The “Object and Purpose” of a Treaty: An Enigma?

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Introduction

Provoked by certain reservations to human rights conventions, the “object and purpose” of a treaty have in the recent past, become a legally decisive but politically controversial element in national treaty-related decision-making.

A well-known case is the Convention on the Elimination of All Forms of Discrimination Against Women, which states in Article 28 para. 2 that reservations which are incompatible with the object and purpose of the Convention shall not be permitted. Even so, the Maldives excluded, in a reservation, such provisions from the application of the Convention “which the Government may consider contradictory to the principles of the Islamic Sharia upon which the laws and traditions of the Maldives is [sic] founded” and added that the Republic of Maldives “does not see itself bound by any provisions of the Convention which obliges to change its constitution and laws in any manner”. Several States objected to that reservation. In one of these objections Austria stated i.a. that “the reservation made by the Maldives is incompatible with the object and purpose of the Convention and is therefore inadmissible ..”

The resolution of the resulting problem between the parties must, of course, be sought within the framework of the Vienna Convention on the Law of Treaties, although that Convention does not appear to provide a reliable procedure for the purpose, or by other peaceful means of their own choice.

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2 See UN Doc. ST/LEG/SER.E/14 (1996), 172, 177. Subsequent similar cases are recorded in Österreichische Außenpolitische Dokumentation, April 1997, No. 2, 90–93.

Beyond that, however, this and similar incidents raise the more general query whether the basis for judging the issue, the “object and purpose” of the convention in question, can be determined objectively and, if so, by what means. These are the questions which this paper will address.

I. Authoritative Statements

1. The Genocide Opinion of the International Court of Justice (ICJ)

The current widespread use of the expression “object and purpose of a treaty” in various contexts is very probably due to the crucial role which the ICJ assigned to it in the 1951 Advisory Opinion on Reservations to the Genocide Convention.\(^4\)

In Resolution 478(V) of 16 November 1950 the General Assembly of the United Nations requested this advisory opinion in order to settle a dispute which had arisen between the Soviet Union and the Secretary-General of the United Nations as depository of the Genocide Convention. The Secretary-General had continued the practice of the League of Nations which required the unanimous consent of all other parties to a multilateral treaty for a reservation to become effective. The Soviet Union contested the validity of that practice. Since the present paper does only incidentally deal with reservations, it suffices to state that the Court departed from the unanimity rule and assigned the task of evaluating reservations to each contracting party.\(^5\)

It furthermore held that “the appraisal of a reservation and the effect of objections that might be made to it depend upon the particular circumstances of each individual case.”\(^6\) At the same time, however, it restricted the freedom of making reservations by requiring the latter’s compatibility with the object and purpose of the treaty in question:

“But even less could the contracting parties have intended to sacrifice the very object of the Convention in favour of a vain desire to secure as many participants as possible. The object and purpose of the Convention thus limit both the freedom of making reservations and that of objecting to them. It follows that it is the compatibility of a reservation with the object and purpose of the Convention that must furnish the criterion for the


\(^5\) Ibid., 21–22.

\(^6\) Ibid., 26.
attitude of a State in making the reservation on accession as well as for the appraisal by a State in objecting to the reservation. Such is the rule of conduct which must guide every State in the appraisal which it must make, individually and from its own standpoint, of the admissibility of any reservation.7

These considerations led the Court to conclude that if a reservation was incompatible with the object and purpose of a convention, the State making the reservation could not be regarded as being a party to the convention, but left the appreciation of whether this was the case to each of the other parties.8 The last part of the Court’s conclusion differs to some extent from an earlier part of the reasoning in which the Court had observed:

“On the other hand, it may be that certain parties who consider that the assent given by other parties to a reservation is incompatible with the purpose of the Convention, will decide to adopt a position on the jurisdictional plane in respect of this divergence and to settle the dispute which thus arises either by special agreement or by the procedure laid down in Article IX of the Convention.”9

The last reference is slightly puzzling since the Soviet Union had excluded the very Article IX by its reservation, a reservation to which other parties had objected, which made the Convention, by the Court’s own standard, inapplicable to their mutual relations and thus not susceptible to judicial action between them. Generally, however, it is important to note that, while the Court gave priority to individual appreciation, this appreciation may eventually be the subject of judicial review.

The reservations regime which the Court had in mind can thus be summarized as follows: Reservations may not frustrate the object and purpose of a multilateral treaty. It is, however, left to the other parties to ascertain the object and purpose and to decide on the compatibility of a reservation with it. Should a divergence of opinion between the State making the reservation and the State objecting to it result – which seems nearly inevitable – it could eventually be settled in an available third-party procedure.

In an earlier part of its Opinion the Court had endeavoured to discover the object and purpose of the Genocide Convention. It indicated that:

“The origins and character of that Convention, the objects pursued by the General Assembly and the contracting parties, the relations which exist between the provisions of the Convention, inter se, and between

7 Ibid., 24; cf. also 21.
8 Ibid., 29.
9 Ibid., 27.
those provisions and these objects, furnish elements of interpretation of the will of the General Assembly and the parties. The origins of the Convention show that it was the intention of the United Nations to condemn and punish genocide as ‘a crime under international law’ ... A second consequence is the universal character both of the condemnation of genocide and of the co-operation required ‘in order to liberate mankind from such an odious scourge’ (Preamble of the Convention) ... The objects of such a convention must also be considered. The Convention was manifestly adopted for a purely humanitarian and civilizing purpose.”

Although these observations are ostensibly the result of interpretation, they appear, rather, as intuitive assumptions which, though seemingly self-evident, are too vague to be helpful for understanding the rationale of the process by which they were obtained.

It is, therefore, not surprising that the severest criticism of the concept of making ‘object and purpose’ of a treaty the test for the admissibility or inadmissibility of reservations, and of its practicability, came from within the Court itself, in the form of a joint dissenting opinion by four judges, which stated in its relevant part:

“Moreover, we have difficulty in seeing how the new rule can work. When a new rule is proposed for the solution of disputes, it should be easy to apply and calculated to produce final and consistent results ... What is the ‘object and purpose’ of the Genocide Convention? To repress genocide? Of course; but is it more than that? Does it comprise any or all of the enforcement articles of the Convention? That is the heart of the matter.”

A further noticeable point is the use of terminology in the Advisory Opinion. The now hallowed expression of “object and purpose” (“objet et but” in French) appears three times but is not used consistently; sometimes it appears in variations, sometimes it is at variance with the French text, and sometimes only half of the expression is used when one would expect the entire formula.

10 Ibid., 23.
11 Ibid., 31–48.
12 Ibid., 44.
13 Ibid., 24. It is also used in answering the questions on p. 29.
14 E.g., ibid., 21: “the purpose and raison d’être of the convention”.
15 E.g., ibid., 23: “the objects of such a convention” reads in French “les fins d’une telle convention” (emphasis added).
16 E.g., ibid., 27: “the purpose of the Convention”.
This tends to show that the idea that the intentions of the parties in drawing up their agreement should play a pivotal role in interpreting the text and in limiting the freedom of the parties in its implementation, although generally accepted, had not yet ripened into a settled concept, and no firm notion for expressing it existed at the time.

2. Other authoritative statements by the Permanent Court of International Justice (PCIJ) and the ICJ

The foregoing observation is supported by an examination of advisory opinions and judgements by the PCIJ and the ICJ in which the idea was referred to, albeit not always in the current standard form of the expression.

a. Terminology

It is useful to arrange the following enquiry in chronological order because this makes apparent the slow emergence of object and purpose as guiding principles of interpretation.

As far as it was possible to ascertain, the expression first appeared in an advisory opinion of the PCIJ in 1926\textsuperscript{17}, though in the form of “the aim and the scope” (“l’objet et la portée”) of a treaty. Thereafter the idea was used in a number of other advisory opinions but its expression varied considerably. One finds “the aim and the object” (“le but et l’objet”\textsuperscript{18}, “the subject and aim” (“l’objet et le but”)\textsuperscript{19}, or “meaning and spirit of the treaties” (“le sens et l’esprit des traités”)\textsuperscript{20}.

According to Article 39 para. 2 of the Statute of the ICJ Judgments and Advisory Opinions are authoritative in one of the two languages, as determined by the Court. The apparent difficulty to settle on corresponding standard terms in English and French for the formula is nevertheless striking. Thus, for the French “objet” the English versions used “object”\textsuperscript{21}, “aim”\textsuperscript{22}, “purpose” (and “object” on the same page)\textsuperscript{23}, and “subject”\textsuperscript{24}. The French “but” was

\textsuperscript{17} Competence of the ILO to Regulate, Incidentally, the Personal Work of the Employer, PCIJ, Series B, No. 13 (1926), 18.

\textsuperscript{18} Interpretation of the Convention Between Greece and Bulgaria Respecting Reciprocal Emigration, Signed at Neuilly-sur-Seine on November 27th, 1919 (Question of the “Communities”), PCIJ, Series B, No.17 (1930), 21.

\textsuperscript{19} Interpretation of the Convention of 1919 Concerning Employment of Women During the Night, PCIJ, Series A/B, No. 50 (1932), Dissenting Opinion of Judge Anzilliotti, 383–389, 383.

\textsuperscript{20} Minority Schools in Albania, PCIJ, Series A/B, No. 64 (1935), 15.

\textsuperscript{21} Source in note 18, 21.

\textsuperscript{22} Source in note 17, 18.

\textsuperscript{23} Jurisdiction of the European Commission of the Danube Between Galatz and Braila, PCIJ, Series B, No. 14 (1927), 64.

\textsuperscript{24} Source in note 19, 383.
rendered as “aim”25, “object”26, and only once as “purpose”27. In one instance the English “purpose” was used as equivalent to “raison d’être”28.

Little of that changed initially with the transition from the PCIJ to the ICJ. In the Southwest Africa Opinion29 “purpose” alone was used, but one year later the Genocide Convention Opinion30 established the standard version of the formula – or so it seemed. In the subsequent US Nationals in Morocco Case31 the elements of the formula appeared in their plurals as “purposes and objects of the convention” (“les buts et les objets”), and in a further case “purpose” became “objet” in French32. In the Case Concerning the Application of the Convention of 1902 Governing the Guardianship of Infants (Netherlands v. Sweden)33 terminological chaos returned: “purpose” is “but”34 in French but also “objet”35, and “object” is also “objet”36. It was not until the Nicaragua case37 that the Court finally returned to the nomenclature established in its Genocide Convention Opinion which it has used more or less consistently since38.

The evaluation of this convoluted development confirms the impression, gained from the Genocide Convention Opinion, that until recently the varying use of terminology reflected the vagueness of the theoretical concept that was to be expressed.

25 Sources in note 18, 21 and in note 19, 383.
26 Source in note 20, 17.
27 Source in note 18, 21.
28 Source in note 18, 22.
30 Source in note 4.
31 Case Concerning Rights of Nationals of the United States of America in Morocco (France v. USA), ICJ, Reports 1952, 176–213, 196.
33 ICJ, Reports 1958, 55–73.
34 Ibid., 68, 69, 71.
35 Ibid., 69, 70.
36 Ibid., 69.
37 Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. USA), ICJ, Reports 1986, 14–150, 136, 137, 138, 140.
b. Concept
And indeed, although the foregoing analysis demonstrates an extensive use of the notions in the practice of the PCIJ and of the ICJ, the relevant passages reveal little of the process by which the Courts arrived at the determination of the object and purpose of a given treaty.

The most lucid defence of the necessity of having recourse to the object and purpose of a treaty for guidance in its interpretation came from Judge Anzilotti in a dissenting opinion, when he stated:

“‘I do not see how it is possible to say that an article of a convention is clear until the subject and aim of the convention have been ascertained, for the article only assumes its true import in this convention and in relations thereto. Only when it is known what the Contracting Parties intended to do and the aim they had in view is it possible to say either that the natural meaning of terms used in a particular article corresponds with the real intention of the Parties, or that the natural meaning of the terms used falls short of or goes further than such intention.’”

He then went on to elucidate the object and purpose of Part XIII of the Treaty of Versailles, referring mostly to its Preamble, in order to determine the scope of the ILO’s functions. A similar exemplary method was used by the ICJ in the Case of United States Nationals in Morocco for interpreting the Convention of Madrid and the Act of Algeciras, and in the Case Concerning the Territorial Dispute for interpreting a treaty of friendship and good neighbourliness. In another case the Court found the purpose of a convention expressed in its title.

By contrast, in two other cases in which a possible conflict between actual conduct and the object and purpose of a treaty played a central role in the proceedings before the Court, the Case Concerning the Application of the Convention of 1902 Governing the Guardianship of Infants and the Case Concerning Military and Paramilitary Activities in and Against Nicaragua,

39 In his dissenting opinion cited in note 19, 383.
40 Ibid., 384–387.
41 Source in note 31, 196: “The purposes and objects of this Convention were stated in its Preamble ...”.
42 Ibid., 197: “... the interpretation of the provisions of the Act must take into account its purposes, which are set forth in the Preamble ...”.
44 Case of Certain Norwegian Loans, source in note 32, 24: “The purpose of the Convention in question is that indicated in its title, that is to say ‘the Limitation of the Employment of Force for the Recovery of Contract Debts’.”
45 Source in note 33, 68–71.
46 Source in note 37, 136–138, 140.
the reasoning of the judgments does not make it clear how the Court discovered the object and purpose of the respective treaties; they seem to have been assumed as self-evident.

A most interesting instance is the Case Concerning the Arbitral Award of 31 July 1989⁴⁷, in which the issue was whether or not the overall objective of the parties to settle their entire maritime dispute, expressed in the Preamble of the arbitration agreement, ought to prevail over the terms laid down by Article 2 of the same agreement. The Court answered the question negatively, thereby demonstrating the limits of the use of "object and purpose" as guiding principles in the process of interpretation.

Another point needs to be mentioned. In the Case Concerning Border and Transborder Armed Actions the Court used the phrase: "Such a solution would be clearly contrary to both the object and the purpose of the Pact"⁴⁸, thereby implying that the two elements were separate and different. This understanding is confirmed by the Oil Platforms case, in which the Court examined possible frustrations of the purpose⁴⁹ and of the object⁵⁰ of a treaty of friendship separately. It is further confirmed by the Asylum Case, in which the Court regarded the object separately when it stated: "The object of the Havana Convention ... was, as indicated in its Preamble, to fix the rules which the signatory States must observe for the granting of asylum in their mutual relations"⁵¹. This passage suggests also that the "object" of a treaty is expressed in the aggregate of its provisions.

c. Conclusions

A few preliminary conclusions may be drawn from the foregoing analysis.

As far as terminology is concerned, the combination of 'object' and 'purpose' in one standard expression is now firmly established, possibly since the Genocide Convention Opinion of the ICJ, but certainly since the Vienna Convention on the Law of Treaties⁵². There is, however a strong indication

⁴⁸ Source in note 38, 89 (italics added).
⁴⁹ Source in note 38, 810, para. 18; there exists, however, a slight disparity between the English and French texts, the French "ont pour but" corresponding to "aim to provide".
⁵⁰ Ibid., 813, para.27.
⁵¹ Asylum Case (Colombia v. Peru), ICJ, Reports 1950, 266–289, 282.
⁵² Recently S. Torres Bernardex, Interpretation of Treaties by the ICJ Following the Adoption of the 1969 VCLT, in G. Hafner et al. (eds.), op.cit. (note 3), 721–748, has convincingly demonstrated that the ICJ finally considers the articles on interpretation of the VCLT declaratory of customary international law.
that they are separate and different elements\(^{53}\) which jointly designate a point of reference for interpretation.

Although they are a point of reference for interpretation, they themselves must be elucidated by interpretation if they are not expressed in the title of a treaty or in its preamble. Considering the way by which the Courts arrived at some of their conclusions it could well be that they considered the whole text of a treaty as expressing its object and purpose, but that is pure conjecture. The ICJ, although it has repeatedly stated that treaty provisions must be considered as a whole for the purpose of interpretation\(^ {54}\), has mostly failed to make the process explicit by which it had discovered the “object and purpose” of a specific treaty. One could just as well believe that it was simply by intuition.

3. The International Law Commission (ILC)

General Assembly Resolution 478(V) (1950), which requested the advisory opinion on reservations to the Genocide Convention, also invited the ILC “to study the question of reservations to multilateral conventions both from the point of view of codification and from that of the progressive development of international law”.

In responding to that request the ILC took account of the Advisory Opinion of the ICJ which had been rendered in the meantime. It had considerable doubts on the usefulness of “object and purpose” as a test and expressed them in the following terms:

“The Commission believes that the criterion of the compatibility of a reservation with the object and purpose of a multilateral convention, applied by the International Court of Justice to the Convention on Genocide, is not suitable for application to multilateral conventions in general ... Even if the distinction between provisions which do and those which do not form part of the object and purpose of a convention be regarded as one that is intrinsically possible to draw, the Commission does not see how the distinction can be made otherwise than subjectively. If State A tenders a reservation which State B regards as compatible and State C

\(^{53}\) This view was also expressed by P. Reuter during the debate in the ILC on the draft of the law of treaties. After a few remarks concerning the alignment of the English and French version of the formula, he concluded: “... the object of an obligation was one thing and its purpose was another.” (YBILC 1964, vol. I, 26, para. 77).

regards as incompatible with the object and purpose of the Convention, there is no objective test by which the difference may be resolved”\(^{55}\).

These misgivings were recalled when the Commission reached the final stage of its work on the law of treaties. In the draft which the Special Rapporteur Sir Humphrey Waldock submitted in 1962 to the ILC for consideration, his commentary on what was then Article 17 (on the power to formulate reservations) was wavering between scepticism and the necessity of finding a compromise between the opinions held in the Commission\(^{56}\). Para. 10 of the commentary, referring to the discussion of 1951, stated:

“... it was said – and rightly – that in any given case the question of the compatibility or incompatibility of a particular reservation with the object and purpose of the treaty depends to a considerable extent on the conclusions reached as to exactly how much of the subject-matter of the treaty is to be regarded as representing the ‘object and purpose of the treaty’ and as to exactly which provisions are to be regarded as material for the achievement of that ‘object and purpose’. But these are questions on which opinions, and especially the opinions of the parties themselves, may well differ, so that the principle applied by the Court is essentially subjective and unsuitable for use as a general test for determining whether a reserving State is or is not entitled to be considered a party to a multilateral treaty ... The Special Rapporteur believes these criticisms of the Court’s criterion to be well founded ... Nevertheless, the Court’s criterion of ‘compatibility with the object and purpose of the convention’ does express a valuable concept to be taken into account both by States formulating a reservation and by States deciding whether or not to consent to a reservation that has been formulated by another State ... Accordingly, the Special Rapporteur has tentatively inserted in paragraph 2 (a) for the Commission’s consideration a provision stating the Court’s concept as a general principle to be taken into account, without however attaching any sanction to it ...”\(^{57}\).

Yet it was the same Special Rapporteur who, two years later, having apparently overcome his original scepticism, proposed the inclusion of the elusive formula into the text of the article on interpretation\(^{58}\). The debate about this


\(^{56}\) See note 60, infra.


issue\textsuperscript{59} demonstrates how difficult it was to form an opinion in the Commission\textsuperscript{60}, but it does not throw any further light on the question how “object and purpose” of a treaty are to be discovered.

One year later the concept had apparently taken root and the Special Rapporteur could confidently remark:

“The objects and purposes of the treaty, as the Commission recognized in adopting article 69 at its sixteenth session, are criteria of fundamental importance for the interpretation in good faith of a treaty.”\textsuperscript{61}

4. The Vienna Convention on the Law of Treaties (VCLT)

It seems thus that the ILC, once it had overcome its initial doubts, warmed to the expression since it appears in not less than eight Articles of the VCLT, though it must be mentioned that in Articles 18 and 33 the criterion has been added during proceedings in the Conference\textsuperscript{62}:

\begin{itemize}
  \item in Article 18 as an obligation not to defeat the object and purpose of a treaty prior to its entry into force;
  \item in Article 19(c) for determining the incompatibility of a reservation;
  \item in Article 20 para. 2 as one possible characteristic of a multilateral treaty to which reservations need the consent of all parties;
  \item in Article 31 para. 1 as general guidance for interpretation;
  \item in Article 33 para. 4 as a point of reference for resolving textual differences between several authentic treaty texts;
  \item in Article 41 para. 1(b)(ii) as limiting the freedom of parties to a multilateral treaty to conclude \textit{inter se} modifications;
  \item in Article 58 para.1(b)(ii) as limiting the freedom of parties to a multilateral treaty to agree on an \textit{inter se} suspension;
  \item in Article 60 para. 3(b) to characterise the material breach of a treaty.
\end{itemize}

\textsuperscript{59} Ibid., 275–291; 765th and 766th meeting.

\textsuperscript{60} Cf. the debate about then Article 70 (Article 69 respectively, now Article 31), in which it appears that the members of the Commission decided to give greater importance to the criterion “object and purpose of the treaty” than did the Special Rapporteur in his report. They accepted de Luna’s and Bartos’s proposition to refer to “object and purpose of the treaty” not in the rule concerning the case of an absurd or ambiguous interpretation (paragraph 2 of the article proposed by the Rapporteur) but in the general rule of interpretation in paragraph one of the article: \textit{ibid.}, 275–282, 765th meeting.


In spite of this multiple use, the Convention does not contain a specific directive on how the object and purpose of a treaty are to be elucidated. Nor does the commentary of the ILC to the draft articles, which served as a basic text for the Vienna Convention, shed light on the question, an omission that is not surprising after what has been described in the previous section. Only two references to “object and purpose” exist:

- In para. 12 of the commentary to then Article 27 (now Article 31) reference is made to “the statement of the object and purpose of the treaty in the preamble”, thereby suggesting that both are normally stated in preambles.
- In para. 2 of the commentary to then Article 37 (now Article 41) an example of an inadmissible modifying treaty is given: “... an inter se agreement modifying substantive provisions of a disarmament or neutralisation treaty would be incompatible with its object and purpose”. Although this conclusion makes sense, since it is as good as a “natural” one, it does not help to decide how to deal with a less “natural” case.

II. Theoretical Considerations

1. The State of the Scholarly Discourse

Since the examination of authoritative sources has not provided a clear indication of how “object and purpose” of a treaty are to be determined, one has to turn to scholarly writings in the hope that they have developed and clarified the concept and the process of its implementation. It is, however, not intended to provide an exhaustive overview; authors are rather chosen as typical examples.

a. Terminology

(i) “Object and purpose” are synonymous or conjoint. This use is frequent in German and English writings, where the two terms are rarely distinguished. They are sometimes used interchangeably, but “purpose” is also used alone.

Thus, Bernhardt discusses the “Vertragszweck” and considers “object and purpose” as synonyms, when he writes: “Der Zweck, das Ziel einzelner Vertragsbestimmungen wie des Vertrages in seiner Gesamtheit spielt in der theoretischen Diskussion wie in der Rechtsprechung zur Vertragsauslegung eine

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große Rolle." He continues to use the words “Vertragszweck”, “Ziele”, “Zweck” in an indiscriminate manner and speaks of “allgemeiner Zweck”.

Ress refers to “object and purpose” as “Gegenstand”, which means subject-matter regulated by the treaty:

“Nach der in Art. 31 Abs 1 WVRK statuierten Grundregel sind völkerrechtliche Verträge nach Treu und Glauben auszulegen, entsprechend der üblichen Bedeutung, die den Begriffen des Vertrages in ihrem Zusammenhang und unter Berücksichtigung ihres Gegenstandes (object and purpose) beizulegen ist.”

This understanding of the expression is too narrow since the German word “Gegenstand” means “object”, but not “object and purpose”.

Stein, on the other hand, only mentions the notion “purposes” of a treaty: “die Ziele des auszulegenden Vertrages”.

Köck uses the entire expression “object and purpose of a treaty”, but does not explain what the two terms mean and whether they differ in any way.

It thus appears that German and Austrian doctrine considers the expression as simple reference to traditional teleological interpretation, which makes a distinction between the two elements of the expression superfluous: the expression ‘object and purpose’ is by and large considered as expressing the general aim of the treaty.

Typical of the English tradition, Jennings advocates a classical textual approach and uses the phrase “object and purpose” as a unit:

“... a treaty is an agreed, authoritative text, normally drafted with care in the choice of terms, and it is the resulting text that States elect to accept, or not to accept ... The qualification ‘in good faith’ is the central component of the principle of pacta sunt servanda: it comprises and

64 R. Bernhardt, Die Auslegung völkerrechtlicher Verträge, Köln 1963, 88.
65 Ibid., 88–97 passim.
68 H.F. Köck, Vertragsinterpretation und Vertragsrechtskonvention, Berlin 1976, 39–41 and 88–89. In a recent paper, Zur Interpretation völkerrechtlicher Verträge, 53 ZÖR (1998, II), 217–237, the author missed another opportunity to explain the meaning of the two terms. Instead he contributed to the conceptual confusion by advocating a three-level hierarchy of general, partial and sectional “object and purpose” (225).
He affirms further that the general rule of interpretation in Article 31 of the Vienna Convention embodies the textual approach.

In considering “the relevance of the object and purpose of the treaty”, Sinclair stresses likewise that in case of a dispute between the parties about the interpretation of the treaty “there can be no common intentions of the parties aside or apart from the text they have agreed upon.”

Thus, for these authors the text of a treaty plays the dominant role in the interpretation of a treaty, and the latter’s object and purpose have to be ascertained primarily with reference to the terms of the treaty. They warn against the excessive form of teleological interpretation defended by some American authors who are only concerned with the “purpose” of a treaty.


The opinion against which Fitzmaurice and other authors argue has already been expressed in the Harvard Draft of 1935. See Article 19 (a): “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, 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 the interpretation is being made, are to be considered in connection with the general purpose which the treaty
and they deny the relevance of intentions which, though they could be entertained under the object and purpose of a treaty, have not been expressed in treaty provisions.

In sum, most scholars in the German, Austrian and English tradition treat ‘object and purpose’ of a treaty as a joint notion. It is only a stream of French doctrine which gives special attention to the distinction between object and purpose of a treaty.

(ii) Object and purpose are distinct notions: A French theory. In French doctrine of public law (administrative law), the “école objectiviste” founded by Duguit and Bonnard\(^{74}\) distinguishes strictly between the object of an act and its purpose by separating the different elements of a legal act. Some French writers in international law, although they admit the inconsistent use of the terms by international courts\(^{75}\), attempt to apply the distinction between object and purpose to international legal acts. Rousseau distinguishes between “objet ou effet direct et immédiat de l’acte” and “but ou résultat de l’effet juridique produit par l’acte”\(^{76}\). More recently, Weckel has expressed the same opinion: “L’objet est une finalité, le but immédiat recherché par les parties\(^{77}\) ... la situation que l’auteur de l’acte a en vue ..., l’effet recherché par l’auteur de l’acte”\(^{78}\).

Hence, according to Weckel, the object of the act is its immediate purpose, i.e. the situation which the author of the act has envisaged or the effect he is striving for; whereas the purpose of the act is the reason of the object, the final situation for which the object is the instrument of achievement: “Le but est la raison de l’objet, la situation en vue de laquelle l’objet est donné; L’objet est l’instrument du but”\(^{79}\).

It must be emphasised that the major part of French doctrine concerning the object and purpose of a treaty was published in the 1970ies\(^{80}\), following

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\(^{75}\) E.g., Ch. Rousseau, *Droit international public*, vol.1, Paris 1970, 272; Rousseau was apparently the first to remark on it. See also M. Gounelle, *La motivation des actes en droit international public*, Paris 1979, 47; and M.K. Yasseen, *L’interprétation des traités d’après la Convention de Vienne sur le droit des traités*, 151 RdC (1976, III), 1–114, at 56–57.

\(^{76}\) Rousseau, *ibid*.


the adoption of the VCLT. This suggests that it was indeed motivated by the intention to contribute to the clarification and development of the concept. It is to J.P. Jacque that we owe the most lucid statement in this respect:

“L’objet d’un acte réside dans les droits et obligations auxquels il donne naissance. L’objet d’un acte c’est donc la norme qu’il crée. Lorsque la Cour veut définir l’objet d’un traité, elle analyse le contenu de celui-ci, c’est à dire les obligations qu’il crée à la charge des parties et les droits qu’il leur confère. Si l’objet d’un acte est toujours une norme, chaque acte se caractérise par le contenu de la norme qu’il crée.

Cependant les droits et obligations créées par l’acte ne constituent pas une fin en eux-mêmes. Ils ne sont que le moyen d’atteindre un résultat donné. Et c’est le résultat qui forme, pour le ou les auteurs de l’acte, le but recherché.”81

This understanding is confirmed by Sur who observes on the object that: “La notion d’objet recouvre le premier et le plus apparent des éléments matériels de l’acte. D’une manière générale, on vise par là son contenu substantiel”82.

According to this French doctrine the term “object” indicates thus the substantial content of the norm, the provisions, rights and obligations created by the norm. The object of a treaty is the instrument for the achievement of the treaty’s purpose, and this purpose is, in turn, the general result which the parties want to achieve by the treaty. While the object can be found in the provisions of the treaty, the purpose may not always be explicit and be prone to a more subjective understanding.

Leonetti, trying to explain the specific role “object and purpose” as notions with separate meaning should play in the process of interpretation, states simply: “La raison du principe de l’interprétation de l’objet et du but est de permettre d’interpréter une règle de façon conforme à l’économie générale du traité.”83

In addition, French authors also use the following arguments in favour of distinguishing between “object and purpose”: “Concurrent treaties” may have a contradictory object84 although they share the same purpose; it is the object of a treaty which determines the treaty’s conformity or non-conformity with the peremptory norms of international law (jus cogens)85; and finally both,
object and purpose are separately relevant for excluding reservations made in bad faith. However, French doctrine is far from being unanimous. Reuter, for example, doubts that the distinction between “object and purpose” is as clear in international law as it is in French law. He adds that the distinction of the terms “object or purpose of the treaty” in Article 60 para. 3(b) of the VCLT is of an exceptional nature and was only necessary to avoid a restriction of the notion of “material breach” which is the subject of this paragraph, but is not an indication of the existence of a real distinction between the two terms in international law. Chaumont is even more sceptical when he argues that the ILC, by using the criterion “object and purpose of the treaty” in Article 31 of the VCLT, confused the rule of teleological interpretation:

“[La Commission de Droit International] s’est contentée de ... considérer [la méthode de l’effet utile] comme incorporée dans le paragraphe 1 [de ce qui est maintenant l’Article 31] stipulant qu’un traité doit être interprété de bonne foi ... et à la lumière de l’objet et du but du traité ... Cette dernière remarque semble comporter une confusion de la part de la Commission entre la méthode de l’effet utile et la méthode du but qui sont, dans leur principe, différentes l’une de l’autre ...”

Most radical is perhaps the conclusion of Gounelle, who questions the usefulness of the expression as such, when he writes: “Il semble donc que le moment serait venu de mettre en cause cette notion spécifique du droit conventionnel, que constitue ‘l’objet et le but’”.

(iii) A sceptical view: Object and purpose are distinct notions – but are they really? This is a reference to Bos, who appears to be the only non-French writer who has examined the idea that object and purpose are two separate notions. Citing Sur, Bos explains:

“Professor Sur proposes to interpret the object of a treaty as its ‘contenu matériel, par opposition aux éléments formels’, in other words as ‘that which the treaty is about’. But what the treaty ‘is about’, he says, first has to be determined by interpretation before it can itself help to determine

86 Cf. the authors in notes 1 and 3.
88 Ibid., 628, fn.9. Cf. however his intervention in the ILC cited in note 53.
90 Gounelle, op.cit. (note 75), 49.
the intention of the party. The same, of course, applies to the term ‘pur-
pose’, which leads the present writer to believe that the interpretation of
‘object’ will necessarily affect that of ‘purpose’, and the reverse ..."^{91}

However Bos has not been persuaded by the reasoning of the French author
because he concludes: "... the best solution of this question of semantics,
therefore, is to consider the expression ‘object and purpose’ as a unitary one
reflecting two closely interrelated aspects of a single idea."^{92}

b. Methodology
Learned explanations of the method which should lead to the discovery of
the object and purpose of a treaty are even less explicit than those concerning
terminology.

Dehaussy is among the few French scholars who try to answer this ques-
tion. He first considers the notion “object of the treaty” as being objective:

“Ce sur quoi porte le traité – c’est à dire la matière (ou les matières)
que les parties sont convenues de régir – résulte en effet ‘objectivement’
de l’instrument lui-même ... De là, enfin, l’appel au but du traité pour
déterminer l’étendue de son objet: ce qui justifie la liaison entre les deux
notions.”^{93}

He thus argues that, in order to determine the object of a treaty, it is neces-
sary to look for its purpose. If the purpose cannot be found in the preamble
or in preliminary provisions of the treaty, and taking into account that the
objectives the parties want to achieve can be different or even contradictory,
Dehaussy suggests that the purpose of a treaty lies in the “function” of the

treaty. He justifies this method of interpretation, which reflects a teleological
approach, as follows:

“Si les intérêts, donc les objectifs, des parties étaient divergents, la fonc-
tion, que celles-ci ont consensuellement attribué au traité, est d’opérer la
conciliation de ces intérêts dans les strictes limites vouluex par elles. Si
ces intérêts étaient sinon identiques, du moins convergents et proches les
uns des autres, la fonction du traité consiste à atteindre le mieux possible
les communs objectifs des parties.”^{94}

^{91} M. Bos, A Methodology of International Law, Amsterdam 1984, 153; see also idem,
Theory and Practice of Treaty Interpretation, 27 NILR (1980), 3–170, 153. His reference is to
Sur, op.cit. (note 80), 228.
^{92} Bos, ibid.
^{93} J. Dehaussy and M. Salem, Sources du droit international. Les traités. Interprétation,
Principes, règles et méthodes applicables à l’interprétation, Juris-Classeurs 1995, Fascicule
12–6, 24.
^{94} Ibid.
It must, however, be stressed that Dehaussy’s explanations do not really clarify the problem. He himself recognises that his solution is useless if one or more parties to the treaty had wilfully inserted ambiguities or deficiencies in the text of the treaty.95

Gounelle distinguishes between “préambule ou motivation” and “dispositif” (operative part of the treaty) and explains that “lorsque l’objet et le but sont mentionnés dans sa motivation, ce sont surtout les indications concernant le but qui sont précieuses: c’est seulement dans cette partie du texte qu’elles sont indiquées, alors que l’objet d’un traité peut se déduire aisément de son dispositif”96. He does, however, not indicate the way by which this may “aisément” be done.

Nor does Yassen’s analysis help any further. In case that object and purpose are not stated in the preamble of the treaty, he proposes that “l’objet et le but peuvent alors être identifiés par l’examen du texte, tout le texte, à la lumière de ce qui est le contexte aux fins de l’interprétation du traité”97.

Bernhard, representing German doctrine, offers only a terse statement in line with the teleological approach:


Like most English authors Sinclair does not trust the notion of object and purpose and, cautiously noting that “the preamble to the treaty may assist in elucidating that object and purpose”, he emphasises that “most treaties have no single, undiluted object and purpose but a variety of differing and possibly conflicting objects and purposes”.99

95 Ibid.
96 Gounelle, op.cit. (note 75), 49.
97 Yassen, loc.cit. (note 75), 57.
98 Bernhard, op.cit. (note 64), 89.
99 Sinclair, op.cit. (note 71), 130. Cf. also Fitzmaurice and his theory of “emergent purpose”, loc.cit. (note 54), 8 fn. 2.
c. Conclusions
The not really surprising result of the scholarly discourse is thus the suggestion that, failing explicit indications in some parts of the treaty, its object and purpose have to be determined by interpreting it as a whole. In view of the heterogeneous instructions which the relevant articles of the VCLT give for the process of interpretation, this suggestion does not show the way to an objectively verifiable result.

The examination of the relevant literature has revealed three main tendencies in the understanding of “object and purpose”100. German writers take them, more or less unreflectively, as a signpost for teleological interpretation. English scholars strongly tend towards a textual approach and see “object and purpose” reflected in the text, which makes a specific enquiry redundant. Only some French scholars have “recycled” a domestic method of interpretation with a view to introducing some kind of teleological interpretation into the law of treaties101.

Since these different opinions all relate to the same provisions of the VCLT, they demonstrate the influence of theoretical concepts, determined by a certain legal, cultural and educational background, on the sense given to “object and purpose”. Constructing a bridge between the different opinions looks, under these circumstances, rather like the work of Sisyphus.

2. The Formulation of a Hypothesis

The examination of the authoritative sources has not brought to light a clearly perceptible way for the discovery of the object and purpose of a treaty. Although all relevant pronouncements imply that they are the result of interpretation, the logical process through which this result has been reached is, if at all, only incidentally disclosed.

Nor does the analysis of the scholarly discourse permit a definitive answer to the question. As has been shown, it is divided along language lines and traditions of legal culture, and presents a pluralistic picture. Although some French writers have attempted to develop a comprehensive theory, this theory is far from commanding widespread acceptance.

100 Most authors who address the question of “object and purpose” of a treaty share the opinion that both are an offshoot of the principle of good faith. This is the only point on which doctrine seems to agree.

101 It is possible that in its Advisory Opinion of 1951 the ICJ was influenced by early streams of French theory. The President of the Court at that time, Judge Basdevant, was French and it is conceivable that he suggested the use of the expression “object and purpose”, which is pivotal in French law.
This makes it necessary, in the context of this enquiry, to formulate a hypothesis of the process required for determining the object and purpose of a treaty.

a. The Clarification of Terms
The bewildering use of terms, especially in the earlier authoritative statements of the PCIJ and the ICJ cited above, necessitates their clarification before a hypothesis can be formulated.

Since the initial search is for the “ordinary meaning to be given to the terms” (Article 31 para. 1 VCLT), one is directed towards dictionaries. Their perusal is, however, rather disappointing. Among the many meanings which both terms have in English, the Oxford English Dictionary and the Concise Oxford Dictionary define object also as “the thing aimed at; a purpose” and purpose as “an object to be attained”, thereby suggesting that they are synonymous which would make their joined use in “object and purpose” pleonastic. In French, the Petit Robert and the Petit Larousse also define a synonymous content for the common use of the terms. The Petit Larousse adds, however, a special legal meaning of objet: “ce sur quoi porte un droit, une obligation, un contrat, une demande en justice”, in other words the legal position or relationship created by a legal rule or transaction.

The fact that this definition appears in French confirms an opinion formed while analysing the relevant literature: It seems that continental legal systems, and in particular the French one, make greater use of teleological interpretation than common law systems, which usually prefer a textual interpretation, relying on the normal meaning of words and phrases\(^ {102}\). Hence lawyers educated in the former are more inclined to look to “object and purpose” for guidance in interpreting international instruments, since this is a kind of teleological interpretation. In this context, it has to be pointed out that authoritative statements of the PCIJ or of the ICJ which were originally drawn up in French show more terminological consistency than those drawn up in English. In the first case, sometimes variations creep into the English version, but in the second case they appear already in the English text and lead to variations in the French text.

For the purpose of formulating a hypothesis it seems, therefore, permissible to prefer the “special” legal meaning (Article 31 para. 4 VCLT) and use the French distinction\(^ {103}\) rather than the apparent English pleonasm.

This means that the term “purpose” indicates the aim which is to be achieved by the treaty, while “object” refers to the legal position created for the parties

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103 Cf. the remarks by Reuter, cited in note 53.
by the provisions of the treaty as a whole, its subject-matter. Or in other words: to the legal instruments created for achieving the aim.

Understood in this way, the terms are neither synonymous nor inseparable. If “purpose” were the only guiding principle for interpretation, unfettered teleology would be possible and the treaty provisions actually agreed upon might become more or less irrelevant as long as the conduct of the parties achieved the aim of the treaty. By joining “object” to the guiding principle, the provisions of the treaty are linked to its aim and the conduct of the parties for achieving the aim is confined to the rights and obligations established by the treaty provisions. Interpreting a treaty in the light of its object and purpose is thus a more restricted variant of teleological interpretation\(^{104}\).

This is also the opinion of Yasseen, when he states that

“il est possible d’affirmer qu’en employant conjointement les deux termes objet et but, la Convention de Vienne a voulu énoncer un critère que forment les sens raisonnablement combinés de deux termes. Ce critère peut donc être: ce que les parties ont voulu atteindre dans la limite des normes qu’elles ont formulées. L’emploi du terme objet conjointement avec le terme but peut être ainsi une garantie de plus contre une interprétation téléologique excessive.”\(^{105}\)

\(b.\) Recourse to Interpretation, but how?

It should be evident, from the authoritative sources as well as from the examined literature, that the title and the preamble of a treaty, and occasionally a programmatic article, are the prime indicators of the purpose of a treaty. Sometimes one may also find there a summary of the treaty’s object; in other cases, however, the object is defined by the treaty provisions as a whole, which means that it must be established by interpretation. Interpretation may also be needed for clarifying an ambiguous purpose. Mere assumptions, like: “the Court considers that the object and purpose ... was”\(^{106}\), or: “the purpose

\(^{104}\) It is highly probable that French doctrine has influenced the adoption and systematic use of the expression “object and purpose” of a treaty in the VCLT. The solution finally adopted in the VCLT appears as a result of a compromise between French and English doctrine. The insertion of the word “object”, as a reference to the text and the provisions of the treaty, makes the use of the “purpose”-criterion acceptable to English scholars, who favour textual interpretation.


\(^{106}\) Case Concerning Maritime Delimitation in the Area Between Greenland and Jan Mayen, supra note 38, 50.
must have been”\textsuperscript{107}, or: “it is obvious that the object ... has been”\textsuperscript{108}, may be appropriate as judicial pronouncements but are hardly adequate in different circumstances.

It should, however, be equally evident that the process of interpretation prescribed by Article 31 para.1 of the VCLT can only be used with modification for that end. It is not possible to be guided in the interpretation of a treaty by its object and purpose when those have to be elucidated first by interpreting the treaty.

If one wishes to escape the vicious circle, a two-stage procedure may help. In a first stage, a \textit{prima facie} assumption of the object and purpose of a treaty must be formed by having recourse to the title, preamble and, if available, programmatic articles of the treaty. This assumption must \textit{then be tested in a second stage against the text of the treaty} and all other available material and, if necessary, adjusted in the light of that test\textsuperscript{109}. The result of that process can then be used as a guideline in the interpretation of other treaty provisions or for assessing compliance with them.

Unfortunately, some authoritative statements cited earlier did not apply the test required to confirm the \textit{prima facie} assumptions of object and purpose, but were content with the assumptions.

A further word of caution is necessary. Although the search in the preamble of a treaty for indications of its object and purpose seems natural and logical, it must nevertheless be approached with circumspection. As far as the preambles of multilateral conventions are concerned, they are rarely prepared by the body which prepares the text. Until the early sixties it was left to the States participating in the diplomatic conference which was to adopt the convention to propose a text for the preamble\textsuperscript{110}. More recently the task has often been entrusted to the drafting committee of the conference,\textsuperscript{111} which may be able to rely on an informal draft prepared by the secretariat. In view of the circumstances of its preparation and adoption it depends on the skill and experience of this randomly composed group of drafters, on their familiarity with the mainstream intentions and on their grasp of the gist of the treaty provisions, whether the draft preamble which they produce will clearly state the purpose and succinctly summarise the object of the convention; and even then it may depend on a chance majority whether it is adopted in this form by

\textsuperscript{107} \textit{International Status of South-West Africa, supra} note 29, 130.
\textsuperscript{108} \textit{Jurisdiction of the European Commission of the Danube, supra} note 23, 64.
\textsuperscript{109} Cf. the \textit{Case Concerning the Arbitral Award of 31 July 1989, supra} note 47.
\textsuperscript{110} Cf., e.g., OR UN Conference on Diplomatic Intercourse and Immunities (1961), vol. I, 227; 39th Meeting Committee of the Whole, paras. 10–51. The custom was still followed by the UN Conference on Consular Relations in 1963.
\textsuperscript{111} Cf., e.g., OR UN Conference on the Law of Treaties, First Session (1968), 7; 3rd Plenary Meeting, para. 7.
the plenary or is amended. It happens sometimes that a preamble degenerates into a collection of high-sounding platitudes which furnish only a blurred indication of object and purpose, or none at all. One should, therefore, not expect miracles when consulting a preamble.

III. Testing the Hypothesis

Whether the hypothesis formulated in the foregoing section and the two-stage procedure suggested for determining the “object and purpose” of a treaty offer a practicable method for avoiding the pitfall of their purely subjective assumption can only be discovered by applying the method to the interpretation of the preamble of specific treaties. This shall be done in a few instances below.

1. The Charter of the United Nations

The Charter of the United Nations is a special case, and that in two respects: Although it is a multilateral treaty, it is also the constituent instrument of an organised community; and it addresses object and purpose not only in the Preamble but also in the programmatic Articles 1, 2 and 55.

If one considers the Preamble by itself, one is inclined to believe that it states in a first part the purpose or purposes of the United Nations and summarises in a second, beginning with the words “and for that ends”, the object of the Charter. Following this belief one would assume that the same sequence would be followed in Article 112 and, indeed, the text repeats:

“The Purposes of the United Nations are:

1. To maintain international peace and security, and to that end ...”, followed by a list of prospective policies in the rest of Article 1, parts of Article 2, and Article 55 through which that purpose should be pursued. These policies could, therefore, be perceived as summarising the ‘object’ of the Charter.

This understanding conflicts, however, with the Advisory Opinion of the ICJ on Certain Expenses of the United Nations113. In this Opinion the Court treated what has been identified above as summary of the “object” of the Charter as a group of secondary purposes. It stated:

112 See R. Wolfrum, “Article 1”, in: B. Simma et al. (eds.), The Charter of the United Nations. A Commentary, Oxford 1995, 49–56, 50, MN 3: “Para. 1 of Art. 1 is composed of two parts, the first of which describes the essential ‘Purpose’ of the Organisation, namely to maintain international peace and security, whereas the second paragraph sets out the means designed to achieve this ‘Purpose’.”

113 ICJ, Reports 1962, 151–180.
“The primary place ascribed to international peace and security is natural, since the fulfilment of the other purposes will be dependent upon the attainment of that basic condition.”

The evident contradiction to the aforementioned understanding has its origin in the language of the Charter, because Article 1 opens with the words “the purposes of the United Nations are”, which implies that the entire article describes purposes of the United Nations. Yet the catch in this reading is its disregard of a characteristic structural feature of the Charter. As constituent instrument of the United Nations Organisation it follows structurally the example of State constitutions: it establishes “purposes and principles” as guide for the conduct of organs while – with the exception of a few Articles which further specify Articles 1 and 2 – all other Articles are of a procedural nature, either attributing specific functions to organs or delimiting these functions.

If, to name but a few examples, “to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace”, or “to achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character” were not expressing the “object” of the Charter, it would be devoid of any substantive “object” and contain only a procedural one.

This leads to the submission that the Certain Expenses Opinion of the ICJ does not invalidate the reading of the Charter which was arrived at by applying the method suggested in the hypothesis. It seems that by treating the object of the Charter as a group of secondary purposes the Court may have been mislead by the inaccurate language of the Charter itself or may, perhaps, have been the victim of one of the periodic vagaries in the choice of terms which became apparent in the analysis of its pronouncements.

Nevertheless, in view of the doubts which may still persist, it would be improper to make a prima facie assumption about the “object” of the Charter by simply relying on its Preamble and programmatic Articles. The object can thus only be determined by a thorough analysis of all Charter provisions for which there is no room in this paper.

2. The Vienna Convention on Diplomatic Relations (VCDR)

The VCDR is a seemingly easier case. Its Preamble contains two unequivocal pointers to the Convention’s purpose when it states:

114 Ibid., 168 (italics added).
115 See Wolfrum, loc.cit. (note 112), 50, MN 2.
“Recalling” that peoples of all nations from ancient times have recog-
nized the status of diplomatic agents, ...

... 

Believing that an international convention on diplomatic intercourse\textsuperscript{116}, privileges and immunities would contribute to the development of friendly
relations among nations, irrespective of their differing constitutional and
social systems ...”

Stripped of the rhetoric of “peaceful coexistence” which was fashionable at
the period, this simply means that the parties wished to put diplomatic rela-
tions on a firm conventional basis in the hope that this would eliminate or at
least reduce the possibility of future conflicts.

The VCDR is, on the other hand, the classical case of a treaty embody-
ing its object in the substantive provisions, which must, therefore, be read
together for its discovery. There is, however, one clue to the object of the
Convention in the Preamble, and it is a curious one. This is the paragraph
which reads:

“Realizing that the purpose\textsuperscript{117} of such privileges and immunities is not
to benefit individuals but to ensure the efficient performance of the func-
tions of diplomatic missions as representing States ...”

This paragraph has a colourful past. In the text of the Preamble proposed by
five States\textsuperscript{118}, it read originally:

“Realizing that the purpose of such immunities and privileges is to en-
sure the efficient performance of the functions of diplomatic missions
and not for the personal benefit of the members of such missions ...”

On the request of the Australian delegate the last “twelve ugly words” were
deleted by 35 votes for the deletion, 19 against and 18 abstentions\textsuperscript{119}. An oral
Soviet amendment to add after the words “diplomatic missions” the words
“as representative organs of States” was adopted by 39 votes to 5, with 23
abstentions\textsuperscript{120}, in spite of the Irish delegate’s warning that it “would put all the
emphasis on the representative character and in effect discard the ‘functional

\textsuperscript{116} This is an oversight of the Drafting Committee which failed to align the text with the
changed title of the Convention.

\textsuperscript{117} This is a reference to the purpose of privileges and immunities and not to the purpose of the
Convention.

\textsuperscript{118} Doc A/CONF.20/C.1/L.329, submitted by Burma, Ceylon, India, Indonesia and the
United Arab Republic; OR UN Conference of Diplomatic Intercourse and Immunities (1961),
vol. II, 48.

\textsuperscript{119} See source in note 110, paras. 43 and 50.

\textsuperscript{120} \textit{Ibid.}, paras. 40 and 50.
necessity’ theory”121. A separate vote on the paragraph as amended was then requested by the UK, and the paragraph was adopted by 45 votes to 9, with 14 abstentions.122

But that was not yet the end of the story. When the Preamble was considered in Plenary, the UK submitted an amendment, proposing to reintroduce the words “not to benefit individuals but” after the words “the purpose of such privileges and immunities is”123. That amendment was adopted by 68 votes to none, with 4 abstentions.124

It is difficult to imagine how that preambular paragraph may guide the interpretation of the provisions concerning privileges and immunities in the VCDR. Whatever the distinguished representatives may have thought in adopting the Soviet amendment, “functional necessity” and “State representation” are disparate theories125 and their use in interpretation may lead to quite different results.126 One wonders moreover what States, when interpreting the immunity provisions of the Convention and coming across an obscure point which they seek to clarify by having recourse to the records of the conference, will make of the delegations’ vacillation concerning the words “not for their personal benefit”.

One thing is obvious. The purpose of the VCDR is clearly recognizable in the Preamble even if, by stating the obvious, it is not terribly enlightening. The indication of the object in the Preamble, on the other hand, is partly confusing and, on the whole, far from being comprehensive. This confirms the submission in the hypothesis that the object is expressed by the treaty provisions as a whole and can only be determined by considering these together, a task which cannot be carried out in the present context. In the absence of a third-party decision this necessary but intricate process leaves ample room for subjectively tainted positions of the parties in any dispute that may arise.

121 Ibid., para. 49.
122 Ibid., para. 51.
123 Doc A/CONF.20/L.3; source note 118, 76.
124 Source in note 110, 7; Fourth Plenary Meeting, para. 9.
126 E. Suy, La Convention de Vienne sur les Relations Diplomatiques, 12 ÖZöR (1962), 86–114, states in this respect: “Il est cependant bien entendu – et cela résulte clairement des discussions –, que la théorie des nécessités de la fonction est la plus importante et que, subsidiairement, c’est-à-dire lorsque cette théorie ne suffit pas pour expliquer certains privilèges, on peut avoir recours à la théorie de la représentation” (91). However, that proposed subsidiarity does not follow necessarily from the text.

An amendment by Switzerland (A/CONF.20/C.1/L.322; source in note 121, 46) which had proposed that “the provisions of this Convention should be interpreted in accordance with the criterion of functional necessity” was withdrawn (source in note 110, para. 38).
3. The Vienna Convention on the Law of Treaties (VCLT)

The Preamble of the VCLT contains a clear indication of the Convention’s purpose, which is reminiscent of the corresponding paragraph in the Preamble of the VCDR. It is, however, in some ways more elaborate, in that it links the aim of stable and unstrained treaty relations which the codification convention is intended to promote to the achievement of the purposes of the United Nations.

In contrast to that clarity, the reference to the object of the VCLT is even more reserved than that in the VCDR. In one paragraph it refers to the parties’ “having in mind the principles of international law embodied in the Charter of the United Nations” and cites some of them. Since the members of the United Nations have to interpret their international obligations in the light of the Charter principles anyway, nothing new is added by that paragraph.

Of greater interest is another paragraph which reads:

“Noting that the principles of free consent and of good faith and the pacta sunt servanda rule are universally recognized ...”.

This paragraph describes essential features of the object of the VCLT which underlie several articles. One is surprised, though, that the principle of rebus sic stantibus is missing from the list, since it is not only the subject of Article 62 but a generally guiding principle of Part V, Section 3 of the VCLT: An equitable regulation of treaty termination is the fruit of a careful balance between the preservation of the treaty link (pacta sunt servanda) and the termination of a burden which has become unfair (rebus sic stantibus), a balance which is at the root of all articles of this Section, including the termination of a treaty in consequence of its breach.

As in the case of the VCDR it is obvious that the description of the object of the Convention in the Preamble is not exhaustive and that the object’s reliable determination would require the interpretation of the treaty as a whole, a task which would, once again, go beyond the scope of this paper.

127 “Believing that the codification and progressive development of the law of treaties achieved in the present Convention will promote the purposes of the United Nations set forth in the Charter, namely, the maintenance of international peace and security, the development of friendly relations and the achievement of co-operation among nations ...”.
128 E.g., Articles 26 and 49–52.
4. The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)

The CEDAW\(^{129}\) is one of the few treaties in which the object and purpose can be found in the preamble and where the two-stage procedure suggested in the hypothesis yields results.

The purpose of the CEDAW is clearly expressed in several parts of the Preamble\(^{130}\) and is summarised in the title of the Convention which concerns “The Elimination of the Discrimination Against Women”. The object of the Convention is indicated in the following paragraph of the Preamble:

“Determined to implement the principles set forth in the Declaration on the Elimination of Discrimination Against Women and, for that purpose, to adopt the measures required for the elimination of such discrimination in all its forms and manifestations ...”\(^{131}\).

Thus the implementation of the principles set forth in the cited Declaration and the adoption of the required measures are the object of the Convention, whereas the elimination of discrimination against women and the achievement of full equality between men and women are its purpose.

This hypothesis is confirmed by the wording of Articles 1, 2 and 3 of the Convention. The opening article of a convention usually defines the terms used in the convention. Article 1 of the CEDAW sheds light on the purpose of the Convention by clarifying the term “discrimination against women” which has to be eliminated according to the purpose of the Convention:

“... the term discrimination against women shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect ...”.

Article 2 of the Convention describes the object of the Convention as follows: to promote the pursuit of a policy of eliminating discrimination against women by the Member States, i.e., the embodiment of the principle of equality of men and women and the assurance of its practical realisation, the adoption of

\(^{129}\) See source in note 1.

\(^{130}\) Cf. “equal rights of men and women” (para. 1 of the Preamble), “everyone is entitled to all the rights and freedoms ... without distinction of any kind, including distinction based on sex” (para. 2), “to ensure the equal rights of men and women to enjoy all economic, social, cultural, civil and political rights” (para. 3), “promoting equality of rights of men and women” (paras. 4, 5 and 9), “full enjoyment of the rights of men and women” (para. 10), “the attainment of full equality between men and women” (para. 11), “maximum participation of women on equal terms in all fields” (para. 12), and “to achieve full equality between men and women” (para. 14).

\(^{131}\) See last paragraph of the Preamble (italics added).
an appropriate legislation and other measures including sanctions prohibiting
discrimination against women, etc. And Article 3 summarises the obligations
of the States pursuant to this object and this purpose:

“States parties shall take in all fields, in particular in the political, social,
economic and cultural fields, all appropriate measures, including legis-
lation, to ensure the full development and advancement of women [this
is the object of the CEDAW], for the purpose of guaranteeing them the
exercise and enjoyment of human rights and fundamental freedoms on a
basis of equality with men” [this is the purpose of the CEDAW].

Applying the hypothesis, it is in this case possible to test the 
prima facie 
assumption of object and purpose of the Convention against the text of the
treaty. The CEDAW is a programmatic Convention, thus the object of
the treaty has a programmatic nature too. The provisions of the CEDAW which
establish the obligation of States to take measures in several fields for pro-
moting the elimination of the discrimination of women confirm the object
and purpose which was ascertained by a prima facie assumption. In fact
several articles of the CEDAW begin as follows: “States-Parties shall take
all appropriate measures to ... eliminate discrimination against women ... in
order to ensure them equal rights with men ... in the field of ...”132.

This justifies the submission that the test works in the case of the CEDAW.
The result of that process, i.e. the object and purpose thus established, can
be used as a guiding point in the interpretation of other provisions of the
CEDAW or for assessing the compliance with them. For example, the re-
servation of the Maldives to the CEDAW mentioned in the introduction to
this paper appears incompatible with the object and purpose of the CEDAW
established by the test. In fact a reservation stating that the Member State
“does not see itself bound by any provisions of the Convention which obliges
to change its Constitution and laws in any manner” is clearly contrary to
the object and purpose of the CEDAW which demands the adoption by the
States-parties of all appropriate measures, including legislation, to achieve
the elimination of all forms of discriminations against women.

The apparent ease of making a distinction between the object and the pur-
pose of the CEDAW seems to be characteristic of human rights treaties with a
definite purpose and object. Other similar conventions, like the Convention on
the Elimination of all Forms of Racial Discrimination,133 also have their pur-
pose embodied in the title of the Convention and confirmed in the Preamble,

132 See Articles 5 to 8, 10 to 14, and 16 of the CEDAW. In the same sense other provisions
of the CEDAW begin with “States-Parties shall grant ...” (Article 9) or “States-Parties shall
accord to women ...” (Article 15).
133 Reprinted in 5 ILM (1966), 352.
and the Preamble of such conventions points likewise to their object. The object of such conventions is to promote the achievement of the purpose by prescribing the adoption of appropriate measures in municipal legislation. Consequently it is possible to test the object and purpose discovered in the Preamble of those conventions against the text of the respective convention as a whole, and then to use the result of the test for the interpretation of other treaty provisions or for assessing compliance with them.


The Preamble of the ECHR states that “the aim of the Council of Europe is the achievement of greater unity between its members” and that one of the methods by which that aim is to be pursued is “the maintenance and further realisation of human rights and fundamental freedoms”. The purpose of the ECHR is probably the sum of these statements, i.e., the maintenance and further realisation of human rights and fundamental freedoms for the achievement of greater unity between the members of the Council of Europe. According to its Preamble, the object of the Convention is “the collective enforcement of certain of the rights stated in the Universal Declaration” the observance of which is to be ensured by the Member States, which “shall secure to everyone within their jurisdiction the rights and freedoms defined in ... [the] Convention” (Article 1 of the Convention).

Yet these statements are not as clear as those in the CEDAW. The ECHR has a much more general “object and purpose” than the CEDAW. Accordingly, the object and purpose of the ECHR are described in the following general terms: to ensure the protection of human rights of individuals (object of the ECHR) in order to maintain and further realise human rights and fundamental freedoms and to achieve a greater unity between the Member States of the Council of Europe (purpose of the ECHR).

General human rights conventions, designed to protect a range of different human rights, only declare, like the ECHR, a very broad “object and purpose”. But while the ECHR has the same object as other general human

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134 Cf. para. 10 of the Preamble of the CERD: “Resolved to adopt all necessary measures [this is the object of the Convention] for speedily eliminating racial discrimination in all its forms and manifestations [this is the purpose of the Convention], and to prevent and combat racist doctrines and practices [object of the Convention] in order to promote understanding between races and to built an international community free from all forms of racial segregation and racial discrimination [purpose of the Convention]

And see para. 12, which states the object of the CERD: “Desiring to implement the principles embodied in the United Nations Declaration on the Elimination of All Forms of Racial Discrimination and to secure the earliest adoption of practical measures to that end.”
rights conventions, it has a more complex purpose. Its specific purpose is connected with the purpose of the Council of Europe, which is to create an increasingly integrated regional system. This purpose is, in turn, linked to that integrated European system, in which authoritative bodies may render binding decisions, particularly on the interpretation of the convention at issue.

If the “object and purpose” of the ECHR may thus be determined objectively by judicial means, a problem occurs in the context of other human rights conventions, for instance the International Covenant on Civil and Political Rights (CCPR). Such conventions also have a very general object but a much vaguer purpose than the ECHR, and they lack organs for adopting an interpretation binding upon the States parties. In fact, the Preamble of the CCPR states that

“the ideal of free human beings enjoying civil and political freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights...”.

The creation of these conditions and the promotion by States of “universal respect for, and observance of, human rights and freedoms” seem to be the object, whereas the achievement of the ideal mentioned above appears to be the purpose of the treaty.

The object and purpose of such general human rights conventions are too vague to be a helpful guide for interpretation of other treaty provisions or for assessing compliance with them in accordance with the two-stage procedure suggested in the hypothesis and which proved successful in the case of the CEDAW. Furthermore, since no judicial organ is established which could interpret the respective convention with binding effect, the criterion of “object and purpose” becomes nearly unworkable.

IV. General Conclusion

With regret one must conclude at the end of the enquiry that the object and purpose of a treaty are indeed something of an enigma. The method for clarification suggested in the hypothesis provides an objective determination only in respect of a specially structured convention. While it was in all cases possible to establish the “purpose” of a convention beyond doubt from the language of its preamble, the “object” remained elusive in the testing of the examples in part III, with the exception of the CEDAW and, possibly, some other conventions with a similarly definite object. Generally, indications of the object may be found in most preambles but they are rarely exhaustively

135 Reprinted in 6 ILM (1967), 368.
formulated. One is thus required to discover the object by interpreting the provisions of the respective treaty as a whole, a path which has not been pursued to its end in this paper, given its limited scope. One thing is, however, clear: the consideration of treaty provisions to determine which of them are essential for achieving the purpose of the treaty and are, therefore, its “object”, and which of them are not, is a considerable challenge for States, even when undertaken in good faith. If the separation of “essential” and “unessential” is not undertaken with the help of formal criteria, like classifying final clauses as unessential, the views of States as to the essential core of a treaty will nearly inevitably be subjective, particularly in respect of provisions concerning a judicial competence to decide disputes over the implementation of the treaty.

The reference to object and purpose is thus a criterion which requires third-party decisions for its objective implementation. In purely inter-State relations its uncertainty raises more problems than it solves and is liable of becoming a bone of contention. This conclusion confirms, unfortunately, the misgivings of the ILC in its 1951 statement.

Although Yasseen argued in the debate in the ILC on the Law of Treaties that “excessive details” in the draft convention “should be avoided” and that “the Commission should confine itself to the leading principles governing interpretation ...”, this proposition was neither felicitous in the case of the VCLT, nor good advice to the drafters of future multilateral conventions. It may sometimes be unavoidable to draft in general terms and to include abstract and undefined terms like “object and purpose” in a text. But then directives for determining their meaning and application, especially in inter-State relations, become indispensable. If they cannot be achieved because the future parties are not willing to accept them, the use of undefined guiding principles for interpretation is counterproductive: Instead of reducing the potential of future conflicts the convention plants the seed of them.

137 See source in note 55.