pristely castigated by Professor McDougal. One of the principal stumbling blocks to the full acceptance of the term “ordinary meaning” is the academic debate on the concept of meaning itself. What is the “meaning” of a word, what is the “sense” of a word, what is the “use” of a word—these are some of the more difficult questions which have agitated philosophers and linguists for half a century at least. Accordingly, the International Law Commission’s usage of the term “ordinary meaning” in its draft unavoidably anchors the articles on interpretation in the most uncertain ground of academic disputation. This obviously was not intended. When the Commission referred to “ordinary meaning” it presumably meant just that—ordinary meaning in the parlance of lawyers. There is little evidence, however, that the Commission was aware of the treacherousness of the term it adopted. Nor was the difficulty overcome by avoiding reference to the “plain and natural” meaning of words. While the Commission is not primarily a scientific body and while its drafts are designed for adoption by governments, the extent to which it may safely ignore relevant research in other disciplines is far from clear. The Commission could not but have benefited at least from an awareness that the concept “ordinary meaning” was at the center of so much controversy. I am not arguing that the Commission should have deferred to any one of the doctrines expounded on the subject, but rather that it should have been informed of their nature. Special reports in relevant disciplines could well have helped the Commission appreciate that even the agreement of states to disregard conceptual problems cannot but leave these problems very much alive.

Comments by Myres S. McDougal

Yale Law School

Mr. McDougal, speaking extemporaneously, was delighted to find in the papers and remarks of Professors Gross and Gottlieb exemplifications of all the confusions which had made it necessary for him and his colleagues, Professors Laswell and Miller, to write the book on The Interpretation of Agreements and World Public Order. Neither Professor Gross nor Professor Gottlieb had offered any very clear notions about the goals of interpretation, or about what was being interpreted, or about the interrelations of interpretation with the other tasks involved in the application of an agreement or prescription, and both wavered back and forth in approach between a dominant textuality and a largely implicit contextuality. The one bit of comfort that could be taken from their presentations was that both appeared to recognize somewhat more than in previous writings the importance of contextuality.

It was indispensable to clarity, Mr. McDougal insisted, to remember that the interpretation of an agreement or other prescription was but one sub-task among several in the more comprehensive task of applying an agreement or prescription. The application of an agreement was commonly a highly complicated process which moved from a preliminary ex-
ploration of potential facts and potential policies through to a final characteriza-
tion of relevant facts and choice among clarified policies. The exploration of potential policies included interpretation, in the sense of search for the closest possible approximation to the genuine shared sub-
jectivities of the parties, supplementing, in the sense of completing omissions and ambiguities in accordance with basic community policies, and
integrating, in the sense of evaluating and policing even shared sub-
jectivities for their compatibility with basic community policies (e.g. by invoking ius cogens). For rational application, one had to be quite clear
about the interrelations of these sub-tasks, the appropriate goals for each,
and the functions of principles or rules in facilitating the performance
of each.

The particular confusions in Professor Gross’s presentation were the same, Mr. McDougal found, as were apparent in the International Law
Commission draft. These included: an inordinate emphasis upon the
text (“plain and ordinary meanings”); a very narrow conception of
context, as largely verbal; the establishing of a hierarchy among bases
of inference, with the travaux being admissible only under the most dif-
ficult conditions; the omission of certain important bases of inference,
such as the major purposes of the parties; and the conception of principles
of interpretation as exclusionary rules of law rather than as permissive
guides weighing features of the context for their significance as indicators
of the parties’ subjectivities. Mr. McDougal thought that Mr. Gross’s
defense of the Commission against these charges ignored the explicit state-
ments of the Commission, in both text and travaux; certainly, neither the
Commission nor Professor Gross offered comprehensive description of the
context of an agreement or suggested principles for its examination.
Finally, it was Professor Gross’s difficulties with the principle of “major
purposes,” Mr. McDougal thought, that made it impossible for him to see
that an interpretation of Article 2(4) of the United Nations Charter,
designed to protect the survival of free peoples from totalitarian ag-
gression, could be an “impartial” clarification of the basic policies of
Article 2(4).

The particular confusions in Professor Gottlieb’s presentation, Mr.
McDougal found, in some ways compounded the more traditional difficul-
ties. Professor Gottlieb was especially obscure about the goal of inter-
pretation because he did not distinguish “goals” and bases of inference
in text and context, and because he sometimes employed “interpretation”
to refer to the whole task of application. Professor Gottlieb explicitly
rejected the model of an agreement as a process of communication, but
offered no alternative; one could not imagine what an alternative might
be. Similarly, by some mysterious concept of “prescriptive” language
he assigned “purposes” to texts (“shapes on paper or agitations in the
air”) rather than to living persons, and thus escaped examining a most
important feature of the context. He also vaguely suggested that there
were dimensions of reference other than syntactic or semantic, but left
these quite spooky; “linguistic analysis” with its mere peepholes upon
reality and unspecified "logic" had never succeeded in making these dimensions communicable. He emphasized "text" more than "context" in the vain hope of limiting the discretion of the interpreter, without recognizing that a focus upon a single set of signs for the mediation of subjectivities could foster more arbitrariness than a disciplined, systematic review of all indices of expectation. One function of principles of interpretation Professor Gottlieb found to be the promotion of "neutrality," the shielding of the interpreter from overt considerations of policy. This function was apparently to be achieved in a curious way: "interpretation" was not, in Professor Gottlieb's conception, a search for the genuine expectation of the parties; it was rather the "performance" of a text, like conducting a symphony or dancing. One could only wonder what "performing" or "dancing" interpreters might do to the stability of parties' expectations. Though Professor Gottlieb sometimes admitted the relevance of context, unhappily he offered no map of it and made few helpful suggestions about how to explore it; how rules of interpretation could be made to serve as "inference guidance devices," without being explicitly and systematically related to all the significant features of the process of agreement and its context, was never explained.

It was not to be thought, Mr. McDougal insisted in conclusion, that the differences between a textual and a contextual approach were inconsequential. There were vast differences both in the indices of the parties' expectations authorized to be observed and in the criteria and procedures established for the evaluation of such indices. The best practical illustration of these differences was to be found in the proposals of the International Law Commission, now sanctified in the new draft convention on treaties, which would make it most difficult for counsel to secure adequate consideration of the travaux and other indices of the parties' expectations and which, because of their utter unworkability in fact, would permit interpreters to indulge in fictions and other covert reasoning in explanation of their decisions. The only structure of authoritative principle compatible with a public order based upon agreement rather than coercion—honoring the genuine intention of the parties—had, in contrast, to be one which required a comprehensive and disciplined search, within the limits of economy, of all significant features of the process of agreement and its context. It was in such a structure of principle, requiring an interpreter to lay bare both his bases of inference and the principles of content and procedure by which he examines and evaluates such bases, that opportunities for spurious and perverted interpretation might best be minimized.

For the further development of these themes Mr. McDougal referred the audience to the book mentioned above, _The Interpretation of Agreements and World Public Order_, and to an article by Mr. David Weisstub upon "The Conceptual World of Linguistic Interpretation" scheduled to appear in a forthcoming issue of _World Politics_, probably in January, 1970.
Comments by Professor Michael Barkun

Maxwell School of Citizenship and Public Affairs, Syracuse University

In discussing this problem we have to take into account community cohesiveness, the length of the treaty, complexity of interactions among parties to the agreement. The text reflects a more complex set of real relationships. Mr. Barkun then proceeded to ask several sets of questions equally addressed to Professors Gross and Gottlieb:

1. The problem of policy—Can “policy” be separated from interpretation and implementation? Are policies implemented or does implementation make policy? How does the definition of policy employed shape our conception of the proper function of interpretation?

2. The problem of interpretive traditions—How does each act of interpretation determine the course of subsequent interpretations? Can each interpreter approach the agreement as if it had never been interpreted before? Or does the interpreter instead internalize a tradition of reading an agreement (or agreements in general) in a certain way?

3. The problem of cultural requisites—Does rule interpretation demand a minimal level of common values among those to whom the rule applies or who interpret it? Is trans-cultural interpretation possible? When is a community present?

4. The problem of political ritual—When is the act of reaching agreement more important than the text? What is the role of the interpreter when agreement-making has functioned as a political ritual?

5. The problem of interactions—What are the patterns of interaction on which an agreement is based? Can an agreement be interpreted apart from a consideration of the totality of relationships between the parties? Is an agreement a device for preserving relationships or changing them? Is it cause, effect, or both?

6. The language problem—How do words acquire meaning? Do we/can we, stand outside the language we use? To what extent do certain rules, meanings, modes of thought become so internalized that we use them habitually and unconsciously? Do words function, in short, both as masters and servants?

7. The problem of interpretive limits—What is the interpreter’s range of conceivable interpretations? What determines the boundaries of this range?

8. The problem of judicial function—What are the functions of judicial institutions? Are the functions they are capable of and called upon to perform related to the kind of society in which they exist?

Larger questions: Can we not view most of these and related questions in terms of two larger constellations of issues, one empirical, the other normative:

a. What are the limits of discretion? Can a decision-maker do anything he wishes? And if not, what restrains him?

b. Who is to set goals for a society, be it national or international? This, to be sure, has its empirical counterpart: On the international level, is the effective setting of goals even possible?
Comments by Professor Anthony A. D'Amato
Northwestern University School of Law

I find Professor Barkun's questions quite comprehensive and therefore would like to take my time in underlining an issue which I think will assume increasing importance in the years to come and yet has been surprisingly overlooked in the presentations today. We are all aware of the revolution in the social sciences as well as in law that is being brought about by the use of data-retrieval computer technology. In our own field, Professor Rohm and his colleagues are working on a computer-based classification system for international treaties. Insofar as these initial attempts result in mere indexing and classification, we can only think of a computer as a very efficient librarian. But much more is in the offing. The computer can take on a substantive-interpretative rôle as it begins to use the technique of content analysis to compare the contexts of words used in treaties and start to arrive at a factor-analytical "dictionary" of the connotations and denotations of treaty language. When this happens, the meanings of words in treaties will begin to define themselves not according to ordinary usage but according to in-treaty usage, since we will have a convenient tool (the computer) for ready access to these definitions and contexts. As scholars, we should anticipate this hardware trend by beginning to fashion the theoretical underpinnings of a treaty-based context of treaty interpretation. We should study the process by which treaty-based words and rules take on a customary-law meaning and thus acquire a universally recognized treaty-applicable usage.

The Chairman opened the floor for questions.

Mr. Zaim Imam, addressing his remarks to the papers of Messrs. Gottlieb and McDougall, stated his opinion that for analytical purposes treaties could be likened to contracts and that some contractual rules of law could be utilized for treaty interpretation. In this context he felt there were three types of treaties: (1) those which were in effect bilateral contracts between parties; (2) multilateral treaties which were non-lawmaking; (3) multilateral treaties which were lawmaking.

He further stated his belief that treaty draftsmen could not recognize all the ambiguities of the language they used. This was particularly evident in the case of lawmaking treaties which were subject to a certain procedure. The original draft is submitted to an international conference for adoption. The conference normally represents all the subjects of international law which have different state practice and conflicting interests. The numerous amendments and sub-amendments submitted by governments are embodied in a compromise text which is designed to reconcile various viewpoints. However, the final text adopted sometimes cannot be understood without reading the travaux préparatoires.

Messrs. McDougall and Gottlieb agreed with Mr. Imam's basic propositions.
Mr. Oscar Schachter observed that while he was in general agreement with Professor McDougall's approach, he found much of value in the remarks of the other speakers. He wished to make two specific points.

First, he was concerned that Professor McDougall's critical reference to the Felix Frankfurter approach to the judicial function might be misunderstood. He was sure that Professor McDougall did not mean that judges (or other third-party interpreters) were free from the requirements of judicial restraint. Indeed, it was especially important in the international context that the judge should be vigilant against substituting his own values for those embodied in the agreement or in the relevant community norms. Without such restraint, it was most unlikely that judges (or for that matter, other international officials) would obtain the confidence necessary for their rôle.

Second, Mr. Schachter queried whether there was any basic incompatibility between the Gottlieb and the McDougall approaches. As he saw it, Professor Gottlieb was mainly concerned with the logical operation necessary for interpretation, but he would surely agree that the interpretative task required more than a process of inference. It also involved the task of ascertaining the set of relevant propositions—normative and empirical—on which the logical operations were to be performed. It is this aspect that Professor McDougall has emphasized; he offers directions for the search for the relevant propositions, especially those to be found outside the instrument under interpretation. Professor Gottlieb, on his part, offers directions for making the necessary inferences from these propositions in order that their application in the particular case would be valid, that is, not arbitrary or capricious. Both of these operations are necessary to the interpretative process and can hardly be regarded as in conflict.

Professor McDougall, in commenting on Mr. Schachter's observations, said he had long since learned not to argue with him.

Mr. Gottlieb stated that he thought Mr. Schachter perfectly right. The parties have agreed to place their emphasis on the words of the texts. In doing so they are emphasizing expectations, i.e., they expect to be guided by the texts.

Professor McDougall took issue with Mr. Gottlieb, saying that sometimes the real desire of diplomats in drafting a text was to cover up disagreement. It was, further, curious that Mr. Gottlieb would honor the putative kind of expectation he assumed, yet disregard the genuine expectations of the parties that produce the text.

Dr. Gauss interrupted at this point by saying that his patience was exhausted and that the confusion created by Professor McDougall was much more serious than that ever created by a tribunal. In the first place a tribunal does not function in a vacuum. The issues of fact and of law are fully developed by the parties in their written and oral pleadings. They may and generally do introduce historical and other contextual considerations which they deem relevant. And finally they, and not the tribunal, formulate their conclusions in the form of submissions in which
the tribunal is asked to "adjudge and declare . . .." These submissions represent the definitive formulations of the issues with respect to which the parties are at variance. A tribunal is not bound by the legal reasoning developed by the parties. It may adopt a different line of legal reasoning, but a tribunal is not at liberty to adjudge issues or declare on submissions which are not those of the parties. Thus, in final analysis, the judgment is the result of a long interaction between the parties on the one hand, and between the parties and a tribunal, on the other.

Vattel's chapter on interpretation is still one of the most instructive in the writings on the subject. The fact that Professor McDougal and his associates considered it so carefully in their book may perhaps indicate that he is gradually moving into the mainstream of international law.

Dr. Gross further stated that it was not true that every policy has found expression in law, though the reverse, namely, that law is the expression of a policy, is probably true. The International Court of Justice in the South West Africa cases applied the policy of the law. Perhaps the policy is a bad one, but the Court decided nonetheless that two states cannot represent the United Nations before the Court in a contentious case.

Professor Bruce H. Weston believed that there were two separate collisions involved, one between Professors McDougal and Gross, the other between Professors McDougal and Gottlieb.

The collision between Professors McDougal and Gross, he noted, involved a basic difference in perception. Unlike Professor McDougal, he said, Professor Gross was willing to place almost complete reliance on the text of a treaty for interpretation purposes, seemingly to the exclusion of even the possibility that other communications surrounding the formation of the text might be more significant, if not more accurate, than the text itself in isolating what is, in fact, intended between the contracting parties. This, he continued, struck at the very heart of Professor McDougal's unquestionably correct thesis. He wondered if Professor Gross would go so far as to deny that some agreements, and so expectations relevant to them, are hammered out not in the conference room but in the diplomatic cocktail lounges.

The collision between Professors McDougal and Gottlieb, Professor Weston further noted, involved mainly a fundamental misunderstanding on Professor Gottlieb's part. Professor Gottlieb, he observed, kept saying that Professor McDougal wrongly insists upon the interpretation of the intention of the parties rather than the interpretation of the treaty. While conceding that Professor Gottlieb was more willing than Professor Gross to consult more than the treaty text, Professor Weston contended that Professor Gottlieb had made a plain but unnatural interpretation, or misinterpretation, of Professor McDougal's thesis. He pointed out that Professor McDougal and his co-authors were insisting not upon the interpretation but the investigation of genuine shared expectations. Professor Weston added that he was surprised, given the clarity of Professor McDougal's writing on the subject, that this central feature of his argument should be thus misunderstood.
Mr. Gottlieb pointed out that Professor McDougal had conceived of the task of the applier-interpreter as deference to the shared expectations of the parties to an agreement. With this he disagreed. He reiterated his belief that, once the parties have agreed to be guided by the text, they are bound to follow the words of the text itself. His concern is to inform the reading of texts with an awareness of their context and their objects.

Dr. Gross stated he was not concerned about being on a collision course. Courts do not engage in interpretation for its own sake. One point which he felt all the participants could agree about was the impossibility of taking into account expectations of the parties which were not expressed in words or in some other form. Courts cannot engage in psychoanalysis. It is up to the parties to show that the words in the agreement are not used in their ordinary sense, but the parties must have a place to start from; the ordinary meaning of words in an agreement is, subject to rebuttal, a convenient and generally accepted starting point of interpretation. In the Continental Shelf case the International Court of Justice gave very full consideration to the genesis of the principle of equidistance, as well as to every facet of the dispute which the parties thought was relevant and submitted to it.

Professor Louis Henkin thought that it might be desirable to articulate what seemed to him the basic differences between the two points of view. They differed on (1) the degree of clarity and of ambiguity in words generally; (2) the weight to be given to the fact that the parties chose to commit their expectations to words and used these particular words to do so; (3) the comparative desirability of enhancing certainty as to what the parties desired, expected, and would be called upon to do, as against promoting ambiguity in order to promote other socially desirable goals; (4) the comparative desirability of interpretation to fulfill the purposes of the parties as against giving effect to "public policy"; (5) the consequences of the different approaches to interpretation for international relations, for the use of treaties, for the willingness to resort to the courts. He concluded by stating that in his view the best approach to interpretation is still that contained in Felix Frankfurter's classic article "On the Reading of Statutes" and what it said was equally pertinent today and equally relevant to the reading of treaties.

Professor D'Amato disagreed with Professor Gottlieb's contention that a "stop sign" on a distant planet would have a readily recognizable core meaning to an observer from Earth. Quite the contrary, on seeing such a "stop sign," even if exactly similar to the ones on American roads, the space ship traveler would not know whether to stop in mid-space and then proceed, land his ship and stop altogether, turn off the engines or merely pause, fly over the sign and ignore it, or any other of myriad possibilities. As Professor Fuller has shown, a word never has an invariant meaning irrespective of context.

Professor McDougal added that Professor Henkin did not mention how an interpreter might go about determining what is the reference of words and statements in a particular context.
Professor Thomas M. Franck stated his belief that the topic could not be discussed without the context of the court. It makes a great deal of difference what kind of court is involved. Is the court interpreting a large treaty or one briefly drawn? Is the treaty relatively easy to amend? What is the political relationship of the judges to their constituents?

Mr. W. Michael Reisman stated that he felt Professor Gross was employing a highly artificial notion of how an international tribunal operates. Professor Gross believed that the tribunal was passive, simply responding to the formulations of the parties. But any perusal of the pleadings of an international case will reveal that there is a subtle but intense interaction between the tribunal and the litigants, and that the tribunal plays a potentially major role in the ultimate formulation of the issues to be decided. In the Savoy and Gex case, for example, the Permanent Court explicitly rejected a formulation of issues submitted jointly by the parties.

It is perfectly proper for an international tribunal to take such an active role in adjudication, for a litigation is never an exclusively private matter. The application of law to a case creates new law and this affects the entire community. Because of this, an international court must consider a broad range of issues transcending the particular dispute before it. In other words, an international court, by the very nature of its function, is obliged to be contextual.

The presentations of the speakers today have made it plain that there is no argument of contextuality versus non-contextuality. Everyone appreciates that a particular datum of information acquires significance and meaning only if it is set in past, present and projected future contexts. The problem has been how to accomplish this. And this, I think, is the pre-eminent contribution of McDougal, Lasswell and Miller, for they are the first to offer a framework by which the context can be described and sets of criteria by which different features of it can be weighed and weighted in decision.

Mr. Stanley Metzger addressed his question to Mr. Oliver, asking him his views as co-editor and reporter of the A.L.I. Restatement. To what extent does the Restatement bridge the disputes we have been faced with by the participants in the panel, and to what extent does it carry them over?

Mr. Oliver declined to answer.

Professor Kenneth S. Carleton stated that words come out of culture, and international law is no longer drawn entirely from the Atlantic basin. In other cultures the same meanings of words are not produced. How can we arrive at a theory of interpretation which can be utilized by a new international court drawn from diverse cultures?

Mr. John Wolff asked Professor McDougal to demonstrate, in the light of a concrete illustration, how a case decided incorrectly in his opinion could have been decided correctly, had the court followed his theory.

Professor McDougal replied that the latest South West Africa case was one such example.