OBJECT AND PURPOSE OF TREATIES IN THE VIENNA CONVENTION ON THE LAW OF TREATIES

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1. INTRODUCTION

The Vienna Convention on the Law of Treaties¹ in many of its provisions refers to the 'object and purpose of the treaty' (French: *l'objet et le but*, Spanish: *el objeto y el fin*, Russian: *objekt i celf*).² Such reference is particularly relevant in the case of so-called 'silent treaties', i.e. treaties which do not contain explicit rules providing an answer to questions of treaty law that may arise. Thus, 'object and purpose' are determinant for the admissibility of reservations to a treaty that does not contain a relevant provision on reservations (Article 19 Conv.). The same applies for determining whether a treaty requires unanimous acceptance of a reservation (Article 20 paragraph 2), as well as for determining the admissibility of so-called *inter se* agreements concluded among some of the

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¹ Vienna Convention on the Law of Treaties, 1155 UNTS 331, adopted 23 May 1969, entered into force 27 January 1980, ratified by 81 states. The Convention constitutes the main conventional source of the international law on treaties today. Many authors and court decisions consider most of the Convention's provisions as a codification of rules of international customary law which were applicable even before the entry into force of the Convention. (See I.BROWNIE, *Principles of Public International Law* (3d ed., 1979) at 601; H.W.BRIGGS, "US ratification of the Vienna Treaty Convention", 73 AJIL (1979) 470-473; P.H. IMBERT, "A l'occasion de l'entrée en vigueur de la Convention de Vienne sur le droit des traités", AFDI (1980) at 524-541) This view was confirmed by later developments. The 1986 Convention on the Law of Treaties between States and International Organizations or between International Organizations (UNdoc.A/CONF.129/15, adopted 21 March 1986, signatories: 38, ratifications: 23, not yet in force) contains provisions which are deliberately drafted in a similar or even, *mutatis mutandis*, identical way as those of the 1969 Convention. This reinforces the claim of their customary nature. Other provisions, however, do contain elements of progressive development. See I.SINCLAIR, "Vienna Conference on the Law of Treaties", 19 ICLQ (1970) 47-69 at 47. Therefore, a thorough examination of the various provisions and terms is necessary, especially those for which the Convention does not provide a definition. Finally, there is a clear connection between the 1978 Convention on Succession of States in respect of Treaties (adopted 23 Aug. 1978, in force: 6 Nov. 1996, signatories: 20, parties: 15) and the 1969 Convention, which also strengthens the above claim.

² See also the reference to object and purpose of treaties in the preamble and Art. 18 of the 1978 Convention on State Succession in respect of Treaties.

parties of a multilateral treaty and meant to modify the treaty relations between them (Article 41) or even to suspend its operation among them (Article 58 paragraph 1). The Vienna Convention also refers specifically to the object and purpose of a treaty in some of its 'general' rules on the law on treaties, such as the rule on interpretation contained in its Article 31 paragraph 1 and the rule regarding the interpretation of treaties authenticated in two or more languages (Article 33 paragraph 4). Article 18 of the Convention lays down the duty of the contracting parties not to defeat the object and purpose of a treaty even before its entry into force. Furthermore, under Article 60 of the Convention the object and purpose of a treaty are essential in determining whether a material breach of that treaty has occurred, giving the right to the injured party to unilaterally terminate or suspend its operation.³

The object and purpose of a treaty are not only relevant in those cases where they are expressly referred to in the Vienna Convention. The Convention also contains rules which are *directly or indirectly related to* the object and purpose of a treaty, such as, particularly, the rules relating to the question of the validity of treaties or their severance. According to some, even the question of classification of treaties falls within the scope of the Vienna Convention, although the latter does not contain specific rules on the matter. For reasons of space we shall not elaborate on these issues.

In view of the foregoing, it may be said that the Vienna Convention has linked some of the most important issues of making, application and termination of treaties with their 'object and purpose'. The lack of a definition of the terms in the Vienna Convention is, therefore, most remarkable.

In this paper we shall try to establish the true meaning of the terms 'object' and 'purpose' in the Vienna Convention and, accordingly, in general international law.

2. TERMINOLOGY

The first problem that we encounter is that of the terminology used. There has been a tendency to use different terms to express the same idea. Yaseen claims a variety of words expressing the notion of object and purpose of treaties, such as: *ratio legis*, aim of treaty, its role, function, economy or *economie générale*.⁴ Hudson moves one step further and claims that the Permanent Court of International Justice used the following words for the same purpose: nature

³ The term 'object of the treaty' is used in a different sense in Art. 61, where it relates to the supervening impossibility of performance, enabling the termination of the treaty in case of "the permanent disappearance or destruction of an object indispensable for the execution of the treaty". According to the accepted views this refers to a physical object.

⁴ M.K. YASEEN, "L'interprétation des traités d'après la Convention de Vienne sur le droit des traités", 151 RdC (1976) 1-141 at 55.

of treaty, reach, object, spirit, accent, function, role, aim, purpose, intent, system, scheme, general plan and, of course, *raison d'être*.⁵ For purely practical reasons we have limited our research to the terms 'object' ('*l'objet*') and 'purpose', 'aim' ('*le but*').

The International Court of Justice, like its predecessor, does not use the terms consistently. Sometimes there is even inconsistency in the translation of a term from one official language of the Court to the other in the same judgment. We find a good example in the advisory opinion rendered by the PCIJ in the case concerning the Minority Schools in Albania. In the authentic, French, version, the Court said: "*Pour atteindre ce but, deux choses ont été considérées comme nécessaires et font l'objet des dispositions des dits traités*". In the same text in English translation we read: "In order to attain this *object*, two things were regarded as particularly necessary, and have formed the *subject* of provisions ...".⁶ If we look at the 'ordinary and natural meaning'⁷ of the words 'object and purpose', however, we realize how the confusion was caused. In the English language (the 'working language' of the Convention⁸) 'object' means, according to the Oxford Advanced Learner's Dictionary of Current English: "(1) something that can be seen or touched, material thing; (2) person or thing to which the action or feeling or thought is directed to, thing aimed at; end; purpose". According to the same dictionary 'purpose' means: "(1) that which one means to do, get, be, etc.; plan; design; intention; (2) determination; power of forming plans and keeping to them".⁹ The two words have a very close meaning in English. This is confirmed by the special (legal) definitions of the two words, with the one denoting the other.¹⁰ We can see the same similarity in French. The English word *object* is translated by the French words: *objet, chose; but*. The English word *purpose* translates into *but, objet; intention*. Clearly, both words have a very similar, if not identical, meaning.¹¹

⁵ M.O. HUDSON, *The Permanent Court of Justice 1920-1942* (New York 1943) 631-661.

⁶ *Minority Schools in Albania* (Adv. Op. 6 April 1935), PCIJ Series A/B No.64 at 17. The French text is often used by the French authors to show what the Court really meant by object and purpose.

⁷ Art. 31 of the Vienna Convention.

⁸ All the drafts on the topic of the International Law Commission, the 'birth place' of the Vienna Convention, came from British lawyers: BRIERLY, FITZMAURICE, LAUTERPACHT and WALDOCK.

⁹ *Oxford Advanced Learner's Dictionary of Current English* (OUP, London 1975). American-English dictionaries yield similar results. 'Object' is a noun with the following meanings: 1. something that is or is capable of being seen, touched, or otherwise sensed or something physical or mental which a subject is cognitively aware, 2. an end toward which effort or action or emotion is directed; goal; motive. On the other hand, 'purpose' can mean: something set up as an object or end to be attained; intention; resolution; determination; a subject under discussion or an action in course of execution. *Webster's New Collegiate Dictionary* (Springfield 1981).

¹⁰ Comp. *Black's Law Dictionary* (1968) at 1222 and 1400. The object of a statute, furthermore, means 'aim or purpose of its enactment'.

¹¹ LAROUSSE, *Dictionnaire Français-Anglais*.

The foregoing has made some writers wonder whether the two terms are synonyms or should at least be read together. The answer is not easy and, as we shall see, is not identical for all legal issues.

3. SILENT TREATIES

The references in the Vienna Convention to object and purpose in the case of silent treaties concern the admissibility of reservations and the so called *inter se* agreements. The issue of reservations deserves our closest attention, since it presents the fundamental issue of using object and purpose as an objective criterion.

3.1. Reservations to treaties

In the Vienna Convention the issue of reservations to treaties is directly connected to the 'object and purpose of the treaty'. This was the result of the struggle between the so-called traditional view of the integral application of a treaty and the modern view of its universal application. The integralists preferred the application of a treaty in its entirety even if by a smaller number of States, while the universalist view preferred a wider application even if this would imply the acceptance of reservations.

The struggle began with the issue of the status of reservations to the Convention for the Prevention and Punishment of the Crime of Genocide. Upon ratification of this Convention some states made a reservation to its Article IX prescribing the compulsory jurisdiction of the International Court of Justice.¹² Some other States were opposed to these reservations and to a right of the reserving States to become parties to the Convention. The United Nations General Assembly then decided to put the question both to the ICJ (with a request for an advisory opinion) and to the International Law Commission.

While the ICJ understandably limited its considerations to the Genocide Convention,¹³ the ILC was asked to give a more general view in the context of its work on the codification of the law of treaties and based on Article 15 of its Statute. The results were surprisingly different.

As to the first question, on whether the reserving State is to be regarded as a party to the Convention while still maintaining its reservation, although other

¹² Reservations were made by the Soviet Union and some other East European states (Bulgaria, Czechoslovakia, Poland, etc.).

¹³ Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Adv. Opinion, ICJ Rep. 1951:15 at 20. The Court emphasized that it "will seek these replies in the rules of law relating to the effect to be given to the intention of the parties to multilateral conventions".

parties to the Convention have raised objections to the reservation, the Court in its opinion adhered to some undisputed principles of the law on treaties. One of these principles was that no State is bound to a treaty without its consent or, in other words, the principle of the integrity of the treaty. The Court examined the circumstances in which the Genocide Convention was concluded and emphasized that, even though the Convention had been adopted unanimously by the General Assembly of the UN, it was nevertheless the result of the application of the majority principle. Consequently, "the majority principle, while facilitating the conclusion of multilateral conventions, may also make it necessary for certain States to make reservations". Finally, the Court considered that "the character of a multilateral convention, its purpose, provisions, mode of preparation and adoption were factors which must be considered in determining, in the absence of any express provision on the subject, the possibility of making reservations, as well as their validity and effect".¹⁴

Based on the preparatory work and some other evidence, the Court concluded that the main intention of the UN member states, and therefore the main purpose of the Genocide Convention, was the punishment of the crime of genocide.¹⁵ Its object, said the Court, was to safeguard the very existence of certain human groups and to confirm and endorse the most elementary principles of morality. It must, therefore, be concluded that the United Nations General Assembly intended its universal application even with reservations.

On the basis of these considerations, the Court then introduced what would become known as the 'compatibility principle':

"... [I]t is the compatibility of a reservation with the object and purpose of the Convention that must furnish the criterion for the attitude of a State in making the reservation on accession as well as for the appraisal by a State in objecting to the reservation. Such is the rule of conduct which must guide every State in the appraisal which it must make, individually and from its own standpoint, of the admissibility of any reservation."¹⁶

In other words, the compatibility test is decisive for both making the reservations and objecting to them.

The criticism of the advisory opinion was very fierce. The compatibility principle was considered a novelty without any foundation, neither in law nor in the intent of the parties.¹⁷ Most of the critics claimed that the criterion was subjective and that an objective test of compatibility was lacking.¹⁸

¹⁴ *Id.* at 22.

¹⁵ *Id.* at 23.

¹⁶ *Id.* at 24

¹⁷ K.HOLLOWAY, *Les réserves dans les traités internationaux* (Paris,1958) at 185. D.R.ANDERSON, "Reservations to Multilateral Treaties. A Re-Examination", 13 ICLQ (1964) 450-481 at 460 claims that the dissenting opinion had a better standing in law. However, he admits that the subsequent practice of States showed the need to change the traditional 'integ-

The International Law Commission, and its Special Rapporteur J.L. BRIERLY, joined the critics. In its Report of 1951,¹⁹ the Commission concluded, like the Court, that there was no satisfactory generally applicable rule in force regarding reservations to treaties. Hence the Commission meant to recommend a rule which "seems to it to be the least unsatisfactory" and voted in favour of the application of the unanimity rule whenever the treaty contained no specific provision on reservations.²⁰ Depending on the nature of the treaty, no reservations or only very specific reservations may be allowed. The greater part of the Report was dedicated to the compatibility criterion as formulated by the Advisory Opinion of the International Court. The criterion was criticized as being inapplicable to multilateral conventions in general, lacking an objective test and distinguishing between treaty provisions which do and those which do not form part of its object and purpose.

Nevertheless, the discussion in the UN General Assembly that followed the Advisory Opinion and the ILC Report stirred the wheel towards the compatibility rule.²¹ The ILC continued its work on the codification of the law of treaties while resenting the criterion, until the next Rapporteur, Sir HUMPHREY WALDOCK, submitted his first report in 1962.²² Although Sir HUMPHREY was even then hesitant and reluctant to adhere to the compatibility test, he had to depart from the unanimity rule which had become less and less acceptable to the states. His report subsequently led to the text of the Articles 19 and 20 of the Vienna Convention.²³

The Vienna Convention of 1969 adopted the compatibility test as one of the admissibility criteria for reservations. *Mutatis mutandis*, we find the same criterion in the subsequent Vienna Conventions on the law of treaties of 1978 (Art. 20) and 1986 (Art. 19-20). Article 19 speaks of 'Formulation of reservations' in the following way:

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

- (a) the reservation is prohibited by the treaty;
- (b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or

city' principle. See also K.ZEMANEK, "Some Unresolved Questions Concerning Reservations", in: *Essays in International Law in Honour of Judge M. Lachs* (1984) 323-336 at 325.

¹⁸ J.L. BRIERLY, *The Law of Nations* (5th ed., 1955) 250.

¹⁹ UN doc.A/CN.4/41, YILC 1951 Vol. II at 123.

²⁰ It was the rule applied and recommended by the Secretary-General. See his Report, UN doc.A/1372 (1950).

²¹ UNGA Res.598 (VI).

²² See his draft Art. 17, para. 2 (a), YILC 1962 Vol. II:31-32, 60-62.

²³ It is remarkable that the terms 'object and purpose' were considered to be well established in the international legal language by the Drafting Committee of the Vienna Conference. Comp. F.HORN, *Reservations and Interpretative Declarations to Multilateral Treaties* (1988):115-117.

(c) in cases not falling under sub-paragraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty."

Article 20 provides rules on the "Acceptance of and objection to reservations". The compatibility test appears in its paragraph 2:

"2. When it appears from the limited number of the negotiating States and the object and purpose of a treaty that the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to be bound by the treaty, a reservation requires acceptance by all the parties."

Although the text of the Vienna Convention on reservations was, surprisingly, broadly accepted by the Conference,²⁴ the critics did not yield. The compatibility criterion continued to be disapproved as being imprecise, uncertain and too subjective for use,²⁵ making it impossible for states to adjust their actions with certainty to the legal norm.²⁶ The very few writers who did accept the criterion, still complained about the lack of an objective body competent to decide on the admissibility of a reservation.²⁷

The compatibility criterion in Article 20 seems less controversial, as most writers agree on the necessity for some special categories of treaties to keep the unanimity rule on the acceptance of reservations.²⁸ Nevertheless, here too the same objections against the compatibility criterion were repeated.²⁹

²⁴ I.SINCLAIR, loc.cit.n.1 at 57. Ninety-two delegations voted in favour of Art. 19, 4 against and 7 abstained.

²⁵ Ch.ROUSSEAU, *Droit international public*, Vol.1 (1970) 126; D.O'CONNELL, *International Law*, Vol.1 (2nd ed.,1970) 239; J.SZTUCKI, "Some questions arising from reservations to the Vienna Convention on the Law of Treaties", 20 GYIL (1977) 277-305 at 298. HOLLOWAY, op.cit. n.17 at 286-289, was particularly concerned that its subjective character would prevent any progress of international law through conventions. TOMUSCHAT considered the compatibility criterion to be a hollow phrase, void of any objectivity and bound to lead to contradictory results. C.TOMUSCHAT, "Admissibility and legal effects of reservations to multilateral treaties", 27 ZaöRV: 463-482 at 478.

²⁶ G.TEOBUL, "Rémarques sur les réserves aux conventions du codification", 86 RGDIP (1982) 679-717 at 697. His concern was with the distinction between, and the definition of, the terms 'object' and 'purpose'. Similar concerns were expressed by M.BOS, "Theory and Practice of Treaty Interpretation", 27 NILR (1980) 3-170 at 149-150.

²⁷ M.LACHS, "Le développement et la fonction des traités multilatéraux", 92 RdC (1957) 233-341 at 305; T.O.ELIAS, *The Modern Law of Treaties* (1974) 34; R.SZAFARZ, "Reservations to multilateral treaties", 2 PolYIL (1970) 293-316 at 301. Finally, writers like IMBERT were aware of the necessity for the criterion, although admitting its many flaws. P.H.IMBERT, *Les réserves aux traités multilatéraux* (1979) 138-140.

²⁸ G.A.L.DROZ, "Les réserves et les facultés dans les Conventions de la Haye de Droit International Privé", 58 RCDIP (1969) 381-424 at 388-392, claims that such would be the case with the Hague Conventions on private international law whose object and purpose are to unify the legal rules of the states parties.

²⁹ TOMUSCHAT, loc.cit n.25 at 479.

State practice does not bring much light in the controversy.³⁰ It is quite varied, although there is some tendency towards the application of the Vienna Convention rules and criteria. When a state raises objections to a reservation as being inadmissible it does so on grounds of its incompatibility with the 'object and purpose' of the treaty. Nevertheless, even then different expressions are used besides 'object and purpose', such as 'aim of the treaty', its 'letter and spirit', its 'content and spirit' or its 'objects'.³¹

Some treaties specifically prescribe the compatibility test for the determination of the admissibility of reservations, such as the International Convention on the Elimination of All Forms of Racial Discrimination of 1965. Its Article 20(2) states as follows:

"(2) A reservation incompatible with the object and purpose of this Convention shall not be permitted... A reservation shall be considered incompatible or inhibitive if at least two thirds of the States parties to this Convention object to it."³²

Very few treaties provide for an impartial body to determine the compatibility of a reservation.³³ It is usually left to the discretion of the parties to the particular treaty to decide individually whether or not they find a reservation incompatible with the treaty's object and purpose. Of course, sometimes the results are very different, especially in the case of treaties of a more or less controversial nature, such as the Convention on the Elimination of All Forms of Discrimination against Women.³⁴ That Convention, one might say, is infa-

³⁰ For the practice of states with regard to reservations, see F.HORN, *op.cit.*n.23 at 219; J.K.GAMBLE, "Reservations to multilateral treaties: A macroscopic view", 74 *AJIL* (1980) 372-395.

³¹ The effects of an objection constitute a separate problem.. In most cases the states concerned refrain from giving the objection the effect provided for in Art. 20(4)(b), namely the non-recognition by the objecting State of the reserving State as a party to the treaty. Some authors, however, claim that an incompatible reservation is inadmissible and, consequently, does not produce any effects, regardless of the objections. D.W.BOWETT, "Reservations to non-restricted multilateral treaties", 48 *BYIL* (1976-77) 67-92 at 82; D.O'CONNELL, *op.cit.*n.25 at 237. See also SZAFARZ, *loc.cit.*n.27 at 309 who claims that the objection of incompatibility has the effect of Art. 20 para 4(b), while other objections do not have such an effect.

³² International Convention on Elimination of All Forms of Racial Discrimination, 21 December 1965, 660 UNTS.

³³ For the specific practice of the European human rights bodies (Commission and Court) based on the European Convention for the Protection of Human Rights and Fundamental Freedoms, see P.H.IMBERT, "Les réserves à la Convention Européenne des droits de l'homme devant la Commission de Strasbourg (Affaire Temeltasch)", 87 *RGDIP* (1983) 580-623, and J.COHEN-JONATHAN, "Les réserves à la Convention Européenne des droits de l'homme (Belilos)", 93 *RGDIP* (1989) 273-315.

³⁴ Convention on the Elimination of All Forms of Discrimination against Women, adopted by UN GA Res. 34/180 of 18 December 1979.

mous for its reservations and the objections to them, despite the fact that its Article 2(2) does not permit a reservation incompatible with the object and purpose of the Convention. A number of states made *prima facie* incompatible reservations, yet very few states raised objections and still fewer among them used the right to deny the reserving State a status as a party to the Convention.³⁵

The compatibility criterion was introduced into the Vienna Convention as an objective criterion in the sense that it could be established in an objective manner.³⁶ It is linked to the 'object and purpose', it stems from the treaty text and can, accordingly, be objectively determined by interpretation of the treaty. Object and purpose, in this context, are used primarily in the sense of *ratio legis*, i.e. as the reason or the aim of the treaty. The requirement that the reservation be compatible with the object and purpose of the treaty should protect the very essence of that treaty, as well as of its parts.

It is to be noted that the ILC has resumed work on the problem of reservations to treaties.³⁷ One of the undisputed conclusions so far is the reaffirmation of the Vienna Convention reservations regime "particularly ... the object and purpose of the treaty as the fundamental criterion for determining the permissibility of reservations... [B]ecause of its flexibility, this regime is suited to the requirements of all treaties, of whatever object or nature, and achieves a satisfactory balance between the objectives of preservation of the integrity of the text of the treaty and universality of participation in the treaty".³⁸

3.2. Inter se agreements

The members of the modern international community are bound by numerous obligations. Sometimes they lose interest in continued participation in a treaty, or like to have their treaty obligations modified but are not able to bring all other parties to the negotiating table. Besides, parties to codification conventions containing dispositive obligations are sometimes expected to regulate

³⁵ See: B.CLARK, "The Vienna Convention's reservations regime and the Convention on Discrimination of Women", 85 AJIL (1991) 281; R.J.COOK, "Reservations to the Convention on the Elimination of All Forms of Discrimination against Women", 30 VirgJIL (1990) 643. Comp. also the reservations to the Convention on Political Rights of Women, F.HORN, op.cit. n.23 at 306-310.

³⁶ J.RUDA, "Reservations to treaties", 146 RdC (1975) 95-218 at 182; ELIAS, op.cit.n.27 at 34-35.

³⁷ The General Assembly, in resolution 48/31 of 9 December 1993, endorsed the decision of the ILC to include in its programme of work the topic "The law and practice relating to reservations to treaties".

³⁸ ILC Report 1996, Chapter VI: Reservations to Treaties, Draft Resolution of the International Law Commission on Reservations to Normative Multilateral Treaties Including Human Rights Treaties, at: <http://www.un.org/law>.

particular matters by separate bilateral treaties.³⁹ In all these cases it may occur that the states parties concerned conclude a separate treaty among themselves, deviating from the provisions of the original treaty, or agree to suspend or terminate the original treaty among themselves. The former case is called 'modification', in contradistinction to 'amendment' of a treaty. The difference basically lies in the fact that in the case of a modified treaty its parties have not had the intention to get all the parties of the original treaty to become parties to the new treaty. The later treaty has, usually, come about contrary to the amendment procedure for the original treaty which is, usually, based on the unanimity rule.⁴⁰ In any case, the general rule applicable to the new treaty, be it a case of amendment or modification, is, of course, that it binds only its contracting parties, according to the general principle *pacta sunt servanda*.

The question that arises with regard to *inter se* agreements concerns their admissibility if the original treaty is silent on the matter. Although there had been similar cases in the past, the Vienna Convention for the first time provided specific rules on the matter.⁴¹ Article 41 bears the title "Agreements to modify multilateral treaties between certain of the parties only". Its paragraph 1 reads as follows:

"1. Two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if:

(a) the possibility of such a modification is provided for by the treaty; or

(b) the modification in question is not prohibited by the treaty and:

(i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;

(ii) does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole."

We see here the compatibility criterion employed in a similar manner as in Article 19(c): It is not allowed to conclude *inter se* agreements incompatible with the effective execution of the object and purpose of the treaty as a whole. The wording is somewhat different and the compatibility is related to the effective execution. The ILC gave an example of an incompatible treaty in its commentary to the 1966 Draft: an *inter se* agreement modifying substantive provisions of a disarmament or neutralization treaty. Such a treaty would be incompatible with the object and purpose of the original one, and, consequently, not permissible. In addition, the Commission emphasized that the conditions set in the article are not alternative, but cumulative, even though "the second and third conditions, it is true, overlap to some extent since an *inter se* agreement

³⁹ See, e.g., Art. 73 of the 1963 Vienna Convention on Consular Relations, 261 UNTS.

⁴⁰ See Article 40 of the Vienna Convention.

⁴¹ R.K.DIXIT, "Amendment or modification of treaties", 10 IJIL (1970) 37-50 at 43. However, note the Harvard Draft, Art. 22 (b), where compatibility with the general purpose of the previous treaty is required.

incompatible with the object and purpose of the treaty may be said to be impliedly prohibited by the treaty".⁴²

What is the status of an *inter se* agreement concluded contrary to Article 41 paragraph 1(ii)? Clearly, like an incompatible reservation, it is inadmissible; but is it null and void? The Vienna Convention is not very clear on this point.⁴³ The ILC did not adhere to the idea of nullity of an incompatible later treaty. The grounds for 'invalidity' provided for in Part V Section 2 of the Vienna Convention do not include 'incompatibility' with a previous treaty, not even in the case of so-called interdependent and integral treaties. According to the ILC's view, the issue belongs to field of state responsibility.⁴⁴ Accordingly, if states conclude an agreement contrary to the provisions of Article 41, the other parties of the original treaty may raise the question of international responsibility, while the validity of the later treaty would not be affected. Nullity is reserved for breaches which are considered especially serious, as provided in Part V Section 2 of the Vienna Convention.⁴⁵

Article 58 of the Vienna Convention deals with the *inter se* agreement whose object is to suspend a multilateral treaty:

"Suspension of the operation of a multilateral treaty by agreement between certain of the parties only:

1. Two or more parties to a multilateral treaty may conclude an agreement to suspend the operation of provisions of the treaty, temporarily and as between themselves alone, if:

the possibility of such a suspension is provided for by the treaty; or
the suspension in question is not prohibited by the treaty and:

- i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;
- (ii) is not incompatible with the object and purpose of the treaty.

2. Unless in a case falling under paragraph 1(a) the treaty otherwise provides, the parties in question shall notify the other parties of their intention to conclude the agreement and of those provisions of the treaty the operation of which they intend to suspend."

⁴² Commentary 1966 to draft Art.37 at 55; also in YILC 1966 Vol.II:235. I.SINCLAIR, *The Vienna Convention on the Law of Treaties* (1984) at 109, holds that the last two conditions "may prove to be unduly onerous in practice".

⁴³ Comp. recent views in J.B.Mus, "Conflicts between treaties in international law", 45 NILR (1998) 208-232 at 225-227.

⁴⁴ Commentary 1966 p. 37 at para.13. Comp. F.CAPOTORTI, "L'extinction et la suspension des traités", 134 RdC (1971) 417-588 at 509: "[L]a limité de la compatibilité avec l'objet et le but du traité initial vise surtout à éviter que soit conclu un accord *inter se* pour amender un traité duquel dérivent des obligations de type interdépendent ou intégral".

⁴⁵ Even among the reasons for nullity enumerated in that part, only some cause the so-called absolute nullity *ex tunc*, i.e. from the beginning. These are the cases of use or threat of force and contravention with a norm of *jus cogens* character, provided for in Articles 51, 52 and 53 respectively.

The similarity with the provision of Article 41 is obvious and intentional. The criterion of compatibility with the object and purpose is used again as one of the key requirements for the admissibility of such *inter se* agreements in the case of a silent treaty. It is important to emphasize that the provision applies solely to agreements for the temporary suspension of the operation of the original treaty.⁴⁶

Both Articles 41 and 58 show that the Vienna Convention has opted for the principle of universality and for the possibility of subdivision of a multilateral treaty into smaller units. This process began with the introduction of the liberal regime of the reservations to treaties, and the use of object and purpose of the treaty as the framework for the parties' liberty.

4. OBJECT AND PURPOSE IN THE 'GENERAL RULES'

As already mentioned earlier, the Vienna Convention makes reference to a treaty's object and purpose in some of its general treaty rules. The first one, Article 18, relates to the duty to refrain from defeating the object and purpose of a signed or ratified treaty, while Articles 31 and 33 deal with interpretation. Finally, Article 60 refers to the object and purpose in relation with the termination of a treaty.

4.1. Obligation not to defeat the object and purpose of a treaty prior to its entry into force

A treaty produces its legal effects and binds its parties after it has come into force. This condition is in accordance with the well-established general principle of *pacta sunt servanda* and is affirmed in Article 26 of the Vienna Convention: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith". Without prejudice to this rule, some treaty rules apply even before the treaty comes into force. These are rules governing "the authentication of its text, the establishment of the consent of States to be bound by the treaty, the manner or date of its entry into force, reservations, the functions of the depositary and other matter arising necessarily before the entry into force of the treaty" (Art. 24 para. 4).

The conclusion of treaties and the conditions for their entry into force follow all sorts of procedures and are often time-consuming. A treaty may be signed by a state's representative with reservation of ratification, which may take years to be realized. On the other hand, states may ratify a treaty long be-

⁴⁶ For some critical observations see SINCLAIR, *op.cit.*n.42 at 185; CAPOTORTI, *loc.cit.*n.44 at 511; B.VUKAS, *Relativno djelovanje međunarodnih ugovora* [The relative effect of treaties](1975) at 53.

fore the number of ratifications necessary for its entry into force is achieved.⁴⁷ What is the status of these treaties in the time interval before they are ratified or come into force? Clearly, the signatory or even the ratifying states are under no obligation to apply a treaty that is not in force, as this would be contrary to the *pacta sunt servanda* rule. Nevertheless, it would be equally wrong to claim that these states have no obligation whatsoever in respect of the signed or even ratified treaty. In the words of the International Court in the Genocide Convention Case:

"...[S]ignature constitutes a first step to participation in the Convention... Pending ratification, the provisional status created by signatures confers upon the signatory a right to formulate as a precautionary measure objections which have themselves a provisional character. These would disappear if the signature were not followed by ratification, or they would become effective on ratification."⁴⁸

The emphasis is, obviously, on the temporary status of the signatory state which produces certain provisional rights. At the same time, however, it produces obligations. This has been confirmed, admittedly not abundant, by state practice and case law. One of the best known cases usually cited in this context is the *Megalidis v. Turkey* case before the Greek-Turkish arbitral tribunal in 1928:

"...[I]l est de principe que déjà avec la signature d'un Traité et avant sa mise en vigueur, il existe pour les parties contractantes une obligation de ne rien faire que puisse nuire au Traité en diminuant la portée de ses clauses... [Ce] principe... n'est qu'une manifestation de la bonne foi qui est la base de toute loi et de toute convention..."⁴⁹

Other cases have connected the behaviour of a state following its signature or its ratification of a treaty to the principle of good faith⁵⁰ or the abuse of rights which, however, cannot be presumed.⁵¹

The Harvard Draft Convention on the Law of Treaties of 1935 confirmed duties of a signatory state based on good faith, and prescribed that "pending the coming into force of the treaty the State shall, for a reasonable time after signature, refrain from taking action which would render performance by any party of the obligations stipulated impossible or more difficult".⁵²

⁴⁷ The examples are numerous, including the Vienna Convention on the Law of Treaties itself (signed in 1969, entered into force in 1980). One of the most impressive examples is the Hague Protocol on Statelessness from 1930 that came into force in 1973.

⁴⁸ ICJ Rep.1951: 15, 28.

⁴⁹ *Megalidis v. Turkey*, Tribunal arbitral greco-turc (1928), 8 TAM 386.

⁵⁰ *Réparations allemandes selon l'article 260 du Traité de Versailles*, 1 RIAA: 439 at 522-533.

⁵¹ *German Interests in Polish Upper Silesia Case*, PCIJ Series A No. 7 at 37.

⁵² Harvard Research on International Law – Draft on the Law of Treaties (29 AJIL Supp.(1935, hereinafter 'Harvard Draft') at 788 (Art.9). Nevertheless, the Draft did not consider the good

Some writers agree on good faith as the basis of a duty not to voluntarily create a situation which would prevent one to be able to act according to the terms existing at the time of signing of the treaty.⁵³ According to PAUL REUTER, this obligation stems from the principle of good faith but has subsequently become a separate norm of international customary law.⁵⁴

The Vienna Convention approaches the problem in its Article 18:

"A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when:

(a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or

(b) it has expressed its consent to be bound by the treaty pending the entry into force of the treaty and provided that such entry into force is not unduly delayed."

In order to find out its meaning, we emphasize that it does not imply a duty to execute the treaty. It usually means a passive duty 'to refrain from', not to commit, certain acts.⁵⁵ Some writers, however, claim that there could even be an active duty if that would be necessary to preserve the object and purpose of the treaty.⁵⁶ Older writers have claimed that the duty to refrain refers to acts that would render it impossible or difficult to perform the treaty. Lord MCNAIR describes them as acts "(other than acts of routine administration) which will diminish the value of any property or other rights which would be transferred, or of any rights which would be created, when the treaty enters into operation".⁵⁷ More recent authors speak of acts which would render performance meaningless,⁵⁸ while some American writers refer to acts which are contrary to the purpose of the treaty and of an irreversible character.⁵⁹ Clearly, some trea-

faith principle to be a legal principle, so that its breach by a state would not produce any consequence other than 'jeopardising its name and reputation'.

⁵³ S.B. CRANDALL, *Treaties. Their Making and Enforcement* (2nd ed., 1916) 344. See for a similar view: J.M. JONES, *Full Powers and Ratification* (1946) 78; Ch. ROUSSEAU, *Cours de droit international public: La théorie générale des traités internationaux* (1959) 45; A. MCNAIR, *The Law of Treaties* (1961) 204; O'CONNELL, *op. cit.* n.25 at 222-223.

⁵⁴ P. REUTER, *Introduction au droit des traités* (2nd ed. 1985) 62.

⁵⁵ J.P. COT, "La bonne foi et la conclusion des traités", 1 RBDI (1968) 140-159 at 155; A.M. ROGOFF, "The international legal obligation of signatories to an unratified treaty", 32 *Maine Law Review* (1980) 263-299 at 297.

⁵⁶ M. VILLIGER, *Customary International Law and Treaties* (1985) 322.

⁵⁷ MCNAIR, *op. cit.* n.53 at 204.

⁵⁸ VILLIGER, *op. cit.* n.56, *ibid.*

⁵⁹ R.F. TURNER, "Legal implications of deferring ratification of SALT II", 21 *VirgJIL* (1981) 747-784 at 747. Discussing the problem of the unratified SALT II agreement, he claims that it could be permissible to enlarge arms stocks even contrary to the agreement, providing there is

ties are more susceptible to be affected by such actions than others. Sir GERALD FITZMAURICE spoke of 'interdependent treaties', treaties whose performance would only make sense if all its signatories have the same obligations, such as a disarmament treaty.

In any case, the prohibition applies to actions which change the circumstances existing at the time of signature or ratification of the treaty and which cause the disappearance of the reasons for a State to sign or ratify the treaty. These reasons are to be determined objectively, through the object and purpose as stated in the text of the treaty. In this context the terms 'object and purpose' most often mean *commitments*, or, even more often, *reasons* for making a treaty, its *purpose* or its *ratio legis*.

4.2. Interpretation of treaties

Without any doubt, interpretation of treaties has been one of the most fundamental issues in the law of treaties. The key question in both practice and doctrine is: what are, if any, the rules of treaty interpretation.⁶⁰

Various writers have adhered to different approaches, but it is safe to say that there are three main methods of treaty interpretation: subjective, textual and teleological.⁶¹ According to DEGAN, the first method relates to the search for the intention of the parties to the treaty, while the textual method emphasizes the text of the treaty. The third method tries to interpret a treaty with respect to its purpose, aim or function.⁶² Furthermore, each method employs various means and processes in determining its principal element in interpreting the treaty.⁶³ Courts and arbitral tribunals have expressed their views on these matters in a number of judgments, awards and opinions.

We shall here limit our discussion to issues of interpretation relating to the object and purpose of the treaty. We have already seen in the foregoing account that the question of object and purpose is most closely connected with the teleological or functional method of interpretation. Some writers make a distinction between the two terms,⁶⁴ while others say that they are in fact syno-

no investigation of new weapons, since the new knowledge could not be annulled (at 783). Comp. M. GLENNON, "The Senate role in treaty ratification", 77 AJIL (1983) 257-280 at 275.

⁶⁰ For a historical overview of the rules of treaty interpretation, see V.D. DEGAN, *L'interprétation des accords en droit international* (1963) 25-66.

⁶¹ G.G. FITZMAURICE, *The Law and Procedure of the International Court of Justice* (a reprint of a series of articles on the work of the Court in the BYIL 1950-1963) Vol. 1 (1986) 42-43. He based his division on the work by LAUTERPACHT at the Institut de droit international.

⁶² DEGAN prefers to call it the 'functional' method as being more precise. DEGAN, *op.cit.* n.60 at 74-75.

⁶³ *Ibid.* at 70-71.

⁶⁴ O'CONNELL, *op.cit.* n.25 at 255; DEGAN, *loc.cit.* n.60.

nyms.⁶⁵ Despite minor differences, the starting point seems always to be: to establish the purpose or the aim of the treaty. The interpretation of a treaty in search of the treaty's object and purpose has also to do with 'effective interpretation' or the maxim *ut res magis valeat quam pereat*, also known as the *l'effet utile* principle. Treaties establishing, or concluded by, international organizations have presented additional problems as courts have appeared to be inclined to invoke object and purpose, especially in cases of *lacunae*. Thus, new terms were created: 'emergent purpose' and 'implied powers'. Finally, courts may differ on whether to find the treaty's object and purpose in or outside the intention of the parties or the text of the treaty. The latter occurs when the treaty's aim has evolved from the original aim as envisaged by the parties, or for the purpose of filling up *lacunae*, i.e. finding answers to questions which are not covered by the treaty.

One should always keep MCNAIR'S words in mind, according to which there are no clear-cut distinctions between the various methods and 'rules' on interpretation, and that they all serve one purpose, namely, to give "effect to the expressed intention of the parties, that is, their intention as expressed in the words used by them in the light of the surrounding circumstances".⁶⁶ This was also, more or less, the attitude adopted by the ILC. Article 31 paragraph 1 of the Vienna Convention provides the following 'general rule of interpretation':

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

The subsequent paragraphs of Article 31 add additional elements that have to be taken into account, such as subsequent agreements, practice followed by the parties to the treaty in question, and any relevant rules of international law applicable in the relations between the parties concerned.

The Vienna Convention has, in a way, summarized the legal doctrine and experience of the past. It was HUGO GROTIUS who, in 1625, made one of the first attempts to lay down rules on treaty interpretation. He wrote of different *conjecturas* to be taken into account in the process of interpreting a treaty. Chapter VIII of his *De jure belli ac pacis* speaks of a 'reasonable motive' (*ec ratione movente*) and claims that the *ratio legis* or the purpose of the law should prevail. *Ratio legis*, however, is not the same as the intent of the par-

⁶⁵ E.HEXNER, "Teleological Interpretation", in: *Essays in Honour of H. Kelsen* (1964) 119-138 at 131; G.SCHWARZENBERGER, *International Law as Applied by International Courts and Tribunals*, Vol.1 (3rd ed. 1957) 517-531; D.SIMON, *L'interprétation judiciaire des traités d'organisations internationales* (1981) 102.

⁶⁶ MCNAIR, op.cit.n. 53 at 365.

ties.⁶⁷ The same distinction and the necessity to take into account the *ratio legis* is found with Vattel.⁶⁸

The first significant attempt at a codification of the law on treaties was made by the Harvard Law School in 1935. According to the view put forward in this project a treaty has to be interpreted, among other things, "in the light of the general purpose which it is intended to serve". Here again, it was held that 'general purpose' is not the same as the intention of the parties, however close the connection between the two may be.⁶⁹ 'General purpose' was apparently meant to serve as a corrective to a subjective interpretation of a treaty when a common intention of the parties cannot be established.

The *Institut de droit international* made a considerable contribution to the issue of treaty interpretation. While failing to draw up strict rules on interpretation, it recommended some principles in its Granada Resolution of 1956.⁷⁰ While it prescribed interpretation on the basis of the 'natural and ordinary sense of the terms of the text', it allowed the determination of objects of a treaty by 'other legitimate means' of interpretation, the *travaux préparatoires* and the subsequent practice of the parties.

The International Law Commission had the difficult task of formulating rules in an area of the law of treaties where most jurists claimed no rules existed. As we know the Commission adopted a general rule of treaty interpretation including the charge of interpreting a treaty 'in the light of its object and purpose'.

The notion of 'object and purpose' was introduced in 1964 by the third Special Rapporteur, Sir HUMPHREY WALDOCK, though only in a subsidiary rule of interpretation. His Article 70 para. 2 provided for turning to object and purpose and the context of the treaty when interpretation of the 'natural and ordinary sense' leads to an unreasonable, absurd or ambiguous result. The object and purpose were clearly seen as a means for correction of otherwise unacceptable results. However, Article 72 of the report provided for the, separate, application of the maxim *ut res magis valeat quam pereat*, requiring that the in-

⁶⁷ H. GROTIUS, *De jure belli ac pacis, Libri tres*, 1625, reproduced in *Classics of International Law* (Washington, 1913) Lib. II, Ch. XVI, para VIII. Comp. B. VITÁNYI, "L'interprétation des traités dans la théorie du droit naturel", 84 RGDIP (1980) 535-586 at 569, who writes that *ratio legis* is "la cause finale, c'est à dire le but que vise la loi ou le traité", and is, therefore, an objective criterion, while the intent of the parties is a subjective one. Accordingly, the substance of an obligation can only be considered with regard to the treaty's purpose or reason.

⁶⁸ E. VATTEL, *Le droit des gens ou principes de loi naturelle*, 1758, reproduced in *Classics of International Law* (Washington 1916) Lib. II, Ch. XVII, para. 287.

⁶⁹ Harvard Draft, Art. 19, and comments at 940, 952-953. According to the drafters, the problem was that disputes often occurred when there had been in fact no common intention of the parties to a treaty. Nevertheless, the interpretation process can and should effectuate the intention of the parties "in the sense that it is conformable to the general purpose which they had in mind when they concluded the treaty" (p. 953).

⁷⁰ 46 *Annuaire* (1956) 358. The Resolution was based on a draft prepared by Sir G. FITZMAURICE, advocate of the textual method.

interpretation produced an effect compatible with the natural and ordinary meaning of the treaty terms as well as 'with the object and purpose of the treaty'.⁷¹ The members of the Commission, however, voted against Article 72 and, accordingly, against the *ut res magis* maxim as a separate rule.⁷² Instead, the Commission later saw the principle embodied in the *bona fide* principle, all within the context of the textual method of interpretation.⁷³ In the Commission's final draft of 1966 the rule on interpretation (Art.27) was based on the textual approach including the following principal elements: good faith, ordinary meaning,⁷⁴ context⁷⁵ and object and purpose of a treaty, without hierarchical order among them. Their position in the text appears to be the result of logic, rather than legal hierarchy. Interpretation should, therefore, be the result of their interactive application, as a unique intellectual operation.⁷⁶ Hierarchy exists only with regard to the supplementary means of interpretation in the following draft Article 28.

The Draft came through the 1968 and 1969 Conference sessions rather unharmed with only minor drafting changes, despite some efforts to revise the whole textual approach.⁷⁷ At the final vote the articles on interpretation were accepted unanimously. They have made a strong impact on subsequent international practice.

The confines of 'object and purpose'

Many authors have asserted that interpretation according to object and purpose of a treaty should be limited by the text of the treaty and by the original intention of the parties. This refers to the textual and the subjective method of treaty interpretation.

According to the subjective method, the object and purpose of a treaty are determined as they were at the time of the conclusion of the treaty. The first

⁷¹ YILC 1964 Vol. II:53.

⁷² YILC 1964 Vol.I:275-296. In the interesting discussions CASTRÉN emphasized that "the rule of article 70 that a treaty should be interpreted by reference to its objects and purpose might in a way be said to constitute an affirmation of the principle of effective interpretation". See also: H.GUTIERREZ-POSSE, "La maxime 'ut res magis valeat quam pereat' (Interprétation en fonction de l'effet utile)", 23 ÖZÖR (1972) 229-254 at 249.

⁷³ Commentary para.6 to draft article 27, YILC 1966 Vol.II: 215.

⁷⁴ According to the Draft the meaning of the term depends on the intention of the parties.

⁷⁵ The Draft defines 'context' as comprising the text itself, including its preamble and annexes, as well as any agreement or any instrument relating to that treaty (Art. 27, para 2).

⁷⁶ SINCLAIR, op.cit. n.42 at 130 holds the view that under Art.30 of the Vienna Convention reference to object and purpose is in fact a secondary or ancillary process. On the other hand, R.BERNHARDT, "Interpretation and implied modification of treaties", 27 ZaöRV (1967) 491-506 at 498 sees in the general rule a unique and combined operation of all elements.

⁷⁷ Comp. M.S.McDOUGAL, "The ILC's draft articles upon interpretation: Textuality redivivus", 61 AJIL (1967) 992-1000; SINCLAIR, loc.cit.n.1 at 61-66.

and foremost task of treaty interpretation is to establish, and to give effect to, the common intention of the parties. The intention of the parties and, accordingly, their purpose, can be assumed or implied. This method was advocated by A. MCNAIR and is well founded in the international judicial practice.⁷⁸ In the Chorzów Factory Case the Permanent Court of International Justice held that when interpreting a treaty one must take into account not only the historical development of the treaties concerned and the grammatical and logical meaning of the words, but also 'the function' of the provision according to the intention of the parties.⁷⁹

According to DEGAN, the intention of the parties can be determined by '*le but primitif du traité*' by using the subjective method of interpretation.⁸⁰ SINCLAIR, however, warns for the dangers of such an approach: "In the case of general multilateral conventions, a search for the common intentions of the parties can be likened to a search for the pot of gold at the end of the rainbow".⁸¹ Other writers warn that this method of interpretation is not suitable for every kind of treaty.⁸² This is certainly true if one juxtaposes closed treaties with a fixed number of parties to so-called universal treaties, open to every State. In the first group of treaties it may be relatively easy to establish the common intention of the parties, but in the latter group there may be more parties than the original negotiating States. To establish their common original object may prove to be next to impossible, the more so since it is conceivable that the original purpose is lost or has changed over the years. In such cases it is often preferable to search for the treaty's object and purpose somewhere else, rather than in the earliest common intention of the parties.

Similar problems occur when the textual approach is applied in determining the treaty's object and purpose. In that case the object and purpose is an objective category, to be derived from the text, often its preamble, or implied in it,⁸³ while the interpreter does not derogate from the text. This approach has had many advocates. Among the older writers DE LOUTER claims that there must be a connection between words used in the treaty and the purpose of the treaty,

⁷⁸ MCNAIR, op.cit.n.53 at 380.

⁷⁹ Case concerning the factory at Chorzów (jurisdiction), 26 July 1927, PCIJ Series A No. 9 at 24.

⁸⁰ DEGAN, op. cit. n.60 at 134.

⁸¹ SINCLAIR, op. cit. n.42 at 130.

⁸² A.FAVRE, "L'interprétation objectiviste des traités internationaux", 17 ASDI (1960) 75-98 at 84-85, L.CAVARÉ, *Le Droit international public positif*, Vol.2 (2d ed.,1969) at 140. They distinguish between 'traités-lois' and 'traités-contrats'. See also W.LANG, "Les règles d'interprétation codifiées par la Convention de Vienne et les divers types des traités", 24 ÖZÖR (1973) 113-174.

⁸³ Comp. CRANDALL, op.cit. n.53 at 371: "[A] literal and narrow meaning of a clause may not be made to defeat the manifest purpose of the parties as gathered from the entire instrument".

while MARCELLE JOKL emphasizes the value of establishing the *raison d'être* of the treaty and at the same time justifies the use of the treaty's preamble.⁸⁴

CHARLES ROUSSEAU belongs to the writers who regard the consideration of the object and purpose as one of three fundamental principles of treaty interpretation. It equals the determination of the *ratio legis*, though it differs from the principle of *l'effet utile*. Furthermore, for this learned author the object and purpose are not the same as the motives of the parties, although he admits that the courts have failed to be consistent in distinguishing between the two.⁸⁵

The international judicial practice is rich with examples of invocation of the object and/or purpose of a treaty or other instruments with which is confronted. There is, however, an inconsistency in the use of the terms 'object' and 'purpose', as well as their synonyms.

In the case concerning the interpretation of the Memel Statute the Permanent Court of International Justice compared the purpose of the entire Statute with that of its Article 17.⁸⁶ Dealing with disputes relating to the protection of minorities after World War I, the Court as a rule looked for the purpose of the treaty in its preamble and juxtaposed it to the object and purpose of particular provisions.⁸⁷ On the other hand, in some other cases the PCIJ tried to find the purpose of the (peace) treaty in the intention of the Allied Powers to protect the minorities.⁸⁸

The International Court of Justice has been equally inclined to refer to the object and purpose of the treaties it had to interpret. In the Asylum Case (1950) the object and purpose of the Havana Convention of 1928 were found in the preamble, in connection with the intention of the parties.⁸⁹ The status of reser-

⁸⁴ J. DE LOUVER, *Le droit international public positif*, Vol. 1 (1920) at 500; M. JOKL, *De l'interprétation des traités normatifs* (1936) at 51. At p. 74, examining the practice of the PCIJ, she comes to conclusion that: "... c'est par examen de la raison d'être d'un traité que la Cour écarte toute interprétation susceptible de réduire la valeur d'un texte ou aboutissant à des résultats déraisonnables ou absurdes". Comp. also M. SIBERT, *Les traités internationaux* (1953) 137, who writes that the preamble "énonce le but de celui-ci avec une précision suffisante pour diriger l'interprétation du dispositif".

⁸⁵ ROUSSEAU, op. cit. n. 25 at 272. P. GUGGENHEIM, *Traité de droit international public*, Vol. 1 (2d. ed., Geneva, 1967) 253-254, admits the following principal maxims of interpretation: intention of the parties, clear meaning, and the purpose of a treaty.

⁸⁶ *Interpretation of the Statute of the Memel Territory*, 11 Aug. 1932, PCIJ Series A/B No. 49 at 314-317. The descriptive text of the French original 'le Statut n'est pas été créé' became 'purpose of the Statute' in the English translation.

⁸⁷ *Rights of Minorities in Upper Silesia (Minority Schools)*, 26 Apr. 1928, PCIJ Series A No. 15 at 33; *German Settlers in Poland*, 10 Sept. 1923, PCIJ Series B No. 6 at 20, 24-25.

⁸⁸ *Question concerning the Acquisition of Polish Nationality*, 15 Sept. 1923, PCIJ Series B No. 7 at 16.

⁸⁹ *Asylum Case*, 20 Nov. 1950, ICJ Rep. 1950:226 at 275, 282. Here, again, the original French 'le but manifeste' became 'the manifest intention'. The preamble was also used in some other cases, such as the *Case Concerning Rights of Nationals of the USA in Morocco*, 27 Aug. 1952, ICJ Rep. 1952:176 at 196: "The purposes and objects of this Convention were stated in its Pre-

vations to the Genocide Convention was determined by referring to the object and purpose of that Convention which the Court held to be implied in the intention of the UN General Assembly and the contracting parties.⁹⁰ However, in the jurisdiction phase of the Fisheries Jurisdiction Case, the Court made clear that the motives which led a party to conclude a treaty must be distinguished from the object and purpose of that treaty as an objective category. Thus the Court concluded that the motive of Iceland to enter into the Exchange of Notes might have been the recognition of a 12-miles fishery jurisdiction and it was plausible that this motive had disappeared in the meantime. However:

"... the object and purpose of the 1961 Exchange of Notes, and therefore the circumstances which constituted an essential basis of the consent of both parties ..., had a much wider scope ... [It] was also to provide means whereby the parties might resolve the question of the validity of any further claims. This follows not only from the text ..., but also from the history of negotiations ..."⁹¹

Clearly, the Court had departed from the subjective method of interpretation and, instead, used the textual method, although starting from the object and purpose of the treaty.

A very elaborate discussion of the ICJ's understanding of 'object and purpose' is to be found in the Case concerning US Diplomatic and Consular Staff in Tehran in 1980:

"The very purpose of a treaty of amity, and indeed of a treaty of establishment, is to promote friendly relations between the two countries concerned, and between their two peoples, more especially by mutual undertakings to ensure the protection and security of their nationals in each other's territory. It is precisely when difficulties arise that the treaty assumes its greatest importance, and the whole object of Art. XXI, par. 2 of the 1955 Treaty was to establish the means for arriving at a friendly settlement of such difficulties by the Court or by the peaceful means. It would, therefore, be incompatible with the whole purpose of the 1955 Treaty if recourse to the Court under Art. XXI par. 2, were now to be found not to be open to the parties precisely at the moment when such recourse was most needed." ⁹²

amble ... The Court can not adopt a construction by implication of the provisions of the Madrid Convention which would go beyond the scope of its declared purposes and objects".

⁹⁰ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Adv. Op. 28 May 1951, ICJ Rep.1951:15 at 23-24.

⁹¹ *Fisheries Jurisdiction* (UK v. Iceland), Jurisdiction, 2 Feb. 1973, ICJ Rep.1973:3 at 17.

⁹² *Case concerning US Diplomatic and Consular Staff in Tehran* (USA v. Iran), 24 May 1980, ICJ Rep.1980:3 para.54. Remarkably, the terms used in the authentic English language match those of the French translation. However, in the case between Nicaragua and the United States, the Court held that the object and purpose of amity treaties should not be interpreted too broadly, but limited to the specific areas foreseen by the treaty. *Military and Paramilitary Activities in and against Nicaragua*, Merits, 27 June 1986, ICJ Rep.1986:14 para.273 at 135-136.

Various arbitrations relating to the peace treaties following the two World Wars adhered to interpretation according to the object and purpose of the treaties.⁹³ One exemplary case is the arbitration, under Part III of the 1946 Paris Act, concerning the claims with respect to the removal of gold by the Germans from Rome in 1943. The Umpire, SAUSER-HALL, held that, in order to determine its object and purpose, "... il convient de rechercher quels sont les antécédents de cet Acte, quels sont les effets et quel est le résultat voulu par les Parties signataires. Cette analyse permettra de déterminer l'objet et le but de cet accord".⁹⁴

Some more recent cases also purport to confirm and clarify what is meant by object and purpose. In the *Young Loan Case* in 1980 the Tribunal took Article 31 of the Vienna Convention as its starting point since it was "widely held in jurisprudence and legal literature that the Convention..., as regards interpretation at least, ... is restricted to the codification of the customary law in force".⁹⁵ Using the 'step by step' technique as required by Article 31, the Tribunal tried to locate the object and purpose of the London Agreement on German External Debts (LDA) of 1953:

"Article 31(1) of the VCT requires, in addition to the wording and context, the 'object and purpose' of the treaty to be taken into account when interpreting unclear treaty provisions. The object of the LDA was the settlement of German external debts. The purpose of the LDA was an attempt to achieve a compromise, in the interests of all concerned, between the liabilities of the Federal Republic of Germany, which, ... felt itself bound to settle the whole German debt, and its actual economic capacity. A prerequisite of the fullest possible settlement with its creditors was the recovery of the German economy. This recovery, therefore, became as much the object of the treaty as the settlement of the debt itself... [T]he LDA's object could be achieved only if foreign creditors were prepared to waive a substantial part of their claims"

⁹⁶

⁹³ E.g.: *German Cession of Vessels and Tugs for Rhine Navigation* (France v. Germany), 8 Jan. 1921, 1 RIAA:71; *German Cession of Vessels and Tugs for Elbe Navigation* (Czechoslovakia v. Germany), 14 June 1921, 1 RIAA:85-86; *Cession of Vessels and Tugs for Navigation on the Danube* (Allied Powers; Germany, Austria, Hungary and Bulgaria), 2 Aug. 1921, 1 RIAA:103.

⁹⁴ *Affaire relative à l'or de la Banque Nationale d'Albanie*, 20 Feb. 1953, 12 RIAA:13, at 39. At a different place the arbitrator emphasized that the proper way to interpret a treaty "selon la doctrine unanime du droit des gens" is to give "des dispositions conventionnelles entre Etats les sens usuel des termes employés par les Etats contractants, et de ne l'abandonner que si leur signification n'est pas compatible avec l'objet et le but de ces engagements". Ibid. at 46.

⁹⁵ '*Young Loan Case*' (Belgium, France, Switzerland, UK and US v. Federal Republic of Germany, May 16, 1980), 19 ILM (1980):1357 at 1370 (paras 16 and 30).

⁹⁶ Ibid. at 1377.

Hence, the Tribunal found that the terms 'object' and 'purpose' are two separate notions, albeit so closely connected that they have to be considered together, as stated in the preamble of the Agreement. The LDA, therefore, has to be interpreted with a view to the delicate balance between the justified aim for adequate satisfaction of the creditors and the need not to burden the debtors with an economically intolerable load.⁹⁷

In the case concerning the delimitation of the maritime boundary between Guinea and Guinea Bissau, the two parties had different views on the object and purpose of the French-Portuguese Convention on delimitation of 1886. For Guinea, its object and purpose was the delimitation of the African possessions of France and Portugal with the purpose of eliminating a source of dispute between them. For Guinea Bissau, however, its only purpose was the preparation of the delimitation, while the possessions constituted the object of the Convention. Finally, the Arbitration Tribunal held that the purpose of the Convention was the partition, the cession, the exchange of the possessions or their occupation, while the delimitation seemed to be only an aspect or a means of partition. On the basis of an analysis of the text and the preamble of the treaty the Tribunal reached the conclusion that this was the true object, not only of Article 1 of the Convention, but of the entire Convention.⁹⁸

More recently the Iran-US Claims Tribunal expressed its view on the Vienna Convention understanding of the object and purpose of treaties, as follows:

"It is to be noted that the Vienna Convention does not envisage that the words of a treaty be regarded in isolation; on the contrary it places 'the ordinary meaning' of those words first within the framework of 'their context' and then within, the still wider framework of the 'object and purpose' of the treaty. The Vienna Convention thereby codifies an established principle of international law."⁹⁹

The invocation of the object and purpose of a treaty has a special function before courts established for the protection of human rights and freedoms, such as the European Court of Human Rights (ECHR). Its task is to interpret the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms and its subsequent Protocols. By way of starting point it assumes that "the Convention is a living instrument which... must be interpreted in the light of present day conditions...[T]he Court cannot but be influenced by the developments and commonly accepted standards in the penal policy of the member States of the Council of Europe in this field".¹⁰⁰ Furthermore: "Given that it is a law-making treaty, it is also necessary to seek the interpretation that

⁹⁷ Ibid.

⁹⁸ Award of 14 Feb. 1985, para 56, 89 RGDIP (1985) 511; 19 RIAA:149 at 172.

⁹⁹ *International Schools Services, Inc. v. National Iranian Copper Industries Co.*, Case No. 111 (1984), 5 *The Iran - US Claims Tribunal Reports* 341.

¹⁰⁰ *Tyrer Case (Max Birchings Case)*, 25 April 1978, para. 31, ECHR Series A Vol. 26.

is most appropriate in order to realise the aim and achieve the object of the treaty".¹⁰¹

Due to such views the ECHR sometimes departs from the strict text of the treaty and goes beyond the initial intent of the parties, applying the teleological or functional method of interpretation. However, even within the textual approach, the ECHR has often reached for the object and purpose of the Convention as a whole or its particular provisions.

Another principal feature of the ECHR's work relates to the application of the Vienna Convention, whose Articles 31 to 33, in the opinion of the Court, "enunciate in essence generally accepted principles of international law ...".¹⁰² An illustration of the Court's contemplation of the purpose of the European Convention is to be found in the so-called Belgian Languages Case:

"The Court considers that the general aim set for themselves by the Contracting Parties through the medium of the European Convention on Human Rights, was to provide the effective protection of fundamental human rights... The Convention therefore implies a just balance between the protection of the general interest of the community and the respect due to fundamental human rights while attaching particular importance to the latter." ¹⁰³

Teleological interpretation

We thus come to cases in which the courts look for implications beyond the very text of the treaty. Some writers have expressed their fear that, in so doing, the courts may cross that fine line between legislation and adjudication. Legislators make rules, judges apply them. By implying rules which are not explicitly contained in the text, the two different functions may be confused.¹⁰⁴

Interpretation according to the purpose of the treaty beyond the scope of the text is sometimes called (extreme) teleological interpretation. Very few writers appear to be in support of its wide application,¹⁰⁵ while most call for caution. Sir GERALD FITZMAURICE, as a traditionalist, limited the teleological method to some categories of treaties, such as multilateral conventions on so-

¹⁰¹ *Wemhoff*, 27 June 1968, paras. 7-8, ECHR Series A Vol. 7.

¹⁰² *Golder Case*, 21 Feb. 1975, para. 29, ECHR Series A Vol. 18.

¹⁰³ Case relating to *Certain Aspects of the Laws on the Use of Languages in Education in Belgium*, Merits, 23 July 1967, 2 Yearbook ECHR (1968) 832; 45 ILR 162.

¹⁰⁴ J.F. HOGG, "The International Court: rules of treaty interpretation", 44 *Minnesota Law Review* (1960) 5-73 at 63.

¹⁰⁵ M.S. McDUGAL, H.D. LASSWELL, J.C. MILLER, *The Interpretation of Agreements and World Public Order: Principles of Content and Procedure* (1967); B. BOLLECKER-STERN, "L'avis consultatif du 21 juin 1971 dans l'affaire de la Namibie (Sud-Ouest Africain)", 17 AFDI (1971) 281-329 at 288-294. The latter differentiates between the extensive, evolutive and teleological method of interpretation, the latter allowing for more precision, filling up the gaps and taking into account the *raison d'être* of the provision or the institution in question.

cial, humanitarian or law-making matters.¹⁰⁶ DEGAN speaks of the 'functional' method when he refers to the interpretation of a treaty with regard to its effect or its aim in the social order.¹⁰⁷ He considers the method particularly appropriate in the case of constitutions of international organizations and to be used for two principal purposes: (1) filling up gaps and (2) satisfying new needs which were not foreseen originally by the parties.¹⁰⁸ The method is called the 'objective method' by CAVARÉ,¹⁰⁹ while BENTIVOGLIO refers to it as interpretation based on the principle of functionality.¹¹⁰

These views come close to the so-called 'emergent purpose' interpretation or 'implied powers' theory. This allows for interpretation focused on the effectuation of the treaty¹¹¹ and, in the case of constitutive instruments, interpretation of the powers of an organ of an international organization.¹¹² Constitutive treaties have thus been interpreted in accordance with the requirements of the time, having in mind the changes that have occurred since the adoption of the instrument. In such cases international courts have reached for a greater latitude for interpretation, which is provided by the 'object and purpose' of the treaty, without contravening the clear meaning of the text, since "it is the duty of the Court to interpret the Treaties, not to revise them".¹¹³

Treaties dealing with the protection of human rights are also susceptible to this kind of teleological interpretation, with the effect of *ut res magis valeat quam pereat*.¹¹⁴ As we have seen earlier, the ECHR has a preference of interpreting the protected rights and fundamental freedoms in light of the changes that have occurred in the legal and social perceptions over the years. Even this method of interpretation need not necessarily lead to results directly contrary to the letter of the treaty.

While various means of interpretation may be employed in order to establish a newly emerging purpose of a treaty, the best result may be obtained by

¹⁰⁶ FITZMAURICE, op.cit.n.61, Vol. 1:42.

¹⁰⁷ DEGAN, op. cit.n.60 at 70.

¹⁰⁸ Ibid. at 139-140.

¹⁰⁹ CAVARÉ, op.cit.n.82, Vol.2 at 145-147.

¹¹⁰ L.BENTIVOGLIO, *Interpretazione del diritto e diritto internazionale* (1953) 262-264.

¹¹¹ L.EHRLICH, "L'interprétation des traités", 24 RdC (1928) 1-145 at 84.

¹¹² SIMON, op.cit.n.65 at 169: "L'interprétation de la répartition des compétences établie par le traité constitutif dans le sens d'un développement des fonctions de l'organisation se manifeste à travers la jurisprudence internationale dans deux directions distinctes, mais complémentaires: d'une part, le juge accepte l'extension matérielle des compétences de l'organisation, et d'autre part, il s'emploie à encadrer les compétences retenues des Etats membres".

¹¹³ *Interpretation of Peace Treaties* (Second phase), Adv.Op.18 July 1950, ICJ Rep.1950: 221,229. The greater latitude would, as a rule, result in political organs of organizations having competence to render an authentic interpretation of an constitutional instrument: "Les organes politiques de l'Organisation ont entrepris de se faire les interprètes de la Charte, et ce non selon le texte parfaitement clair de celle-ci, mais dans le but de servir les fins de l'Organisation, en fonction des circonstances internationales variables". DEGAN, op.cit. n.60:147.

¹¹⁴ See J.TOUSCOZ, *Le principe d'effectivité dans l'ordre international* (1964) 166.

relying on the subsequent practice of the contracting States, as provided by Article 31(3) of the Vienna Convention.

In international judicial practice courts often invoke the object and purpose of a treaty in order to go beyond the very letter of the treaty or the initial intentions of the parties. The PCIJ acknowledged the implied powers of the International Labour Organisation to regulate, 'incidentally', the personal work of the employer in light of the aim of the treaty, even though its Statute did not contain such an authorization.¹¹⁵ One of the most fundamental implied powers interpretations was employed by the ICJ in its Advisory Opinion in the Reparations for Injuries Case in 1949. In that case the question had arisen whether the UN was competent to act as an international person. Despite the fact that the Charter does not settle the question of international personality of the UN in explicit terms, the attribution of international personality was deemed indispensable by the Court in order for the United Nations to achieve its purposes and principles as specified in the Charter:

"The Organisation must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties."¹¹⁶

The ICJ found itself in a similar situation in a couple of cases dealing with the international status of South-West Africa and the problem of the succession of UN mechanisms of control to those of the mandate system under the League of Nations. Lacking a clear provision authorizing the UN to take over the control mechanisms over the former mandates, the Court looked into Article 80(1) of the Charter and concluded that its purpose "must have been to provide a real protection for those rights; but no such rights of the peoples could be effectively safeguarded without international supervision ...". Accordingly, the duty of international control was deemed to have remained in place.¹¹⁷

¹¹⁵ *Competence of the International Labour Organisation to regulate, incidentally, the personal work of the employer*, 23 July 1926, PCIJ Series B No. 13:18. The object and purpose were found in the preamble of the Statute. On the other hand, any limitations to its powers "clearly inconsistent with the aim and the scope of Part XIII" would have been expressed in the Treaty itself and could not be implied.

¹¹⁶ *Reparation for injuries suffered in the service of the UN*, Adv.Op. 11 April 1949, ICJ Rep.1949:174 at 178-182.

¹¹⁷ *International Status of South-West Africa*, Adv.Op. 11 July 1950, ICJ Rep.1950: 128,136. But the Court found that there was no duty to transfer the mandate to the Trusteeship system of the UN. Similar in *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276* (1970), Adv.Op.21 June 1971, ICJ Rep.1971:16 at 30-33. In para. 53 of the latter opinion, the Court emphasized that the concepts embodied in Art. 22 of the Pact of the League of Nations were 'by definition evolutionary' and that the Court's interpretation must be affected by the "subsequent development of law"

The European Court of Justice and its predecessors, as the judiciary branch of the European Communities, is an extraordinary international court, due to the special nature of the treaties it has to interpret. As Lord DENNING put it, speaking of the Treaty establishing the European Economic Community,

"How different is this treaty! It lays down general principles. It expresses its aims and purposes... But it lacks precision. It uses words and phrases without defining what they mean... All the way through the Treaty there are gaps and lacunae"¹¹⁸

Against this backdrop, it is not surprising that the Court often employs the teleological method of interpretation, with reference to the objects and purposes of the treaties.¹¹⁹ Nevertheless, the Court stressed that the interpretation can not result in "a revision of the text which is clear and unambiguous".¹²⁰ With regard to the European Economic Community Treaty, the Court used various terms, such as 'general objectives', 'ultimate general aim' or 'primary object', in interpreting Article 85 of that Treaty, while avoiding interpretation that would be 'incompatible with the objectives of the Treaty':

"While the Treaty's primary object is to eliminate... the obstacles to the free movement of goods within the common market and to confirm and safeguard the unity of that market, it also permits the Community authorities to carry out certain positive, though indirect, action with a view to promoting a harmonious development of economic activities within the whole Community, in accordance with Art. 2 of the Treaty."¹²¹

Indeed, the teleological interpretation is mostly employed in respect of Articles 2, 3, 4 and 5 of the Rome and Paris Treaties. These articles represent the basic objectives of the Communities on which the Treaties are based.¹²² Ac-

¹¹⁸ *Bulmer v. Bollinger*, Court of Appeal 1974, 60 ILR: 424.

¹¹⁹ Comp. the opinion of ANNE BREDIMAS, according to which the teleological interpretation is one of the aspects of the functional method, next to the principle *l'effet utile* and *l'effet nécessaire*. A. BREDIMAS, *Methods of Interpretation and Community Law* (1978) 78-79. See also D.G. VALENTINE, *The Court of Justice of the European Communities*, Vol.1 (1965): 376.

¹²⁰ *Alpha Steel v. Comm.*, Case 14/81, ECR 1982:769, para. 33. Already in some of the early cases the European Court of Justice emphasized the importance of the goals set in Art. 2 of the Paris (ECSC) Treaty. Thus, for example, in Case 30/59, the Court allowed interpretation of the term 'subventions' only if the resulting definition was confirmed by other dispositions of the Treaty or by its objects as stated in its Art.2. *De Gezamenlijke Steenkolenmijnen in Limburg c. Haute autorité*, 23 Feb.1961, Rec.Vol.VII/1962:1 at 38 et seq.

¹²¹ Case 14/68: *Wilhelm v. Bundeskartellamt*, 13 Feb.1969, ECR 1969: 1, para. 5 at 14.

¹²² P. PESCATORE, "Les objectifs de la Communauté Européenne comme principe d'interprétation dans la jurisprudence de la Cour de Justice", *Miscellanea W.J. Ganshof van der Meersch*, Vol.2 (1972) 325-363 at 326. According to this author, the principal aims of the Communities are: equality, freedom, solidarity and unity. See also Case 1/54 (*French Government v. High Authority of the ECSC*): "Articles 2, 3 and 4 of the Treaty, referred to at the beginning of Art. 60(1), constitute fundamental provisions establishing the Common Market and

cordingly, when the question of implied powers emerged, the Court readily gave the following view in the well-known ERTA Case in 1973:

"Although it is true that Articles 74 and 75 do not expressly confer on the Community authority to enter into international agreements, nevertheless the bringing into force, on 25 March 1969, of Regulation No. 543/69 of the Council on the harmonisation of certain social legislation relating to road transport... necessarily vested in the Community power to enter into any agreements with third countries relating to the subject matter governed by that regulation."¹²³

Dynamic interpretation is also found in cases relating to treaties on the protection of human rights, as is shown by the practice of the European and Inter-American Courts of Human Rights. As mentioned earlier, the ECHR has often taken as its starting point that the European Convention on the Protection of Human Rights and Fundamental Freedoms is 'a living instrument' that has to be interpreted in the light of contemporary conditions. Accordingly, and sometimes even in face of strong opposition among the members of the Court, the interpretation would occasionally depart from the meaning some terms used to have at the time of the conclusion of the Convention. A fine example of this practice is the 'Pretty and Others' case in 1983 where the Court actually did 'not feel bound to adopt a literal interpretation' and held that 'reference to the object and purpose' of the particular Article was necessary.¹²⁴

By way of conclusion we may say that reference to a treaty's object and purpose is a legitimate means of interpretation, but that its employment is particularly accepted in case of treaties belonging to the category of constitutional instruments of international organizations and treaties on the protection of human rights.

In referring to object and purpose of the whole or part of the treaty or even a particular provision, courts and arbitral tribunals use these terms in plural and singular, and refer to either or both of them. The practice shows a great variety. The same applies with regard to the way in which specific objects and purposes are determined. Again, practice differs considerably. Although the text of the treaty constitutes the primary source, sometimes reference is made to the context. The preamble seems to be a most important, though not the exclusive,

the common objectives of the Community. Their importance is clear from Art. 95. In authorizing the High Authority to define prohibited practices, the Treaty obliges it to take into account all the aims laid down in Art. 2, 3 and 4". Reports of the Cases, [1954 to 1956] European Court of Justice, p. 1, 9.

¹²³ Case 22/70: *Commission v. Council* (ERTA), 31 March 1973, Rec.Vol.XVII:263. More on the use of this method see: PESCATORE, loc.cit.n.122; R.ORMAND, "L'utilisation particulière de la méthode d'interprétation des traités selon leur 'effet utile' par la Cour de Justice des Communautés Européennes", 12 *Revue trimestrielle de droit européen* (1976) 624-634.

¹²⁴ ECHR Series A Vol. 71; 73 ILR 482 at 491.

source for the deduction of the treaty's object and purpose. Most often some connection is found with the original intention of the parties, unless the court decides to interpret a treaty dynamically in light of the 'emerging purpose' of that treaty.

Plurilingual treaties

A rather recent problem of treaty interpretation has arisen in relation to plurilingual treaties, i.e. treaties concluded in two or more equally authentic versions in different languages. The problem appeared for the first time with the peace treaties concluded after World War I that were concluded in English and French.¹²⁵ Today the multitude of language versions has become a rule, rather than an exception, especially in the context of international organizations.¹²⁶

Interpretation of plurilingual treaties brings with it additional problems of finding the true meaning of the terms used.¹²⁷ There are two basic approaches in international legal doctrine and judicial practice. The first one starts from the presumption that one of the language versions has priority. It could be the language of one of the parties or the language of the party who took up the obligation, providing its language was used at all.¹²⁸ It could also be the 'working language' in which the treaty was prepared.¹²⁹ Another approach starts from the presumption of a single treaty, regardless of the number of language versions.¹³⁰ Consequently, it must be possible to find the common meaning stemming from the common intent of the parties.¹³¹

¹²⁵ Notwithstanding the fact that there are examples of 19th century treaties written in one language, but signed in two. Comp. *The Manica Arbitration*, in J.B.MOORE, *A Digest of International Law*, Vol. 5 (1906): 4985, 4992.

¹²⁶ Comp. M.TABORY, *Multilingualism in International Law and Institutions* (1980).

¹²⁷ ROSENNE argues that there are even differences in English terms in American or British version. S.ROSENNE, "Conceptualism as a Guide to Treaty Interpretation", *Mélanges R. Ago*, Vol. 1 (Milan, 1987) 417-431 at 421.

¹²⁸ CRANDALL, op.cit. n.53:389. The PCIJ indirectly applied this rule in the *Mavrommatis Palestine Concessions Case* (Jurisdiction), PCIJ Series A No.2:19. The European Court of Justice, however, considered the method inadmissible in Case 26/62. Cf. S.A.DICKSHAT, "Problèmes d'interprétation des traités européens résultant de leur plurilinguisme", 4 RBDI (1968) 40-60.

¹²⁹ Comp. *Interpretation of the Convention of 1919 concerning employment of women during the night* (Adv.Op.15 Nov.1932), PCIJ Series A/B No.50 at 365. J.HARDY, "The interpretation of plurilingual treaties by international courts and tribunals", 37 BYIL (1961) 72-155; P.GERMER, "Interpretation of plurilingual treaties: A study of Article 33 of the Vienna Convention on the Law of Treaties", 11 HarvILJ (1970) 400-427.

¹³⁰ See *Conditions of admission of a State to membership in the United Nations* (Art. 4 UN Charter), Adv.Op.28 May 1948, ICJ Rep.1947-1948:57; *Aerial Incident Case* (preliminary objections), 26 May 1959, ICJ Rep.1959:127.

¹³¹ EHRlich, loc.cit.n.111 at 99; D.ANZILOTTI, *Cours de droit international public* (Paris, 1929) 107.

The Vienna Convention adopted the latter view. Its Article 33, that was accepted unanimously at the conference, reads as follows:

"Interpretation of treaties authenticated in two or more languages

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

For the purpose of the present paper, paragraph 4 is the most important provision. It contains the criteria for reconciling the different wording of the authentic versions of the treaty. The criterion consists of the referral to the object and purpose of the treaty. It is interesting to note that this is a second referral after the ordinary process of interpretation, *inter alia* in light of the treaty's object and purpose, has, apparently, not resulted in a satisfactory solution. One may wonder whether such a duplication is necessary. In the Young Loan Case before the Arbitral Tribunal for German External Debts the arbitrators held:

"The repeated reference by Article 33(4) of the VCT to the 'object and purpose' of the treaty means in effect nothing else than that any person having to interpret a plurilingual international treaty has the opportunity of resolving any divergence in the texts which persists, after the principles of Articles 31 and 32 of the VCT have been applied, by opting, for a final interpretation, for the one or the other text which in his opinion most closely approaches the 'object and purpose' of the treaty."¹³²

Material breach and termination of a treaty

Unilateral termination of a treaty as a consequence of its breach is one of the legitimate ways of termination of a treaty. It is founded in customary law and codified by Article 60 of the Vienna Convention.¹³³

¹³² *Young Loan Case*, 19 ILM (1980) 1357, para.39 at 1382.

¹³³ SINHA BHEK PATI, *Unilateral denunciation of treaty because of prior violations of obligations by the other Party* (1966) at 35, claims that the rule has been invoked by various states since 1793 and that it is a rule of customary international law. Some writers see the rule as one

The right to unilateral termination is not, however, the principal response to another party's breach of the treaty. Furthermore, a breach by one party does not automatically terminate the treaty.¹³⁴ The injured party has a choice either to insist on the implementation of the treaty or to ask for its termination and damages.¹³⁵ The latter is a very grave and final remedy. The Vienna Convention has, therefore, laid down strict rules and imposed significant limitations on the injured party. Besides, due to the special nature of international treaty relations, the Vienna Convention prescribes different rules for bilateral and multilateral treaties.

The principal rule is contained in Article 60, which bears the title "Termination or suspension of the operation of a treaty as a consequence of its breach". Article 60 paragraph 1, dealing with bilateral treaties, reads:

"1. A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part."¹³⁶

Accordingly, there has to be 'a material breach' (French: *violation substantielle*, Spanish: *violacion grave*) in order for the right to unilaterally terminate or suspend the treaty to become available. The definition of a material breach, which is obviously very important, is to be found in paragraph 3 of the same article:

"3. A material breach of a treaty, for the purposes of this article, consists in: (a) a repudiation of the treaty not sanctioned by the present Convention; or the violation of a provision essential to the accomplishment of the object or purpose of the treaty."

The International Law Commission in its Commentary to the 1966 Draft explained the difference between the term 'material' and 'fundamental' – used, *inter alia*, in the article relating to the *clausula rebus sic stantibus* (Art. 62 Vienna Convention) – :

of the general principles of law: CAPOTORTI, loc.cit.n.44 at 548-549; BROWNLIE, op.cit.n.1 at 615. See ANZILOTTI's dissenting opinion in *The diversion of water from the Meuse* Case (28 June 1937), PCIJ Series A/B No.70 at 49-50: "The principle underlying this submission (inadimplenti non est adimplendum) ... is one of these general principles of law ...". However, VILLIGER, op.cit.n.56 at 376, emphasizes that the rule is more common in the case of bilateral than multilateral treaty relations.

¹³⁴ McNAIR, op.cit. n.53 at 553; Harvard Draft, Art.27.

¹³⁵ Some writers make a distinction between termination resulting from a breach and that seized by way of legitimate reprisal. B.SIMMA, "Reflections on Art. 60 of the Vienna Convention on the Law of Treaties and its background in general international law", 20 ÖZÖR (1970) 5-83 at 20.

¹³⁶ Similarly, in multilateral treaty relations, "a material breach of a multilateral treaty by one of the parties entitles" other parties to undertake similar measures: Art.60 para.2.

"The word 'fundamental' might be understood as meaning that only the violation of a provision directly touching the *central* purposes of the treaty can ever justify the other party in terminating the treaty. But other provisions considered by a party to be essential to the effective execution of the treaty may have been very material in inducing it to enter into the treaty at all, even though these provisions may be of an ancillary character."¹³⁷

Clearly, the Commission had in mind the possibility for a treaty to have several objects and purposes at different levels. In the words of PAUL REUTER:

"... il n'exige pas que la violation rende impossible la réalisation de l'objet et du but, il suffit que la disposition violée soit essentielle à cette réalisation, ce qui implique que l'objet et le but sont au moins sérieusement menacés dans leur réalisation."¹³⁸

Some writers, however, disapprove of the criteria used by the Vienna Convention. SIMMA and MAZZESCHI hold the view that the material breach should be determined by also taking into account the nature of the breach,¹³⁹ while ROSENNE holds that the breach can only be deducted from the law on state responsibility.¹⁴⁰

In an early arbitration case on the so-called Tacna-Arica Question, the arbitrator had to decide what administrative actions constituted a breach of a peace treaty between Chile and Peru:

"It is manifest that if abuses of administration could have the effect of terminating such an agreement, it would be necessary to establish such serious conditions as the consequence of administrative wrongs as would operate to frustrate the purpose of the agreement"¹⁴¹

The International Court of Justice acknowledged the codificatory nature of Article 60 in its advisory opinion on Namibia in 1971, i.e. before the entry into force of the Vienna Convention. According to the Court's view, the right to terminate a treaty exists "in case of a deliberate and persistent violation of obligations which destroys the very object and purpose of that relationship".¹⁴² This

¹³⁷ Commentary 1966 to draft Art. 57, at para.9, YILC 1966 Vol.II:255.

¹³⁸ REUTER, op.cit.n.54 at 161. In his opinion, this was the only way to enounce the criteria of material breach in general terms.

¹³⁹ SIMMA, loc.cit.n.135 at 61; R.P.MAZZESCHI, *Risoluzione e sospensione dei trattati per inadempimento* (1984) at 122.

¹⁴⁰ S.ROSENNE, *Breach of Treaty* (Cambridge, 1985) 119, 123.

¹⁴¹ *Tacna Arica Case* (Chile v. Peru), 4 March 1925, 2 RIAA:921 at 943-944.

¹⁴² *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Adv.Op.21 June 1971, ICJ Rep.1971:16 at 47, paras. 94-95. See also para. 96: "The silence of a treaty as to the existence of such a right cannot be interpreted as implying the exclusion of a right which has its

attitude was affirmed in some later judgments, most recently in the case between Hungary and Slovakia in 1997.¹⁴³

The breach of a multilateral convention is dealt with in a separate paragraph (para.2) of Article 60. In accordance with the basic principle, the reaction of the parties other than the defaulting state can be either collective or individual, either to terminate or suspend the treaty, in whole or in part, and to terminate it either in the relations between themselves and the defaulting State, or as between all the parties. In addition, any party other than the defaulting State is entitled to invoke the breach as a ground for suspending the operation of the treaty in whole or in part with respect to itself if the treaty is of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty.

In the context of treaty violation and the available remedies, the object and purpose may be seen as the *ratio legis* of a treaty. Like in some other instances, the Vienna Convention allows a great deal of subjectivity to the individual parties in deciding whether they want the treaty to be terminated or not. Nevertheless there is a strongly objective criterion contained in the requirement that the breach should be material, which contributes to the accomplishment of the object and purpose of the treaty.

5. CONCLUSION: DETERMINATION OF OBJECT AND PURPOSE

The question of determination of a treaty's object and purpose has been a challenge to many international lawyers. We shall summarize their opinions according to whether they regard object and purpose as synonyms or as two separate or even opposite notions. In addition to some writers already mentioned above, others like CHARLES ROUSSEAU and OPPENHEIM-LAUTERPACHT hold the view that the object of a treaty consists of the obligations and rights

source outside of the treaty, in general international law, and is dependent on the occurrence of circumstances which are not normally envisaged when a treaty is concluded".

¹⁴³ *Case Concerning the Gabčíkovo-Nagymaros Project* (Hungary/Slovakia), 25 Sep.1997, ICJ Rep.1997:46: "The Court has no need to dwell upon the question of the applicability in the present case of the Vienna Convention of 1969 on the Law of Treaties. It needs only to be mindful of the fact that it has several times had occasion to hold that some of the rules laid down in that Convention might be considered as a codification of existing customary law. The Court takes the view that in many respects this applies to the provisions of the Vienna Convention concerning the termination and the suspension of the operation of treaties, set forth in Articles 60 to 62". Hungary argued that the termination of the 1977 Treaty was justified by Czechoslovakia's material breaches of the Treaty, so the Court looked into the Vienna Convention and examined its Art. 60. In conclusion, the Court emphasized that the termination had been premature. (paras. 109-110). See also: *Fisheries Jurisdiction* (United Kingdom v. Iceland) (Jurisdiction), ICJ Rep.1973:18; *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, Adv.Op., ICJ Rep.1980:95-96.

prescribed by the treaty, while its purpose could be said to represent the result that the parties have set out to achieve.¹⁴⁴ DUGUIT probably influenced many French writers in adhering to this distinction. In his opinion, 'object' constitutes the material element of the treaty, while 'purpose' is its psychological element. The former provides an answer to the question '*quid?*' – what is wanted, the latter to '*cur?*' – why it is wanted.¹⁴⁵ YASEEN too holds that the two terms do not have the same meaning: the fact that the Vienna Convention always uses the two terms together means that it wanted to create a reasonable criterion denoting what the parties wanted to achieve within the limits of the set norm.¹⁴⁶

The Dutch lawyer BOS takes a compromising attitude, believing that the interpretation of 'object' will necessarily influence the interpretation of 'purpose'. It is, therefore, wise to consider the phrase 'object and purpose' as a unique expression denoting two closely related aspects of the same idea.¹⁴⁷ This view seems to be in accordance with the spirit of the Vienna Convention, which always uses the two notions together.

The essential feature of the reference to 'object and purpose' in the Vienna Convention is the subjectivity inherent in the two notions. As a rule, it is left to interested parties to assess whether the act in question – the formulation of reservations, the conclusion of an *inter se* agreement, the breach of provisions of the treaty, etc. – was lawful or not. This subjectivity can lead, and has sometimes actually lead, to very different results. Nevertheless, on the basis of proper interpretation, as confirmed by relevant judicial practice, it seems reasonable to suggest that the Vienna Convention does provide an objective framework for this subjectivity. This, it is suggested, consists of the text of the treaty.¹⁴⁸

¹⁴⁴ ROUSSEAU, *op.cit.*n.25 at 18. OPPENHEIM-LAUTERPACHT, *International Law*, Vol.1 (8th ed.,1955) at 893.

¹⁴⁵ L.DUGUIT, *Traité de droit constitutionnel*, Vol.1 (1921):151 at 284. See also: J.P.JACQUE, *Elements pour une théorie de l'acte juridique en droit international public* (1972) 169; CAVARE, *op.cit.*n.82 at 88; C.H.CHENG, *Essai critique sur l'interprétation* (1941) at 37.

¹⁴⁶ YASEEN, *op.cit.*n.4 at 57.

¹⁴⁷ M.BOS, *A Methodology in International Law* (1984) at 153.

¹⁴⁸ Comp. *US Diplomatic and Consular Staff in Tehran*, ICJ Rep.1980:3 at para.54, and *Military and Paramilitary Activities in and against Nicaragua*, ICJ Rep.1986:14 at para.273.