

OFFICIAL DOCUMENTS

VIENNA CONFERENCE ON THE LAW OF TREATIES

STATEMENT OF PROFESSOR MYRES S. McDOUGAL, UNITED STATES DELEGATION, TO COMMITTEE OF THE WHOLE, APRIL 19, 1968:

MR. CHAIRMAN AND DISTINGUISHED COLLEAGUES:

In the note verbale of October 2, 1967, from its Permanent Representative to the United Nations, the United States Government indicated that it considered Articles 27 and 28¹ on the interpretation of treaties to lay down "overly rigid and unnecessarily restricted requirements."

It is the purpose of the amendment submitted by the United States Delegation in Document L. 156² to suggest a simple and easy way of eliminating these difficulties in Articles 27 and 28 and of re-establishing the authority and viability of a process of interpretation which has served the peoples of the world well for several centuries.

The rigidities and restrictions of Articles 27 and 28 are by now the common knowledge of us all. In its separation of Articles 27 and 28 the draft Convention establishes a hierarchical distinction between certain primary means of interpretation, described as a "general rule of interpretation," and certain allegedly "supplementary means of interpretation." Among the primary means a predominant emphasis is ascribed to the text of the treaty, which is to be interpreted "in accordance with the *ordinary* meaning to be given to the terms." The Commentary to Article 27 insists that the reference in the Article to "context" is not to factual circumstances attending the conclusion of the treaty, but to the mere verbal texts, and, similarly, that the reference to "object and purpose" is not to the actual common intent of the parties, explicitly rejected

¹ For Arts. 27 and 28, see 61 A.J.I.L. 348 (1967) [Ed.].

² The U. S. proposal of April 10, 1968 (A/CONF.39/C.1/L.156) reads:

Amend article 27 to read as follows:

"A treaty shall be interpreted in good faith in order to determine the meaning to be given to its terms in the light of all relevant factors, including in particular:

- (a) the context of the treaty;
- (b) its objects and purposes;
- (c) any agreement between the parties regarding the interpretation of the treaty;
- (d) any instrument 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;
- (e) any subsequent practice in the application of the treaty which establishes the common understanding of the meaning of the terms as between the parties generally;
- (f) the preparatory work of the treaty;
- (g) the circumstances of its conclusion;
- (h) any relevant rules of international law applicable in the relations between the parties;
- (i) the special meaning to be given to a term if the parties intended such term to have a special meaning."

Delete article 28. [Ed.]

as the goal of interpretation, but rather to mere words about "object and purpose" intrinsic to the text. Indeed, it is overwhelmingly evident (as noted by Messrs. Ago, Ruda, Rosenne, and others in the Commission) that the whole structure of Articles 27 and 28 is built about the famous *petitio principii* of Vattel that "it is not permissible to interpret what has no need of interpretation." The "supplementary means" which an interpreter is authorized to employ only after taking certain high, preclusionary hurdles—include "the preparatory work of the treaty and the circumstances of its conclusion." The high preclusionary hurdles—designed to foreclose automatic, habitual recourse to such "supplementary means"—are a necessity "to confirm the meaning resulting from the application of Article 27" or a finding that an "interpretation according to Article 27" either "leaves the meaning ambiguous or obscure" or "leads to a result which is manifestly absurd or unreasonable." In its Commentary to Article 28, the Commission insists, despite its earlier protestations that it did not seek to establish an obligatory hierarchy, 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."

It is the respectful submission of the United States Delegation that these rigidities and restrictions in Articles 27 and 28 have never in the past been international law, cannot successfully be made international law in the future even if adopted in this Convention, and should not be made international law in the future even if we possessed the omnipotence so to make them.

Why do we say that these rigidities and restrictions have never been international law? The answer is written large in the history of interpretation in particular cases of controversy.

First, the principles of interpretation, taken as a whole, have seldom in the past been considered as mandatory rules of law, precluding examination of relevant circumstances; they have most often been considered permissive guidelines, facilitating examination of relevant circumstances. Only very rarely, in the countless instances of interpretation, which create people's realistic expectations about what the relevant law is, have even the principles about plain and natural meaning and about the admissibility of preparatory work been employed in a way to foreclose inquiry.

Secondly, though judges and statesmen have sometimes purported to resolve disputes about interpretation by the application of simple dictionary definitions of the words of a text, they have much more frequently affirmed that a text is meaningless apart from the larger context of circumstances in which it was framed. The long historic trend in the great bulk of decisions is for an interpreter to take into account any circumstance which may effect the common intention which parties seek to express in a text. Thus, the Harvard Research, after an exhaustive study of the cases, summarized in a passage fully confirmed by subsequent decisions:

"The historical background of a 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."

In the vast majority of cases, "plain" and "ordinary," or dictionary, meanings have been regarded not as inexorable commands foreclosing further inquiry, but rather as one important index, among many other important indices, of the common intent of the parties. Interpreters have habitually employed many principles of interpretation, such for example as the principle of effectiveness which is not incorporated in the draft Convention, in canvass of all potentially relevant indices.

Thirdly, in more recent years the hoary maxim from Vattel, about which the hierarchy in Articles 27 and 28 is structured, has become generally recognized as an obscurantist tautology. It is a tautology because the determination of what text does or does not require interpretation is in itself an interpretation; it is obscurantist because the grounds for such determination are not revealed for candid appraisal. Lord McNair puts the matter in a nutshell in noting that the maxim "is constantly employed both by advocates and tribunals, as an argument against seeking to find out what was the intent of the parties in using the words, having regard to the surrounding circumstances." He adds: "It is in truth a petitio principii because it begs the question whether the words used are, or are not clear—a subjective matter because they may be clear to one man and not clear to another, and frequently to one or more judges and not to their colleagues." (Law of Treaties (1961) 372.)

Finally, the restrictions upon the use of preparatory works expressed in Article 28 do not, any more than the restrictions imposed upon the use of other circumstances, represent established practice. The Commentary quite correctly describes these restrictions as "dicta." Even in the *Lotus* case, which perhaps contains the most famous exposition of the alleged rule that "there is no occasion to have regard to preparatory work if the text of a convention is sufficiently clear in itself," the Court did in fact look at the *travaux*. This would appear to have been equally the case in most other instances in which a similar rule has been announced, and in many recent decisions judges have not bothered to apologize for resort to the *travaux*. The habitual use of preparatory work by foreign offices needs no emphasis here. It may be recalled also that one of the reasons given by Dr. Jenks for the immunization of international organizations from the Convention was that "ILO practice has involved greater recourse to preparatory work than was envisaged in Article 28."

In sum, it would thus appear entirely clear that none of the rigidities and restrictions built into Articles 27 and 28 can find justification in the wisdom of past experience.

Why do we say that the rigidities and restrictions of Articles 27 and 28 cannot successfully be made international law even if adopted in this Convention? The answer is: because they are impossible of application.

The assumption upon which such rigidities and restrictions are built is that a text has a meaning apart from the circumstances of its framing and can be interpreted barely, as it stands, without reference to extraneous factors.

The fact is that a text is, apart from the intentions of its users, as a great English philosopher has said, "but shapes on paper or an agitation in the air." It is generally agreed, in today's age of sophistication, that there are no fixed or natural meanings of words which the parties to an agreement cannot alter. The point was put epigrammatically by our Mr. Justice Holmes, who wrote: "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 time in which it is used."

Similarly, even without benefit of modern communications study, common sense informs us that the "plain and ordinary" meanings—the dictionary meanings—of words are multiple and ambiguous, and can be made particular and clear only by reference to the factual circumstance of their use. With characteristic felicity, Lord McNair has described the appropriate function of the "plain and ordinary" meaning rule. This "so-called rule of interpretation," he writes, "like others is merely a starting point, a prima facie guide, and cannot be allowed to obstruct the essential quest in the application of treaties, namely, the search for the *real* intention of the contracting parties in using the language employed by them." (Law of Treaties (1961) 366.)

The difficulties in the draft Convention's more preclusionary use of "ordinary" meaning was noted by many members of the International Law Commission. Thus Professor Briggs, speaking as a member of the Commission, urged deletion of the concept of "ordinary meaning," a term "which he found just as objectionable as the former reference to the 'natural' meaning." "Words," he insisted, "have no ordinary or natural meanings in isolation from their context and the other elements of interpretation."

From this broad perspective of the requirements of communication and the necessities of interpretation, it would, therefore, appear that an interpreter could not hope to apply the draft Convention's "general rule" in Article 27 or to invoke the "supplementary means" authorized in Article 28 without at the same time violating the alleged prescription of textuality in Article 27. The "general rule" cannot be applied because a concern for the text alone, apart from the circumstances of its conclusion, can afford no criteria for ascribing a meaning to the text. Similarly, without having recourse to "the preparatory work of the treaty and the circumstances of its conclusion," it would appear impossible, as Mr. Rosenne and other members of the Commission suggested, to determine whether an "interpretation according to Article 27" either "leaves the meaning ambiguous or obscure" or "leads to a result which is manifestly absurd or unreasonable." The point was made, with a cogency as direct as unheeded, by Mr. Yasseen, who said "that the clearness or ambiguity of a provision was a

relative matter.” “Sometimes,” he explained, “one had to refer to the preparatory work or look at the circumstances surrounding the conclusion of the treaty in order to determine whether the text was really clear and whether the seeming clarity was not simply a deceptive appearance. He could not accept an Article which would permit reference to preparatory work only after it had been decided that the text was not clear, that decision itself being often influenced by the same sources.” (1964 Yearbook 313.) The Commentary adds, in a triumph of understatement: “Sir Humphrey Waldoock, Special Rapporteur, noted that it was sometimes impossible to understand clearly even the object and purpose of the treaty without such reference” (*Id.*).

The ultimate poverty of the textuality approach is, for final illustration, most dramatically documented by the problem of conflicting authenticated texts in several languages, a problem dealt with in Article 29, with respect to which the Commission is forced to resort, albeit somewhat shamefacedly, to the “intentions” of the parties.

In parenthesis, it could be added that the mere presence at this Conference of Sir Humphrey Waldoock, in the rôle of former Special Rapporteur, is the best testimony, not always mute, of the impossibility in application of the textuality approach. Time after time during the course of our deliberations, even with the preparatory work of the Commission before us, we have found it necessary to appeal to Sir Humphrey for enlightenment about the “ordinary” meanings of the simple Convention before us. The tremendous clarity he has brought to our deliberations and the enormous influence he has had with us have been due, I submit, not to his skill in flipping the pages of a dictionary or as a logician, but rather to his very special knowledge of all the circumstances attending the framing of our draft Convention.

Why do we urge—to come to our third major point—that the rigidities and restrictions in Articles 27 and 28 *should not* be made international law—even if in defiance of the requirements of communication and the necessities of interpretation we could so make them? The answer again can be summarized: because of their authorizing of two different kinds of arbitrariness, such rigidities and restrictions could be employed by interpreters to impose upon the parties to treaties agreements they never made and, hence, might be most disruptive of that stability in the expectations of parties to treaties which is indispensable to peaceful co-operation in the world’s work.

The first kind of arbitrariness authorized by Articles 27 and 28 derives from their arrogating to a single set of signs—the text of a document as infused by “ordinary” meaning—the task of serving, save in the most exceptional circumstances, as the exclusive index of the common intent of the parties. The fact is of course that the parties to any particular treaty may have a common intent quite different from that expressed by ordinary meanings and may communicate to each other by many different signs and acts of collaboration. To impose upon such parties certain alleged “ordinary” meanings and an artificial, preclusionary hierarchy in the relevance

of modes of communication may amount to clumsy and arbitrary deformation, completely contrary to the basic policies of a free world order. Just as in our national communities we seek, save for overriding common interest, to defend the dignity of man by respecting *his* choices rather than by imposing the choices of others upon him, so also in the larger community of states a law of freedom will seek to respect the unique choices of the particular parties to agreements rather than to impose upon them the choices of others. "It should be," as we have said elsewhere, "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 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." In modest concession to parties of unstandardized demands and expectations, Article 27 (4) does provide that "a special meaning shall be given to a term if it is established that the parties so intended." The Commentary emphasizes, however, that "the burden of proof lies on the party invoking the special term," and it is nowhere indicating how, without recourse to the forbidden factors in Article 28, such a burden is to be discharged and a special meaning established.

The second kind of arbitrariness authorized by Articles 27 and 28 derives from the inherent ambiguities, already noted, of the criterion of ordinary meaning. What is one man's "ordinary meaning" may be another man's poison, and reasonable men may reasonably differ as to which of multiple dictionary meanings represents common intent. The license which these inescapable ambiguities accord an interpreter—whose task is conceived as the mere ascription of a meaning to a text rather than as a systematic and disciplined examination of all potentially relevant indices of common intent—is enormous. Emphasis upon the primacy of the text and the priority of ordinary meanings certainly opens more doors to uncertainty—even to obscurantist manipulation—than does insistence upon a comprehensive, contextual examination of all factors potentially relevant to common intent.

The danger of encouraging arbitrariness in decision by overemphasis upon the primacy of textuality in interpretation is perhaps best illustrated by the opinion of the International Court of Justice in the most recent of the *South-West Africa* cases. (1966) I.C.J. Rep. 4.

The proponents of the rigidities and restrictions in the present draft Convention might well ask themselves whether this is the kind of decision and opinion which they wish to authorize and promote. The requirement, in contrast, of a systematic and disciplined examination of all potentially relevant features of the context would certainly make it more difficult for judges to justify arbitrary interpretations; it might even make it more difficult for them to make such decisions.

In not irrelevant footnote it can be added that the hierarchy among criteria for interpretation established by Articles 27 and 28, and made applicable through the vague references to "ambiguous or obscure" meanings and to results "manifestly absurd or unreasonable," could introduce an entirely new element of uncertainty into the stability of treaties. States prejudiced by either the invocation or the non-application of the hierarchy could have a new ground for claims of *excès de pouvoir*. It must be recalled that it is proposed to make this vague and illusory hierarchy obligatory international law. The misapplication of relevant law, which could easily occur or be alleged with respect to terms so diffuse, is one of the traditional grounds for confirming *excès de pouvoir*.

The fundamental point that the United States Delegation would emphasize is that the text of a treaty and the common or public meanings of words can be made economic points of departure for interpretation, as the International Law Commission aspires, without their being made also the end of the voyage of inquiry. The dichotomy the Commission makes when it contraposes "the intention of the parties as a subjective element distinct from the text" and "the text of the treaty as the authentic expression of the intention of the parties" is a non-exhaustive dichotomy. The most important alternative omitted is that the text could be regarded as simply one important index, among many, of the common intent of the parties and not as a preclusionary bar to examination of the other indices necessary to the realistic and rational relation of text and common intent. The Convention on Treaties could establish appropriate principles of economic procedure, without imposing an incubus of arbitrary hierarchical weightings.

In its Amendment, L. 156, the United States Delegation, therefore, proposes, as was urged by Professor Briggs and others within the Commission, the elimination of all the rigidities and restrictions in Articles 27 and 28 and the merger of these two articles into one open-ended itemization of elements relevant to rational interpretation. Though in the opening words of our amendment we place an economic emphasis upon the terms of the text, we seek to avoid any fixed hierarchy among the elements of interpretation and to make accessible to interpreters whatever elements—be they "ordinary meaning" or "subsequent practice" or "preparatory work" or other—which may be of significance in any particular set of circumstances. The aspiration of our draft is to encourage an economic, systematic, and disciplined canvass by interpreters of all elements which may aid in the identification and clarification of common intent.

In the formulation of its Amendment, the United States Delegation has sought to preserve as fully as possible the original wording of the International Law Commission, while securing the merger of Articles 27 and 28. Our Delegation is not, however, wedded to any particular words or formulations. If the basic objective of removing all hierarchical weightings and obstacles to open-ended inquiry can be achieved, our Delegation will regard the particular formula by which this can be secured as a mere matter of drafting.