

# Current Trends in Treaty Interpretation and the South African Approach\*

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## Introduction

To be of any value, a study of the South African approach to treaty interpretation should not take place in splendid isolation but should instead be set against current international practice in this regard. It is therefore proposed to examine briefly the general rules of treaty interpretation followed and accepted by the international community and to compare the South African approach with this. Even prior to the Vienna Convention on the Law of Treaties<sup>1</sup> different attitudes towards this problem had been adopted by States and international lawyers, and a detailed body of working rules had come into existence. The International Law Commission aimed to codify the main rules for the guidance of States and international tribunals. Articles 31 and 32 of the Vienna Convention are the results of its efforts. A strong element of progressive development is present in these articles, which by no means entirely supersede the rules in practice before the conclusion of the Convention; they should rather be regarded as complementary to the rules already in force. In any event these articles are themselves subject to interpretation.

The South African approach to treaty interpretation is a textual approach. It clearly mirrors the South African attitude towards municipal law and the judicial function in general and has its roots in the positivist legal philosophy. In the municipal sphere it is to be regretted that very few treaties have been subject to interpretation by the local courts. In those rare instances when municipal courts have considered the interpretation of a treaty, they have addressed the problem primarily as one of statutory interpretation rather than treaty interpretation. This is reasonable in view of the fact that treaties must be incorporated into municipal law by legislative action before they begin to operate locally.

The South African approach to treaty interpretation has manifested itself mainly in the international sphere through arguments submitted on a number of occasions to the International Court of Justice in the various South-West Africa Advisory Opinions and judgments. These submissions, therefore, form the primary basis of this study. It will become apparent that the South African approach has, through the years,

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1. On 28 December 1979 the government of Togo deposited its instrument of accession with the Secretary-General of the United Nations. This accession brought to thirty-five the number of instruments of ratification and accession deposited with the secretary-general in respect of the Convention and had the effect of bringing the Convention into force in accordance with Article 84.

remained rigidly textual. The advent of the Vienna Convention on the Law of Treaties has served only to consolidate this attitude and no effort has been made to accommodate or even to understand the teleological point of view that has gained widespread acceptance in many parts of the world.

(a) *Varieties of Approach to Treaty Interpretation*

It is a task of some difficulty to describe with any precision what are the generally accepted principles of international law relating to treaty interpretation in view of the varying practices of States and the numerous erudite but conflicting academic and doctrinal discussions on the subject. The problem has been rendered even more difficult by the approach of the Permanent Court of International Justice and its successor, the International Court of Justice, which have been far from consistent in this matter. Nevertheless, in 1951, Sir Gerald Fitzmaurice, then Second Legal Adviser to the British Foreign Office, was able to write<sup>2</sup> that there existed three main schools of thought on the subject of treaty interpretation, the first school concentrating on deciphering the intentions of the contracting parties, the second adopting a textual approach aimed at ascertaining the 'ordinary meaning' of the words of the treaty, while the third, a teleological school, was intent on putting into effect the 'aims and objects' of the treaty. All three schools still exist today although they have to some extent been overtaken by the advent of the Vienna Convention on the Law of Treaties.<sup>3</sup>

While the ideas of each school are not necessarily exclusive of one another, each nonetheless tends to confer primacy on different aspects of treaty interpretation. Very few international lawyers, except perhaps those who support the extreme teleologist train of thought, would deny that the basic *aim* of treaty interpretation is ultimately to give effect to the intentions of the contracting parties.<sup>4</sup> Ideas differ, though, on how this objective is to be achieved.

(i) *The Intentions Approach*

Adherents of the 'intentions' school believe that 'the only consideration that matters in the process of interpretation is to discover the intention of the parties . . . [and that] (n)o rule of interpretation purports . . . to serve a purpose other than the revealing of the intentions of the parties'.<sup>5</sup> Such overriding concern with the intentions of the parties has been criticized<sup>6</sup>

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2. Fitzmaurice G G, 'The Law and Procedure of the International Court of Justice: Treaty Interpretation and Certain Other Treaty Points' (1951) 28 BYBIL 1 at 1-2.
  3. This Convention is reproduced in (1969) 63 AJIL 875.
  4. See Fairman C, 'The Interpretation of Treaties' (1935) 20 Tr Gr Soc 122 for an early look at this problem.
  5. Lauterpacht H, *International Law-Collected Papers* Vol I (1970), p 361; Judge Anzilotti in his Dissenting Opinion in the *Night Work* case heard before the Permanent Court of International Justice, Ser A/B, No 50, p 383, expressed this attitude by saying 'the words have no value except as an expression of the intention of the parties'.
  6. See Fitzmaurice, op cit 3-6 and 14-17; also Fitzmaurice, 'The Law and Procedure of

for a number of reasons. One of the most fundamental is that this school ignores the fact that the treaty was drafted precisely to give effect to the intentions of the contracting parties and therefore it must be presumed to do so. This intention is accordingly to be found in the text itself and thus the primary question is not what the parties intended but what the text means. Whatever it clearly means will be deemed to reflect the intentions of the parties. In addition, the intentions approach to treaty interpretation is inadequate in the interpretation of multilateral treaties where often many of the parties have joined by accession and have taken no part in the framing of the convention. Here the presumption arises that they have joined on the basis of what the text itself says rather than what the original contracting parties intended.<sup>7</sup>

Situations may well arise in which an international tribunal or national court, faced with the task of interpreting a disputed provision of a treaty, is not able to do so on the basis of a common intention of the contracting parties because such a common intention may not exist at all in relation to that provision.<sup>8</sup> It is possible that the parties, although using identical terminology, might in good faith have attached different meanings to it, perhaps dictated by the peculiarities of their own respective languages. Perhaps one party, bent on benefiting from an ambiguity in expression, has deliberately allowed this to be included in the body of the treaty. Often where the parties have been unable to reach an agreed solution, they will be content to couch a phrase or term in deliberately non-committal or ambiguous language, leaving the problem open for solution in the future by further agreement, negotiation or arbitration.

The difficulty of finding the common intention of the parties manifests itself when two or more provisions of the same treaty are mutually inconsistent. Many multilateral treaties, in particular, cover a wide range of subjects. Compromise provisions ultimately drafted after protracted negotiations are often not conducive to consistency. A judge confronted with the task of interpreting such conflicting treaty provisions will not be afforded any aid by attempting to rely on this so-called 'legislative will'. He must, instead, view the treaty as a whole.<sup>9</sup>

(ii) *The Textual Approach*

Contraposed to the 'intentions' school are the textualists whose prime object is to establish the meaning of the *text* of the treaty. The emphasis here is to give all words and phrases their natural and ordinary meanings and to allow the *text* to reveal the intentions of the contracting parties rather than to attribute a meaning to the text in the light of the intentions of the parties. The starting-point of the textualist school is that any approach to the interpretation of a treaty must begin with the words

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the International Court of Justice 1951-4: Treaty Interpretation and Other Treaty Points' (1957) 33 BYBIL 203 at 205 et seq.

7. Ibid.

8. Lauterpacht H, 'Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties' (1949) 26 BYBIL 48 at 76 et seq.

9. Ibid.

actually used. First and foremost, the intentions of the parties are to be deduced from the way in which these intentions have been expressed in the text. As Sir Gerald Fitzmaurice stated so succinctly:<sup>10</sup>

'(A) sounder and more scientific method of approach [than the 'intentions' approach] would seem to be one which, while not exactly ignoring the question of intentions, lays the chief emphasis elsewhere, or alternatively attempts to give effect to intentions by methods other than a direct investigation of them as such. . . . Interpretation starts, as it must, with a careful consideration of the text to be interpreted. This is so because the text *is* the expression of the will and intention of the parties. To elucidate its meaning, therefore, is, *ex hypothesi* to give effect to that will and intention. If the text is not clear, recourse must be had to extraneous sources of interpretation: but the object is still the same—to find out what the text means or must be taken to mean.'

Perhaps the single most important consideration that adherents of the textual school take into account is the 'natural and ordinary' meaning of the words of the treaty. A court will give effect to a provision of a treaty in the sense required by its clear and unambiguous wording, unless some valid ground can be shown for interpreting the provision in a different way. This approach was amply demonstrated in the *Competence of the General Assembly* case<sup>11</sup> where the International Court of Justice was asked to decide whether the General Assembly could admit a State to the United Nations without the Security Council having made any recommendation on the matter. According to Article 4(2) of the Charter, the admission of a State to the United Nations 'will be effected by a decision of the General Assembly upon the recommendation of the Security Council'. Although the Court went on to consider other reasons supporting its view that the Assembly acting alone was not competent to admit new members to the organisation, the real basis for its decision was the fact that Article 4(2) had a clear and obvious meaning to which the Court was bound to give effect:

'The Court considers it necessary to say that the first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty, is to endeavour to give effect to them in their natural and ordinary meaning in the context in which they occur. If the relevant words in their natural and ordinary meaning make sense in their context, that is an end of the matter. . . . When the Court can give effect to a provision of a treaty by giving to the words used in it their natural and ordinary meaning, it may not interpret the words by seeking to give them some other meaning. In the present case the Court finds no difficulty in ascertaining the natural and ordinary

10. Fitzmaurice, 'The Law and Procedure of the International Court of Justice 1951-4: Treaty Interpretation and Other Treaty Points' (1957) 33 BYBIL 203 at 207.

11. ICJ Rep 1950, p 4.

meaning of the words in question and no difficulty in giving effect to them.<sup>12</sup>

(iii) *The Teleological Approach*

The third approach to treaty interpretation is that of the teleological or sociological school, on which a substantial amount of American theory and practice is based<sup>13</sup> and amongst whose chief and most vocal advocates are to be found Professors McDougal, Lasswell and Miller.<sup>14</sup> Teleologists argue primarily that the text of the treaty should be regarded simply as the formal embodiment of the parties' shared intentions and that any interpreter is required to make, as a matter of course, a far-ranging enquiry into non-textual matters.<sup>15</sup> The main goal of treaty interpretation here is to ascertain the objects and purposes of the treaty and then to interpret the treaty so as to give effect to those objects and purposes.<sup>16</sup> The enquiry is of necessity much broader in scope than that of the textual school. To a certain extent, however, the teleological approach is simply an amalgam of elements of the first two approaches. In so far as it relies on the objects and purposes of the treaty as they are expressed in the text and in the preamble, the teleological approach is essentially a variant of the textual approach.<sup>17</sup> On the other hand, by going beyond the text and seeking to ascertain the original aims of the parties to the convention by reference to the entire course of negotiations and the circumstances surrounding its conclusion, it manifests a kinship with the intentions approach. The teleological stance is, nonetheless, unique, in that it acknowledges, in accordance with the doctrine of the 'emergent purpose', that the objects and purposes which determine the true interpretation of a treaty may be those which exist at the time of interpretation rather than at the time of its conclusion.<sup>18</sup> This aspect of the teleological approach is not textual because the emergent purpose cannot be gathered from the text, nor is it intentional, since it is independent of the original intentions of the parties.<sup>19</sup>

One model formulation of the teleological approach is contained in the Draft Convention on the Law of Treaties prepared in 1935 as part of the Harvard Research in International Law.<sup>20</sup> This Draft Convention

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12. At p 8.

13. Merrills J G, 'Two Approaches to Treaty Interpretation' (1968-9) Aust YB IL 55 at 64 et seq gives a lucid exposition of the American viewpoint.

14. See, for example, Professor McDougal's speech on behalf of the United States to the Vienna Conference on the Law of Treaties, reproduced in (1968) 62 AJIL 1021; see, too, McDougal, Lasswell and Miller, *The Interpretation of Agreements and World Public Order* (1967).

15. McDougal, Lasswell and Miller, op cit.

16. Sinclair I M, 'Vienna Conference on the Law of Treaties' (1970) 19 ICLQ 47 at 61.

17. Jacobs F L, 'Varieties of Approach to Treaty Interpretation: With Special Reference to the Draft Convention on the Law of Treaties Before the Vienna Diplomatic Conference' (1969) 18 ICLQ 318 at 319.

18. Ibid, p 320.

19. Ibid.

20. 'Harvard Research in International Law, Draft Convention on the Law of Treaties' (1935) 29 AJIL Supp 653.

stipulates<sup>21</sup> that '(a) treaty is to be interpreted in the light of the general purpose which it is intended to serve'. It then lists a variety of factors which 'are to be considered in connection with the general purpose which the treaty is intended to serve'.<sup>22</sup> These include the historical background of the treaty, *travaux préparatoires*, the circumstances of the parties at the time of its conclusion as well as the change in these circumstances sought to be effected, any subsequent conduct of the parties in applying the treaty, and the conditions prevailing at the time of interpretation. One important factor is that the Draft Convention, unlike the 'intentions' and the 'textual' approaches, makes no attempt to establish any hierarchical order among these principles of treaty interpretation. It simply lists them. In similar fashion, the *Restatement of Foreign Relations Law of the United States*, published in 1965 by the American Law Institute, lists a large number of 'factors to be taken into account by way of guidance in the interpretative process' other than the ordinary meaning of the words of the agreement in their context.<sup>23</sup> It emphasizes that this list is not intended to be exhaustive. Paragraph 147(2) of the *Restatement* specifically provides that there is no established priority as between these aids to the interpretative process.

Professor Myres S. McDougal, in the course of criticizing the final recommendations of the International Law Commission in regard to the interpretation of treaties,<sup>24</sup> commented that

'in the absence of a comprehensive, contextual examination of all the potentially significant features of the process of agreement, undertaken without the blinders of advance restrictive hierarchies or weightings, no interpreter can be sure that his determinations bear any relation to the genuine shared expectations of the parties.'

He described the basic approach of the Commission in arrogating to the text of the treaty the role of serving as the 'exclusive index of the shared expectations of the parties' as an 'exercise in primitive and potentially destructive formalism [because it ignored the fact that] the parties to any particular agreement may have sought to communicate their shared expectations of commitment by many other signs and acts of collaboration'.<sup>25</sup>

Professor McDougal, in his subsequent role as a member of the United States delegation to the Vienna Conference on the Law of Treaties, had ample opportunity to elaborate further on the teleological viewpoint. In a statement made on the 19 April, 1968, to the Committee of the Whole,<sup>26</sup> he

21. Ibid, p 937, Article 19.

22. Ibid.

23. Paragraph 147.

24. McDougal M S, 'The International Law Commission's Draft Articles Upon Interpretation: Textuality *Redivivus*' (1967) 61 AJIL 992 at 998.

25. Ibid, p 997.

26. The full text of Professor McDougal's statement has been published in the (1968) 62 AJIL 1021.

pointed out<sup>27</sup> that 'the long historic trend in the great bulk of decisions is for an interpreter to take into account any circumstance which may [a]ffect the common intention which parties seek to express in a text'.

In most cases, the 'plain' and 'ordinary' meanings have simply been regarded by interpreters as 'one important index' among many others of ascertaining the intention of the contracting parties rather than as 'inexorable commands foreclosing further enquiry'. The textual approach, which imposed on parties alleged 'plain' and 'ordinary' meanings as well as an artificial, preclusionary hierarchy of interpretative aids amounted, in McDougal's view, to 'clumsy and arbitrary deformation completely contrary to the basic policies of a free world order'.<sup>28</sup> Another, more tangible criticism he levied was that 'reasonable men may reasonably differ as to which of multiple dictionary meanings represents common intent'.<sup>29</sup> By over-emphasising the primacy of the text and the priority of ordinary meanings the doors are flung open to greater uncertainty than would be the case if interpreters insisted upon a comprehensive, contextual examination of all factors potentially relevant to discovering the common intent.<sup>30</sup>

With these thoughts in mind, among others, the United States delegation tabled an amendment<sup>31</sup> to the draft articles<sup>32</sup> submitted by the International Law Commission. This amendment attempted to eliminate the rigidities and restrictions of the two draft articles and to merge these two articles into one 'open-ended itemization of elements relevant to rational interpretation'.<sup>33</sup> According to the proposed amendment<sup>34</sup> any treaty was to be interpreted 'in good faith in order to determine the meaning to be given to its terms in the light of all relevant factors'. There followed a non-exhaustive list of nine factors, including *inter alia* the context of the treaty, its objects and purposes, the preparatory works, and the circumstances surrounding the conclusion of the treaty. Through this proposed amendment, which sought to place an 'economic emphasis' on the contents of the text, the United States delegation sought to avoid any fixed hierarchy of aids to interpretation and to make all elements which might be helpful in any particular set of circumstances accessible to interpreters, be they 'ordinary meaning', 'subsequent practice', 'preparatory works', or indeed, any other. The American delegate stated that '(t)he aspiration of our draft is to encourage an economic, systematic and disciplined canvass by interpreters of all elements which may aid in the identification and clarification of common intent'.<sup>35</sup>

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27. Ibid, p 1022. The AJIL text uses 'effect', but 'affect' is surely correct: see UN Conf, 1st Sess, p 167.

28. Ibid pp 1025-6.

29. Ibid pp 1026.

30. Ibid.

31. A/CONF. 39/C.1/L.156.

32. At that stage draft articles 27 and 28.

33. (1968) 62 AJIL 1027.

34. Reproduced in the (1968) 62 AJIL 1021 fn 2.

35. Ibid, p 1027.

(b) *The Vienna Convention on the Law of Treaties*

The question of the approach adopted in the Vienna Convention on the Law of Treaties may now be considered. The International Law Commission realized from the outset that they were faced with an *embarras de richesse*. The Commission acknowledged that the jurisprudence of international tribunals had furnished examples of all these approaches to treaty interpretation, and that while the textual approach seemed to predominate, none of the three methods was exclusively the correct one, in that their use in any given case was to some extent a matter of choice and appreciation.<sup>36</sup> The Commission also realized<sup>37</sup> that there were many different principles of interpretation whose appropriateness in any particular instance depended largely on the particular context and on a subjective appreciation of varying circumstances. For these reasons, it at first considered inserting a permissive provision stating simply that recourse *might* be had to the principles in question for the purpose of interpreting a treaty. The Commission ultimately rejected this proposition as undesirable because of the danger that any inadvertent omission of a principle from the list might be construed in a way which would throw doubt upon its status even as a subsidiary aid to interpretation. In the outcome the Commission concluded that the choice before it was either to omit altogether the topic of interpretation of treaties from the Convention or to seek to isolate and codify the comparatively few rules which, to its mind, constituted the strictly legal basis of the interpretation of treaties.<sup>38</sup> It embarked on the latter course of action for a variety of reasons. Primarily it valued the certainty and uniformity in interpretative methods that such a codification would provide. It recognised that the interpretation of treaties without arbitration and according to law was a vital linch-pin of the *pacta sunt servanda* rule, important in practice both for the application and the drafting of treaties.

Another factor which influenced the decision of the Commission was the realization that doctrinal differences concerning methods of interpretation had tended to weaken the significance of the text as the expression of the will of the parties, and the Commission deemed it desirable to take a clear position on the role of the text in this regard. The conclusion was reached that, in the international community where the role of treaty interpretation was of such importance, there was particular value in codifying as rules such basic principles of interpretation which, in the course of their investigations, they had found to be generally accepted as law.<sup>39</sup> The Special Rapporteur accordingly prepared for the consideration of the International Law Commission draft articles dealing generally with the interpretation of treaties. These took their inspiration

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36. Third Report on the Law of Treaties by Special Rapporteur (Waldock). YbILC 1964 Vol II, p 54.

37. Ibid.

38. Ibid.

39. See the comments of Special Rapporteur (Waldock) in his Sixth Report on the Law of Treaties. YbILC 1966 Vol II, p 94.



from two major sources. The first was the 1956 Resolution of the Institute of International Law<sup>40</sup> which provided:

'The agreement of the parties having been reached on the text of the treaty, the natural and ordinary meaning of the terms of that text should be taken as the basis of interpretation. The terms of the provisions of the treaty should be interpreted in the context as a whole, in accordance with good faith and in the light of the principles of international law.<sup>41</sup> However, if it is established that the terms employed should be understood in another sense, the natural and ordinary meaning of those terms is set aside.'<sup>42</sup>

Article 2 went on to provide that an international tribunal could decide whether and to what extent other methods of interpretation should be employed. These included the consultation of *travaux préparatoires*, the practices followed by States in the actual application of the treaty and the consideration of the objects of the treaty.<sup>43</sup>

The second major source of inspiration for the Commission was Sir Gerald Fitzmaurice's formulation of the major principles of treaty interpretation which were based on the jurisprudence of the International Court of Justice during the period 1946 to 1954. These principles were stated in the following terms:<sup>44</sup>

I. Principle of Actuality (or Textuality). Treaties are to be interpreted primarily as they stand, and on the basis of their actual texts.

II. Principle of the Natural and Ordinary Meaning. Subject to Principle VI below, where applicable, particular words and phrases are to be given their normal, natural, and unstrained meaning in the context in which they occur. This meaning can only be displaced by direct evidence that the terms used are to be understood in another sense than the natural and ordinary one, or if such an interpretation would lead to an unreasonable or absurd result. Only if the language employed is fundamentally obscure or ambiguous may recourse be had to extraneous means of interpretation, such as consideration of the surrounding circumstances, or *travaux préparatoires*.

III. Principle of Integration. Treaties are to be interpreted as a whole, and particular parts, chapters or sections also as a whole.

Subject to the foregoing Principles

IV. Principle of Effectiveness (*ut res magis valeat quam pereat*). Treaties are to be interpreted with reference to their declared or apparent objects and purposes, and particular pro-

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40. 1956 *Annuaire* 364-5.

41. Article 1(1).

42. Article 1(2).

43. It can be appreciated that this Resolution contained elements of all the different approaches to treaty interpretation.

44. Fitzmaurice, 'The Law and Procedure of the International Court of Justice 1951-4: Treaty Interpretation and Other Treaty Points' (1957) 33 *BYBIL* 203 at 211-2.

visions are to be interpreted so as to give them their fullest weight and effect consistent with the normal sense of the words and with other parts of the text, and in such a way that a reason and a meaning can be attributed to every part of the text.

V. Principle of Subsequent Practice. In interpreting a text, recourse to the subsequent conduct and practice of the parties in relation to the treaty is permissible, and may be desirable, as affording the best and most reliable evidence, derived from how the treaty has been interpreted in practice, as to what its correct interpretation is.

Footnote to this Principle. Where the practice has brought about a change or development in the meaning of the treaty through a *revision* of its terms by conduct, it is permissible to give effect to this change or development as an agreed revision but not as an interpretation of its original terms.

To the above principles may now be added, on the basis of certain pronouncements made in the 1951-4 period, a sixth major principle, as follows:

VI. Principle of Contemporaneity. The terms of a treaty must be interpreted according to the meaning which they possessed, or which would have been attributed to them, and in the light of current linguistic usage, as at the time when the treaty was originally concluded.

This last principle could perhaps be regarded as constituting in a sense no more than a qualification to the principle (No. II) of the natural and ordinary meaning. But, on account of its affinities with the principle of the inter-temporal law and for other reasons . . . it seems to go beyond that, and to merit the status of an independent principle of interpretation.'

Sinclair<sup>45</sup> notes that Fitzmaurice, in stressing the principles of actuality and that of the natural and ordinary meaning of the treaty, attaches primary importance to the textual approach. However, he by no means ignores the other two approaches although they are clearly allocated a secondary and supportive role. A place is found for the teleological school in the principle of effectiveness while recourse to extraneous means of interpretation (one of the hallmarks of the intentions school) is regarded by Fitzmaurice as permissible in certain defined circumstances.

The International Law Commission worked from the basic assumption that 'the text must be presumed to be the authentic expression of the intentions of the parties, and that, in consequence, the starting point and purpose of interpretation is to elucidate the meaning of the text, not to investigate *ab initio* the intentions of the parties'.<sup>46</sup> This led the Commission to treat interpretation as a two-stage process: the provision that

45. Sinclair I M, 'The Principles of Treaty Interpretation and their Application by the English Courts' (1963) 12 ICLQ 508 at 510-511.

46. Commentary of the International Law Commission YbILC 1964 Vol II p 56 para 13.

eventually became Article 31 describes the primary method of interpretation, while Article 32 lists the main supplementary aids to interpretation.

Shabtai Rosenne<sup>47</sup> maintains that the most striking difference between the American *Restatement* and the approach of the ILC lies in the fact that the principle that the authors of the *Restatement* included in one paragraph,<sup>48</sup> appeared originally in three articles of the Commission's text.<sup>49</sup> The Commission itself rejected suggestions made during the second reading that the material should be combined in one single article. Rosenne traces this basic difference back to the fact that many members of the ILC were legal positivists and to the distrust that many international lawyers have towards the teleological approach to treaty interpretation.<sup>50</sup> Nevertheless, although the way in which the material is presented in Articles 31 and 32 seems designed to stress the dominant position of the text in the interpretative process, the attitude of the International Law Commission is not exclusively textual.

Article 31(1) states that a treaty is to be interpreted 'in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'. The Commission headed Article 31 'General Rule of Interpretation' in the singular, not *General Rules*<sup>51</sup> in the plural, precisely because it wished to emphasize that the process of interpretation is a unity and that the provisions of the article form a single, closely integrated rule. All the various elements, it insisted, as they were present in any given case, would be thrown into the crucible and their interaction would provide the legally relevant interpretation.<sup>52</sup> The Commission stressed that while the starting point of interpretation lies in ascertaining the 'ordinary meaning' of the text, logic dictated that this ordinary meaning had to be gleaned from the terms of the treaty in their 'context' as well as in the light of the 'objects and purposes' of the treaty.<sup>53</sup> This resulted from the fact that the ordinary meaning of a term could not be determined in the abstract but had to be determined in the whole context of the document in the light of its object and purpose.<sup>54</sup> Article 31 would, therefore, appear to legitimize both the textual and the teleological techniques of treaty interpretation and by failing clearly to separate them would seem to concede that, whenever the problem of treaty interpretation arises, the object and purpose of the treaty must be taken into account.<sup>55</sup>

Article 31(2) defines the text of a treaty as inclusive of the preamble and annexes, and states that the context of a treaty for the purposes of

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47. Rosenne, 'Interpretation of Treaties in the Restatement and the International Law Commission's Draft Articles: A Comparison' (1966) 5 Col J Trans L 205 at 221.

48. Section 147.

49. At that stage Articles 27, 28 and 29.

50. Further remarks in this regard are made on pp 166 et seq below.

51. Italics added.

52. YbILC 1966 Vol II pp 219-20, para 8.

53. *Ibid*, para 9.

54. *Ibid*, p 221, para 12.

55. O'Connell *International Law* 2 ed (1970) Vol 1, p 255.

interpretation shall comprise, in addition to this 'text', any collateral agreements relating to the treaty (which presumably might include even oral agreements), provided that these were made by all the parties involved in the conclusion of the treaty; or, in the case of an instrument made by only one or some of the parties, that it was accepted by the other parties as an instrument related to the treaty. The provision was based on the principle that a unilateral document cannot be regarded as forming part of the 'context' unless it was made in connection with the conclusion of the treaty and if, in addition, its relation to the treaty had been accepted in the same manner by all the parties.<sup>56</sup>

Article 31(3) specifies as further authentic elements of interpretation to be taken into account together with the context 'any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation [and] any relevant rules of international law applicable in the relations between the parties'.

Although these three canons of interpretation were certainly applied even prior to the Vienna Convention, the International Law Commission adopted an innovative approach by including them as primary means of interpretation and it is mainly here that the Commission modified its textual leanings.

Just as an agreement on the interpretation of a provision reached before or at the same time as the treaty was concluded is to be regarded as forming part of the treaty,<sup>57</sup> so, the Commission argued, any agreement of the parties as to the interpretation of a provision reached after the conclusion of the treaty ought to be regarded as an authentic and authoritative interpretation by any tribunal.<sup>58</sup> In the case of a bilateral treaty, the common interpretation of a clause by both parties to the treaty could validly be regarded as final.<sup>59</sup> However, with a multilateral treaty the matter is not so simple and in the past international tribunals have in some instances required 'an interpretation which is more flexible than either of those which are respectively contended for by the Parties'<sup>60</sup> or agreed to by them.<sup>61</sup> Past tribunals have even felt free to proceed on their own initiatives to interpret the terms of multilateral treaties which were not in dispute.<sup>62</sup>

The International Law Commission lists 'subsequent practice' of the

56. YbILC 1966 Vol II, p 221, para 13.

57. In the *Ambatielos* case (Preliminary Objections) ICJ Rep 1952, p 44, the Court held that 'the provisions of the Declaration are in the nature of an interpretation clause and as such should be regarded as an integral part of the Treaty'.

58. YbILC 1966 Vol II, p 221, para 14.

59. Per Judge Cordova in the *Case Regarding the Application of the Convention of 1902 Governing the Guardianship of Infants* ICJ Rep 1958, p 55 at 143.

60. *Rights of United States Nationals in Morocco* case ICJ Rep 1952, p 176 at 211.

61. See O'Connell op cit 261.

62. Per Judge Jessup in the Second Phase of the *South-West Africa* cases ICJ Rep 1966, p 6 at 352.

parties as a *primary* means of interpretation.<sup>63</sup> In so doing it appears to have relied heavily on Sir Gerald Fitzmaurice's findings<sup>64</sup> which pronounced recourse to subsequent practice as not only permissible but desirable in that it affords 'the best and most reliable evidence, derived from how the treaty has been interpreted in practice as to what its correct interpretation is'. While not denying the importance of such practice, at least one critic<sup>65</sup> has queried the labelling of subsequent practice as a primary method of interpretation. Jacobs contends<sup>66</sup> that this principle has traditionally been regarded only as a supplementary aid to the interpretative process.<sup>67</sup> Oppenheim,<sup>68</sup> for example, would allow resort to subsequent practice 'in some cases' only. McNair<sup>69</sup> advocates the use of this principle when there is doubt as to the meaning of a provision or expression of a treaty. Here the subsequent practice of the parties will carry a high probative value as to their intentions at the time they concluded the treaty. Presumably if the meaning is clear an interpreter would have no occasion to look at subsequent practice at all. Certain *caveats* in the application of this rule should be borne in mind, namely, that the conduct of the parties may have been in disregard of the treaty;<sup>70</sup> furthermore, that the probative value of subsequent conduct is doubtful in the case of multilateral treaties, especially where the number of parties has increased or decreased to any significant extent.<sup>71</sup>

The commentary of the International Law Commission<sup>72</sup> cites four cases in support of its contention that recourse to subsequent practice is a well-established rule in the jurisprudence of international tribunals. In the *Competence of the ILO to Regulate Agricultural Labour* case<sup>73</sup> the question arose whether the sphere of agricultural labour fell within the competence of the ILO. The Permanent Court held that the treaty constituting the ILO quite clearly gave the ILO this competence, but added, nevertheless, that '(i)f there were any ambiguity, the Court might, for the purpose of arriving at the true meaning, consider the action which has been taken under the Treaty'. The Court also approved recourse to subsequent practice in configuration of a meaning which it had deduced from the text and which it considered to be unambiguous.<sup>74</sup>

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63. Article 31(3)(b).

64. Fitzmaurice, 'The Law and Procedure of the International Court of Justice: Treaty Interpretation and Certain Other Treaty Points' (1951) 28 BYBIL 1 at 21.

65. Jacobs *op cit* 327.

66. *Ibid.*

67. See, too, Greig D W, *International Law* 2 ed (1976) 481; O'Connell, *op cit* 261.

68. Oppenheim *International Law* 8 ed (1955) Vol 1 957.

69. McNair A D, *The Law of Treaties* (1961) 424.

70. Oppenheim *loc cit.*

71. Per Judge Spender, *Certain Expenses of the United Nations* case ICJ Rep 1962, p 151 at 191.

72. YbILC, 1966 Vol II, p 222, para 15.

73. (1922) PCIJ, Ser B, No 2.

74. *Ibid* at 39; More recently, in the *Status of South-West Africa* case ICJ Rep 1950, p 128, the ICJ was required to decide whether South Africa was still bound by the terms of its Mandate over South-West Africa. The Court referred to a number of declarations made by the South African Government to the League of Nations and to

In the *Corfu Channel* case,<sup>75</sup> the ICJ held that the subsequent practice of the parties was admissible as evidence of their original intentions.<sup>76</sup>

Jacobs observes<sup>77</sup> that the cases used by the Commission to support the use of subsequent practice carry as their natural corollary the idea that if the original intentions of the parties are clear or if the provisions of the treaty are unambiguous, there will be no need to resort to subsequent practice at all.<sup>78</sup> He contends that in placing subsequent practice among the principal means of interpretation, the International Law Commission departed considerably from the practice of the Court. The Commission, however, considered<sup>79</sup> that subsequent practice establishing the understanding of the parties regarding the interpretation of a treaty should logically be included in paragraph 3 as an authentic means of interpretation alongside interpretative agreements, presumably since both interpretative agreements and subsequent practice show the common understanding of the parties as to the meaning of the terms of their agreement. The final word on the subject might be given to Fitzmaurice<sup>80</sup> who points out that reference to subsequent practice is not so much a principle of interpretation as it is a rule of evidence, 'a question of the probative value of the practice of the parties as indicative of what the treaty means'.

Article 31(3)(c) adds as a third element to be taken into account together with the context 'any relevant rules of international law applicable in the relations between the parties'. In the text provisionally adopted in 1964, this rule was formulated in a slightly different but effectively significant manner. The text at that time read that the ordinary meaning to be given to the terms of a treaty was to be determined 'in the light of the general rules of international law *in force at the time of its conclusion*'.<sup>81</sup> The earlier formulation reflected the widely-held idea that a juridical fact should be appreciated in the light of the law contemporary with it and not of the law in force at the time when a dispute arose or was adjudicated upon. However, when this provision was discussed at its

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the United Nations and then stated: 'These declarations constitute recognition by the Union Government of the continuance of its obligations under the Mandate. . . . Interpretations placed upon legal instruments by the parties to them, though not conclusive as to their meaning, have considerable probative value when they contain recognition by a party of its own obligations under an instrument. In this case the declarations of the Union of South Africa support the conclusion already reached by the Court' (at 135-6).

75. ICJ Rep 1949, p 25.

76. Similarly see the *Interpretation of Article 3, para 2, of the Treaty of Lausanne* case, (1925) PCIJ, Ser B, No 12, p 24.

77. Jacobs op cit 328-9.

78. The ILC commentary (YbILC 1966, Vol II, p 222, fn 137) refers to the *Brazilian Loans* case (1929) PCIJ, Ser A, No 21, p 119, in support of Article 31(3)(b) but, once again, the Court expressly stated that subsequent conduct of the parties was permissible only in cases of ambiguity.

79. YbILC 1966 Vol II, p 222, para 15.

80. Fitzmaurice (1951) 28 BYBIL 1 at 21.

81. Italics added. This was Article 69(1)(b), reproduced in YbILC 1964 Vol II, p 199.

sixteenth session<sup>82</sup> some members of the Commission argued that it failed to deal with the problem of the effect of an evolution of the law on the interpretation of the provisions of a treaty and was, therefore, inadequate. Upon re-examination, the Commission concluded that the 1964 text was unsatisfactory in that by only partially dealing with the question of inter-temporal law in its application to treaties it might lead to misunderstanding. On the other hand, the Commission balked at the idea of attempting to formulate a rule that would comprehensively cover the temporal element. It decided that the correct application of the temporal element would normally be indicated by the interpretation of the treaty in good faith. In the end result the Commission omitted altogether any mention of the temporal element and in its final formulation left the rule very flexible.

Article 31(4) of the Vienna Convention on the Law of Treaties contains the proviso that, notwithstanding the apparent meaning of a term in its context, where it is established that the parties intended it to have a special meaning, a tribunal shall acknowledge this special meaning. This is an exception to the rule that a treaty must be interpreted according to its natural and ordinary meaning. Most often this exception operates with regard to treaties regulating technical matters. Some members of the Commission doubted the need to include a special provision on this point on the basis that any technical or other special use of a term normally appears from the context of a treaty and becomes, as it were, the ordinary meaning in that particular context.<sup>83</sup> After some deliberation, however, the Commission concluded that there was a certain utility in laying down a specific rule on the point, if only to emphasize that the burden of proof lies on the party invoking the special meaning.<sup>84</sup> The ILC pointed out that this exception had been referred to more than once by the Court. In the *Legal Status of Eastern Greenland* case,<sup>85</sup> Norway unsuccessfully argued that in the legislative and administrative acts of the eighteenth century on which Denmark relied, the word 'Greenland' was not used in its geographical sense but meant only the colonies or colonized area of the West Coast. The Permanent Court of International Justice stated:

'The geographical meaning of the word "Greenland" is the name which is habitually used in the map to denominate the whole island, must be regarded as the ordinary meaning of the word. If it is alleged by one of the Parties that some unusual or exceptional meaning is to be attributed to it, it lies on that Party to establish its contention.'

The International Court of Justice has also recognized the existence of this rule and the strictness of the proof required to apply it.<sup>86</sup> The present

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82. Report of the International Law Commission covering the work of its sixteenth session, 11 May-24 July, 1964, YbILC 1964, Vol II, p 173 at 202-3, para 11.

83. YbILC 1966 Vol II, p 222, para 17.

84. Ibid.

85. (1933) PCIJ, Ser A/B, No 53, p 49.

86. *Conditions of Admission of a State to Membership in the United Nations* case, ICJ Rep 1948, p 57 at 63.

Article 31(4) therefore accurately reflects the attitude of the Court in this regard and should not prove to be a matter for dispute.

The same cannot be said of Article 32 of the Vienna Convention which provides:

'Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31 or to determine the meaning when the interpretation according to Article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable.'

The Commission relegated preparatory work to Article 32 as a mere 'supplementary means' of interpretation. It wisely refrained from defining *travaux préparatoires* since 'to do so might only lead to the possible exclusion of relevant evidence'.<sup>87</sup> The term designates those extrinsic materials which had a formulative effect on the final draft of a treaty, and which, therefore, assist in the disclosure of the parties' aims and intentions.<sup>88</sup> In general terms it is the record of the drafting of a treaty and includes all the documents such as minutes, preliminary drafts, conference discussions, memoranda and draft amendments of the treaty in question. It also covers records of negotiations between the States that participated in the drafting of the treaty and in some cases records of the work of independent bodies of experts, such as the International Law Commission.<sup>89</sup> McNair<sup>90</sup> submits that unilateral statements such as those made by Government spokesmen prior to or concurrently with the negotiations but not as part of them should not be admissible under the omnibus term of preparatory work as 'whatever value there may be in preparatory work is that it may afford evidence of the *common* intention of the parties'.<sup>91</sup>

Today there is little, if any, dispute on the permissibility of resort to *travaux préparatoires* as an aid to treaty interpretation but its significance has never been clearly explained in international jurisprudence. The essential problem is how to balance the final text of the treaty and the mass of documentation going under the label of preparatory work.<sup>92</sup> Some authorities have adopted the view that recourse to preparatory work is only permissible where the text is not clear,<sup>93</sup> where the language employed is fundamentally obscure or ambiguous,<sup>94</sup> or to confirm a conclusion reached by 'normal' methods of construction.<sup>95</sup> O'Connell<sup>96</sup>

87. YbILC 1966 Vol II, p 223, para 20.

88. O'Connell, op cit 262.

89. Harris D H, *Cases and Materials on International Law* (1973) 589.

90. McNair, op cit 421-2.

91. Italics added.

92. O'Connell loc cit.

93. Starke J G, *An Introduction to International Law* 5 ed (1963) 361.

94. Fitzmaurice, 'The Law and Procedure of the International Court of Justice 1951-4: Treaty Interpretation and Other Treaty Points' (1957) 33 BYBIL 203 at 211.

95. Starke, loc cit.

96. O'Connell, loc cit.



recognises that from a policy point of view recourse to preparatory work by an international arbiter is desirable as its effect is to delimit the area of discretion of the judge, and in this way guaranteeing litigant States of his impartiality. By having preparatory work at his disposal the arbitrator has a means of discovering exactly what the parties meant by a particular provision in a treaty—it is not left solely to him to devise a construction of the treaty.

Apart from this, most treaties represent a compromise of vital political interests which cannot be fully understood without reference to the *travaux préparatoires*.<sup>97</sup> Despite this, O'Connell<sup>98</sup> is of the view that on certain occasions resort to preparatory work should be sparing, particularly when the text itself is substantially free from ambiguity. On some occasions, moreover, he believes, consultation of this source might even be 'dangerously unhelpful'.

McNair, after reviewing briefly the practice of international tribunals in this regard,<sup>99</sup> concludes that in most cases involving the interpretation of treaties one or both of the parties has sought to invoke preparatory work but the courts, while reluctant to exclude resort to this work *e limine* have, nevertheless, been slow in according to the practice any decisive role. The Court, he contends, has shown an ambiguous attitude towards preparatory work. In many cases it had announced that there was no need to have regard to preparatory work because the treaty in question was clear in itself; yet an examination of these cases shows that the Court had in fact considered the preparatory work before making that pronouncement.<sup>1</sup> McNair concludes from this<sup>2</sup> that any litigant before an international tribunal should not ignore *travaux préparatoires* but should not rely primarily on them. Furthermore, the Court would be wise to admit recourse to such work only as a subsidiary aid to interpretation in cases where it affords evidence of the common intention of the parties.

At the Vienna Conference on the Law of Treaties, the United States delegation argued forcefully but unsuccessfully for a rule permitting the use of preparatory work equally with the text as a means of determining the intentions of the parties. It contended *inter alia*<sup>3</sup> that

'the restrictions upon the use of preparatory works expressed in Article 28 [Article 32 of the Convention] do not, any more than the restrictions imposed on the use of other circumstances, represent established practice . . . Even in the *Lotus* case<sup>4</sup> which perhaps contains the most famous exposition of the alleged rule that "there is no occasion to have regard to preparatory work if the text of a

97. See the comments of Lauterpacht in this regard in 'Some Observations on Preparatory Work in the Interpretation of Treaties' (1934-5) 48 Harv LR 549 at 575.

98. O'Connell, op cit pp 263-4.

99. McNair op cit p 412 ff.

1. See, for example, *The Lotus* case (1927) PCIJ, Ser A, No 10, p 16, and *Conditions of Admission of a State to the United Nations* case ICJ Rep 1950, p 8.

2. McNair, op cit pp 422-3.

3. (1968) 62 AJIL 1021, at 1023.

4. Above fn 1.

convention is sufficiently clear in itself', the Court did in fact look at the *travaux* . . . The habitual use of preparatory work by foreign offices needs no emphasis here.'

The International Law Commission, however, was heavily influenced by the numerous *dicta* of international tribunals stating that where the ordinary meaning of a provision is clear and makes sense in the context of the treaty, there is no need to have resort to other methods of interpretation including the *travaux préparatoires*.<sup>5</sup> The Commission stressed that fact that its entire approach to the subject of treaty interpretation, made manifest in Article 27,<sup>6</sup> was based on the idea that the text of the treaty is presumed to be the authentic expression of the intentions of the parties and that, therefore, the object of interpretation is the elucidation of the meaning of the text rather than an investigation *ab initio* of the supposed intentions of the parties which an examination of preparatory work would supply. Nevertheless, it was aware that in practice international tribunals, States and international organisations do have recourse to *travaux préparatoires*, more especially for the purpose of confirming their conclusions as to the 'ordinary' meaning of the text.<sup>7</sup> The Commission added, however, that in its opinion international tribunals have relied on preparatory work with 'comparative rarity'.<sup>8</sup> This suggested to them that the courts regard this exception as limited to cases where the absurd or unreasonable character of the 'ordinary' meaning is manifest. These considerations led the Commission to include recourse to preparatory work as the supplementary method of interpretation described above. It was most anxious that while *travaux préparatoires* was to be accorded some status as an aid to interpretation, it was not to be allowed to 'weaken unduly the authority of the ordinary meaning of the terms'.<sup>9</sup>

This two-stage approach to treaty interpretation adopted by the Vienna Convention on the Law of Treaties does have a considerable amount of support in the jurisprudence of both the Permanent Court and the International Court of Justice, especially in the latter's earlier years.<sup>10</sup> It must be conceded, however, that the practice of the Court has not been consistent<sup>11</sup> in this matter. So, while it is inaccurate to say that the approach of the International Law Commission can find no justification 'in the wisdom of past experience'<sup>12</sup> or that the rule as formulated by the Commission introduces 'an entirely new element of uncertainty into the

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5. YbILC 1966 Vol II p 222-3, para 18.
  6. Article 31 of the Convention.
  7. The Commission cited in this regard the opinion of the Permanent Court in the *Interpretation of the Convention of 1919 concerning Employment of Women during the Night* (1932) PCIJ, Ser A/B, No 50, p 380.
  8. YbILC 1966 Vol II p 223 para 19.
  9. *Ibid.*
  10. Lauterpacht H, *The Development of International Law by the International Court* (1958) 116-124.
  11. At 124-7.
  12. As did McDougal in his statement to the ILC: (1968) 62 AJIL 1021 at 1023.

stability of treaties',<sup>13</sup> the true position seems to be, as one critic has noted,<sup>14</sup> that the Special Rapporteur might well have gone beyond the evidence in presenting the Commission's view as the general rule. As with so much of the law of treaties, there was no settled rule and consequently this codification contains a strong element of 'progressive development'.

A final *caveat* should be mentioned. Articles 31 and 32 of the Vienna Convention on the Law of Treaties were not intended by the Commission to be an exclusive or exhaustive enumeration of the factors which might be taken into account in the interpretation of treaties. It acknowledged<sup>15</sup> that statements can be found in the decisions of international tribunals to support the use of virtually every maxim of interpretation that undoubtedly exists, many of which are made use of in municipal legal systems in the interpretation of statutes and contracts, as well as in the interpretation of treaties. These would include such rules as *ut res magis valeat quam pereat*, *contra proferentem*, *eiusdem generis*, *expressio unius est exclusio alterius*, and *generalia specialibus non derogant*. McNair<sup>16</sup> warns that the rules of interpretation of treaties are so many and so conflicting that

'today for many of the so-called rules of interpretation that one party may invoke before a tribunal the adverse party can often, by the exercise of a little ingenuity, find another rule to serve as an equally attractive antidote . . . The many maxims and phrases . . . are merely *prima facie* guides to the intention of the parties and must always give way to contrary evidence of the intention of the parties in a particular case. If they are allowed to become our masters instead of our servants these guides can be very misleading.'

The International Law Commission voiced similar reservations, labelling these maxims 'principles of logic and good sense valuable only as guides'<sup>17</sup> to the interpretative process, whose worth is dependent upon a variety of considerations that the interpreter must bear in mind. It regarded the interpretation of treaties to some extent as an art, not as an exact science, which meant that the use of such maxims of interpretation was discretionary rather than obligatory. For all these reasons, the Commission made no attempt to include these maxims of interpretation in the terms of the Vienna Convention on the Law of Treaties. Their use is not, however, forbidden or even discouraged in any way and it remains a truism that many of these maxims and principles will be of assistance in many instances of treaty interpretation.

### (c) *The South African Approach to Treaty Interpretation*

#### (i) *The Approach of the South African Government*

Through the unique legal situation arising out of its somewhat unusual 'reign' as Mandatory for the territory of South-West Africa and the subsequent widely publicized actions in respect of the territory before the

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13. At 1027.

14. Merrills, *op cit* 57-8.

15. YbILC 1964 Vol II p 54, para 5.

16. McNair, *op cit* 365.

17. YbILC 1964 Vol II p 54, para 6.

International Court of Justice, the South African Government has been forced to clarify for the international community its approach to the problem of treaty interpretation. It is in this governmental arena that treaty interpretation has assumed its prime importance, as the South African courts have not to date been confronted with the necessity to develop their view on the matter. Because of this lacuna, when the domestic courts are eventually called upon to interpret treaties, it is inevitable that they will be heavily influenced by the approach of the South African Government as made manifest before the International Court. South African courts are not alone in this situation. In many countries the day to day interpretation and application of treaties and conventions is primarily the concern of those governmental departments whose responsibility it is to administer the treaty, more especially the Department of Foreign Affairs. In this way, the vast majority of treaties and conventions are interpreted and given effect by the executive branch of government and only in rare instances will the matter reach the domestic courts. For these reasons it is necessary to analyse the arguments put forward by representatives of the South African Government and to decide whether they accord with the current attitudes of the world community as regards treaty interpretation as evidenced, in particular, by the Vienna Convention on the Law of Treaties.

The approach of the South African Government towards the interpretation of treaties was explained in the oral submissions made on its behalf by Mr D P de Villiers, SC, to the International Court in 1962<sup>18</sup> as well as in South Africa's written submissions to the International Court in 1971.<sup>19</sup> The timing of both these submissions was fortuitous because of the conclusion of the Vienna Convention on the Law of Treaties in the interim in 1969. Although South Africa has not become a party to the Convention, the South African Government has shown great interest in its provisions; and in the written submissions of 1971 it is clear that the Government attempted to justify its approach in terms of Articles 31 and 32 of the Convention. It is interesting to note, though, that the provisions of the Convention have not operated to alter in any significant manner the approach of the South African Government to the interpretation of treaties. They have instead served as confirmation of its basic preconceived ideas.

On both occasions,<sup>20</sup> the South African Government realized fully that the philosophy adopted by the Court towards the problem of treaty interpretation would have an important, if not decisive, bearing on the ultimate outcome of the cases. As a result it took great pains to clarify and emphasize for the Court certain aspects of the principles of treaty interpretation in the hope that the Court would thereby arrive at a more

18. 1962 ICJ Pleadings, South-West Africa, vol 7, pp 37-64, hereinafter cited as 'oral submissions'.

19. 1970 ICJ Request for Advisory Opinion: Statement Submitted by the Government of the Republic of South Africa vol 1, chap 2, pp 10-43, hereinafter cited as 'written submissions'.

20. That is, in 1962 and 1971.

sympathetic appreciation of South Africa's position as Mandatory for the territory of South-West Africa. It suggested that the Court uphold the South African approach to the interpretation of treaties, conventions or other similar instruments embodying international obligations.

The foundation upon which the South African Government constructed its theory was the idea that the basic aim or purpose of treaty interpretation is to ascertain and to give effect to the common intentions of the parties.<sup>21</sup> This it described as a necessary consequence of the principle that treaties owe their validity in international law to the joint or common consent of the parties thereto.<sup>22</sup> It followed that all the rules of treaty interpretation were merely subservient to this dominant purpose. While it is no new idea that the aim of treaty interpretation is to give effect to the common intentions of the parties, the heavy emphasis placed on this objective by the South African Government served to inform the Court from the outset that theirs was no teleological approach to this subject.

The oral submissions of de Villiers<sup>23</sup> went on to cite at some length a number of authorities for these propositions, including judgments of the Permanent Court of Justice, the International Court of Justice and opinions of numerous jurists. The written submissions<sup>24</sup> were primarily concerned with justifying the South African approach in terms of the 1969 Vienna Convention on the Law of Treaties.<sup>25</sup> They noted that the formulation in the Vienna Convention was largely in accordance with the recommendations of the International Law Commission contained in its 1966 Report<sup>26</sup> in which the Commission had theorized that jurists differ to some extent in their basic approach to the interpretation of treaties according to the relative weight which they give to the text of the treaty as the authentic expression of the intentions of the parties; the intentions of the parties as a subjective element distinct from the text; and the declared or apparent objects and purposes of the treaty. The main difference between jurists who emphasized the text of the treaty and those who concentrated subjectively on the intentions of the parties related to the extent to which recourse might be had to preparatory work and other such evidence of the intentions of contracting States as is extraneous to the text of a treaty.<sup>27</sup> Both schools, however, accepted that the true aim of treaty interpretation was to ascertain the common intent of the parties. This was contrasted with jurists who emphasized the importance of the objects and purposes of the treaty and who do not necessarily accept this basic assumption. By giving greater weight to the objects and purposes, these jurists were more ready, especially in the case of general multilateral conventions, to admit teleological interpreta-

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21. Many South African jurists would agree with this. See, for example, van Wyk JT 'The International Court of Justice at the Crossroads' 1967 *Acta Juridica* 201 at 204 et seq.

22. Oral submissions op cit 37; written submissions op cit 11.

23. Oral submission op cit 37-40.

24. Written submissions op cit 1-6.

25. Articles 31 and 32.

26. *YbILC* 1966 Vol II, pp 217-8.

27. At 218.

tions of the text which might go beyond or even diverge from the original intentions of the parties as expressed in the text.<sup>28</sup>

The South African submissions noted with satisfaction<sup>29</sup> that the amendment introduced by Professor Myres S. McDougal on behalf of the American delegation to the Conference, which advocated a teleological approach, was rejected in the Committee of the Whole by sixty-six votes to eight, with ten abstentions, and that the draft articles as they stood were unanimously approved—draft article 27<sup>30</sup> by ninety-seven votes to none and draft article 28<sup>31</sup> by 101 votes to none.<sup>32</sup> While the South African Government refrained from analysing the draft articles in any detail, it did emphasize<sup>33</sup> two points which had been made repeatedly during the discussions surrounding America's proposed amendment, namely, that the actual text of the treaty was the safest and most reliable indication of the intentions of the parties, and that it would, in the words of the U.S.S.R. delegate, be 'politically dangerous . . . [to] permit an arbitrary interpretation divorced from the text and capable of altering its meaning'.<sup>34</sup> This led South Africa to the conclusion that the textual approach was not only in accordance with logic as being based upon the fundamental principle of the consent of the contracting parties, but that it had received, in addition, the *imprimatur* of the International Law Commission (a body composed of some of the world's most highly qualified jurists), of the Court,<sup>35</sup> and of States themselves, as evidenced by the ultimate endorsement of the draft articles. It submitted that the teleological approach long advocated by various jurists and certain judges of the Court had been decisively rejected as being out of step with the practice of States, and that the textual approach had been overwhelmingly confirmed. It concluded that, in the end result, the fundamental principle which emerged from the Vienna Convention is that the aim and purpose of treaty interpretation is to ascertain and give effect to the common intention of the parties as evidenced by the text.<sup>36</sup>

Having established the underlying objective of treaty interpretation in this way, the South African Government turned its attention to the principles of actuality, ordinary meaning and contemporaneity.<sup>37</sup> The principle of actuality is premised on the general rule that the parties to a treaty intend to set out their agreement in writing in such a way that it will be clearly understandable to themselves or to others that might have an interest in its terms. Consequently the text of a treaty as it stands should

28. *Ibid.*

29. Written submissions op cit 4.

30. Article 31 in the final Convention.

31. Article 32 in the final Convention.

32. United Nations Conf on the Law of Treaties, 2nd sess, pp 57 and 59.

33. Written submissions loc cit.

34. United Nations Conf on the Law of Treaties, 1st sess, pp 174-5.

35. In saying this, the South African Government may have glossed rather too lightly over the later judgements of the ICJ, in particular, which have often endorsed a teleological approach.

36. Written submissions op cit 5-6

37. Oral submissions op cit 40 et seq; Written submissions op cit 7 et seq.

be regarded as fully and accurately expressing the common intent of the parties. Similar to this is the ordinary meaning principle according to which the language of the text is to be given its ordinary, natural and unrestrained meaning in its context. These principles are not to be regarded as absolute rules but as strong *prima facie* guides to intention. While the principle of ordinary meaning has been highlighted in Article 31(1) of the Vienna Convention which provides, *inter alia*, that a treaty shall be interpreted 'in accordance with the ordinary meaning to be given to the term', the Convention goes considerably further afield than the narrow principle of actuality relied upon by the South African Government. First, it concentrates on the 'context' rather than simply on the text, which is to be regarded as one aspect of the context only. The context is stated to comprise, in addition to the text, 'any instrument . . . made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to this treaty'<sup>38</sup> as well as any agreement relating to the treaty made by the parties in connection with the conclusion of the treaty.<sup>39</sup> It should be noted that although the South African representative before the Court in 1962 (Mr D P de Villiers) had stressed that the principles of actuality and natural meaning were very strong *prima facie* guides to the intention of the parties, he nevertheless conceded that they were not absolute rules and that 'special reasons' might exist to displace the results which an application of these principles would indicate in a particular case.<sup>40</sup> If, for instance, the text did not set out the full agreement of the parties, or if there was something which had not been expressed in writing but which was, nevertheless, part of the common intent of the parties, such as something oral, tacit or unexpressed, these would be taken into account although they would require 'special and convincing demonstration'.<sup>41</sup>

Secondly, the Convention stipulates that, contemporaneously with the context, account shall be taken of subsequent agreements of the parties regarding the interpretation of the treaty or the application of its provisions, subsequent practice of the parties and any relevant rules of international law applicable in the relations of the parties.<sup>42</sup> The International Law Commission made the point quite clearly that these three factors were not to be regarded as in any way subservient to the context. They had simply been listed after the definition of the context for the sake of clarity.<sup>43</sup> Article 31, it stated, was to be read as a whole. It is in this regard that the doggedly textual approach of the South African Government differs from that of the Commission. Interpretation of the actual text is important, but it cannot be allowed to dominate the interpretative process to the extent that the Government would have it.

The third principle which the South African Government has regarded

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38. Article 31(2)(b).

39. Article 31(2)(a).

40. Oral submissions *op cit* 41-5.

41. *Ibid.*

42. Article 31(3).

43. YbILC 1966 Vol II, pp 219-20, para 8.

of prime importance, and virtually as a corollary to the principles of actuality and natural meaning, is that of contemporaneity.<sup>44</sup> This enjoins appraisal of the treaty in the light of concepts and linguistic usage current at the time of execution of the treaty rather than at the time the dispute arose or was litigated upon.<sup>45</sup> Although this principle has been acknowledged by many leading authorities in international law<sup>46</sup> and has on a number of occasions been applied by international tribunals,<sup>47</sup> the International Law Commission did not regard the principle of contemporaneity as settled enough to include in the Vienna Convention. As a result, all reference to it was purposefully omitted. It is arguable, however, that this principle is covered by Article 31(3)(c) of the Convention, as a 'relevant rule of international law applicable in the relations the parties'. In any event, Articles 31 and 32 were never intended by the Commission to be an exhaustive exposé of the law on treaty interpretation. The Commission realized that such a task would have been impossible as the applicability of any one of a number of principles of treaty interpretation depends on factors which were too numerous and too variable to state in writing with any degree of accuracy.

The principle of actuality means that the parties must *prima facie* be considered to have expressed their full agreement in the written text. Exceptionally, however, the conclusion may be warranted that the parties did, in fact, tacitly agree upon something not expressly stated in the text. This question of the implication of terms was particularly important in the various South-West Africa cases, and this led the South African Government to expound its views on the subject at some length.<sup>48</sup> Mr De Villiers maintained that the process of ascertaining whether an implication does or does not apply in a particular case is not really a matter of interpretation in the narrower sense of assigning a meaning to the text; it is, instead, a process of attempting to establish a proposition by circumstantial evidence from which a logical inference becomes necessary. This

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44. Oral submissions op cit 45-6; written submissions op cit 7-8.

45. Many prominent South African academics hold similar views. Cilliers in a critique of the 1966 Advisory Opinion on South-West Africa, argues that the practice of apartheid, if acceptable to the international community in 1921, could not suddenly be regarded as illegal in 1966, simply because a standard of non-discrimination was in the process of evolving. Although South Africa, as Mandatory, had an obligation to keep up with developing constitutional, technological and sociological trends this in itself did not justify a novel interpretation of the Mandate agreement: Cilliers A C 'Die Suidwes-Afrika-Saak en die Volkereg' (1971) 34 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* at 33-4. Advocates de Villiers SC and Grosskopf SC are also sceptical of the idea that any recent standard of non-discrimination could govern the interpretation of the Mandate. They argue that '(i)t is difficult to see how events transpiring more than a quarter of a century after drafting of the Mandate could be of decisive importance (or even of any assistance) in its interpretation': de Villiers D P and Grosskopf E M 'The South-West Africa Case—A Reply from South Africa' (1967) 1 *International Lawyer* 457 at 469.

46. See, for example, Fitzmaurice op cit 212.

47. Many of these are listed in the oral submissions loc cit, and in the written submissions op cit 8 n 2.

48. Oral submissions op cit 46-52; written submissions op cit 9-12.



circumstantial evidence would begin with the indications afforded by the text itself, but extraneous considerations, including *travaux préparatoires* and subsequent conduct of the parties, would also play a part in building up an overall picture in order to see finally whether that logical inference may be drawn. The inference would be one of a tacit mutual assent which actually existed on the part of the parties in regard to a certain point.

The Government postulated further that courts of law in all legal systems guard themselves against assenting too readily to a proposition that a certain clause be read into a contract or treaty, realizing that implication on a basis of speculation or of what the parties ought reasonably to have done, could too easily amount to the making of a new bargain or compact for the parties which is not the courts' true function. The South African Government insisted that a court's function is to give effect to the bargain or compact actually agreed upon by the parties themselves.

Because of the above two factors, viz, that this is a process of reasoning by inference with a heavy reliance on circumstantial evidence, and the danger of making new contracts for the parties, the courts have stressed that, in order to be justified, any implication of consensus must arise necessarily or inevitably from the relevant facts, in the sense that all other reasonable inferences are logically excluded.<sup>49</sup> This cautious approach has been advocated by some international lawyers<sup>50</sup> and by the International Court<sup>51</sup> as well as by South African courts when faced with the task of the interpretation of contracts. South African courts<sup>52</sup> have accepted the test formulated by Lord Justice Scrutton in *Reigate v Union Manufacturing Co (Ramsbottom) Ltd*<sup>53</sup> to the effect that

'(a) term can only be implied if it is necessary in the business sense to give efficacy to the contract; that is, if it is such a term that it can confidently be said that if at the time the contract was being negotiated someone had said to the parties "What will happen in such a case?" They would both have replied "Of course, so and so will happen; we did not trouble to say that; it is too clear."'

Two further considerations stem from the emphasis placed on the requirement of inevitability and necessity of implied terms. First, the term sought to be implied must be capable of formulation in substantially one way only. If the context of the term sought to be implied is doubtful,

49. See van Wyk J T 'The United Nations, South-West Africa and the Law' (1969) 2 *Comp and Inter Law J of S A* 48 at 52.

50. Notably, Fitzmaurice 'The Law and Procedure of the International Court of Justice: Treaty Interpretation and Certain Other Treaty Points' (1951) 28 *BYBIL* 1 at 9, 22-4; and McNair *The Law of Treaties* (1961) 436.

51. *Reparations for Injuries Suffered in the Service of the United Nations* ICJ Rep 1949, p 174 at 179, 182, 184; the *Colombian-Peruvian Asylum case* ICJ Rep 1950, p 266 at 275; *Case Concerning Rights of Nationals of the United States of America in Morocco* ICJ Rep 1952, p 176 at 198-9; *Certain Expenses of the United Nations (Article 17(2) of the Charter)* ICJ Rep 1962, p 151.

52. See, for example, *Barnabas Plein and Company v Sol Jacobson and Son* 1928 AD, p 25 at 31; *West End Diamonds Ltd v Johannesburg Stock Exchange* 1946 AD, p 910 at 921.

53. [1918] 1 *KB* 592 (CA) at 605.

then the court cannot conclude that the parties tacitly agreed upon anything at all. Secondly, it follows that where the written document makes express provision for a particular eventuality, it will be even more difficult to find that there is an implied term covering substantially the same ground as the express provision.<sup>54</sup> These are principles applied by South African courts as regards the implication of terms in contracts<sup>55</sup> and the South African Government contended (by implication) that they would adopt a similar view when interpreting the provisions of a treaty.<sup>56</sup> The Government contended, in addition,<sup>57</sup> that one factor which would militate very strongly against any contention that an implied agreement had been reached, was the availability of means to conclude a similar agreement in express terms, together with the failure to make use of such availability. This omission was accorded decisive weight in the *North Sea Continental Shelf* cases<sup>58</sup> in which it had been contended that the Federal Republic of Germany had become bound under the 1958 Geneva Convention on the Continental Shelf, despite the fact that it had never ratified the Convention. The Court said:<sup>59</sup>

'As regards these contentions, it is clear that only a very definite, very consistent course of conduct on the part of a State in the situation of the Federal Republic could justify the Court in upholding them; and, if this had existed—that is to say if there had been a real intention to manifest acceptance or recognition of the applicability of the conventional regime—then it must be asked why it was that the Federal Republic did not take the obvious step of giving expression to this readiness by simply ratifying the Convention. In principle, when a number of States, including the one whose conduct is invoked, and those invoking it, have drawn up a convention specifically providing for a particular method by which the intention to become bound by the regime of the convention is to be manifested—namely by the carrying out of certain prescribed formalities (ratification, accession), it is not lightly to be presumed that a State which has not carried out these formalities, though at all times fully able and entitled to do so, has nevertheless somehow become bound in another way. Indeed if it were a question not of obligation but of rights,—if, that is to say, a State which, though entitled to do so, had not ratified or acceded, attempted to claim rights under the convention, on the basis of a declared willingness to be bound by it, or of conduct evincing acceptance of the conventional regime, it would simply be told that, not having become a party to the convention it could not claim any rights under it until the professed willingness and acceptance had been manifested in the prescribed form.'

In the opinion of the South African Government, the principles men-

54. Oral submissions op cit 51, written submissions op cit 10.

55. See, for instance, *Rapp and Maister v Aronovsky* 1943 WLD p 68 at 74-5.

56. Written and Oral Submissions loc cit.

57. Written submissions op cit 11-12.

58. ICJ Rep 1969, p 3.

59. At 25-6.

tioned in the *North Sea Continental Shelf* cases would, *a fortiori*, apply if the State sought to be bound by a suggested tacit agreement had not only failed to take advantage of an opportunity to conclude an express agreement, but had clearly rejected suggestions that such an agreement be concluded at all.<sup>60</sup>

Because the applicants in the 1962 proceedings had invoked the principle of effectiveness (*ut res magis valeat quam pereat*) in support of their applications, and because it was an issue that would inevitably be raised in the 1971, advisory proceedings, the South African Government felt it necessary to state its views on the matter.<sup>61</sup> The principle of effectiveness takes account of the objects and purposes of a treaty. It presumes that all parties intended the provisions of the treaty to have their maximum effect in the light of the underlying objects and purposes of the treaty. The South African view acknowledges the existence of this principle of treaty interpretation but would not allow its use without due circumspection. It is primarily to be used as an aid in choosing between alternative possible meanings of an ambiguous or obscure text, but it might also be a factor in deciding whether an inference of tacit agreement might be drawn in a particular treaty. While different considerations arise to some extent depending on its use, certain basic propositions are regarded by the Government as common to both.<sup>62</sup> First of all, this maxim is to be regarded simply as an aid to the intention of the parties. It cannot operate to give a higher degree of efficacy to the instrument than the parties intended nor can it operate as a substitute for a non-existent common intention. Furthermore, the objects and purposes to which effect is sought to be given, must themselves be ascertained by interpretation. The principle of effectiveness cannot be used to ascribe to the parties a different purpose from the one they actually had in mind. The Government emphasized that even in its primary use as an aid to textual interpretation, the principle of effectiveness cannot override the clear meaning of the text. At most it can assist the court in deciding which of two or more possible inferences is to be preferred in cases of doubt.

Where it operates in regard to implied terms, the principle of effectiveness basically means that, for the purpose of deciding whether a term is to be implied or not, regard must be had to the probability that the parties intended a result which is in consonance with the general object and purpose that they had in mind. The ordinary rules relating to implied terms will still apply. As a result, it would never be sufficient to have regard merely to the objects and purposes of the treaty. This would be only *one* of the circumstances to be taken into consideration, albeit in some cases a very important one. All relevant, practical and reliable indications of intent would have to be examined before an interpreter could arrive at any final conclusion.

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60. Written submissions op cit 12-13.

61. Oral submissions op cit 57-64; written submissions op cit 12-18.

62. Written submissions op cit 14-16.

In the oral submissions<sup>63</sup> the *caveat* was added that an implied term can never override or supplant the real *intention* of the parties or the absence of *intention* on a particular point.<sup>64</sup> In the later written submissions<sup>65</sup> this *caveat* was altered to state that an implied term cannot override the express *terms of the instrument* or operate to regulate some aspect for which express provision is made *in the instrument*.<sup>66</sup> This difference in language indicates a shift in attitude in 1971 away from a too heavy reliance on the intentions of the contracting parties, which was discredited by the International Law Commission, towards a greater recognition of the role of the text. It is probably safe to assume, though, that this shift is more apparent than real, and made largely for pragmatic reasons, viz., to make the South African approach more acceptable to the International Court. The fact that the numerous authorities cited by Governmental spokesmen on both occasions are identical tends to bear this out.<sup>67</sup>

The South African Government conceded<sup>68</sup> that the role assigned by itself to the principle of effectiveness was a necessary corollary to the basic textual approach to treaty interpretation permeating all its arguments. It stated that

“‘effectiveness’ could play a greater or a different role only as part of an integrated interpretative system pursuing different ends and applying different methods. . . . In particular, such interpretative system would have to proceed from a premise other than that the consent of the parties is the ultimate source of treaty obligations, and (upon rejection of such premise) could accordingly dispense with the theory that interpretation necessarily involves the ascertainment of the parties’ common intent.”<sup>69</sup>

The conservative stance of South Africa on this matter is not without the considerable support of many academics.<sup>70</sup> It has also been advanced by the International Court itself on various occasions.<sup>71</sup> Sir Gerald Fitzmaurice, in 1957, summarized the Court’s approach thus:<sup>72</sup>

‘(I)t is through the principle of effectiveness that the Court has given its legitimate place to the teleological element in interpretation (objects and purposes). But . . . precisely because of its teleological

63. Oral submissions op cit 60.

64. Italics added.

65. Written submissions op cit 17.

66. Italics added.

67. Oral submissions op cit 60-3, written submissions op cit 12 fn 2 and 16-17.

68. Written submissions op cit 60.

69. Ibid.

70. See, for instance, Lauterpacht H, ‘Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties’ (1949) 26 BYBIL 48 at 73-4 and 83; Lauterpacht H *The Development of International Law by the International Court* (1958) 229, 281.

71. *Anglo-Iranian Oil Company* case ICJ Rep 1952, p 93 at 145; *Case Concerning Rights of Nationals of the United States of America in Morocco* ICJ Rep 1952, p 176 at 196; *Peace Treaties* case ICJ Rep 1950, p 221 at 229-30.

72. Fitzmaurice G G, ‘The Law and Procedure of the International Court of Justice 1951-4: Treaty Interpretation and Other Treaty Points’ (1957) 33 BYBIL 203 at 222-3.

tendencies, and the danger of falling into judicial legislation that the teleological principle may involve, the Court has subordinated the principle of effectiveness to that of the textual and natural meaning, in the sense that it is never legitimate, even with the object of giving maximum effect to a text, to interpret it in a manner actually contrary to, or not consistent with, its plain meaning.'

Nevertheless, it is arguable that the principle of *ut res magis valeat quam pereat* ought not to be dismissed so lightly by the South African Government, especially in view of the fact that it has expressly been incorporated into Article 31(1) of the Vienna Convention on the Law of Treaties. This provides that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and that this interpretation must take place 'in the light of its objects and purposes'. By including the principle of effectiveness in Article 31, the general rule of interpretation, the International Law Commission made it quite clear that this principle was not to be regarded merely as a supplementary means of interpretation, but is a major factor to be taken into account whenever treaties are interpreted. It has been given equal status with the rule that treaties are to be interpreted in accordance with their 'ordinary meaning' and constitutes an acknowledgement that teleological elements are valid tools of treaty interpretation. Unfortunately, while Article 31(1) results from an attempt to balance the textual and teleological approaches to treaty interpretation, its wording is vague enough to allow for many different interpretations and applications. The South African Government has freely admitted that its view of the principle of effectiveness has been coloured by its overall approach to treaty interpretation, and while it is regrettable that its stance in this regard is too rigidly textual, it is nevertheless justifiable in the light of the ambiguous phraseology of Article 31.

During the course of the 1962 South-West Africa dispute, the South African Government had occasion to state its views on the value of *travaux préparatoires* as an aid to the interpretative process.<sup>73</sup> It adopted the attitude that this was merely one of many extraneous aids to interpretation, the usefulness of which might increase or decrease in accordance with the clarity or lack thereof in the text. If the natural and ordinary meaning of the text was clear and unambiguous, it would be impossible for the *travaux préparatoires* to compete against the evidential weight of that text as to the intentions of the parties. Most often, however, the matter is not so simple. The text might not be absolutely clear or it might be completely ambiguous. Depending on the degree of ambiguity, it might then be possible to have recourse to preparatory work and other maxims of interpretation. These could also be helpful in ascertaining whether, in a particular instance, the parties had tacitly agreed on something which they had not expressed. Here their role is that of evidential data from which inferences could ultimately be drawn.

In regarding *travaux préparatoires* as a supplementary means of inter-

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73. Oral submissions op cit 52-5.

pretation, the attitude of the South African Government is basically in harmony with that subsequently adopted by the International Law Commission. Article 32 of the Vienna Convention on the Law of Treaties adopts a somewhat broader approach in that it would allow the use of preparatory work not only where an interpretation according to the method prescribed in Article 31 has left the meaning of the treaty ambiguous or obscure, but also in order to confirm the meaning resulting from the application of Article 31. On the other hand, no mention is made in the Convention of the possibility of utilising preparatory work to imply a term of a treaty. The process of implication of terms is not, strictly speaking, one of interpretation proper, but rather one of quasi-interpretation in the sense of adding a provision to the treaty. Seen in this light this omission is, perhaps, acceptable. However, there is no doubt that, in practice, preparatory work will continue to be a factor in the implication of terms where the treaty itself is silent on a matter.<sup>74</sup>

In the 1962 heads of argument submitted by Mr De Villiers on behalf of the South African Government,<sup>75</sup> the principle of subsequent conduct of the parties was treated in much the same manner as that of *travaux préparatoires* in that its use, too, was approved to assign a meaning to an ambiguous or obscure text where other methods of interpretation fail to provide a clear answer; or, alternatively, in the quasi-interpretative sense of implying a tacit agreement or understanding on a particular point. It is clear from this that the principle of subsequent conduct was regarded by South Africa as a secondary method of interpretation.

A much more detailed explanation of the South African attitude was advanced in the 1971 proceedings.<sup>76</sup> From the outset it was stressed<sup>77</sup> that, if subsequent conduct of the parties was to play any role in treaty interpretation, it could be relevant only to ascertain the common intention of the parties as it existed when the treaty was concluded. It therefore followed that the subsequent conduct of the parties could never be used to give a treaty a meaning different from that which it bore at its inception. South Africa chose to gloss over the fact that this principle had been incorporated by the Commission as part of the general rule of treaty interpretation and had, therefore, been treated by the Commission as a primary method of interpretation.<sup>78</sup> Instead, the Government submitted that, although it was permissible to resort to the principle of subsequent conduct as an aid to interpretation, its value was very limited.<sup>79</sup> It could,

74. In the *Reservation to the Convention on Genocide* ICJ Rep 1951, p 15 at 22, the *travaux préparatoires* were used in this way. The Court said: 'The character of a multilateral convention, its purpose, provisions, mode of preparation and adoption, are factors which must be considered in determining, in the absence of any express provision on the subject, the possibility of making reservations, as well as their validity and effect'.

75. Oral submissions op cit 55-7.

76. Written submissions op cit 20-40.

77. Ibid 20-22.

78. It is incorporated into Article 31(3)(b) of the Vienna Convention on the Law of Treaties.

79. Written submissions op cit 22-23.

in fact, be of assistance only where the text of the treaty was ambiguous or unclear, and it could never justify any departure from the clear wording of the text. This idea appears to be a necessary corollary of the overall approach to treaty interpretation adopted by South Africa, viz, the textual approach.

It was further contended that, in any event, the practical utility of subsequent conduct as an aid to clarifying the intentions of contracting parties was small.<sup>80</sup> Indeed, for it to have any probative value at all, the subsequent conduct must be so clear and so consistent as to permit of only one inference, and disputes in meaning, it was argued, were highly unlikely to arise if all the parties to a treaty applied it in the same way. When disputes do arise, the reason is likely to be that the treaty has been applied differently by the various parties. In this event there would *ex hypothesi* be no clear concordant practice which could have substantial probative value as to the meaning of the text. The Government submitted that it was commonly accepted, in relation to bilateral treaties, that the subsequent conduct of one party alone cannot be adduced as evidence of a common intention as to its terms.<sup>81</sup>

The situation is not, however, as clear-cut as this. For example, in the Advisory Opinion of the ICJ in 1950 on the *International Status of South-West Africa*,<sup>82</sup> the Court, after referring to a series of declarations made by the Government of the Union of South Africa to the League of Nations and later on to the United Nations, stated:<sup>83</sup>

‘These declarations constitute recognition by the Union Government of the continuance of its obligations under the Mandate and not a mere indication of the future conduct of that Government. Interpretations placed upon legal instruments by the parties to them, although not conclusive as to their meaning, have considerable probative value *when they contain recognition by a party of its own obligations under an instrument.*’

Even in bilateral treaties, the subsequent conduct of one party only will be regarded as an important factor in the interpretation of the terms of the treaty if it could be said to constitute a recognition by that party of its own obligations arising out of the instrument. Furthermore, as submitted by Lord McNair,<sup>84</sup> evidence that both parties have adopted the same meaning of a treaty provision will, for obvious reasons, be of higher probative value than evidence as to the view of one party only. ‘But when one party in some public document such as a statute adopts a particular meaning, circumstances can arise, particularly after the lapse of time without any protest from the other party, in which that evidence will influence a

80. Ibid, 23-25.

81. The comments of Sir Percy Spender in the *Certain Expenses of the United Nations Advisory Opinion*, ICJ Rep 1962, p 151 at 190 were cited by the South African Government in favour of this proposition.

82. ICJ Rep 1950, at 135-6.

83. Italics added.

84. McNair, op cit 427.

tribunal.<sup>85</sup> Much would seem to depend on the form that the subsequent conduct assumes as to how much evidential weight it will ultimately carry with a tribunal.

As for multilateral conventions, the South African Government argued that where one or some, but not all, of the parties have acted in a particular way, their subsequent conduct could not of itself have any probative value or provide a criterion for judicial interpretation. In addition, special consideration has to be given to multilateral conventions where the original parties may or have already been added to in accordance with the terms of the convention itself. Is the subsequent conduct of the original members only to be taken into account or that of all the members, new and old? The textualists would advocate the former course of action if forced to choose but would prefer not to rely on subsequent conduct at all. As Sir Percy Spender<sup>86</sup> said when applying this principle to the Charter of the United Nations, which is a prime example of such a treaty:<sup>87</sup>

'The original Members of the Charter number less than half the total number of Member States. If the intention of the original Members of the United Nations, at the time they entered into the Charter, is that which provides a criterion of interpretation, then it is the subsequent conduct of *those* Members which may be equated with the subsequent conduct of the parties to a bilateral or multilateral treaty where the parties are fixed and constant. This, it seems to me, could add a new and indeterminate dimension to the rights and obligations of States that were not original Members and so were not privy to the intentions of the original Members.'

This brief resume indicates that the South African Government views the principle of subsequent conduct with suspicion, to be used only on rare occasions and even then with circumspection. The International Law Commission, however, labelled it a general rule of interpretation and States, by endorsing this proposal, have indicated that they rank the principle of subsequent conduct higher than that of *travaux préparatoires*. So it is in this respect that the approach of the South African Government differs from that of the international community.

One other aspect of the principle of subsequent conduct was examined by South Africa in 1971,<sup>88</sup> namely, the provision that a treaty might be revised or modified by the subsequent conduct of the parties. The International Law Commission had proposed that this proposition be included in the Vienna Convention.<sup>89</sup> But, although this specific proposal drew little comment from Governments,<sup>90</sup> amendments deleting it were ultimately

85. Ibid.

86. Himself a textualist.

87. *Certain Expenses of the United Nations* ICJ Rep 1962, p 151 at 191.

88. Written submissions op cit 34-39.

89. In draft article 38: YbILC 1966 Vol II, p 236. This draft article provided: 'A treaty may be modified by subsequent practice in the application of the treaty establishing the agreement of the parties to modify its provisions'.

90. Yb ILC1966 Vol II, pp 279 et seq.



adopted by fifty-three votes to fifteen, with twenty-six abstentions, by the Conference's Committee of the Whole.

One of the main objections advanced by delegates against inclusion of this draft article was that it would offend against the principle of *pacta sunt servanda*,<sup>91</sup> and in this way pose a threat to the inviolability of treaties.<sup>92</sup> Other problems included the fact that the draft article did not define with precision the type of practice contemplated, the period of time during which such practice must have continued or the extent to which subsequent practice could modify a treaty. Would it be capable of modifying the main basis of the treaty or would its effect be limited to the alteration of less essential features?<sup>93</sup>

Another objection to this draft article advanced by delegates arose from the fact that implementation of treaties is generally in the hands of State officials who are not themselves authorized to conclude or amend treaties. States would accordingly be faced with serious difficulties if the manner of such implementation were to be regarded as subsequent conduct capable of effecting modifications to treaties despite the fact that such modifications had not been approved by the necessary constitutional processes.<sup>94</sup>

The South African Government, after summarizing in its submissions the above proceedings,<sup>95</sup> arrived at the conclusion that the rejection by States of draft article 38

'must necessarily cast doubt on the ambit and, indeed, the very existence of a rule permitting modifications of treaties by subsequent conduct of the parties. If, despite the attitudes of States at the Conference, such a rule were recognized, it could, it is submitted, be invoked only in a very clear case. The subsequent conduct would not only have to be unambiguous but would probably have to amount to a well-accepted and long-standing practice; the intentions of all the parties to effect a modification would have to be conclusively established; and the treaty-making organs of the parties would have to be involved in the practice, whether by actual participation or acquiescence.'<sup>96</sup>

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91. United Nations Conf on the Law of Treaties, 1st sess. See the objections of the representatives of Spain (paragraph 69, p. 209); Chile (para 75, p 210); USSR (para 3, p 210); Syria (para 30, p 212); Uruguay (para 34, p 212); Cuba (para 40, p 213); Portugal (para 42, p 213); and Netherlands (para 47, p 213).

92. The argument of Sir Humphrey Waldock, the Expert Consultant, that this draft article would not necessarily encroach on the principle of *pacta sunt servanda* since it would apply only to conduct establishing that *all* the parties to a treaty had agreed to its modification, did not serve to allay the fears of the delegates: United Nations Conf on the Law of Treaties, 1st sess, 214 para 56.

93. Such limitations had previously been suggested by Tunkin C I: YbILC 1966 Vol I, part II, p 4, para 18.

94. United Nations Conf on the Law of Treaties, 1st sess. See objections of representatives of France (para 63, p 208); Spain (para 68, p 209); USSR (para 4, p 210); Poland (para 16, p 211); Turkey (para 27, p 211); Uruguay (para 36, p 212); and Phillipines (para 43, p 213); see, too, the reply of the Expert Consultant (para 57, p 214).

95. Written submissions op cit 26-30.

96. Ibid 29-30.

The South African Government stated in conclusion that regard must be had to treaties which specifically prescribed the method of their amendment. It submitted that any attempt to achieve an amendment by different methods must be ineffective in law. At the very least, the availability of a prescribed procedure would militate strongly against any suggestion that the parties applied some different procedure towards achieving the end for the attainment of which the prescribed procedure was established.<sup>97</sup>

(ii) *The Approach of the South African Courts*

In 1971 Schreuer<sup>98</sup> drew attention to the fact that international lawyers concerned with the interpretation of treaties generally overlook the fact that 'by far the greater part in the judicial interpretation of international agreements falls to municipal, not international, tribunals. Consequently, they have offered very little assistance in the way of clear guidelines to domestic courts on how they should interpret an international convention'. The first part of Schreuer's observation is not true of the South African scene. Although in South Africa little, if any, academic help has been proffered to domestic courts in this regard, it is probable that the cause of this omission has been the fact that South African courts are only rarely called on to interpret and apply international treaties directly.

It is a fundamental principle of South African constitutional law that the courts will not regard a treaty by itself as being a source of South African law in the sense that it imposes duties or confers rights on private individuals. South African courts, following the practices which originated in the United Kingdom, insist that a treaty be incorporated into the law of the land by legislation.<sup>99</sup> Strictly speaking, therefore, in South African courts as in English courts<sup>1</sup> the question is primarily one of statutory interpretation. Consciously or unconsciously it is inevitable that South African courts will tend to follow their own precedents and doctrines even in cases where they have to interpret and apply law which does not originate in their own legal system.<sup>2</sup> Furthermore, common lawyers instinctively tend to lean towards the view that a statute adopting a treaty is on the same level as other ordinary statutes<sup>3</sup> because any treaty which purports to alter the law requires an Act of Parliament before it becomes operative.

97. Ibid 30-33.

98. Schreuer C H 'The Interpretation of Treaties by Domestic Courts' (1971) 45 BYBIL 255.

99. Sinclair I M, 'The Principles of Treaty Interpretation and their Application by the English Courts' (1963) 12 ICLQ 508 at 524 et seq discusses the necessity for such enabling legislation and contends that the method by which legislative effect is given to a treaty may affect the extent to which the English courts will be called on to interpret and apply the treaty. Also Mann F A, 'The Interpretation of Uniform Statutes' (1946) 62 LQR 278.

1. Schreuer op cit 257.

2. One of the arguments advanced in favour of abolishing appeals from South African courts to the Privy Council was that the latter tended to apply English solutions to matters which should have been governed by Roman-Dutch Law.

3. Mann op cit 279.

The rules of interpretation of a South African statute are well-established<sup>4</sup> and routinely applied by municipal courts. The overriding concern of the courts here is to ascertain and give effect to the intention of the legislature<sup>5</sup> as it appears from the text. The words of the statute must generally be interpreted in their ordinary grammatical sense.<sup>6</sup> If they prove to be ambiguous, the legislature's intention is to be sought through the application of accepted mechanical rules. Similarly, on the numerous occasions upon which South African courts have been called on to interpret contracts and wills, their avowed aim has been to determine and give effect to the intentions of the contracting parties or the testator. The courts have stressed that on no account will they themselves contract on behalf of the parties.

Fawcett contends<sup>7</sup> that the practice of courts in the United Kingdom, from which the courts in other Commonwealth countries do not markedly diverge,<sup>8</sup> in the interpretation and application of treaties, rests on two complementary principles. 'The first is the constitutional principle of the primacy of the laws enacted by Parliament; the second is the recognition that international agreements have their own special structure and field of operation and must, subject to the first principle, be construed and applied accordingly.'

The primacy of statute law manifests itself in several ways. Even where the treaty has been incorporated into municipal law by legislation, if there is a conflict between the statute and the treaty the statute will prevail.<sup>9</sup> Fawcett contends further that the enactment of legislation in a particular sphere might be regarded as evidence of the intention of parties to a convention, the United Kingdom being one of them. Despite this a statute cannot be interpreted any differently simply because at the date of its passing a convention dealing with the same subject-matter was in force to which the United Kingdom did in fact accede after the passing of the statute.

Yet another result of the primacy of legislation lies in the fact that the determination of the meaning of the language used in a statute giving effect to an international agreement also follows rules resting on the primacy of the statute. Where, for example, a treaty provision directing that, in the case of divergence of language the French text is to prevail, has not been incorporated into English law, the other provisions of the

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4. The Interpretation Act 33 of 1957 applies to all statutes unless the statute itself provides otherwise. The leading text on the subject is Steyn L C, *Die Uitleg van Wet* 3 ed (1963). See, too, Hahlo H R and Kahn E, *The South African Legal System and its Background* (1968) 176 et seq.

5. This, of course, is a fictional process, for, being composite, the legislature cannot have one state of mind and the intentions of the members of this body, if they are consciously formulated at all, will often conflict and even the majority of the majority favouring the measure may be unaware of its precise terms: Cross R, *Precedent in English Law* (1961) 171.

6. Hahlo and Kahn op cit 183.

7. Fawcett J E S, *The British Commonwealth in International Law* (1963), pp 66 et seq.

8. These remarks apply with equal accuracy to South Africa even today.

9. The State of course will remain liable on the international level.

treaty must be construed according to the English text.<sup>10</sup> The French text will be regarded only as an aid to the solution of ambiguities but not as conclusive.<sup>11</sup>

Finally, it should be remembered that even where a treaty has been incorporated into local law by statute, this will not prevent the legislature from amending or even repealing the statute at some later date. This might result in the treaty itself still being binding on the State at the international level, while the municipal courts find themselves powerless to interpret its provisions or to give effect to any of its terms.

The second principle mentioned by Fawcett is complementary to the first and has the effect of moderating its severity. It recognizes that an international agreement has its own special status and function as an instrument of international law.<sup>12</sup> Therefore, to the extent that the first principle of the primacy of a statute does not operate in any given situation, the treaty should be construed by canons of interpretation designed to make it as effective as possible in its field of operation.<sup>13</sup> The insistence of many international lawyers that international standards of interpretation should be applied by municipal courts has at its objective the achievement of international uniformity.<sup>14</sup> Some even go as far as holding that there is an obligation under international law to secure this uniformity.<sup>15</sup> Despite such considerations, other lawyers insist that treaty law, as soon as it has become part of the domestic legal system, should be treated like any other domestic law.<sup>16</sup> A South African court ought not to be urged to adopt either extreme point of view. On the one hand, while the courts should be encouraged to regard international law, be it customary or conventional, as part of the law of the land, they should, at the same time, be aware that the manner in which they apply a particular rule or treaty provision may ultimately have ramifications beyond the narrow borders of the country. In order to ensure the continued existence of an international norm it ought, as far as it is reasonably possible, be uniformly interpreted and applied by municipal courts of every State. In interpreting an international convention, a domestic court should, therefore, bear in mind that 'an enactment, as far as its language permits, is to be construed as consistent with the established principles of public international law'.<sup>17</sup> The interpretation of an international convention must, as Lord Sumner said in *The Blonde*,<sup>18</sup> take note of the fact that 'it is expressed in what is by tradition the common language of international intercourse'.<sup>19</sup> He warned further that there existed 'many rules . . . as to

10. *Rothschild v Administrator of Austrian Property* [1923] 2 Ch 542.

11. *Pyrene Co Ltd v Scindia Navigation Co* [1953] 2 QB 402.

12. See, for instance, the view taken of the fourth Hague Convention of 1907 in *Porter v Freudenberg* [1915] 1 KB 857 (CA).

13. Fawcett, *op cit* 67-8.

14. Schreuer, *op cit* 264.

15. *Ibid.*

16. *Ibid.*

17. Hahlo and Kahn, *op cit* 211.

18. [1922] 1 AC 313 (PC).

19. At 325.

the formation, the interpretation and the discharge of contracts which cannot be transferred indiscriminately from municipal law to the law of nations'.<sup>20</sup> As Lord Macmillan declared in *Stag Line Ltd v Foscolo Mango and Co*<sup>21</sup> in respect of the Carriage of Goods by Sea Act 1924, which incorporates the Hague Rules into English Law:

'It is important to remember that the Act of 1924 was the outcome of an international conference and that the rules in the Schedule have an international currency. As these rules must come under the Consideration of foreign courts, it is desirable in the interests of uniformity that their interpretation should not be rigidly controlled by domestic precedents of antecedent date, but rather that the language of the rules should be construed as broad principles of general acceptance.'

A South African court in *Dave Zick Timbers (Pty) Ltd v Progress Steamship Co Ltd*<sup>22</sup> was recently called upon to interpret the phrase 'brought suit' in Article 3(6) of the Hague Rules contained in the International Convention for the Unification of certain Rules relating to Bills of Lading, which had been incorporated into South African law by the Merchant Shipping Act of 1951.<sup>23</sup> The court held that, although South Africa was a party to the Convention in question, Article 3(6) was to be interpreted in accordance with the principles of South African law because the action had been instituted in a South African court and the question could only be determined by reference to South African law. As John Dugard commented,<sup>24</sup> South African law was applicable in this case not only for the reasons advanced by the court but also because Article 3(6) of the Hague Rules had been enacted into domestic law by s 308(8) of the Merchant Shipping Act and on that basis alone fell to be interpreted in accordance with South African principles. It is unfortunate that the court did not discuss the problem in any greater depth or consult the jurisprudence of the English courts, especially in view of the dearth of South African judgments on the subject of treaty interpretation.

In *Pyrene Co Ltd v Scindia Navigation Co* Devlin J remarked:<sup>25</sup>

'it is no doubt necessary for an English court to apply the [Hague] Rules as part of English law, but that is a different thing from assuming them to be drafted in the light of English law. If one is enquiring whether "loaded on" in article 1(e) has a different meaning from "loaded" or "loading" in other parts of the rules, it would be mistaken to look for the significant distinction in the light of a conception which may be peculiar to English law.'

However, where terms or expressions in an international agreement are not adopted verbatim but are translated into the phraseology of English

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20. At 331.

21. [1932] AC 328 at 350 (HL).

22. 1974 (4) SA 381 (D).

23. Act 57 of 1951.

24. Dugard J, 'Foreign Affairs and Public International Law' 1974 Ann Surv of SA Law 52 at 58.

25. [1954] 2 QB 402 at 416.

statutes or where they have a meaning already judicially assigned to them in English law, Parliament must be taken to have intended that they should bear their English meaning.<sup>26</sup> Such arguments would apply with equal validity to similar South African situations.

One final point should be noted in regard to the interpretation of treaties by municipal courts. If a term of the statute incorporating a treaty provision is itself ambiguous or unclear, resort may be had by a South African court to the language of the treaty itself to assist in the interpretation of the statute.<sup>27</sup>

### (iii) *The Philosophy Underlying the South African Approach to Treaty Interpretation*

The above brief survey of the South African attitude to treaty interpretation is indicative of certain conclusions. It is clear that at the present time South African courts have been provided with little academic exposition or judicial precedent as to how they are to set about the task of interpreting treaties and international conventions. As a result, it is likely that when this problem arises in the future they will turn to the guidelines provided by the South African Government in the oral submission of 1962 and the written submissions of 1971, as summarized in the preceding pages.

The most striking and recurring feature of the South African Governmental approach lies in its unswerving adherence to the textual school of thought. This approach has not only remained aloof from the widespread trend towards an acceptance of certain teleological or sociological elements, but has, furthermore, manifested a complete lack of understanding of this current jurisprudential philosophy. The teleological approach of the International Court of Justice in its latest (1971) pronouncement on the status of South-West Africa, in which it declared South Africa's continued presence in the territory to be illegal, was described by the Prime Minister, Mr B J Vorster, himself a lawyer, as 'entirely untenable' and 'clearly and demonstrably the result of political manoeuvring instead of objective jurisprudence'.<sup>28</sup> Mr Justice J T van Wyk, South African *ad hoc* judge in the 1962-6 contentious proceedings over South-West Africa, accused the Court of 'substituting mere mumbo-jumbo for sound legal reasoning'.<sup>29</sup> This accusation echoes his

26. Fawcett, *op cit* 69.

27. Per Scrutton L J in *Ellerman Lines Ltd v Murray* [1930] P 197 at 201; not disputed on appeal although the House of Lords did not find resort to the Convention necessary in this particular case: [1931] AC 126.

28. *Rand Daily Mail* 22 June 1971.

29. Address to students of the University of Cape Town on 17 August, 1971 (unpublished). Such outbursts are in sharp contrast to the praise lavished on the Court's integrity and courage by South African jurists after the 1966 judicial proceedings over South-West Africa: De Villiers DP, 'The South-West Africa Cases: The Moment of Truth' *Ethiopia and Liberia v South Africa: The South West Africa Cases*, Symposium. Los Angeles, African Studies Centre, University of California, Occasional Paper No 5, 1968, p 13 at 18. See further, Wiechers M, 'South West Africa: The

earlier statements on the reasons behind and the effects of the 1962 preliminary decision of the court.<sup>30</sup> He has contended that the efforts of international lawyers and international tribunals to promote confidence in an international regime had suffered a 'severe set-back' as a result of the 1962 decision. This set-back had been caused 'by those judges who refuse to apply the traditional methods of interpretation of treaties . . . and who base their conclusions on assertions, assumptions and inferences not supported by the facts'.<sup>31</sup> In his opinion the 'erroneous' majority judgement in the 1962 proceedings had been based on 'inadequate grounds'.<sup>32</sup> He was convinced that 'to a great extent these errors [were] due to an excessive zeal to reach a predetermined result'.<sup>33</sup> Justice van Wyk strongly condemned any attempt at judicial lawmaking<sup>34</sup> and quoted extensive authority in support of his view that the 'so-called conceptional and formalistic methods [of interpretation] are the accepted methods'.<sup>35</sup> A similar lack of understanding of the teleological approach to law was demonstrated by Advocate E M Grosskopf, SC, who was a member of the South African legal team during the proceedings before the International Court in regard to South-West Africa, 1960-6; and who later became co-leader of the legal team in the proceedings leading to the Court's Advisory Opinion of 1971.<sup>36</sup> Grosskopf described the teleological method of interpretation as a 'vague and undefined' concept<sup>37</sup> and condemned the 1971 Advisory Opinion as 'a propaganda piece dressed up as a legal opinion'.<sup>38</sup> He appears convinced that the International Court had set out to condemn the South African Government for practising apartheid in the territory of South-West Africa, even if by so doing they found themselves unable to deliver a well reasoned, sound legal opinion.<sup>39</sup>

Indeed, the arguments contained in South Africa's written submissions to the Court in 1971 are an attempt to prove that the 1969 Vienna Convention on the Law of Treaties has entirely discredited the legitimacy

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Decision of 16 July 1966 and its Aftermath' (1968) 1 Comp and Int LJ of Southern Africa 408.

30. Van Wyk JT, 'The International Court of Justice at the Crossroads' 1967 Acta Juridica 201.
31. Ibid 202.
32. At 203.
33. Ibid.
34. Ibid 206.
35. Ibid 206-7. See too, his remarks to the effect that the teleological or sociological method of interpretation as defined by Judge Tanaka in his dissenting opinion in the *South West Africa Cases, Second Phase*, ICJ Rep 1966 at 278 would 'undoubtedly lead to a greater reluctance on the part of States to enter into treaties or to submit interpretation disputes to arbitration': Van Wyk JT, 'The United Nations, South-West Africa and the Law' (1969) 2 Comp and Int LJ of Southern Africa 48 at 49.
36. Grosskopf E M, 'The 1971 Advisory Opinion' published in a booklet entitled *South West Africa and the International Court: Two Viewpoints on the 1971 Advisory Opinion* by the South Africa Institute of International Affairs, Johannesburg, 1974, p 10.
37. Ibid.
38. At 15.
39. Ibid.

of teleological methods of interpretation. This attempt was shortsighted. Although the International Law Commission expressed itself strongly against *extreme* methods of teleological interpretation,<sup>40</sup> its endorsement of various purpose orientated elements of treaty interpretation is proof that this body was not opposed to more moderate forms of teleological interpretation.<sup>41</sup> In any event, as Dugard has noted,<sup>42</sup> even assuming its interpretation of the Vienna Convention was correct, South Africa overlooked the fact that it is doubtful whether the Vienna Convention was designed to cover the constitutive and humanitarian treaties such as the Mandate for South-West Africa. Here special rules of interpretation apply designed to adapt the letter of the treaty to circumstances of the time and contemporary expectations.<sup>43</sup> Be that as it may, it is arguable that even where the terms of an 'ordinary' treaty are in dispute the approach of the South African Government would be too rigidly textual to be entirely acceptable.

Why, then, are teleological principles rejected by South African lawyers? The answer lies in an examination of the underlying South African judicial philosophy. The South African approach on the international level to treaty interpretation stems from this judicial philosophy and simply mirrors the general approach of municipal courts towards the interpretative function. When interpreting a statute the court basically adopts the view that its sole task is to discover the intention of the legislature through the application of accepted mechanical rules.<sup>44</sup> A similar attitude towards the intention of the parties is adopted when the courts consider the interpretation of contracts or wills.

In this way, through the years the myth of judicial non-interference has been preserved. The function of the judiciary is seen as purely mechanical or phonographic. The idea has crystallized that the intention of the legislature or that of the contracting parties is generally discoverable provided that the right rules of interpretation are applied in the right manner.

An insight into the legal philosophy underlying the approach of municipal courts as well as many South African-trained academics, lawyers and members of the executive entrusted with the task of interpreting and

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40. See the commentary of the Commission on articles 27 and 28 of the Draft Articles on the Law of Treaties in (1967) 61 AJIL 350.

41. Ibid 351-2.

42. Dugard J, 'The Opinion on South-West Africa (Namibia): The Teleologist's Triumph' (1971) 88 SAfLJ 460 at 476.

43. See the comments of Judge De Castro in ICJ 1971, p 184. Sir Gerald Fitzmaurice, who could not by any stretch of the imagination be labelled a teleologist, also recognizes the need for a different approach to constitutive treaties: 'Judicial innovation - Its Uses and Its Perils' *Cambridge Essays in International Law* (1965) 24.

44. The view permeates Steyn LC, *Die Uitleg van Wette*, 3 ed. (1963). This book describes in considerable detail the technical rules of interpretation but, as noted by Dugard in 'The Judicial Process, Positivism and Civil Liberty', (1971) 88 SAfLJ 181 at 182 fn 5, the commentary contains no reference to the nature of the judicial process itself in this field, nor significantly, does the bibliography refer to any of the numerous modern studies on the judicial process and the interpretation of statutes.



applying treaties to which South Africa is a party will help not only in understanding the position taken by the South African Government and courts in the past, but also in assessing their probable future course of conduct. Such an insight has already been provided by Dugard in a number of publications which dwell precisely on this topic. The answer to the myth of judicial sterility, which is preserved in the case of interpretation of statutes and contracts, suggests Dugard,<sup>45</sup> lies in the acceptance of positivism as a jurisprudential guide. This legal philosophy, developed by John Austin in the nineteenth century, is based on two cardinal beliefs. The first is that law is a command from a political superior to a political inferior; the second is that law and morality (including legal values) must be firmly separated.<sup>46</sup> A strict division must therefore be maintained between law as it is and law as it ought to be.<sup>47</sup> Positivism was the dominant legal philosophy of nineteenth-century England<sup>48</sup> and when the British annexed the Cape Colony in 1806 they brought this legal philosophy with them. Here it soon replaced the Roman-Dutch natural law heritage of Grotius and Voet.<sup>49</sup>

Attempts were made to revive natural-law philosophy in the Orange Free State and South African Republic, where it was incorporated in the provisions of rigid Constitutions with which the laws of the respective Volksrade were obliged to conform. However, after the 'laws' of the Transvaal Volksraad were struck down by Chief Justice Kotzé for non-conformity with the Constitution,<sup>50</sup> President Kruger declared the testing right (and hence a higher ideal law to which man-made law should aspire) to be a 'principle of the Devil'<sup>51</sup> and proclaimed the supremacy of the Volksraad. This notion of Parliamentary sovereignty accords fully with the Austinian command theory. By 1908 Sir John Wessels<sup>52</sup> was able to declare that

'(t)he whole theory of the Law of Nature is now so thoroughly exploded that it is difficult for the modern student to imagine how the jurists of former years ever came to attach such importance to the abstraction—Natural Law.'

The decline of the natural-law doctrine in Europe<sup>53</sup> and the pervasiveness of English legal influence were the two major reasons for the growth of

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45. Dugard J, 'The Judicial Process, Positivism and Civil Liberty' op cit 183.
  46. Hart HLA, 'Positivism and the Separation of Law and Morals' (1958) 71 Harv LR 593 at 601-2; Fuller LL, 'Positivism and Fidelity to Law—A Reply to Professor Hart' (1958) 71 HarvLR 630 at 640, 656; W Friedman, *Legal Theory* 5 ed (1967) 256-91
  47. Hart op cit 596-7.
  48. Radbruch G, 'Anglo-American Jurisprudence through Continental Eyes' (1936) 52 LQR 530 provides a study of the effect of Austin on nineteenth-century English legal philosophy.
  49. Sir John Wessels, *History of the Roman-Dutch Law* (1908) 291-3, describes this process.
  50. In *Brown v Leyds NO* (1897) 4 Off Rep 17.
  51. *Notulen Eersten Volksraad* (1898), 153-4. Cited in Sir John Kotzé's *Memoirs and Reminiscences* II (1949) xli-xlii.
  52. Wessels op cit 291.
  53. See Friedmann op cit 128, 132.

positivism in South Africa. Advocates of the Cape Colony were obliged to be members of the United Kingdom Bar or doctors of law of Oxford, Cambridge or Dublin.<sup>54</sup> As a result they were trained in the mould of positivists and were taught to concern themselves with rules of law alone and their mechanical application and to avoid any speculation about the morality of any given law.

The flaws and dangers inherent in this type of legal thinking, which insisted upon servile obedience to the will of the sovereign and the strict distinction between law and morals, were made manifest in the exploitation of the law and lawyers by the corrupt Nazi regime and the consequent debasement of the German legal system. The horrors exposed during the Nuremberg Trials did much to contribute to a general post-war revival of natural-law doctrines. In the United States, in particular, new sociological and realist theories of law had begun to take effect even prior to the Second World War.<sup>55</sup> The United Kingdom still adheres to the positivist creed<sup>56</sup> but the full rigours of the Austinian theory have been modified by such modern positivists as Hart<sup>57</sup> and Lloyd.<sup>58</sup> South Africa, however, has remained untouched by the new jurisprudential trends. As stated by Dugard:<sup>59</sup>

'In present-day South Africa the austere doctrine of the imperative nature of law and the rigid separation of law and morality still flourish in their pristine Austinian purity. This is manifested in a variety of ways, of which the more obvious are the largely quiescent attitudes of the legal profession towards statutes invading individual liberty; the mechanical search of the judiciary for the legislature's intention in these same statutes—with firm adherence to the distinction between strict law and legal values; the failure of legal education to relate law to the social sciences; and the general lack of interest among lawyers in the nature and the role of law in modern South African society.'

In the field of statutory interpretation, the twin principles of positivism—command and distinction between law and morality—have manifested themselves in the acceptance of the courts of the rigid distinction between the legislative function and the judicial function inherent in the command theory. The courts regard it as their duty to analyse and interpret the will of Parliament but not to question its underlying motivation.<sup>60</sup> From this there is a natural progression to seeking the will of the parties to contracts, wills and treaties. In addition, the rigid distinction

54. Hahlo H R and Kahn E, *The Union of South Africa: The Development of Its Laws and Constitution* (1960) 205-6.

55. Hall J, 'The Present Position of Jurisprudence in the United States' (1958) 44 *Virg LR* 321.

56. *Ibid*; see too, Hart H L A, 'Philosophy of Law and Jurisprudence in Britain (1945-1952)' (1953) 2 *AJCompL* 355.

57. See in particular Hart H L A, *The Concept of Law* (1961).

58. Lloyd D, *The Idea of Law* (1964) chapter 5.

59. Dugard *op cit* 186.

60. *Ibid* 186-7.

between law and morals has led to a repudiation in the judicial process of considerations of policy: the courts have often indicated that they 'will not sit in judgement on matters of policy'.<sup>61</sup>

This domestic approach contends Dugard<sup>62</sup> is reflected in the South African attitude towards international law and the international judicial process, where an extreme positivist stance has been adopted. The South African Government sees international law as a body of rules between States to which they have consented.<sup>63</sup> It regards the principle of non-intervention in the domestic affairs of States as the cornerstone of the international legal order, a principle overriding the whole Charter.<sup>64</sup> No State has a legal right to enquire into or pronounce upon the morality of laws applied by any other State. The positivist approach shows itself in a variety of ways. South Africa totally rejects the notion that customary rules of international behaviour may be created in the political organs of the United Nations.<sup>65</sup> It refuses to accept human rights and self-determination as legal rights or legal values worthy of consideration by international tribunals.<sup>66</sup> It requires the International Court of Justice to adopt the same narrow view of the judicial function as that taken by South African and British courts.<sup>67</sup>

Many South African academics would not agree with Dugard's explanation of the differences between the South African approach to treaty interpretation and that adopted by the ICJ in 1962 and 1971. Grosskopf has labelled his theories 'demonstrably unsound'.<sup>68</sup> He accuses Dugard of not defining his legal philosophy with any precision. To his mind Dugard

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61. Per Steyn C J in *S v Tuhadelene* 1969 (1) SA 153 AD at 172.
  62. Dugard J, 'Namibia (South-West Africa): The Court's Opinion, South Africa's Response and Prospects for the Future' (1972) 11 Col J of Trans L 14 at 35; Dugard J 'The Opinion on South-West Africa (Namibia): The Teleologist's Triumph' (1971) 88 SAf LJ 460 at 474.
  63. This approach is evident in South Africa's arguments before the Court in 1966: 1966 ICJ Pleadings, South-West Africa, vol 9, 629-36, 653-4.
  64. See the statement to this effect by Fourie in the Security Council: 15 UN SCOR, 851 st mtg 8 (1960).
  65. See 1966 ICJ Pleadings, South-West Africa, vol 9, 653-4. Also vol 10, 40; and the separate opinion of Mr Justice van Wyk in the 1966 *South-West Africa* cases ICJ Rep 1966, 169-70. Similar sentiments have been expressed by various South African academics. For example see Wiechers M, 'South-West Africa: The Decision of 16 July 1966 and its Aftermath' (1968) 1 Comp and Int LJ of Southern Africa 408 at 427.
  66. Note the doubts expressed to this effect by South Africa's legal representative in the 1966 ICJ Pleadings, South-West Africa, vol 10, 60-6.
  67. See 1966 ICJ Pleadings, South-West Africa, vol 9, 643-5. Numerous statements to this effect have been made by South African lawyers. See, for example, Van Wyk J T, 'The International Court of Justice at the Crossroads' 1967 Acta Juridica 201 at 204. Also Wiechers loc cit, and De Villiers D P 'The South-West Africa Cases: The Moment of Truth' *Ethiopia and Liberia v South Africa: The South West Africa Cases*. Symposium, Los Angeles: African Studies Centre, University of California, Occasional Paper No. 5 (1968), 13 at 17. For a discussion of the British approach see Higgins 'Policy Considerations and the International Judicial Process' (1958) 17 ICLQ 58.
  68. Grosskopf E M, 'The 1971 Advisory Opinion Addendum' *South West Africa and the International Court: Two Viewpoints on the 1971 Advisory Opinion* op cit 30.

seems to be saying no more than that 'in international law the ends may justify the means—the ends being the political, social and moral causes sought to be advanced and the means being the legal reasoning employed in advancing those causes'.<sup>69</sup> He characteristically dismisses the talk about natural law, teleological theories and sociological philosophies as a gloss placed upon the Court's Opinion by well-disposed (but misguided) academics like Dugard<sup>70</sup> and adopts the view that the only true philosophy underlying the Court's opinions was that of handing down decisions which were adverse to South Africa in order to condemn judicially the practice of apartheid.<sup>71</sup>

Such is the extreme view of Grosskopf for what it is worth. However, other South African lawyers also manifest a deep distrust of any judicial deviation from positivist principles. Advocate de Villiers was leader of the South African Government's legal team at the Hague during the South West African cases before the International Court, 1960-6, and during the proceedings before the Court in connection with the 1971 Advisory Opinion. In an article praising the courage and integrity of the Court in 1966, he stressed the need for caution to be applied to any suggestion for 'dynamic' law-making.<sup>72</sup> Judges should not overstep the bounds of their judicial function. This was especially true, he felt, of international adjudications which are entirely dependent on the willingness of States to submit to the jurisdiction of the Court.

Similar exhortations have been advanced by van Wyk. He disapproved of lawyers who supported teleological or sociological methods of interpretation despite their admissions that such methods could not be justified on the basis of conventional jurisprudence.<sup>73</sup> He realized that their support for this unconventional approach stemmed from their belief in what the law ought to be. However laudable such an objective was, it did not constitute sound jurisprudence.<sup>74</sup> The tenor of his article reveals a pre-occupation with ascertaining the intentions of the parties as they were at the time that the Mandate agreement was concluded. The humanitarian argument that the Court's function was to uphold and protect the 'sacred trust of civilization' even if this meant implying certain terms into the Mandate agreement, left him unmoved. The Court's function, he insists, is limited to interpreting and applying only those intentions of the parties which appeared in the agreement. The Court has no right to fill in lacunas by theoretical interpretation.<sup>75</sup> The moral issues involved in upholding the underlying objects and purposes of the Mandate agreement are plainly of no concern to him. The Court's function is to interpret the intention of the parties in accordance with predetermined rules of interpretation—it is no less and no more.

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69. *Ibid.*

70. *Ibid.*

71. *Ibid.* 31.

72. De Villiers DP 'The South-West Africa Cases: The Moment of Truth' *op cit* 18-19.

73. Van Wyk JT 'The United Nations, South-West Africa and the Law' *op cit* 49.

74. *Ibid.*

75. *Ibid.* 62-3.

Wiechers similarly queries the Court's authority to fill in lacunas in the mandate agreement on the basis that the Court would then be undertaking a legislative function, the soundness of which was highly doubtful.<sup>76</sup> Although his writings reveal his positivist leanings, he is more sensitive than many South African academics to the important role that legal philosophy plays in judicial decisions. Thus he admits that '(t)he legal foundation of the South-West Africa dispute cannot be ignored or denied. What can create differences of opinion, however, is the role and characteristics of the law which has to be applied in order to solve that dispute'.<sup>77</sup> However, in an analysis of the 1966 South West Africa decision he arrives at the unhappy conclusion that there is an 'unbridgeable gap'<sup>78</sup> between the ideas and philosophies of the majority and the dissenting judges.<sup>79</sup>

In the light of this approach to international law it is not surprising that South Africa expects the Court to interpret all treaties restrictively in the interests of State sovereignty,<sup>80</sup> to refrain from applying teleological methods of interpretation to any treaties including those of a constitutive and humanitarian nature such as the Mandate; and to adopt instead a narrow, textual attitude; to apply the principle of contemporaneity by examining the text of a treaty in the light of concepts and linguistic usages current at the time of its conclusion, and to invoke the subsequent conduct of parties to a treaty as a guide to the original common intention of the parties only.<sup>81</sup>

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76. Wiechers M 'The Judgement of 18 July 1966: The Legal Implications' *Codicillus*, Special Edition, October 1966, 6 at 7.
77. Wiechers M *South West Africa and the International Court: Two Viewpoints on the 1971 Advisory Opinion* (1974) Introduction, p 9.
78. 'n onoorbrugbare kloof'.
79. Wiechers M 'Die Suidwes-Afrika-Saak: Enkele Aspekte van die Uitspraak van die Internasionale Geregshof van 18 Julie 1966' (1966) 29 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 297 at 310.
80. Dugard loc cit.
81. *Ibid.*