ATTEMPTS TO CODIFY PRINCIPLES OF TREATY INTERPRETATION AND THE SOUTH-WEST AFRICA CASE

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1. The codification of principles of interpretation is a very delicate question. The doctrine is not unanimous even with regard to the very existence of legal rules concerning treaty interpretation. There are also different approaches to the problem of methods of interpretation and construction. Hence, the task of the International Law Commission to codify the treaty interpretation principles in the frame of the codification of the whole law of treaties was in no way envious.

However, the Commission was not the first to work in this field. There were several earlier attempts at cataloguing the principles and rules of treaty interpretation ; the first of them were made in some arbitral awards in the last century. The awards in the cases of *San Juan* of 1872,[1] *Van Bokkelen* of 1888[2] and *Aspinwall* of 1890,[3] contain several principles of treaty interpretation given *in abstracto*, almost all of them collected from the textbooks of Grotius and Vattel.[4] The doctrine of the classical writers in international law was of a high authority for the arbitrators of that epoch.

2. By far the most important and complete work in this respect was the arbitral award in the *Georges Pinson Case* by the President of the French-Mexican Mixed Claims Commission, J.H.W. Verzijl, on October 19th, 1928.

That part of the award which relates to the general principles of treaty interpretation is the following :

> "1. Autant que le texte de la convention est clair par lui même, il n'y a pas lieu d'en appeler à de prétendues intentions contraires de ses

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1. Cf. Lapradelle-Politis, *Recueil des arbitrages internationaux*, tome III, 1954, pp. 20-22.
2. Cf. J.B. Moore, *History and Digest of the International Arbitration to which the United States has been a Party*, vol. II, 1898, pp. 1848-1850.
3. *Ibid.*, vol. IV, pp. 3621-3622.
4. Hugo Grotius, *De jure belli ac pacis*, liber secundus, caput XVI ; Emmeric de Vattel, *Le droit des gens*, liver II, chap. XVII, 1856.

auteurs, sauf le cas exceptionnel dans lequel les deux parties litigantes reconnaîtaient que le texte ne correspond pas à leur intention commune.

2. Autant que le texte n'est pas suffisamment clair, il est loisible de recourir aux intentions des parties contractantes. Si, dans ce cas, les intentions sont claires et unanimes, elles doivent prévaloir sur toute autre interprétation possible. Si, au contraire, elles divergent ou ne sont pas claires, il faut chercher l'interprétation qui, dans le cadre du texte, correspond le mieux, soit à une l'offre de la partie qui a pris l'initiative a raisonnablement et de bonne foi dû faire sur l'autre partie.

3. Pour fixer le sens du texte conventionnel ou les intentions des parties contractantes, les négociations diplomatiques qui ont conduit à la conclusion de la convention peuvent être prises en considération, à moins que les parties contractantes n'aient fini par adopter un texte incompatible avec la teneur des négociations, ou qu'elles n'aient consciemment renoncé à invoquer les éléments d'interprétation que les pourparlers diplomatiques pourraient fournir.

4. Toute convention internationale droit être réputée s'en référer tacitement au droit international commun, pour toutes les questions qu'elle ne résout pas elle-même en termes exprès et d'une facon différente.

5. En cas de doute sur la portée d'une stipulation conventionnelle, elle doit être entendue dans un sens qui en assure la possibilité d'application, tandis que, en cas d'impossibilité de fixer son sens exact, elle doit être interprétée en faveur de la partie qui a contracté l'engagement."[5]

According to this set of rules the fundamental principle is the investigation of the text of the interpreted treaty. The question is that of the famous principle established by Vattel—"*in claris non fit interpretatio*", that is to say, the rule of clear sense. When the text is clear, there is no room for further interpretation and construction. It must be applied immediately. This general rule guarantees in the best possible way the effectiveness of the fundamental principle of international law, *pacta sunt servanda*. Every interpretation is an uncertain procedure which can give various results, and which can be easily abused. The rule of clear sense is an attempt to prevent this danger and to assure the fulfilment of treaty obligations.

The alternative to the foregoing principle, in cases where the text is not sufficiently clear, is the subjective method of interpretation, that is, the determination of the common intention of the contracting parties.

5. R.I.A.A., Vol. V, p. 422.

As supplementary means to both, the investigation of the text and the common intention of the parties, is provided resort to *travaux préparatoires*, with two explicit reservations. The first one concerns those cases where the parties have adopted a text which is not compatible with previous negotiations, and the second relates to such cases where they have renounced appeal to this way of interpretation.

It is pointed out clearly that general international law was a basis of interpretation of all questions, save where the explicit terms of a treaty provide for a different solution, that is to say, the *lex specialis*. In the last place was mentioned the rule *contra proferentem*, namely, the principle favouring the party which assumed the obligation.

It must be admitted that this set of rules, laid down by a single person, Umpire Verzijl, is quite a complete system of treaty interpretation principles. It takes into account the fact that all parties can revise or even denounce, by their common will, their earlier treaty, and that their common will can be an exception to the rule of clear sense. Otherwise, the text is the first basis which is to serve for interpretation, and next to it is the common intention of the parties.

3. The next attempt to codify treaty interpretation principles belongs to the collective work organized by the Harvard Law School. The Draft Convention on the Law of Treaties, published in 1935, devotes its article 19 to it. The text of this provision is as follows :

> "(*a*) A treaty is to be interpreted in the light of the general purpose which it is intended to serve. The historical background of the treaty, *travaux préparatoires*, the circumstances of the parties at the time the treaty was entered into, the change in these circumstances sought to be effected, the subsequent conduct of the parties in applying the provisions of the treaty, and the conditions prevailing at the time interpretation is being made, are to be considered in connection with the general purpose which the treaty is intended to serve.
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> (*b*) When the text of a treaty is embodied in versions in different languages, and when it is not stipulated that the version in one of the languages shall prevail, the treaty is to be interpreted with a view to giving to corresponding provisions in the different versions a common meaning which will effect the general purpose which the treaty is intended to serve."[6]

This draft stresses the subjective method of interpretation. In the very centre of every interpretation is "the general purpose of the treaty which it is

6. A.J.I.L., *Supplement*. Vol. 29, 1935, p. 661.

intended to serve", obviously by the contracting parties. Otherwise, this purpose isolated from the will of the parties would lead toward the teleological interpretation as exclusive, which was not the intention of its drafters.

For this end of interpretation several supplementary means were provided for, namely the *travaux préparatoires*, the cirumstances under which the treaty was concluded, the change in these circumstances, and the subsequent conduct of the parties. The last two can nevertheless open the door to the teleological interpretation, which can be contrary even to the original intention of the parties and to the clear text of the treaty.

Paragraph (*b*) of this provision relates to the interpretation of texts embodied in the versions of different languages. This problem, being a real one even at that time, has become far more acute after the Second World War, when almost all important multilateral conventions are drafted in two, three, or even five languages. The solution for the discrepancies between two equal versions is—to give effect to the common meaning in different versions, which effectuates the general purpose which the treaty is intended to serve—the very centre of each interpretation.

It seems that this attempt at codification was the least successful of all. The proposed code of interpretation—the general purpose of the treaty—is more the result of doctrinal conceptions than of international practice, which was even at that time very highly developed in this respect. The quoted article does not make any mention of the role of 'text of the treaty' in the process of interpretation. Moreover it does not deal with some other means which were very well established in practice, as for instance the context of the treaty, the ordinary and special meanings of the terms employed, the analogy, etc. In any case this draft conferred the real importance upon the rule of effectiveness of the interpreted provisions, as an element of its general purpose.

4. The next step in this direction was the Resolution of the *Institut de Droit International*, adopted at its 1956 session held in Granada.

This Resolution was the result of the discussions over several years, where the opposed conceptions confronted each other. The first Special Rapporteur, Sir Hersch Lauterpacht, opted for the subjective approach rather than for the textual method of interpretation, with special stress on the importance of researching the *travaux préparatoires*. The majority of the members of the Institute disapproved of this position, and the next Rapporteur, Sir Gerald Fitzmaurice, gave effect to the opinion of the majority.

The final text of the Resolution concerning treaty interpretation is as follows :

> "When a treaty is to be interpreted, States and international organizations and tribunals might be guided by the following principles :

Article 1

1. The agreement of the parties having been reached on the text of the treaty, the natural and ordinary meaning of the terms of that text should be taken as the basis of interpretation. The terms of the provisions of the treaty should be interpreted in the context as a whole, in accordance with good faith and in the light of the principles of international law.

2. However, if it is established that the terms employed should be understood in another sense, the natural and ordinary meaning of those terms is set aside.

Article 2

1. In the case of a dispute brought before an international tribunal, it will be for the tribunal, taking into account the provisions of article 1, to determine whether and to what extent other means of interpretation should be employed.

2. The following are among the legitimate means of interpretation :

(*a*) consultation of the *travaux preparatoires;*

(*b*) the practice followed in the actual application of the treaty;

(*c*) the consideration of the objects of the treaty.[7]

First of all, it must be mentioned that the Resolution refers to the organs which are called upon to apply its principles. The first article is dedicated to States in their unilateral interpretation, to international organisations and tribunals, whereas the second article mentions only international tribunals. It is therefore obvious that the rules of interpretation prescribed by that provision can be applied also by other institutions.

The Resolution sets up three categories of treaty interpretation principles. The first one is implicitly expressed in its preamble by the words—"*...lorsqu'il y a lieu d'interprétation...*" (—"when a treaty is to be interpreted"). It proceeds that the interpretation is not an automatic process, bound in every case by the application and execution of a treaty, but rather an exception when the text to be applied is not clear. Hence, those words confirm Vattel's fundamental principle—*in claris non fit interpretatio*, or the rule of clear sense.

The second category of rules explicitly relates to the textual method of interpretation, that is to say the interpretation based on the research of the

7. Translation from the French original text—*Yearbook of the International Law Commission*, 1964, vol. II, p. 55.

text of the treaty, as the most authentic expression of the intentions of the parties. Article 1 of the Resolution establishes also some auxiliary means of interpretation in the frame of the textual method : the natural and ordinary meaning of the terms, the context of the treaty, the principle of good faith, and interpretation in the light of the principles of international law. The same provision in its paragraph 2 forsees the exception to the principle of the natural and ordinary meaning, in favour of a special meaning, when it is established that the terms employed are to be understood in that manner.

Finally, according to article 2 of the Resolution, international tribunals have at their discretion recourse to some other supplementary means of interpretation in the frame of textual interpretation. The Resolution explicitly mentions the following three among the "legitimate means", which means that this enumeration is not exhaustive. These are—consultation of the *travaux préparatoires*, the practice followed in the actual application of the treaty, and the consideration of the objects of the treaty.

It is obvious that the *Institut de Droit International* had no intention to record in its Resolution all possible rules and principles of interpretation which are applied by international courts and tribunals. But its hierarchy among the three categories of the means of interpretation is of very great practical value. It confirms the textual method as the basic one.

5. The foregoing texts, together with a very developed practice of international courts and tribunals in this respect, were at the service of the International Law Commission to continue this work and to codify the treaty interpretation principles in the framework of the Law of Treaties. This topic—the Law of Treaties—was placed on the agenda of the Commission at its first session held in 1949. But a complete draft convention on this subject was not accomplished until 1966. Four Special Rapporteurs followed one another, all of them being British scholars—Professor J.L. Brierly, Sir Hersch Lauterpacht, Sir Gerald Fitzmaurice and Sir Humphrey Waldock. But it was only Sir Humphrey Waldock who incorporated the principles of interpretation in his draft articles. The first three Special Rapporteurs, in their uncompleted work before the Commission, did not even touch this subject.

The third report of Sir Humphrey Waldock, presented to the Commission in 1964, contained a special section devoted to the interpretation of treaties with six articles, two of which were consecrated to the interpretation of multilingual treaties.

After the discussions at the Commission from 14 to 17 July 1964, the new draft proposed for discussion by the General Assembly of the United Nations contained five articles on this subject. The provisions regarding the principle of effectiveness, and the effect of a later customary rule or of a later agreement on interpretation, were omitted in the new draft.

In its eighteenth session in 1966, the Commission finally adopted the whole body of draft articles on the Law of Treaties, on the basis of the suggestions of the Member States of the United Nations. This draft contains 75 articles in very clear and selective language, three of them devoted to treaty interpretation. All draft provisions are followed by large and instructive commentaries.

Despite the earlier experiences on the codification of the rules of interpretation, and the plurality of international practice in this respect, the task of the Special Rapporteur, as well as of the Commission, was very delicate. It was confirmed in the Commission's Commentary to this section by the following words : "Thus, it would be possible to find sufficient evidence of recourse to principles and maxims in international practice to justify their inclusion in a codification of the law of treaties, if the question were simply one of their relevance on the international plane. But the question raised by jurists is rather as to the non-obligatory character of many of these principles and maxims. They are, for the most part, principles of logic and good sense valuable only as guides to assist in appreciating the meaning which the parties may have intended to attach to the expression that they employed in a document.....Even when a possible occasion for their application may appear to exist, their application is not automatic but depends on the conviction of the interpreter that it is appropriate in the particular circumstances of the case. In other words, recourse to many of these principles is discretionary rather than obligatory and the interpretation of documents is to some extent an art, not an exact science."[8]

Therefore, the Commission confined its task to isolating and codifying the comparatively few general principles which appear to constitute the general rules for the interpretation of treaties. Nevertheless, it has not attached equal importance to all of these principles, but a new hierarchy was established, which is indicated by the titles to the first two draft articles as "General rules...", and "Supplementary means of interpretation". Before commenting upon them, the relevant articles may be quoted :

"Section 3 : Interpretation of Treaties

Article 27[9]

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.

8. Cf., this *Journal*, Vol. 7 (1967), p. 245.
9. *Ibid.*, p. 243.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes :

(*a*) Any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty ;

(*b*) Any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context :

(*a*) Any subsequent agreement between the parties regarding the interpretation of the treaty ;

(*b*) Any subsequent practice in the application of the treaty which establishes the understanding of the parties regarding its interpretation ;

(*c*) Any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 28[10]

Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 27, or to determine the meaning when the interpretation according to Article 27 :

(*a*) Leaves the meaning ambiguous or obscure ; or

(*b*) Leads to a result which is manifestly absurd or unreasonable.

Article 29[11]

Interpretation of treaties 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

10. *Ibid*, p. 244.
11. *Ibid.*, p. 256.

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. Except in the case mentioned in paragraph 1, when a comparison of the texts discloses a difference of meaning which the application of Articles 27 and 28 does not remove, a meaning which as far as possible reconciles the texts shall be adopted."

As was indicated in the Commentary, Article 27 is entitled "General *rule*" of interpretation in the singular, not "General *rules*..." in plural, because the Commission desired to emphasize that the process of interpretation is a unity and the provisions of the article form a single, closely integrated, rule.[12]

The Commentary also indicates that paragraph 1 of Article 27 contains three separate principles—interpretation in good faith, which flows directly from the rule *pacta sunt servanda* ; the ordinary meaning of the used terms ; and the context and the object and purpose of the treaty which is to be interpreted.[13]

Paragraphs 2 and 3 of this article are not a simple codification, but in some way constitute the progressive development of some principles which have not been very clearly established in international practice. They specify what the context of a treaty means for the purpose of interpretation. It is very significant that it was clearly explained that the preamble, the annexes and any agreement made in connexion with the conclusion of the treaty are considered as parts of the context, hence that they have full legal force in the process of interpretation, and even equal legal value with the operative text of the treaty.

Equal force was given to subsequent agreements regarding interpretation, to subsequent practice in the application of the treaty, and to the relevant rules of international law applicable in the relations between the parties. The first two elements affect the right of all contracting parties to revise their earlier agreement without any restriction.

Paragraph 4 provides an exception to the rule of ordinary meaning. When it is established that the parties intended to give a special, that is to say a technical meaning to a provision, the interpreter must give effect to this will of the parties.

If such an interpretation, on the basis of the general rule, leaves the meaning ambiguous or obscure, or leads to a manifestly absurd or unreasonable result, in that case only is there room for recourse to the supplementary

12. *Ibid.*, p. 248.
13. *Ibid.*, p. 250.

means of interpretation. These means are also available to confirm the meaning which results from the application of the general rule of interpretation in Article 27. Article 28 is not intended to explain all possible supplementary means of interpretation, but it is significant that it mentions *exempli causa,* amongst all others, the *travaux prêparatoires* and the circumstances of the conclusion of the treaty which is to be interpreted.

Article 29 deals with plurilingual treaties. It gives effect to the will of the parties with regard to the text which is to prevail. But in the case of discrepancy among equally authoritative versions, which the application of Articles 27 and 28 cannot resolve, a meaning which reconciles, as far as possible, the texts, is to be adopted. The Commentary to this article says that it does not mean in each particular case a restrictive interpretation. It seems to us that such an interpretation cannot practically be avoided. Hence, the International Law Commission does not advocate the giving of preference to the version which is more clear, or in which the treaty was first stipulated. In this respect it differs in some way from established international practice.

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It must be recognized that the draft articles of the International Law Commission definitely admit the textual method of interpretation as the basic one, and more important than the two others—the subjective, and the teleological. This attitude is expressly confirmed by the commentary and it expresses the view of almost all members of the Commission.

Furthermore, the principles of interpretation which constitute the general rule are very clearly dissociated from the supplementary means. The distinction between these two categories of different means of interpretation is very well sustained by the practice of international courts and tribunals, and it must be admitted, from the doctrinal point of view also.

However it seems that the codified principles of interpretation which are drawn up by the foregoing articles had, as their only starting point, an interpretation made fairly, and in good faith. It must be recognized that the international judicial and arbitral practice until 1966 has hardly given apposite examples. But a codification of treaty interpretation principles must attempt by its rules to prevent abuses in this field, in particular because it was not pointed out in the draft articles that they apply only to international courts.

We must consider in this light the fact that the foregoing rules did not expressly stipulate Vattel's rule of clear sense and the principle of effectiveness. The proclamation of the principle of good faith among the three fundamental principles of interpretation is not, by itself, sufficient to prevent all possible abuses in practice.

It is obvious that the application of the sum of the means prescribed by

the general rule of interpretation in Article 27, will have the same result as Vattel's rule. So recourse to the supplementary means of interpretation provided by Article 28 is expressly permitted only in cases when the application of the general rule leaves the meaning of the interpreted provision ambiguous or obscure, or when it leads to an absurd or unreasonable result. Consequently, it was expected that the normal application of Article 27 will confirm the clear sense of a provision if it exists.

It is true also that to establish that a provision is clear, it is necessary to examine the meaning of the terms used, the context of the treaty, its object and purpose, and furthermore, the versions in different languages must be compared. Only on the basis of such a research is it possible to conclude that a provision is clear and that it can be applied immediately. And it must be recognized that all these means are provided by Articles 27 and 29.

Anyway, the present version of these provisions, where the rule of clear sense is not expressly stipulated, makes the process of interpretation obligatory and automatic on every application of a treaty provision in practice. If it is not stipulated that the clear provision is obligatory, the application of prescribed means of interpretation opens the door to the interpreter to sustain even results which are not justified by the clear sense of the words. Interpretation is a highly complicated process where different criteria can be applied. It can encourage an unscrupulous interpeter to reach such conclusions as suit him. For this reason the arbitral tribunals and the two Hague Courts have had appeal to this rule of clear sense more than to any other principle of treaty interpretation. Their will was to strengthen the fundamental principle of international law—*pacta sunt servanda.*

During the discussions in the International Law Commission, only José M. Ruda advocated the inclusion of this principle in the text of the draft articles,[14] but he was outvoted by the other members. As the Chairman, Robert Ago, pointed out in this respect, two parties to a treaty can find a treaty perfectly clear, but can interpret it in two different ways.[15] This is true in the case of two unilateral interpretations by the parties themselves, but it does not relate to interpretation by an impartial organ, such as the Hague Court.

This lack of express provisions to which the established rules relate, was criticized by Alfred Verdross.[16] The Commentary expressly says only that the proposed principles cannot be applied to their full extent by international organizations in interpreting their statutes. It was added that the interpretation of these statutes concerns the law of international organizations

14. *Yearbook of the International Law Commission,* 1964, vol. I, p. 277.
15. *Ibid.*, p. 280.
16. *Ibid.*, p. 279.

more than the law of treaties.[17] But it would seem that this explanation is not sufficient.

The objection to the principle of clear sense, that it cannot be applied when it leads to a result which is manifestly absurd, cannot be admitted. The ordinary meaning is not synonymous with the clear meaning. So if an ordinary meaning of a provision leads to an unreasonable result, it means that it is not clear unless a special signification is applied. So the conclusion that a text is clear implies that it leads to a result which is not meaningless.

The principle of effectiveness – *ut res magis valeat quam pereat*—is equally a very important rule of treaty interpretation which could find an appropriate place in codification. Sir Humphrey Waldock provided for it in his first draft by a special article, the text of which was as follows :

Article 72

Effective interpretation of the terms (ut res magis valeat quam pereat)

In the application of articles 70 and 71 a term of a treaty shall be so interpreted as to give it the fullest weight and effect consistent—

(*a*) with its natural and ordinary meaning and that of the other terms of the treaty; and

(*b*) with the objects and purposes of the treaty"[18].

But in his comment on this draft provision, Sir Humphrey expressed his own doubt on the usefulness of this principle. All other members of the Commission adopted the same attitude that this provision could produce an extensive interpretation, and they decided unanimously to omit this article. In the Commentary it was said that this maxim reflects a true general rule of interpretation, which is embodied in Article 27, paragraph 1, and which requires that a treaty shall be interpreted *in good faith*, in accordance with the context of the treaty, and *in the light of its object and purpose.*[19]

The main reason for this excessive distrust of this principle is based, as referred to above, on the anxiety that it can result in an extensive interpretation. The first author who expressed this opinion in the literature of international law was Lord McNair in 1961,[20] and this attitude was adopted afterwards by many others.

17. It was mentioned in the Commentary to Article 69 of the Report to the General Assembly. *Cf.*, *Yearbook of the International Law Commission*, 1964, vol. II, pp. 215-216. But the Commentary to the final draft articles does not make even this mention.
18. *Yearbook of the International Law Commission*, 1964, vol. II, p. 53.
19. See this *Journal*, *op. cit.*, p. 246.
20. Lord McNair, *The Law of Treaties*, Second Edition, 1961,p. 388.

Effective interpretation is not the same as extensive interpretation or construction. The opposite of an extensive interpretation is a restrictive one; and the opposite of effectiveness is non-effectiveness. The two ideas are quite different. Non-effectiveness is much more dangerous to the basic principle *pacta sunt servanda* than an extensive interpretation.

To give full effect to a treaty provision does not mean its broad interpretation. It means respect for the rights and obligations of the contracting parties, and consequently respect for the principle, *pacta sunt servanda.*

The principle of effectiveness has found an application in the practice of international courts and tribunals, being in its frequency next to the rule of clear sense. It was much more frequently applied than any interpretation principle codified by the draft provisions, as, for example, the rule of ordinary meaning and its counter-rule of technical meaning, object and purpose of the treaty and in particular recourse to the *travaux préparatoires.* The only limit to the application of this principle was laid down by the Hague Court itself in the advisory opinion rendered on July 18, 1950, on the *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania(second phase).* The Court said :

> "The principle of interpretation expressed in the maxim : *Ut res magis valeat quam pereat,* often referred to as the rule of effectiveness, cannot justify the Court in attributing to the provisions for the settlement of disputes in the Peace Treaties a meaning which, as stated above, would be contrary to their letter and spirit."[21]

In other words the exception to this principle is the rule of clear sense, which has an obligatory character for every interpreter. It may be seen that this quotation of the Court served in some cases to deny effect to a provision which was perfectly clear. This is precisely the greatest danger of the rejection of this principle as a rule of treaty interpretation.

About the relationship between the process of interpretation and the application of international law, some members of the Commission, including André Tunkin, have insisted on the rule that every interpretation of a treaty must conform to the principles of international law. In the Report of the Commission to the General Assembly, this principle was enclosed as a part of general rule of interpretation in paragraph 1 of Article 69 :

> "1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to each term :
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> (*a*) In the context of the treaty and in the light of its objects and purposes ; and

21. *I.C.J. Reports 1950,* p. 229.

(*b*) *In the light of the rules of general international law in force at the time of its conclusion.*"[22]

The final draft, composed on the basis of suggestions of the Member States of the United Nations, was much more prudent in this respect. It refers to the "relevant rules of international law applicable in the relations between the parties", as paragraph 3 (*c*) of Article 27 indicates

It must be pointed out in this respect that interpretation as a process is not intended to make up a possible conflict between a treaty provision and peremptory rules of general international law (*jus cogens*) mentioned in Articles 50 and 61 of this draft. If an interpreter concludes that such a discrepancy exists, the task of interpretation comes to its end, and a question arises of the invalidity of such a treaty provision.

But in other cases, some general principles of international law, in particular those referring to the Law of Treaties, can be useful to the interpreter in ascertaining the meaning of some terms applied, or even in filling in possible gaps of the treaty provisions.

So the final draft of the "*General rule of interpretation*" has well provided for the place of international law in this respect, but this problem of relationship between treaty interpretation and *jus cogens* could have been better emphasized in its Commentary.

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Because the International Law Commission completed its work on the Draft articles on the Law of Treaties at its session of July 18, 1966, it is obvious that it could have had in mind the Hague Court's practice up to that date.

It is somewhat paradoxical that on the very same date, July 18th, 1966, the International Court of Justice rendered its Jugdment on the second phase of the *South West Africa Cases*.[23] The practice of treaty interpretation adopted in this Judgment is entirely different from any previous practice of the International Court.

The problem of South-West Africa was the subject of three Advisory Opinions of the International Court of Justice, and two judgments in two phases of the dispute between Ethiopia and Liberia and the Republic of South Africa. In all these, the interpretation of the same treaty provisions was involved. A comparative analysis of the different practices of interpretation of

22. *Yearbook of the International Law Commission*, 1964, vol. II, p. 199. (Italics Supplied).
23. *I.C J. Reports 1966*, p. 6.

two legal texts, and their consequences in this respect would, therefore, be revealing.

The principle of the "sacred trust of civilization" in the framework of the Mandates System provided in article 22, paragraphs 1 and 2 of the Covenant of the League of Nations may be considered first. The text which was after-wards the object of interpretation is the following :

> "1. To those colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the States which formerly governed them and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilization and that securities for the performance of this trust should be embodied in this Covenant.
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> 2. The best method of giving practical effect to this principle is that the tutelage of such peoples should be entrusted to advanced nations who by reason of their resources, their experience or their geographical position can best undertake this responsibility, and who are willing to accept it, and that this tutelage should be exercised by them as Mandatories on behalf of the League."

In the Advisory opinion of 1950, concerning the *International Status of South-West Africa*, the above-mentioned principle of "the sacred trust of civilization" was treated as the basis of the international obligations assumed by the Union of South Africa by its Mandate of South-West Africa :

> "The international obligations, assumed by the Union of South Africa, were of two kinds. One kind was directly related to the administration of the Territory, and corresponds to the sacred trust of civilization referred to in Article 22 of the Covenant. The other related to the machinery for implementation, and was closely linked to the supervision and control of the League. It corresponded to the "securities for the performance of this trust" referred to in the same article.
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> The first mentioned group of obligations are defined in Article 22 of the Covenant and in Articles 2 to 5 of the Mandate. The Union undertook the general obligation to promote to the utmost the material and moral well-being and the social progress of the inhabitants. It assumed particular obligations relating to slave trade, forced labour, traffic in arms and ammunition, intoxicating spirits and beverages, military training and

24. *I.C.J. Reports* 1950, p. 133.

establishments, as well as obligations relating to freedom of conscience and free exercise of worship, including special obligations with regard to missionaries.

These obligations represent the very essence of the sacred trust of civilization. Their *raison d'etre* and original object remain. Since their fulfilment did not depend on the existence of the League of Nations, they could not be brought to an end merely because this supervisory organ ceased to exist. Nor could the right of the population to have the territory administered in accordance with these rules depend thereon."[24]

From this quotation we can see how far-reaching this principle was, in the mind of the Court. Its legal value in 1950 was out of question. Its consequences were very strong with regard to the dissolution of the League. It was stressed once again in the following quotation :

"The obligation incumbent upon a mandatory State to accept international supervision and to submit reports is an important part of the Mandates System. When the authors of the Covenant created this system, they considered that the effective performance of the sacred trust of civilization by the mandatory Powers required that the administration of mandated territories should be subject to international supervision. The authors of the Charter had in mind the same necessity when they organized an International Trusteeship System. The necessity for supervision continues to exist despite the disappearance of the supervisory organ under the Mandates System. It cannot be admitted that the obligation to submit to supervision has disappeared merely because the supervisory organ has ceased to exist, when the United Nations has another international organ performing similar, though not identical, supervisory function."[25]

Therefore the Court concluded that the General Assembly of the United Nations is legally authorised to perform the supervisory function of the former Council of the League of Nations.

This attitude was confirmed with greater force in the next Advisory opinion of the Hague Court concerning the Voting Procedure, delivered in 1955.[26]

In the Advisory Opinion of 1956 concerning the *Admissibility of hearings of petitioners by the Committee on South-West Africa*, the Court explained once again the general purport and meaning of its 1950 Opinion, to safeguard the

25. *Ibid.*, p. 136.
26. *I.C.J. Reports 1955*, pp. 72-77.

sacred trust of civilization through the maintenance of effective international supervision :

> "The general purport and meaning of the Opinion of the Court of 11 July 1950 is that the paramount purpose underlying the taking over by the General Assembly of the United Nations of the supervisory functions in respect of the Mandate for South West Africa formerly exercised by the Council of the League of Nations was to safeguard the sacred trust of civilization through the maintenance of effective international supervision of the administration of the Mandated Territory."[27]

The Court shared its own opinion in the contentious procedure of the same problem. In the Judgment of 1962, about the preliminary objections in the *South West Africa Cases*, the Court said as follows :

> "The essential principles of the Mandates System consist chiefly in the recognition of certain rights of the peoples of the underdeveloped territories; the establishment of a regime of tutelage for each of such peoples to be exercised by an advanced nation as a "Mandatory" "on behalf of the League of Nations"; and the recognition of "a sacred trust of civilization" laid upon the League as an organized international community and upon its Member States. This system is dedicated to the avowed object of promoting the well-being and development of the peoples concerned and is fortified by setting up safeguards for the protection of their rights."[28]

The above-mentioned pronouncements of the Court are thus consequent, and there is no difference among them with regard to the interpretation of the principle of the sacred trust of civilization. The Court attributed full legal effect to this principle.

But in 1966 the situation completely changed. The same principle of the "sacred trust of civilization" lost its "residual juridical content", and became a simple "moral ideal". In the words of the Court :

> "52. In the present case, the principle of the sacred trust has as its sole juridical expression the mandates system. As such, it constitutes a moral ideal given form as a juridical régime in the shape of that system. But it is necessary not to confuse the moral ideal with the legal rules intended to give it effect. For the purpose of realizing the aims of the trust in the particular form of any given mandate, its legal rights and obligations were those, and those alone, which resulted from the relevant instruments creating the system, and the mandate itself, within the framework of the League of Nations.

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27. *I.C.J. Reports 1956*, p. 28.
28. *I.C.J. Reports 1962*, p. 329.

53. Thus it is that paragraph 2 of Article 22 of the Covenant, in the same breath that it postulates the principle of the sacred trust, specifies in terms that, in order to give "effect to this principle", the tutelage of the peoples of the mandated territories should be entrusted to certain nations, "and that this tutelage should be exercised by them" as mandatories "on behalf of the League". It was from this that flowed all the legal consequences already noticed.

54. To sum up, the principle of the sacred trust has no residual juridical content which could, so far as any particular mandate is concerned, operate *per se* to give rise to legal rights and obligations outside the system as a whole, and, within the system equally, such rights and obligations exist only in so far as there is actual provision for them..."[29]

This is obviously attributing a quite different meaning to the same words. And the whole system of Mandates received a meaning quite different from that given to it by the same judicial organ. The preamble of the U.N. Charter also lost its legal value, except as the moral and political basis for the so-called "specific legal provisions". The Court said :

"50. Humanitarian considerations may constitute the inspirational basis for the rules of law, just as, for instance, the preambular parts of the United Nations Charter constitute the moral and political basis for the specific legal provisions thereafter set out. Such considerations do not, however, in themselves amount to rules of law. All States are interested—have an interest—in such matters. But the existence of an "interest" does not of itself entail that this interest is specifically juridical in character."[30]

The general rule of interpretation laid down by the International Law Commission, in particular paragraphs 1 and 2 of the draft article 27, concerning the interpretation in the context of the treaty, including its preamble, and in the light of its object and purpose, can hardly be reconciled with such an interpretation.

According to these new criteria, the Court in 1966 found for the first time that after the dissolution of the League of Nations, no entity is entitled to claim the due performance of the Mandate :

"57. Another argument which requires consideration is that in so far as the Court's view leads to the conclusion that there is now no entity entitled to claim the due performance of the Mandate, it must be unacceptable. Without attempting in any way to pronounce on the

29. *I.C.J. Reports 1966*, pp. 34-35.
30. *Ibid.*, p. 34.

various implications involved in this argument, the Court thinks the inference sought to be drawn from it is inadmissible. If, on a correct legal reading of a given situation, certain alleged rights are found to be non-existent, the consequences of this must be accepted. The Court cannot properly postulate the existence of such rights in order to avert those consequences. This would be to engage in an essentially legislative task, in the service of political ends the promotion of which, however desirable in itself, lies outside the function of a court-of-law." [31]

Now, if the 1966 Judgment represents the "correct legal reading of a given situation", it is obvious that the same judicial organ in 1950, 1955, 1956 and 1962, was engaged "in an essentially legislative task, in the service of political ends", or vice-versa. The two interpretations of the Mandates System cannot be reconciled.

To support its new legal position on the so-called faults in the Mandates System, the Court rejected the teleological principle of interpretation in order to fill in the gaps. In this respect it referred to the attitude it adopted previously in the *Peace Treaties Case* towards the principle of effectiveness, when the text was clear :

"...Rights cannot be presumed to exist merely because it might seem desirable that they should. On a previous occasion, which had certain affinities with the present one, the Court declined to find that an intended three-member commission could properly be constituted with two members only, despite the (as the Court had held) illegal refusal of one of the parties to the jurisdictional clause to appoint its arbitrator—and although the whole purpose of the jurisdictional clause was thereby frustrated. In so doing, the Court (*I.C.J. Reports 1950*, p. 229) said that it was its duty "to interpret the Treaties, not to revise them". It continued :

"The principle of interpretation expressed in the maxim : *Ut res magis valeat quam pereat*, often referred to as the rule of effectiveness, cannot justify the Court in attributing to the provisions for the settlement of disputes in the Peace Treaties a meaning which, as stated above, would be contrary to their letter and spirit."[32]

It may be seen that the Court did its utmost to escape in its interpretation from the principle of effectiveness. But it did not avoid by this practice an extensive interpretation. It made the whole legal system of Mandates ineffective. A restrictive interpretation is not less dangerous than an extensive

31. *Ibid.*, p. 36.
32. *Ibid.*, p. 48.

one. In any case the explicit rejection of the principle of effectiveness can encourage an interpreter to find gaps, inconveniences, and faults even in the most advanced legal systems.

* * *

Secondly, paragraph 2 of Article 7 of the Mandate for South-West Africa stated in very clear language the right of every Member of the League to submit to the Court "any dispute whatever (that) should arise" with the Mandatory, relating to the interpretation or the application of the provisions of that Mandate. The provision runs thus :

> "The Mandatory agrees that, if any dispute whatever should arise between the Mandatory and another Member of the League of Nations relating to the interpretation or the application of the provisions of the Mandate, such dispute, if it cannot be settled by negotiation, shall be submitted to the Permanent Court of International Justice provided for by Article 14 of the Covenant of the League of Nations."

In the 1950 Advisory Opinion, the International Court of Justice established that this right related to any Member of the League, with regard to any dispute on that subject-matter :

> "The essentially international character of the functions which had been entrusted to the Union of South Africa...also appears from the fact that any Member of the League of Nations could, according to Article 7 of the Mandate, submit to the Permanent Court of International Justice any dispute with the Union Government relating to the interpretation or the application of the provisions of the Mandate."[33]

The Court also concluded that the obligation continued to exist :

> "...Having regard to Article 37 of the Statute of the International Court of Justice, and Article 80, paragraph 1, of the Charter, the Court is of opinion that this clause in the Mandate is still in force and that, therefore, the Union of South Africa is under an obligation to accept the compulsory jurisdiction of the Court according to those provisions."[34]

Sir Arnold McNair (now Lord McNair) in his separate opinion in the same case, concluded also that this judicial supervision still exists, and that every State which was a Member of the League at the time of its dissolution still has a legal interest in the proper exercise of the Mandate :

> "Although there is no longer any League to supervise the exercise of

33. *I.C.J. Reports 1950*, p. 132.
34. *Ibid.*, p. 138.

> the Mandate, it would be an error to think that there is no control over the Mandatory. Every State which was a Member of the League at the time of its dissolution still has a legal interest in the proper exercise of the Mandate. The Mandate provides two kinds of machinery for its supervision—*judicial*, by means of the right of any Member of the League under Article 7 to bring the Mandatory compulsorily before the Permanent Court, and *administrative*,..."[35]

A very similar opinion was expressed on this occasion by Judge Read in his separate opinion.[36]

The Court's Judgment of 1962 concerning the preliminary objections to the *South West Africa Cases*, was on the same lines. It first rejected the respondent's objection that Ethiopia and Liberia have no *locus standi*, because neither of them was at that moment "another Member of the League of Nations", because of its dissolution. The Court stated that this part of the compromissory clause cannot be interpreted according to the rule of natural and ordinary meaning, because that rule is not of an absolute character. In the light of the spirit, purpose and context of the Mandate, it established that this right relates to every State which was a Member of the League at the time of its dissolution. This interpretation was not contested in the Judgment rendered in 1966 on the second phase of this case.

The 1962 Judgment established that all Members of the League have by this compromissory clause still recognized their legal right and interest in the exercise of the Mandate. The Court rejected the respondent's objection in this respect :

> "...The only effective recourse for protection of the sacred trust would be for a Member or Members of the League to invoke Article 7 and bring the dispute as also one between them and the Mandatory to the Permanent Court for adjudication. It was for this all-important purpose that the provision was couched in broad terms embracing "any dispute whatever...between the Mandatory and another Member of the League of Nations relating to the interpretation or the application of the provisions of the Mandate...if it cannot be settled by negotiation". It is thus seen what an essential part Article 7 was intended to play as one of the securities in the Mandates System for the observance of the obligations by the Mandatory."[37]

Rejecting the respondent's third preliminary objection that in the present "conflict or disagreement" "no material interests of the Governments

35. *Ibid.*, p. 158.
36. *Ibid.*, pp. 164-165.
37. *I.C.J. Reports 1962*, p. 337.

of Ethiopia and/or Liberia or of their nationals are involved or affected", the Court declared :

> "The question which calls for the Court's consideration is whether the dispute is a "dispute" as envisaged in Article 7 of the Mandate and within the meaning of Article 36 of the Statute of the Court.
>
> The Respondent's contention runs counter to the natural and ordinary meaning of the provisions of Article 7 of the Mandate, which mentions "any dispute whatever" arising between the Mandatory and another Member of the League of Nations "relating to the intepretation or the application of the provisions of the Mandate." The language used is broad, clear and precise: it gives rise to no ambiguity and it permits of no exception. It refers to any dispute whatever relating not to any one particular provision or provisions, but to "the provisions" of the Mandate, obviously meaning all or any provisions, whether they relate to substantive obligations of the Mandatory toward the inhabitants of the Territory or toward the other Members of the League or to its obligation to submit to supervision by the League under Article 6 or to protection under Article 7 itself. For the manifest scope and purport of the provisions of this Article indicate that the Members of the League were understood to have a legal right or interest in the observance by the Mandatory of its obligations both toward the inhabitants of the Mandated Territory, and toward the League of Nations and its Members."[38]

An observance of the obligatory rule—*in claris non fit interpretatio*—could not permit any further discussion and it would insure an immediate application of this provision.

But the new majority in the Court of 1966 did not think so. All provisions of the Pact and Mandate concerning the Mandates System were sharply divided into two categories—*conduct* provisions, concerning the carrying out of mandates, and *special interest* provisions in favour of the nationals of Member States of the League of Nations. According to the Court's opinion paragraph 2 of Article 7 of the Mandate for South-West Africa became a provision entirely concluded to safeguard the special interests of other Member States. And the Court came to the strong conclusion that the only special interest of other Member States of the League in Mandates C, protected by this clause, was the right of their nationals to penetrate these territories as missionaries.

And here is the new interpretation of the words "any dispute whatever" of the clause :

> "...the Applicant's contention is seen to depend in the last analysis

38. *Ibid.*, p. 343.

almost entirely on what has been called the broad and unambiguous language of the juridictional clause—or in other words its literal meaning taken in isolation and without reference to any other consideration. The combination of certain phrases in this clause, namely the reference to "any dispute whatever", coupled with the further words "between the Mandatory and another Member of the League of Nations" and the phrase "relating ..to the provisions of the Mandate", is said to permit of a reference to the Court of a dispute about any provision of the Mandate, and thus to imply, reflect or bear witness to the existence of a legal right or interest for every member of the League in the due execution of every such provision. The Court does not however consider that the word "whatever" in Article 7, paragraph 2, does anything more than lend emphasis to a phrase that would have meant exactly the same without it ; or that the phrase "any dispute" (whatever) means anything intrinsically different from "a dispute"; or that the reference to the "provisions" of the Mandate, in the plural, has any different effect from what would have resulted from saying "a provision". Thus reduced to its basic meaning, it can be seen that the clause is not capable of carrying the load the Applicants seek to put upon it, and which would result in giving such clauses an effect that States accepting the Court's jurisdiction by reason of them, could never suppose them to have."[39]

The partisans of restrictive interpretation would be satisfied with this example. But the example shows that by this "interpretation" adopted by the Court in its 1966 Judgment, everything desired can be backed by evidence. The result of such an "interpretation" does not depend on the clearness of the treaty provisions, nor even on the intention of the parties, but only on the person of the interpreter.

It was obviously not the intention of the International Law Commission to ensure by its codification such an interpretation of treaties. And it must be recognized that the division between treaty provisions "having only a moral character" and those which have "special legal character" is not consistent with the rule of interpretation in their context including the preamble and in the light of the object and purpose of the interpreted treaty. And the division between the "conduct provisions" and "special interest provisions" has led to an extremely restrictive interpretation of the compromissory clause of the Mandate. Such an interpretation has no legal criteria. It is detrimental to the clear sense of treaty provisions, and as such, it violates the fundamental rule of international law, *pacta sunt servanda.*

Without the express stipulation of the two basic treaty interpretation principles, that of clear sense and that of effectiveness, the general rule of

39. *I.C.J. Reports 1966*, pp. 41-42.

interpretation laid down by draft Article 27 could be easily betrayed. The principle of good faith is not of great use here.

So not every restrictive interpretation is good interpretation, as can be concluded from the Commentary of the International Law Commission. The restriction in this respect is not less dangerous than extension, concerning respect for the general rule, *pacta sunt servanda.*

The ample practice of the two Hague Courts and of numerous arbitral tribunals in treaty interpretation must be decisive with regard to purely doctrinal arguments. It is not by chance that the principle of clear sense and that of effectiveness have ample application in the international judicial and arbitral practice. There is no conclusive reason, therefore, to omit them in such an important codification as this, made by the International Law Commission, where the rule *pacta sunt servanda* is also included.

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