Comments by Professor Anthony A. D'Amato

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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 Rohn 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 McDougal, 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. MCDOUGAL and GOTTLIEB agreed with Mr. Imam's basic propositions.

MR. OSCAR SCHACHTER observed that while he was in general agreement with Professor McDougal'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 McDougal's critical reference to the Felix Frankfurter approach to the judicial function might be misunderstood. He was sure that Professor McDougal 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 McDougal 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 McDougal 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 MCDOUGAL, 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 MCDOUGAL 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. GROSS interrupted at this point by saying that his patience was exhausted and that the confusion created by Professor McDougal 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 BURNS 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 Profesor 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 rôle 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 rôle 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. CARLSTON 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.