here covered, and upon other treaty questions of similar importance and interest.[7]

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THE INTERNATIONAL LAW COMMISSION'S DRAFT ARTICLES UPON INTERPRETATION: TEXTUALITY *REDIVIVUS*

Scire leges non hoc est verba earum tenere, sed vim ac potestatem—Celsus, *Dig.* 1.3.17

The great defect, and tragedy, in the International Law Commission's final recommendations about the interpretation of treaties is in their insistent emphasis upon an impossible, conformity-imposing textuality.[1] This unhappy emphasis makes an appearance in, and dominates, the goal for interpretation which the Commission implicitly postulates but never critically examines; the deprecatory appraisal which the Commission offers of the potentialities that inhere in the rational employment of principles of interpretation; and the content and ordering of the particular principles which the Commission puts forward for canonization as "obligatory" rules of law.

In explicit rejection of a quest for the "intentions of the parties as a subjective element distinct from the text," the Commission adopts a "basic approach" which demands merely the ascription of a meaning to a text.[2] The only justification offered, and several times repeated as if in an effort to carry conviction, is that "the text [of a treaty] must be presumed to be the authentic expression of the intentions of the parties" and hence that "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."[3] This arbitrary presumption is described as "established law" because of approval by the Institute of International Law and pronouncements by the International Court of Justice. The Court, it is noted, "has more than once stressed that it is not the function of interpretation to revise treaties or to read into them what they do not, expressly or by implication, contain."[4]

In justifying the inclusion within its draft articles of any principles of interpretation—principles whose "utility and even existence" have been

[7] In the present volume of the Journal one could point, for instance, to K. J. Keith, "Succession to Bilateral Treaties by Seceding States," 61 A.J.I.L. 521 (April, 1967).

The Journal expects to prepare a similar collection of articles and comments concerning various problems of international legal protection of human rights for publication as one of its 1968 issues, probably that for October.

[1] The draft articles we criticize appear in Report of the International Law Commission, U.N. General Assembly, 21st Sess., Official Records, Supp. No. 9 (U.N. Doc. A/6309/Rev. 1) (1966), hereinafter referred to as "Report"; reprinted in 61 A.J.I.L. 248 (1967).

[2] Report at 49.

[3] *Ibid.* at 51.

[4] *Ibid.* at 52. What is ignored by the Court and the Commission is that a failure to apply an agreement because of some alleged verbal gap or inadequacy in the text may be equally a "revision" of the genuine shared expectations of the parties.

"sometimes questioned"—the Commission makes a distinction between "so-called canons" and "general rules" of interpretation.[5] The "so-called canons" are not "automatic" in their application, but depend upon discretion:

> 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 expressions that they employed in a document. Their availability for use in any given case hinges on a variety of considerations which have first to be appreciated by the interpreter of the document: the particular arrangement of the words and sentences, their relation to each other and to other parts of the document, the general nature and subject matter of the document, the circumstances in which it was drawn up, etc.[6]

It would "clearly be inadvisable," the Commission insists, to "attempt to codify the conditions of the application of those principles of interpretation whose appropriateness in any particular case depends on the particular context and on a subjective appreciation of varying consequences."[7] The "general rules" of interpretation are, in contrast, "obligatory" and presumably "automatic" in their application. As difficult as the task may be, "cogent reasons"—including promotion of the good faith interpretation of treaties, the taking of "a clear position in regard to the role of the text in treaty interpretation," the application of the convention itself, and advice to future draftsmen—require the isolation and codification of such principles.[8]

The framework of particular principles which the Commission in fact projects into its draft articles begins with that inevitable twin of textuality: "ordinary meaning." The first prescription in Article 27, the key article, is that "A treaty shall be interpreted in good faith and 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."[9] Lest it be thought that the references to "context" and to "object and purpose" are intended to remedy the blindness and arbitrariness of "ordinary meaning," context is immediately defined as including mere text:

> 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 connection 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.[10]

The Commentary makes clear, further, that "object and purpose" do not refer to the actual subjectivities of the parties, rejected as the goal of interpretation, but rather to the mere words about "object and purpose"

[5] *Ibid.* at 50.
[6] *Ibid.*
[7] *Ibid.*
[8] *Ibid.*
[9] *Ibid.* at 49.
[10] *Ibid.*

intrinsic to the text.[11] The Commission, in consistent stance, also explicitly refuses to recognize the principle of "effectiveness" by which decision-makers traditionally have assessed the relevance of many varying indices of the parties' shared purposes.[12]

In Subsection 3 of Article 27, the Commission adds three "elements," all "extrinsic to the text" and of an "obligatory character," which "shall be taken into account, together with the context" in interpretation.[13] These include:

> (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.[14]

Somewhat curiously, the Commission justifies the importance attached to "subsequent practice" by suggesting that "it constitutes objective evidence of the understanding of the parties as to the meaning of the treaty," and notes that "the value of subsequent practice varies according as it shows the common understanding of the parties as to the meaning of the terms."[15] Even more curious is the consideration of the Commission that "the relevance of rules of international law for the interpretation of treaties in any given case was dependent on the intentions of the parties."[16]

In modest concession to parties of unstandardized demands and expectations, and despite the reluctance of some of its members, the Commission provides in the final Subsection 4 of Article 27 that "A special meaning shall be given to a term if it is established that the parties so intended."[17] The Commentary emphasizes that "the burden of proof lies on the party

[11] *Ibid.* at 51. *Cf.* Rosenne, "Interpretation of Treaties in the Restatement and the International Law Commission's Draft Articles: A Comparison," 5 Columbia Journal of Transnational Law 205, at 221 (1966):

"The way the material is presented in articles 27 and 28 is designed to stress the dominant position of the text itself in the interpretation process, the material running in sequences from the text to related elements lying outside the text."

The context makes clear that "object and purpose," mentioned in the very first section of Art. 27, are regarded as part of the "text" and not of "related elements" lying outside the text.

It may be recalled that Professor Rosenne is a member of the International Law Commission.

[12] Report at 50.

[13] *Ibid.* at 51, 49.

[14] *Ibid.* at 49.

[15] *Ibid.* at 52, 53.

[16] *Ibid.* at 53. In a more explicit postulation of the goals of interpretation the Commission would have had to consider, beyond responsible effort to ascertain the content of the genuine shared expectations of the parties, the necessity, in any particular application of an agreement, both for supplementing incomplete and vague expectations by recourse to basic community policies and for appraising even genuine expectations for their compatibility with such policies. The Commission might have sought a more careful correlation of its principles of interpretation with its provision for *jus cogens* in Art. 50.

[17] *Ibid.* at 49.

invoking the special term," but nowhere indicates how, within the compass of the rules prescribed by the Commission and its "basic approach," such a burden is to be discharged and a special meaning established.[18]

The rigor of the Commission's insistency upon the "primacy of the text" is maintained in Article 28, which authorizes a minimum recourse to preparatory work and other features of the process of agreement prior to its culmination in the sacred words of commitment. This article reads:

> 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.[19]

The Commission insists that it is establishing a hierarchy among the elements to which recourse is authorized in noting that the "word 'supplementary' emphasizes that Article 28 does not provide for alternative, autonomous, means of interpretation but only for means to aid an interpretation governed by the principles contained in Article 27."[20] The reason given for this creation of a hierarchy of relevance among potential indices of the parties' shared expectations is that, while the "elements of interpretation in Article 27 all relate to the agreement between the parties *at the time when or after it received authentic expression in the text,*" preparatory work does not, since it comes before the culminating moment of text.[21] This appears to deprive it of "authentic character" and to make it more susceptible of discretion in appraisal. It is nowhere explained by what indices "meanings" which are "ambiguous or obscure" or "ordinary meanings" which are "manifestly absurd or unreasonable" are to be established.[22]

It is difficult to escape the assessment that the International Law Commission's entire formulation of principles of interpretation is based upon a conception of "ordinary meaning" which is impossible of application. Indeed, even with the aid of the *travaux préparatoires* of the proposed convention, it is difficult to ascertain what this conception is.[23] In a very

[18] *Ibid.* at 53.

[19] *Ibid.* at 49.

[20] *Ibid.* at 54.

[21] *Ibid.* at 51. It is difficult to understand why preparatory work is less "objective evidence of the understanding of the parties" than subsequent practice.

[22] *Cf.* Rosenne, note 11 above, at 222:

"In particular, it is our view that the formal limitation on the permission to employ what the Commission has entitled 'supplementary means of interpretation' in article 28 is artificial and has no basis either in practice or in law, and certainly cannot be supported by such international jurisprudence as there is on this question."

[23] *Cf.* Professor Briggs, speaking as a member of the Commission and recommending deletion of the concept, in 1966 I.L.C. Yearbook (I), Pt. II, at 188: "Such an approach would also have the advantage of deleting all reference to the 'ordinary' meaning, a term which he found just as objectionable as the former reference to the 'natural'

recent supplementary report, Sir Humphrey Waldock, the Special Rapporteur, objects to a reconstruction of Article 27 suggested by the United States upon the ground that such a reconstruction would "seem to recognize that terms have an ordinary meaning which is independent of their context and of the objects and purposes of the treaty."[24] "This," he adds, "may be true as a matter of pure linguistics but it may be doubted whether it is true as a matter of interpretation."[25] Yet, as we have seen, the references ascribed by the Commission to "context" and "object and purpose," as these words are employed in Article 27, are so limited it is difficult to know what "meanings" such words could be given apart from linguistics, pure or otherwise. The most "basic approach" of the Commission, in all the various articles, would appear to come close to Vattel's assumption that texts can have plain and natural meanings which do not require interpretation. Indeed, the Chairman of the Commission Professor Roberto Ago, has declared, not with whole-hearted approval, that "Vattel's rule" is "in fact implicit in the proposed articles."[26] Similarly, the suggestion that it is not the function of a decision-maker "to revise treaties or to read into them what they do not, expressly or by implication, contain" is at least mildly reminiscent of Mr. Justice Owle's insistence in the case of *Brigitte Bardot M.P.?* that "If

meaning. Words had no ordinary or natural meaning in isolation from their context and the other elements of interpretation."

The difficulties that other members of the Commission found with the concept are broadcast in the same volume. See, for example, pp. 189, 191, 194, 195, 196. Mr. Reuter at 194 is especially sharp in reference to the contradictions in the Commission's usage.

These difficulties were cogently anticipated by Professor Hyde. In 2 International Law Chiefly as Interpreted and Applied by the United States at 1470 (1945), he wrote:

"Accordingly, one must reject as an unhelpful and unscientific procedure the endeavor to test the significance of the words employed in a treaty by reference to their so-called 'natural meaning' or any other linguistic standard, and then to attempt to reconcile therewith the thought or conduct of the contracting parties. Such a method involves the implication that those parties must be deemed to have employed words in a sense that usage may have decreed, even though contrary to their common design. It transforms the function of the interpreter from a fact-probing endeavor to ascertain the actual sense in which the parties used the words of their choice, to an effort to find what usage appears to decree as to the significance of those words, and thereupon to reconcile the conduct of the parties therewith. In so far as the interpreter essays to make that effort he is diverted from the task of ascertaining the truth concerning the design of the parties as exemplified by the text of their agreement, and endangers the success of such an attainment."

[24] Sixth Report, U.N. Doc. A/CN.4/186/Add. 6 at 11.

[25] *Ibid.*

[26] 1964 I.L.C. Yearbook (I) at 280. *Cf.* Rosenne, note 11 above, at 219:

"Sir Humphrey appears to have regarded 'interpretation' as the process by which, *in cases of doubt only*, the correct meaning of the treaty is to be established. For that process and having that objective, the text to which the parties had set their hands constituted the only point of departure; not an investigation into the objectives which prompted them to subscribe to that text, or more teleological concepts having in mind the presumed objectives of the treaty."

Parliament does not mean what it says it must say so."[27] Even if it be assumed that by "ordinary meaning" the Commission refers to linguistic usages shared in some community of which the parties are members, it is nowhere indicated by what procedures, in aid of clairvoyance, such meaning is to be ascertained and related to a "context" and to "object and purpose" which are confined to a text and do not make reference to an extrinsic process of agreement, including identifiable particular parties, with all their unique demands and expectations and varying modalities of expression.[28]

It can scarcely be doubted, further, that the "basic approach" of the Commission in generally arrogating to one particular set of signs—the text of a document—the rôle of serving as the exclusive index of the shared expectations of the parties to an agreement is an exercise in primitive and potentially destructive formalism. The parties to any particular agreement may have sought to communicate their shared expectations of commitment by many other signs and acts of collaboration; and it is *hubris* of the highest order to assume that the presence or absence of shared subjectivities at the outcome phase of any sequence of communications, much less that of an international agreement, can be read off in simple fashion from a manifest content or "ordinary meaning" of words imprinted or embossed in a document.[29] It should be the task of decision-makers, representing a larger community dedicated to the shaping and sharing of values by persuasion and agreement with a minimum of coercion and violence, to honor and promote individuality, inventiveness and diversity, and to expand the alternatives in co-operation open to as many

[27] Herbert, Bardot M.P.? and Other Misleading Cases at 167–168 (1964).

[28] *Cf.* Professor Ago in 1966 I.L.C. Yearbook (I), Pt. II, at 189: "The expression 'ordinary meaning' had been criticized. He agreed that no term had an inherent meaning, and that the meaning always depended on usage. That was why it was essential to use terms as far as possible in the sense in which they were customarily used, which was what was understood by their 'ordinary meaning' ".

It may be noted that even this conception is not "objective" in the sense that it escapes inquiry about subjectivities. For the subjectivities of the particular parties to an agreement, it merely substitutes the subjectivities of the members of the larger community. The important question is by what indices inquiry is to be made about both kinds of subjectivities; they are not necessarily equivalent in the particular instance.

Despite its emphasis upon the "ordinary meaning" of text, the Commission cannot of course escape references to the intent of the parties. In addition to the tail-end reference in the concluding words of Art. 27 itself, there are many other instances in the proposed convention. I am indebted to Professor Frank Newman for the following itemization: Secs. 6 (1) (b), 24, 25, 31–33, 53, 56 (1) (a) and (2); also (in the guise of "object and purpose") 16 (c), 17 (2), and 55 (b). Unfortunately, the brief flash of insight in the words "the intention underlying the treaty" (Report at 23) does not seem often to recur.

[29] This ancient wisdom, confirmed by contemporary communication studies, was put into epigrammatic form by Mr. Justice Holmes in Towne *v.* Eisner, 245 U.S. 418, 425 (1918): "A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used."

members of the community as possible on as many occasions as possible. It can only be a debasement of the basic values of such a community to seek to impose upon all parties, whatever their nuances in creativity, the lowest common denominator in conformity. To foreclose or impede inquiry about features of the process of making and performing agreements which in fact affect the parties' expectations about commitment, and to establish in advance of inquiry fixed hierarchies in significance among features of the process whose significance in fact is a function of the configuration of all other features in any particular context, may be to impose upon one or both of the parties an agreement they never made and completely to disrupt that stability in expectation which is indispensable to effective co-operation.[30] The truth is that in the absence of a comprehensive, contextual examination of all the potentially significant features of the process of agreement, undertaken without the blinders of advance restrictive hierarchies or weightings, no interpreter can be sure that his determinations bear any relation to the genuine shared expectations of the parties. If it be suggested that the Commission's formulations are so vague and imprecise and so impossible of effective application that a sophisticated decision-maker can easily escape their putative limits, surely it must be answered that not all decision-makers are so sophisticated and that it is not the expected function of the International Law Commission to create myth for cloaking arbitrary decision.[31]

The insight had appeared widespread, prior to the appearance of the Commission's formulations, that the most appropriate function of all principles of interpretation, including both "general rules" and "so-called canons," is that of guiding interpreters to potentially relevant features of the process of agreement and its context and, hence, of assisting in the making of that comprehensive and systematic examination regarded as indispensable to rational decision.[32] The great bulk of the principles

[30] The Commission itself purports to reject the notion of a hierarchy among the "elements of interpretation" it itemizes in Art. 27, but it does not carry this insight into its presentation of the allegedly "supplementary" elements in Art. 28, and its pervasive emphasis upon textuality qualifies even the modest insight asserted in relation to Art. 27. Report at 51. *Cf.* the appraisal by Lissitzyn in "The Law of International Agreements in the Restatement," 41 N.Y.U. Law Rev. 96, 108 (1966).

[31] If a dominant policy purpose of the Commission is, as a recurrent reference to "good faith" and "*Pacta sunt servanda*" might suggest, to preclude spurious or fraudulent interpretation, surely its overwhelming emphasis upon a single variable—the text—in the larger factual context is not the best instrumentality to its end. An open-eyed, systematic exploration of all relevant features of the context would appear to promise much the more effective protection against spurious and fraudulent claims.

It is entirely gratuitous to assume that a departure in interpretation from somebody's notion of "ordinary meaning" is fraud.

[32] *Cf.* Waldock, Sixth Report, U.N. Doc. A/CN.4/L.116/Add. 18 at 8: "In a sense, all 'rules' of interpretation have the character of 'guide lines' since their application in a particular case depends so much on the appreciation of the context and the circumstances of the point to be interpreted."

There can of course be no comprehensive presentation or systematic ordering of principles in the absence of a clear postulation of goals for interpretation. The goal of "textuality"—with its deference to mere "shapes on paper"—yields no criteria for

historically employed by international and national tribunals, as well as by other interpreters, has in fact, with the exception of some formulations of the *travaux préparatoires* and the "ordinary meaning" principles, been primarily permissive, opening up features for inquiry, rather than restrictive in character; and expositions of relevant principles, whether by authoritative decision-makers or private scholars, have largely differed only in the comprehensiveness and systematization of their presentation. In such a context, it has made little difference whether principles of interpretation were regarded as "obligatory" prescriptions or mere optional aids; only occasional impediments to inquiry have been imposed by even the "obligatory" view.[83] The International Law Commission, in contrast, not only projects the highly restrictive principles which we have noted above, but also recommends that these principles be made obligatory prescription—which of course they will become if the states of the world accept in present form the proposed convention on the law of treaties. A broad sampling of past decision, practice and opinion would suggest that the Commission's formulations accurately reflect neither the aggregate flow of past decision and practice nor general expectations about the requirements of future decision.[84] Certainly, it would not appear to be in the common interest for a community, which depends upon agreement not merely as a modality for the peaceful shaping and sharing of values among members but even as a principal instrument for establishing its constitution and for the prescription of authoritative community policy, deliberately to accept and project as authoritative prescription, formulations so esoteric and potentially so destructive of the foundations of genuine agreement as those put forward by the Commission.

Fortunately, an excellent model both in statement of appropriate goal and in perception of relevant features of the process of agreement and its context is readily available for any critic who may choose to seek alternatives to the Commission's formulations. The Harvard Research in International Law, more than thirty years ago, put the essential understanding for such a model into black-letter nutshell:

> 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,

either identifying or organizing principles. The goal of seeking to approximate the genuine shared expectations of the parties to a particular agreement offers, in contrast, the criteria of potential relevance to communication (the factors that are commonly found to affect the mediation of subjectivities).

The differences between a bare textual and a genuinely contextual approach to interpretation are, hence, not merely in goals sought but also in the range of factors made relevant and the procedures recommended for inquiry.

[83] *Cf.* Liacouras, "The International Court of Justice and Development of Useful 'Rules of Interpretation' in the Process of Treaty Interpretation," 1965 Proceedings, American Society of International Law 161.

[84] For documentation, see McDougal, Lasswell, and Miller, The Interpretation of Agreements and World Public Order: Principles of Content and Procedure (1967).

The Commission formulations are based more upon what the International Court of Justice has said than upon what it has done, and ignore much other practice and opinion.

> *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.[35]

What the Harvard Research does not offer, in implementation of its insight about appropriate goal and necessary context, is a comprehensive and systematic set of principles of content and procedure designed effectively to assist interpreters in the economic examination of particular contexts in pursuit of their appropriate goal. Even the task of fashioning such a set of principles should not, however, be beyond the reach of contemporary scholars who enjoy the advantages both of a rich inheritance in tested principles and of access to modern studies in semantics, syntactics, and other aspects of communication.

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THE TERMINATION AND SUSPENSION OF TREATIES

One very important aspect of treaty law concerns the circumstances under which a party is free to regard its obligations under a treaty as terminated or suspended, and among such circumstances alleged violation by the other party is of major importance.

The United States Department of State in its brief on *The Legality of United States Participation in the Defense of Vietnam*[1] relied on acts of North Viet-Nam which it considered in violation of the Cease-Fire Agreement. It sought to justify its augmentation of military personnel and equipment in South Viet-Nam beyond that permitted in the Cease-Fire Agreement of 1954 by the "international law principle that a material breach of an agreement by one party entitles the other at least to withhold compliance with an equivalent, corresponding, or related provision until the defaulting party is prepared to honor its obligation."[2]

The United States was not a party to the Cease-Fire Agreement which was concluded between the Commander-in-Chief of the Peoples' Army of Viet-Nam under Ho Chi Minh and the French Union Forces in Indochina, which had supported Bao Dai as President of the Republic of Viet-Nam, but which had withdrawn in 1955, leaving the administration of the

[35] Harvard Research in International Law, Law of Treaties, 29 A.J.I.L. Supp. 653 at 937 (1935), Art. 19.

The American Law Institute, Restatement of the Law (Second), The Foreign Relations Law of the United States (1965) at 449, Art. 146, builds upon this model:

"The primary object of interpretation is to ascertain the meaning intended by the parties for the terms in which the agreement is expressed, having regard to the context in which they occur and the circumstances under which the agreement was made. This meaning is determined in the light of all relevant factors."

In the section which follows, a wide range of "criteria" for interpretation is itemized and no advance priorities in relevance are established among such criteria.

[1] Dept. of State, Office of the Legal Adviser, March 4, 1966, reprinted in 60 A.J.I.L. 565 (1966).

[2] *Op. cit.* 30.