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of communication may amount to clumsy and arbitrary deformation, completely contrary to the basic policies of a free world order. (*Loc. cit.* 1025-1026.)

Enough has been said to show that the Commission did not intend and did not establish any "preclusionary hierarchy." But if there is any danger of deformation, it could work both ways and not necessarily to the detriment of a free world order. It may be that some policies and actions of the United States may have appeared contrary to the ordinary meaning of the United Nations Charter or other relevant instruments to which the United States is a party. Such cases have not come, and are most unlikely to come, before an international tribunal. But if such a case came before a tribunal, and if that tribunal, after studying the pleadings, finally but not easily concluded that one or the other party was at fault, is it really reasonable to expect such a tribunal to espouse an "interpretation of survival" in favor of that party which belongs to the free world? Could such a tribunal be regarded as "impartial"? And, finally, is it impartial when it is partial to the free world?

THE INTERPRETATION OF TREATIES BY TRIBUNALS

By Gidon Gottlieb

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I

Objects, Purposes and Context

A year ago, at its first session, the Vienna Conference on the Law of Treaties rejected a United States amendment to the draft articles on interpretation prepared by the International Law Commission. It did so after hearing Professor McDougal's statement for the United States and it did so by a massive vote. In his statement Professor McDougal pointed out that the purpose of the United States' amendment to these articles was

to eliminate the rigidities, restrictions and hierarchical distinctions of draft Articles 27 and 28. The text of a treaty and the common meanings of words would be made the point of departure of interpretation, but not the end of the inquiry. The text would be treated as one important index among many of the common intent of the parties. No fixed hierarchy would be established among the elements of interpretation; the amendment of the United States sought to make accessible to interpreters whatever elements might be significant in a particular set of circumstances, including ordinary meaning, subsequent practice and preparatory work, but not excluding others that might be also relevant.¹

During the debate on the United States amendment, the representative for the United Kingdom reminded the Conference that the Institute of International Law had rejected the view advocated by Sir Hersch Lauterpacht that the primary aim of treaty interpretation was to ascertain the

¹ United Nations Conference on the Law of Treaties, First Session, Official Records (1969), at 168.

common intention of the parties, independently of the text if need be. He observed also that parts of Professor McDougal's statement seemed to be directed toward reviving the doctrine rejected by the Institute.

It has now been asserted on a number of occasions that the text must be presumed to be the authentic expression of the intentions of the parties and "that, in consequence, the starting point of interpretation is the elucidation of the meaning of the text, not an investigation *ab initio* into the intentions of the parties."² The Institute of International Law, the International Law Commission and the Vienna Conference have all adopted the textual approach to treaty interpretation, objecting to giving too large a place to the intentions of the parties as an *independent* basis of interpretation. It remains thus to consider what the proper role of an international tribunal is when it interprets treaties on the basis of the Vienna Articles.

The problem that we discuss today is essentially a jurisprudential one. And, rather than apologize for making an argument on the esoteric plane of jurisprudence, I shall submit that the principal difficulties with theories of interpretation and with the Vienna Articles arise precisely from a failure to take into account some central conceptual requirements.

I would like first to talk about the relationship between texts and policies or, to use the International Law Commission's terminology, between the terms of a treaty and their object and purpose. This is a matter of importance, since the "object and purpose" provision in Article 27 provides one of the few escape hatches from the confining pressures of strict textualism imposed by the Vienna Draft. But let me add at once that Articles 27 and 28 may very well be shown to provide considerable flexibility despite their heavy textual emphasis.

It has been asserted that every legal text must be applied in light of its context and that to truncate texts from their objects is both irrational and arbitrary. While the draft articles on interpretation refer to the object and purpose of a treaty in general, it is not at all clear how courts will be able to establish the object and purpose of a particular stipulation without resort to preparatory work. Let me elaborate. Article 27, paragraph 1, of the Vienna Draft Articles provides:

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.

According to the International Law Commission, this provision is designed to isolate and codify some general principles which appeared to constitute general rules for the interpretation of treaties.³ While the function of this provision is clear—the general rule on interpretation is designed to guide interpretation—its objects and purposes are far from clear. There is no handy preamble indicating the "object and purpose" of Articles 27 and 28, there is indeed nothing in the "ordinary meaning" of the terms of the article itself to tell us what its object and purpose are

² *Ibid.* at 177.

³ Report of the International Law Commission, General Assembly, 21st Sess., Official Records, Supp. No. 9 (A/6309/Rev. 1) (1966) at 50.

apart from the tautological statement that it is designed to guide interpretation. Nor is it clear that we may have recourse to the International Law Commission's commentary otherwise than as permitted in Article 28 itself. Or, to put the matter differently, Articles 27 and 28 do not give us much help in interpreting their own provisions. The International Law Commission's intention to limit the means of interpretation which are admissible for ascertaining the intention of the parties is expressed only in the preparatory work of the Vienna Treaty which under Articles 27 and 28 should not be looked at in normal circumstances.

My questions about the "object and purpose" of the provisions of Article 27 echo the problem which has been the subject of the debate on the role of purpose and policy in the application of law which has been going on for more than ten years. This debate, which has a direct bearing on the work of the Commission, was among the mass of materials ignored by the Commission which conducted its proceedings in quasi-hermetic isolation from work in other relevant fields.

It is frequently not enough to discuss the general object and purpose of a treaty in order to obtain guidance about the application of one of its provisions. Every stipulation in a treaty presumably has an object of its own hopefully integrated with the broad aims or major purposes of the treaty as a whole. Thus, in the famous *Expenses* case, the International Court of Justice made reference both to the specific purposes of Article 17 of the Charter and to the general purposes of the Organization itself. In its opinion, the Court pointed out that

The general purposes of Article 17 are the vesting of control over the finances of the Organization, and the levying of apportioned amounts of the expenses of the Organization in order to enable it to carry out the functions of the Organization as a whole acting through its principal organs and such subsidiary organs as may be established.⁴

If the court's judgment in this case is suspect for some in this room as an example of exuberant functional interpretation, let me cite from a far older opinion of the Permanent Court in the *Chorzów Factory* case:

For the interpretation of Article 23 account must be taken not only of the historical development of arbitration treaties, as well as of the terminology of such treaties, and of the grammatical and logical meaning of the words used, but also and more especially of the function which, in the intention of the Contracting Parties, is to be attributed to this provision.⁵

The functions which Contracting Parties attribute to specific treaty provisions—to individual articles—are generally expressed in the preparatory work and not in the treaty itself. This is a matter of particular importance for lawmaking treaties such as the U.N. Charter and the Vienna Draft Articles themselves, which purport to lay down guidelines for international tribunals and for foreign offices on fundamental international constitutional matters. Article 28, which restricts recourse to such preparatory work, is destined to hamper the intelligent application of treaty provisions informed by their stated purposes and objects.

⁴ [1962] I.C.J. Rep. 151, 162.

⁵ P.C.I.J., Ser. A, No. 9, p. 24 (1927).

Lon Fuller has emphasized that if in some cases we seem to be able to apply a rule without asking what its purpose is, this is not because we can treat a directive arrangement as if it had no purpose, but rather because we know the purpose "without thinking." He demanded that we be sufficiently capable, when we apply a rule, to put ourselves in the position of those who drafted the rule to know what they thought the application ought to be. Significantly, this is a point on which he is not contested by Hart who has otherwise sharply opposed him on the relationship between purpose and meaning.

The concept of text, like the concept of rule which I have analyzed elsewhere, is inherently purposive.⁶ Rules as here understood are one of a set of devices for the guidance of processes of reasoning leading to decisions and judgments. In this sense, treaty stipulations, especially those of law-making treaties, are clearly rule-like. Their dependence on objects and purposes is not just a matter of judicial convenience or of professional convention. The connection between textual guidance devices and their objects, whether reduced to writing or not, goes to the very root of the rationality of their use. The objects and purposes of a rule or its policy are imbedded so to speak in the concept of rule itself and the opposition of the one to the other is both misconceived and dangerous. It encourages interpreters to turn either with excessive deference or with exaggerated indifference to the guiding hand of written words. The connection between rules or texts and purposes is echoed in the interpretation of single words. When an occurrence falls within the so-called penumbra of meaning of words in a rule or in a text, it is generally admitted that reference to the purpose of the rule is required to determine whether the occurrence should be governed by it. The purpose is then used to determine the inclusion or exclusion of marginal occurrences. For example, the applicability of the French term "navires" to steamships, when it had figured in a treaty concluded at a time when only sailing vessels were in existence, would depend on the objects which the stipulation was designed to promote.

It is suggested in modern linguistic philosophy that the meaning of a word, its sense (not what it refers to), is a rule for the use of the word: the connection between the meaning of words and their object is then apparent and manifest.

This characterization of rules and textual stipulations confirms the necessary reliance on purposes whenever they are applied or interpreted. Purposes and objects must be considered unless one is prepared to disregard what it is that texts are designed to accomplish; unless one is prepared to accept the possibility of the self-defeating application of texts or their application in a manner not contemplated by their authors.

While the difficulties encountered in ascertaining and giving effect to the objects and purposes of treaty stipulations are considerable, there is little guidance to be had from the two draft articles. Mention of "preambles" in the context provisions of Article 27 is not helpful when we look for the objects of particular terms.

⁶ Gidon Gottlieb, *The Logic of Choice: An Investigation of the Concepts of Rule and Rationality* (1968).

I have argued that reference to the objects and purposes of a text could be required to guide its application in two separate sets of situations: (a) when the events to which the text may be applicable fall squarely within the penumbra of meaning of the words in the text; and (b) when the events to which the text seems to apply fall squarely within the ordinary meaning of its terms.

Let me illustrate this point using a hypothetical example familiar to legal theorists. The big Powers have agreed "to ban the access of military vehicles to designated areas in Berlin." In speeches at the signing ceremony it was pointed out that the agreement would promote friendly relations and co-operation between the Occupying Powers by limiting the introduction of armaments into the city. Some time later local World War II veterans decided to mount an old Wehrmacht tank on a pedestal as a memorial to fallen comrades in a designated area of the U. S. Zone. The Soviet Commander then protested that the introduction of the tank amounted to a violation of the "ordinary meaning" of the terms of the agreement. I expect that under the International Law Commission's commentary, when the ordinary meaning of words is clear and makes sense in the context, there is no occasion to have recourse to other means of interpretation. I expect that under such an interpretation the Soviet contention could well be upheld and that recourse to the speeches made at the signing ceremony would be resisted, since prohibition of the monument would be neither manifestly absurd nor unreasonable.

In this manner the hierarchical distinction between the elements mentioned in Article 27 and those of Article 28 could very well lead, as Professor McDougal has pointed out, to the imposition upon the parties of an agreement they had never made. (I must incidentally point out to Professor Gross that Sir Humphrey Waldock expressly recognized a hierarchical distinction between the two articles; the commentary asserted there was no hierarchical order merely as between the provisions *within* Article 27).⁷

In the Vienna spirit, which was, I understand, not only a textualist but also an amending spirit, I would have moved the following amendment to clarify the proper role of an international tribunal in interpreting treaties:

1. that the words "object and purpose" in Article 27(1) be amended to "objects and purposes";
2. that Article 28 be amended by the addition of two new sub-paragraphs (e) and (d):
 - (e) Leads to a result not in conformity with the objects and purposes of the stipulation interpreted; or
 - (d) Leads to a result not in conformity with the objects and purposes of any relevant rule of international law applicable in the relations between the parties.

⁷ Report of the International Law Commission, *loc. cit.* at 51; and Vienna Conference on the Law of Treaties, *loc. cit.* at 184.

I trust, however, that it should be possible for tribunals to reach for supplementary means of interpretation, including preparatory work, in a wide range of circumstances even without the addition of these additional provisions. As Sir Humphrey Waldock pointed out at the Vienna Conference, "There had certainly been no intention of discouraging automatic recourse to preparatory work for the general understanding of a treaty."⁸ This consideration lay behind use of the term "to confirm" in Article 28. Article 28 thus permits the use of supplementary means of interpretation in *all* cases "to confirm" the meaning resulting from the application of Article 27. It opens the door wide to the use of such other means of interpretation and does much to relax the rigors of the provisions of Article 27.

II

Texts and Shared Expectations

The second point I would like to make touches on the role of texts in the interpretation of agreements and on Professor McDougal's concept of language and text. I believe that it lies at the bottom of his theory about the goals and strategies of interpretation which have been so firmly opposed in Vienna.

Texts, in Professor McDougal's framework of inquiry, play a distinctly secondary role. The *conception* of *agreement* as a process of communication involves, he says, viewing all signs and acts of collaboration between the parties as an effort on their part to mediate all relevant subjectivities of commitment. These are his terms. Communication, he adds, involves the *transmission* of signs through channels to targets or audiences with the goal of mutual understanding on the part both of the sender and receiver of the messages.

In the terminology of communication analysis the subjectivities of communicator and audience are "mediated" by gestures, signals, and languages. These mediating events are not subjective events; however, they are specialized to the inducing of such events. We speak of them as "signs", such as the physical movements made in a "gesture" of rejection, or the fire signal employed to indicate that the "enemy sues for peace", or the spoken sounds uttered in saying "I agree". The gesture, signal, and speech pattern constitute sign systems when they call up relatively standardized symbol events, which are the subjectivities constituting the interpretation of signs. . . . Communication is a sequence that we define as beginning with subjective events—the intention to participate in a given activity in a certain way—and proceeding through expression—which consists in such non-subjective events as using one's voice or shaking one's head—to the subjective events eventually occurring in an audience, which are preceded by physical orientation toward the channel and the transmission of sensory events to the brain. At any cross section in a communication sequence an observer-participant must recognize that subjective and non-subjective events occur simultaneously.⁹

⁸ Vienna Conference on the Law of Treaties, *ibid.*

⁹ McDougal, Lasswell and Miller, *The Interpretation of Agreements and World Public Order* at 37–38 (1967).

If Professor McDougal is right, if texts merely *transmit* the demands and subjectivities of commitments, if they merely act as *carriers* for “subjectivities,” for the shared expectations of the parties, if they are to expectations what telephone lines are to electric impulses, then his impatience with the textualist approach is indeed warranted. For, under his view, the textualist interpreter concentrates on the *instrument* transmitting the subjectivities of the parties rather than on the shared expectations themselves which should be the heart of the matter. The use of communication theory as the foundation of his work on interpretation would necessarily commit an interpreter to a study of what is being transmitted, to whom, by whom, through what channels and with what effects rather than to a study of the text of the message itself. From such perspective, reliance on legal texts is then but one of a number of strategies for discovering the shared expectations of the parties. The recommended task of interpreters, according to this thesis, is deference to relevant expectations. Professor McDougal is explicit on this score: “In the public order we recommend, applier-interpreters must, therefore, be committed to *primary interpretation*, or the giving of deference to the genuine shared expectations of the particular parties.” And he makes quite clear that the text of a document is merely “one particular set of signs,” one of many indexes to the parties’ shared expectations, and that a simple reading of “the final text, while clearly indispensable, may often be of only limited assistance.”¹⁰ It contrasts with the traditional legal approach of deference to textual provisions. *Fidelity to legal provisions and deference to the expectations of text-makers are very different matters. If the communication theory is applicable and properly conceived for the study of language and interpretation, then, I submit, everything else follows and McDougal, Lasswell and Miller’s Theory of Interpretation is vindicated.*

My difficulties, however, lie with their adoption of the communication theory itself (not, I wish to emphasize, with their quite proper emphasis on the importance of context in interpretation). Conceptual analysis would suggest that communication theory is entirely inappropriate and out of place in the study of language and text. The injection of the irrelevant communication theory model merely blurs an otherwise masterful legal analysis of judicial interpretation.

“Subjective events” cannot guide; headaches, memories, intentions, expectation and other dispositions and states of mind cannot be acted upon by others, *unless* first expressed in words or agreed signs. But the converse is not necessarily true: sentences in legal instruments, to paraphrase Gilbert Ryle, cannot always be interpreted as being “categorical reports of particular but unwitnessable matters of fact”; they are “neither reports of observed or observable states of affairs, nor yet reports of unobserved or unobservable states of affairs. They narrate no incidents.”¹¹ In other words they do not *report* shared expectations, they do not *stand for* something or *designate* it in the way that a proper name does. They do not *describe* either subjective or non-subjective events. Legal texts are in-

¹⁰ *Ibid.* at 394, 396.

¹¹ Gilbert Ryle, *The Concept of Mind* at 125 (1949).

tended not to report facts nor to “transmit” the shared expectations of parties to audiences. They are intended to influence people, to guide them, to direct them; or, to be more specific, to guide their reasoning, the drawing of inferences towards choices, decisions, judgments and the like. The goal of interpretation is submissive deference to such guidance with due regard to its context and object.

Texts, however, are not the only device for guiding reasoning—other agreed signs can also be relied upon. White smoke in the Vatican chimney and Indian smoke signals can be acted upon by informed watchers, but expectations and intentions, unless expressed, remain concealed and unknown.

In recommending as the primary goal of interpretation that decision-makers undertake a disciplined, responsible effort to *ascertain* the genuine shared *expectations* of the particular parties to an agreement, McDougal emphasizes the inherent shortcomings in the capability of words to communicate shared subjectivities. I would argue, however, that the primary goal of interpretation is to act upon the words, texts and other devices agreed upon by the parties in light of their agreed and stated objects and purposes, that is, with proper regard for context.

Professor McDougal is criticized therefore for conceiving of interpretation primarily as a process for ascertaining a “subjective event,” the shared expectation of the parties, rather than as a process for acting on their agreed instruments for guidance. For him, interpretation is a process of *discovery*. I would submit, however, that interpretation is much more like the *performance* of a symphonic score (different conductors perform a score with varying degrees of fidelity to the composer’s expectations).

The notion that texts and signs of all sorts function as devices for guiding reasoning, for guiding inferences, is recognized among philosophers influenced by Ludwig Wittgenstein. It is analyzed in the work of Gilbert Ryle, Peter Winch and H. L. A. Hart. The function of legal language can best be understood by referring to the experience of being guided by it. “Let us consider the experience of being guided and ask ourselves what this experience consists in when, for instance, we follow instructions in filling out a form or in playing a new card game.”¹² Evidently texts do not guide physical movements. “To use a Wittgenstein metaphor, they are more like the letters of the alphabet which enable us to read. When we use a text we allow our minds to be guided. We may not always understand what a mental process is, but surely we are familiar with what it is to let our reasoning be guided. We can ask what it was, what took place when we suddenly reached a conclusion.”¹³ This process is elusive, since it involves the direct guidance not of physical movements but of a process of reasoning required for the application of texts in concrete situations. I have pointed out elsewhere that, since a text permits a full range of potential inferences, the problem for the interpreter is *not* to discover

¹² The Logic of Choice at 66; and Wittgenstein, *Philosophical Investigations*, Proposition No. 172 (1953).

¹³ Gidon Gottlieb, “The Conceptual World of the Yale School of International Law,” 21 *World Politics* 108 (1968), for a more complete discussion of Professor McDougal’s thesis.

the meaning of words, but is entirely different. It is to discover whether the person to whom the words were addressed acted reasonably in *choosing* and acting on one of many potential meanings. Often, parties to a treaty who are unable to agree on a specific provision adopt vague language, thus in effect postponing agreement and delegating to the interpreters the responsibility for reaching an acceptable solution. The main problem of interpretation, in other words, is to decide whether the inference drawn in accordance with the text is authorized or required by it—to decide *not* what *the* meaning of words in the text is but whether the words authorized the inference made in reliance on them. The problem of interpretation would in this view involve not discovering something *in* the text, but finding guidance for its application. The problem of interpretation involves finding guidance for the *choice* between the rival applications of a text.

The consideration of purposes provides just such guidance. Frequently, the preamble, the preparatory work and other textual evidence will turn out to be the principal and most authoritative statement of the object and purpose of a text. Texts have a capacity to guide not unlike that of road signs, dancing partners or instructions on Campbell soup cans. When states decide to guide each other and to guide interpreters through the drafting and the adoption of texts, they decide not merely on the content of an agreement but also on a mode of guidance. Article 2 of the Draft Articles on the Law of Treaties defines treaties as agreements in their written form. Their interpretation is an exercise altogether *different* from the interpretation of the shared expectation of the parties.

Evidently it must now be recognized that states have expectations not only about the implementation of international agreements. They also have shared expectations about their interpretation. States now look to the interpretation of the texts they adopt rather than to deference to their shared subjectivities of expectations. This does not in any way mean that context, objects and purposes, preparatory work and other relevant materials are out of place in the interpretation of texts. What states want is that their texts, their agreements be interpreted, not their shared subjectivities. If there ever was much doubt about this, it was dispelled by the work of the Institute of International Law, the International Law Commission and most recently by the Vienna Conference on the Law of Treaties. Under international law, texts were always at least the starting point of interpretation. Judicious resort to the *travaux préparatoires* and sensitivity to context must never permit the interpreter to lose sight of this textual starting point. What is called for is not deference to the genuine shared expectations of the parties to an agreement, but rather deference to the agreement itself—text, context, objects and all.

III

Ordinary Meaning

In conclusion I would also like to express misgivings about the use of the term “ordinary meaning” in the Draft Articles which was so appro-