in their ordinary, everyday sense in the language concerned, it is at least not excluded that the German text would provide one answer to the original query, and the French and English texts a different one. In German, the meaning of the term *Abwertung* is relatively clear. In the proper technical language, it means a reduction in the external value of currency – in relation to a fixed yardstick, *e.g*. gold – by an act of government. (*Cf. e.g*. Gabler's *Banklexikon*, *Handwörterbuch für das Bank- und Sparkassengewerbe*, 8th edition 1979, p. 15.)

In everyday German usage, however, there is, at least, some uncertainty, inasmuch as the expression "formal" devaluation (*formelle Abwertung*) tends to be used to describe the devaluation of a currency by governmental act, as distinguished from the far more common economic phenomenon of the depreciation of a currency.

In English and French, on the other hand, the terms "depreciation" and *dépréciation*, as they occur in the disputed clause, are normally used to describe the economic phenomenon of depreciation of a currency quite generally, while "formal" devaluation is usually termed "devaluation" or *dévaluation*. (*Cf*. in this context *e.g*. Carreau, *Souveraineté et Coopération Monétaire Internationale*, Paris 1970, p. 208; Nussbaum, *Money in the Law*, *National and International*, Brooklyn 1950, p. 172.)

However, even if the twin terms "depreciation" – *dépréciation* and "devaluation" – *dévaluation* are distinguishable in the two languages in the way indicated and normally refer to different events, they are also used interchangeably in the two languages to describe the same process, both in practice and in theory and both in everyday and in technical language. (Contemporary writings also contain examples of a continuing terminological uncertainty in these respects. See Carreau, Juillard, Flory, *Droit International Economique*, Paris 1978, p. 232; Hirschberg, *The Impact of Inflation and Devaluation on Obligations*, Jerusalem 1976, p. 40; Horsefield (ed.), *The International Monetary Fund*, 1945/65, Volume II: *Analysis*, Washington 1969, p. 90 *et seq*; *cf*. also Nussbaum, *op. cit*., p. 172.)

The possibility of the German and English or French texts of the disputed clause having different meanings cannot therefore be ruled out.[43]

Once again we are faced with an example of a treaty interpreted by reference to a technical language – this time the language of banking and finance. As appears from the tribunal's line of reasoning, the treaty is interpreted "in accordance with the ordinary meaning to be given to the terms of the treaty". In an introductory passage the tribunal observes:

[I]f it were to proceed on terminology alone and take the words in their ordinary, everyday sense in the language concerned, it is at least not excluded that the German text would provide one answer to the original query, and the French and English texts a different one.[44]

Based on the wording of this passage, it is tempting to believe that in the tribunal's opinion, conventional language ("the ordinary meaning") is in all

respects synonymous with everyday language. Considering the context of the utterance, this conclusion immediately appears a less plausible one. In my opinion, the tribunal's choice of words is merely an act of carelessness. When reasons are given for the first, introductory statement, and the different meanings are presented, it is not only with reference to "everyday language", but also with consideration for the relevant "technical language". Thus, in the opinion of the tribunal it appears an applier, for the purpose of interpretation, can make use of the language of banking and finance, and then justify his action as an act of interpretation using "the ordinary meaning".

## 3 REGARDING THE PROBLEM CAUSED BY TEMPORAL VARIATION IN LANGUAGE

Earlier in this work, we observed that human language bears a singular characteristic – namely, that it changes. First of all, language changes depending on the social context. Above, we looked into the problem caused by these social variations for the interpretation of treaties. We also established how the problem is to be resolved from the point of view of an interpretation using conventional language ("the ordinary meaning"). Another aspect of the variation of language is the one now to be addressed: it is a fact that language varies over time. Human language conventions are not such that they can ever be said to "stand till". On the contrary, they are under a constant flux. Bit by bit, lexicon, grammar, and pragmatics are created anew: new words and linguistic structures come into use; old ones are abandoned or acquire partly or even completely new meanings.[45] Obviously, changes such as these must also affect the language used in treaties. The following question arises: What language conventions shall an applier employ when he interprets a treaty using conventional language? Shall she employ the conventions adhered to at the time the treaty is interpreted (what we will henceforth be calling CONTEMORARY LANGUAGE)? Or shall she employ the conventions adhered to at the time the treaty was concluded (henceforth: HISTORICAL LANGUAGE)? No answer to this question is given in the Vienna Convention.

Legal literature sheds little additional light on the subject. Some authors categorically dismiss the idea that an applier, for interpretation purposes, should be allowed to consider contemporary language: "the ordinary meaning" of a treaty is determined by historical language, and that language only.[46] "[I]t is a generally accepted principle", Haraszti declares, ...

> ... that by the ordinary meaning of the words the meaning that prevailed at the time when the treaty was concluded has to be understood.[47]

Rousseau considers this principle self-evident:

Il va de soi que l'interprète doit prendre en considération le sens qu'avaient les mots à l'époque de la conclusion du traité, car il y a présomption que ce sens a été adopté par les auteurs de celui-ci [...].[48]

Let me also cite professor Dupuy:

L'interprétation doit prendre appui sur "le texte suivant le sens ordinaire à attribuer à ses termes". C'est ici que la priorité sinon la préférance à accorder au texte lui-même (y compris le préambule et les éventuelles annexes) est marquée par la convention: celui-ci étant l'expression authentique de l'intention des Parties et l'aboutissement de leur négociation, il incarne *prima facie* la manifestation la plus directe de leur volonté. C'est donc lui qu'il convient en premier lieu d'examiner en accordant à ses termes le sens qu'il est ou qu'il était normal, *au moment de la conclusion de l'accord*, de leur attribuer.[49]

Other authors take a more liberal stance.[50] For example, Villiger writes:

This [i.e. the ordinary meaning] is not necessarily the meaning in use at the time of the conclusion of the treaty.[51]

He then adds in a footnote:

This is essentially a matter of good faith, depending on the intentions of the parties [...].[52]

Something similar is expressed in the resolution – that bears the title *"Le problème intertemporel en droit international public"* – adopted by the Institute of International Law in 1975:

Lorsqu'une disposition conventionelle se réfère à une notion juridique ou autre sans la définir, il convient de recourir aux méthodes habituelles d'interprétation pour déterminer si cette notion doit être comprise dans son acception au moment de l'établissement de la disposition ou dans son acception au moment de l'application.[53]

All in all, we are confronted with two different ways of understanding international law. According to the one alternative, the decisive factor for determining "the ordinary meaning" of the terms of a treaty is historical language, and this language only. Let us call this alternative (a). According to the second alternative, the decisive factor for determining "the ordinary meaning" of the terms of a treaty is either historical or contemporary language, depending on the circumstances. We will call this alternative (b). In my judgment, the correct description of the present legal state-of-affairs is that represented by alternative (b), and not alternative (a). Two sets of circumstances support this conclusion.

The first is the object and purpose of the treaty at issue, i.e. the Vienna Convention. When an applier uses conventional language for the interpretation of a treaty provision, it is for the purpose of establishing its legally correct meaning. This, the legally correct meaning of a treaty provision, is a meaning of the kind we call its utterance meaning.[54] Decisive for the utterance meaning of a treaty provision, among other things, is the reference

of the expressions used for the provision. REFERENCE – as the term shall here be defined – [55] is the relationship held between an expression and what the expression stands for in the world at the occasion of its utterance.[56] Under such premises alternative (b) appears to be the only possible conclusion. If the object and purpose of using the ordinary meaning is to establish the utterance meaning of the treaty interpreted, and the utterance meaning of a treaty is partly determined by the references of the expressions used for the treaty, then the determining factor for "the ordinary meaning" cannot be historical language, and that language only – so goes the argument. The reason is that if we take the opposite to be true – the assumption represented by alternative (a) – then, for the very same reason, we commit ourselves to a certain assumption. We assume that of pure necessity, the utterer's referring possibilities are limited by the language conventions adhered to at the moment of utterance.[57] The point is that this assumption is not at all tenable. I shall now show why this is so.

As we have already noted, REFERENCE is the relationship that holds between an expression and that for which the expression stands in the world on the occasion of its utterance – what we will call its REFERENT.[58] An expression used by someone to refer to a referent is a REFERRING EXPRESSION.[59] Referring expressions are of different types.[60] First, we have to distinguish between expressions that refer to a single phenomenon and expressions that refer to a group of phenomena. We call the former SINGULAR REFERRING EXPRESSIONS; the latter are called GENERAL REFERRING EXPRESSIONS.[61] Take for example the following passage contained in a special agreement concluded by Guinea and Guinea-Bissau, on 18 February 1983:

> Within 30 days after signature of this Special Agreement, the Parties will each appoint, for purposes of the arbitration, an Agent, and will submit to the Tribunal and the other Party the name and address of said Agent.[62]

We can easily identify the special agreement of 18 February 1983 as the referent of the expression "this Special Agreement". It is equally obvious that the expression "the Parties" refers to Guinea and Guinea-Bissau. Consequently, "this Special Agreement" is a singular referring expression; "the Parties" is a general referring one.

Singular and general referring expressions can be either definite or indefinite referring expressions. A DEFINITE REFERRING EXPRESSION is one that refers to a specific phenomenon or group of phenomena; and, of course, an INDEFINITE REFERRING EXPRESSION is one that refers to a non-specific phenomenon or group of phenomena.[63] In the example above, both "this Special Agreement" and "the Parties" are definite referring expressions. As an example of an indefinite referring expression, let us examine yet another passage taken from the special agreement:

The Arbitration Tribunal (hereinafter the "Tribunal") will be composed of nationals of third States, which shall be appointed within 30 days after the signature of this Special Agreement, and shall consist of three (3) Members, hereinafter named: M ... appointed by the Republic of Guinea-Bissau; M ... appointed by the People's Revolutionary Republic of Guinea; the third Arbitrator, who will serve as the President of the Tribunal, will be appointed by mutual agreement of the two Parties; in case they cannot reach agreement, the third Arbitrator shall be appointed by the two Arbitrators acting jointly after consultation with the two Parties.[64]

The expression "the two Arbitrators" does not refer to any specific group of individuals; it refers to individuals, any individuals – who are not nationals of Guinea or Guinea-Bissau – appointed by the two parties. Consequently, "the two Arbitrators" can be termed as an indefinite, general referring expression. The expression "the third Arbitrator" does not refer to a specific individual; it refers to an individual, any individual – who is not a national of Guinea or Guinea-Bissau – jointly appointed by the two parties, or by the arbitrators selected by the parties after consultation with the same. Thus, "the third Arbitrator" can be categorised as an indefinite, singular referring expression.

In addition to singular and general referring expressions, a third type of reference must be singled out. Take the following excerpt from the 1967 *Treaty on the Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies*:

States Parties to the Treaty undertake not to place in orbit around the Earth any objects carrying nuclear weapons or any other kinds of weapons of mass destruction, install such weapons on celestial bodies, or station such weapons in outer space in any other manner.[65]

What I would like to draw attention to are the two expressions "nuclear weapons or any other kinds of weapons of mass destruction" and "celestial bodies". The expressions have been articulated in the indefinite plural, but neither is a general referring expression – this much is clear. The expression "nuclear weapons or any other kinds of weapons of mass destruction" does not refer to a specific group of weapons of mass destruction; it refers to the class weapons of mass destruction *as such*. The same applies to the expression "celestial bodies"; it does not refer to a specific collection of celestial bodies, but to celestial bodies considered as a category. Expressions of this type are what we call GENERIC REFERRING EXPRESSIONS.[66]

Among the words and phrases existing in a language, many can usually be used to refer both singularly or generally, as well as generically. Take for example the term CELESTIAL BODIES. First, it can be used to refer to an (indefinite) group of celestial bodies; second, it can be used to refer to the class *celestial bodies* as such. In order for a reader to understand how a specific referring expression is to be categorised, it is clear that in some cases the expression must first be interpreted. It may then be taken

as an important piece of information that between singular and general referring expressions on the one hand, and generic referring expressions on the other, there is a significant difference. Singular and general referring expressions are used to express propositions that are time-bound. When a singular or general referring expression is uttered, a (temporal) relationship is established between the occasion of utterance and the point in time or time period at or during which the referent is presumed to exist.[67] Thus, for example, it is not difficult to see that the existence of the referent of the expression "the Parties", in the special agreement cited above between Guinea and Guinea-Bissau, is located at the same point in time as the utterance itself; that is, 18 February 1983. The existence of the referent of the expression "the third Arbitrator" is located at a point in time somewhere between the occasion of utterance and 30 days hence. Generic referring expressions, on the other hand, are used to express propositions that are timeless. When a generic expression is uttered, *no* relationship is established between the time of utterance and the time at which the referent is assumed to exist.[68] For example, in the treaty cited earlier on the installation of weapons of mass destruction in outer space, it appears somewhat irrelevant to ask which day and month, or which year, weapons of mass destruction shall not be installed. The text does not refer to a specific occasion. In a way we can say that the existence of the referent of the expression "nuclear weapons or any other kinds of weapons of mass destruction" is outside time altogether.[69]

When a referring expression is uttered, the referent can be either defined or undefined. If a singular or general referring expression is uttered, and the reference is definite, then the referent is *extensionally* defined.[70] The utterer has in mind a very specific phenomenon or group of phenomena. If the reference is indefinite, then the referent is *intensionally* defined.[71] The utterer does not have in mind a specific phenomenon or group of phenomena, but in principle, the number of possible referents could be listed, since there are specific *properties* a referent must possess. So, for example, in the special agreement between Guinea and Guinea-Bissau, the referent to the expression "the two Arbitrators" is not just any group of individuals; the referent is a group of individuals, of which one is appointed by Guinea and the other by Guinea-Bissau, and neither is a national of Guinea or Guinea-Bissau.

If a generic referring expression is uttered, then immediately things become more complicated: the referent can be either defined or undefined. Consider again the Moon Treaty cited above. The existence of the referent to the expression "nuclear weapons or any other kinds of weapons of mass destruction", as we have already noted, is not located to a specific point in time or time period. There are two possible reasons for this:

(1) It was assumed by the parties that the class *weapons of mass destruction* will remain unaltered for as long as the treaty is in force – those types of weapons that can be said to exist when the treaty is concluded will always exist, and no new ones will ever be produced.
(2) It was assumed by the parties that during the life span of the treaty, the class *weapons of mass destruction* will most likely alter – not every type of weapon that can be said to exist when the treaty is concluded will always exist, and new types will probably be produced.

In the former case, the referent of the expression "nuclear weapons and other weapons of mass destruction" is defined; the referent is the class *weapons of mass destruction*, as that class is known at the time of the treaty's conclusion. In the latter case, the referent is undefined; the referent is the class *weapons of mass destruction*, as that class is known at any given moment.

We can now see why it is wrong to assume that, of pure necessity, an utterer's referring possibilities are limited by the linguistic conventions adhered to when the expression is uttered. As we have seen, one can speak of references of different kinds, such as singular and general references. A singular referring expression is one that refers to a single phenomenon; an expression that refers to a group of phenomena is what we call a general referring expression. Singular and general referring expressions can be either definite or indefinite. The referent of a definite referring expression is something the utterer defines extensionally. The referent of an indefinite referring expression is something the utterer defines intensionally. As long as we use the term reference to mean only singular and general references, there seems to be nothing wrong about the claim that an utterer's referring possibilities are limited by the linguistic conventions adhered to on the occasion of utterance. Taken as a general statement, however, the proposition is clearly incorrect. As we have seen, apart from being singular and general, reference can also be generic. A generic referring expression is one that does not refer to a certain phenomenon or group of phenomena, but to the class of certain phenomena. The referent of a generic referring expression can be something, which is either defined or undefined. If the referent is a class that the utterer assumes will remain unaltered, then the referent is defined.[72] If the referent is a class that the utterer assumes is alterable, then the referent is undefined. Only in the former case are the utterer's referring possibilities limited by the linguistic conventions adhered to on the occasion of utterance. In the latter case, limitations are set by the conventions adhered to at any given moment.

The second set of circumstances that supports alternative (b), making alternative (a) seem even less tenable, are the judicial opinions expressed