The International Court: Rules of Treaty Interpretation

James F. Hogg

Follow this and additional works at: https://scholarship.law.umn.edu/mlr

Part of the Law Commons

Recommended Citation
https://scholarship.law.umn.edu/mlr/1555

This Article is brought to you for free and open access by the University of Minnesota Law School. It has been accepted for inclusion in Minnesota Law Review collection by an authorized administrator of the Scholarship Repository. For more information, please contact lenzx009@umn.edu.
The International Court:

Rules of Treaty Interpretation†

When the meaning of a treaty is in dispute, the intention of the parties to the treaty is generally resorted to to determine the meaning. Rules of interpretation are used to ascertain the "intent of the parties" (as in the interpretation of municipal contracts). The author, in a case-by-case analysis of the decisions of the International Court of Justice, examines two rules of interpretation and ascertains the practical significance of the rules as limitations upon the power of the Court to "remake" an agreement or to obligate the parties to an agreement which neither intended.

James F. Hogg*

But unless some day somebody trust somebody, There'll be nothing left on earth excepting fishes.
from The King and I
Rodgers and Hammerstein

INTRODUCTION

To support such a thesis a writer need do no more than refer to the development of nuclear bombs and rockets which has taken place since the end of the Second World War. Yet the events of this period, or indeed of this century, have provided not only little evidence of somebody trusting somebody, but equally little reason why they should. Solemn agreements between states have been set down in treaties only to be flouted at a later date—the First World War began over a "scrap of paper," the Second became possible because of breaches of the Treaty of Versailles, the Kellogg-

† This Article is a part of an extended work examining the rules of treaty interpretation used by the International Court of Justice, and is composed of the first two sections of that work, the rules of "Ordinary Meaning" and "Necessary Implication." The other rules, which will be considered in a subsequent publication, are the "Surplus Words" rule, the rule of "Expressio Unius," the rule of "Restrictive Interpretation," the rule of "Travaux Préparatoires," the rule of "Authentic Interpretation," and the rule of "Purpose."

* Associate Professor of Law, University of Minnesota School of Law. The author wishes to thank Professor Louis B. Sohn of the Harvard Law School, and Professor Kenneth C. Davis of the Minnesota Law School for their valuable criticism of this article. He also acknowledges his debt to Richard E. Wetherall of the Board of Editors of the Minnesota Law Review who has spent much time trying to make the text more coherent.
Briand Pact and many others. No one would claim that war could have been prevented had a court been empowered to determine the existence of breaches of these treaties. Until world government is achieved such judgments will remain no more than declarations of the rights of the parties. But between states prepared to observe their treaty obligations such declarations are by no means without effect. The great majority of states today are prepared to honor their obligations, which for the most part, are contained in treaties. Yet these states have shown considerable reluctance to submit disputes over the scope and meaning of these obligations to international tribunals. Some have claimed a unilateral right of interpretation, others that an interpretation can only be arrived at by agreement of the parties. These attitudes can only result in a depreciation of the trust which states place in a treaty they have signed, and indeed, cannot but cast doubt on their willingness to observe the commitments they have entered into. Just as in national law a contract in dispute derives its full force and effect from the agreement of the parties objectively interpreted by a court, so in international law a treaty will best establish trust between the parties, and as an instrument will best achieve its purpose when states submit disputes over its meaning to the objective judgment of an international tribunal.

Many questions in the past have been submitted to arbitral tribunals constituted by states for particular types of cases. The Permanent Court of International Justice, however, reincorporated under the United Nations as the International Court of Justice, represented the first attempt to constitute a world court with a jurisdiction not limited to a particular time, particular parties, or particular cases. It gave promise of securing a greater measure of objectivity in its judgments than had arbitral tribunals constituted by the parties to disputes, of securing greater continuity in the application of international law, and indeed, of giving more specific content to the general principles of that law. And yet the fact remains that disputes referred to the International Court of Justice since 1947 have been minimal both in number and in importance when compared to the volume of disputes which have arisen between states in that period. It may well be wondered why the Court has seen such little business.

It is, of course, clear that a number of the disputes which have

1. A plan which would provide sanctions for such decisions as part of a wider plan for world government in matters affecting maintenance of peace has recently been published. See CLARK & SOHN, WORLD PEACE THROUGH WORLD LAW (1958). The book has attracted wide attention both in this country and Europe.

2. In this Article, no attempt is made to distinguish between the various types of instruments to which states may become parties. The word "treaty" then, is used to include agreements in heads-of-state form as well as inter-governmental agreements and conventions.
arisen in this period are political rather than legal in character; they have involved a claim asserted on one side that the existing arrangements between the parties should be changed rather than a claim that a treaty already in force must provide the answer to any particular dispute. It is not suggested that the Court could provide an answer for this need. Many of these disputes, however, have not involved a claim for a new order but a disagreement over the terms of the existing order, claims as to respective rights under a treaty. The resolution of such disputes is a task peculiarly appropriate to the Court.

In the field of treaty interpretation the International Court by comparison with ad hoc arbitral tribunals has a unique position. It possesses great prestige first, because it is an organ of the United Nations, second because it is the successor to the Permanent Court, third because its Judges are drawn from as great a diversity and variety of backgrounds as possible, and fourth because the Judges are all men of undoubted ability in the sphere of international law. It possesses great utility for states because it is a permanent organization, it applies in the absence of special agreement, a uniform law to the best of its ability, and as a result its decisions give rise to a maximum of objectivity, of certainty and predictability in the law. If sufficient use were made of the Court it could create a body of jurisprudence on treaty interpretation which would give proof of consistency and wisdom of judgment, the end result of which would be to encourage states to broaden the area of submission to its jurisdiction.

To encourage states to move in that direction, however, it is necessary for the Court to show that it has not used its judicial powers to make substantial encroachments on the treaty “rights” of the parties, that it is not using its admitted powers in an arbitrary and subjective fashion, that in determining the content of a treaty obligation it observes some limitations on its power. In treaty interpretation it might be said that the limits the Court has purported to impose on arbitrary decision are the rules of construction it has espoused, the means which the Court has used to limit the content given to a treaty. The International Court, like its predecessor, has made extensive reference to these rules and in most decisions both majority and dissenters have sought to explain the result in terms of their application.

This Article examines critically and comparatively the use which the Court has made of these rules, and ascertains whether these

3. One of the great shortcomings in international society is the absence of any organization with legislative powers to provide for peaceful change. The likelihood of the acceptance of any such organization seems as remote as ever.
rules operate as a limiting factor on the Court's range of discretion. It will show that, through these rules, the Court is limiting its power in a way which should encourage states to make wider use of its facilities as an arbiter of disputes if such states have a good faith interest in settlement.

The Rules Applied by the Court and the Method of Application

The purpose of interpretation has been said by the Court to be the ascertainment of the "intention of the parties." All the rules are


In addition, see the bibliographies contained in the International Court of Justice Yearbooks and also those in Chang, op. cit. supra at 186–91; Grousset, op. cit. supra at 181–98; Hambro, op. cit. supra at 463–553; Sohn, Cases and Other Materials on World Law 15–16 (1950); Yu, op. cit. supra at 248–60; Ehrlich, supra at 140–41; Harvard Draft Convention, supra at 671–85.

For a recent discussion of the analogous problem of statutory interpretation see Witherspoon, Administrative Discretion to Determine Statutory Meaning: "The High Road," 35 Texas L. Rev. 63 (1956), containing an excellent discussion of the various approaches that have been taken in this country to the problem of giving meaning to a statute. For further discussion of this problem see A Symposium on Statutory Construction, 3 Vand. L. Rev. 365 (1950) including a bibliography at 560.

5. The Court, in the exercise of its jurisdiction, is empowered to deal with two types of proceedings, contentious cases and advisory opinions. Stat. Int'l Ct. Just. arts. 36, 65. Agreement of the parties is required by the terms of article 36 to confer jurisdiction on the Court in contentious cases. This agreement is commonly found in declarations made by both parties pursuant to the "optional clause," article 36(2).
applied to this end. That the choice of different rules may lead to different conclusions as to the content of that intention, and that members of the Court can differ in their choice of rules and in the application of those rules to the facts of the case, suggests however, that this "intention" as determined by the Court may be an artificial thing. National courts in using the same criterion for the interpreta-

These declarations have generally been made in advance of any particular dispute. Agreements to submit specific disputes or types of dispute are also to be found in a number of treaties.

Questions of interpretation may be raised in both contentious and advisory proceedings. In contentious cases the question will be framed by the terms of the application instituting the proceeding together with the subsequent written and oral statements of the parties. In an advisory proceeding, the question will be found in the terms of the request for the opinion.

In many contentious cases the factual material necessary for a resolution of the problem is presented to the Court in the written and oral statements of the parties although article 48 of the Court statute does provide for the Court to hear witnesses and experts in addition to agents, counsel and advocates. In advisory proceedings the organization authorized to request the opinion is charged with the obligation to transmit to the Court all documents likely to throw light upon the question. Stat. Int'l Ct. Just. art. 65. Provision is made for the notification of all states entitled to appear before the Court, and for the receipt by the Court of written and oral statements. Art. 66.

It is the writer's opinion that in both contentious and advisory proceedings the Court uses the same method to resolve questions of interpretation—that nothing turns on whether the question is raised in the one type of proceeding rather than the other. In a contentious proceeding with respect to disputed issues of fact the defendant state usually has an initial advantage in that the plaintiff state will have the burden of adducing evidence and of persuasion. (This terminology is borrowed from McCormick, Evidence 635–39 (1954). Compare 9 Wigmore, Evidence §§ 2483–89 (3d ed. 1940). The degree of persuasion required by the International Court of Justice is that leaving "no room for reasonable doubt." Corfu Channel Case, [1949] I.C.J. Rep. 4, 18. Compare the refusal of the Court to regard certain proof as adequate in the Colombian-Peruvian Case, [1950] I.C.J. Rep. 266, 276–78. There is no corresponding burden in an advisory proceeding. But in both types of case where the issue relates to the meaning of a treaty, no one asserted meaning has any initial advantage with respect to any other asserted meaning. If however, the Court were to decide to apply a rule of restrictive interpretation, one meaning might be given an eventual advantage as opposed to another asserted meaning. It will be a rare case in which the Court decides that after consideration of all the arguments it cannot decide what the text means. But assuming that it does so decide and the proceedings are contentious, it may hold that the plaintiff state has failed to persuade it that the preferred text supports the claim for relief (as opposed to a finding that the defendant state's version of the text is the correct one). If the proceeding is an advisory one the Court will resolve that the text does not provide an answer for the question put. But in both cases the decision of the Court as to meaning will be the same: namely that the text does not provide an answer, a decision which is unaffected by the burden of proof or persuasion. Both types of cases then, involve an evaluation of the factual material and arguments advanced to support a particular meaning, both involve a consideration of any relevant presumptions and rules of construction.

tion of constitutions, statutes and private documents, have frequently stated that a decision determining an intention may include situations which the legislature or the parties never considered in drafting the text, or considered but never reached agreement on in precise terms, or in which members of the legislature or the parties understood the words used in different senses. They recognize that a court in interpreting a text performs, within limits, a positive function of harmonizing rights and duties of the parties. The International Court performs the same function; and it is in the limitations the Court recognizes as inherent in the phrase "intention of the parties" that an answer will be found to the question: what is the extent of the discretionary power the Court in fact exercises?

In the cases that have come before it, the Court has seldom relied exclusively on any one rule and one of the problems raised by its practice is whether any criteria can be deduced indicating in particular situations a preference for one rule as opposed to another, or indicating a particular order in which they should be applied. These rules could be classified according to whether they relate to indications of meaning derived from the instrument itself, or from evidence external to the instrument. No particular significance has been attached by the Court to this distinction but, in general, the following analysis of its practice will deal first with those rules pertaining to internal, then those pertaining to external evidence.

A. The Rule of "Ordinary Meaning"

A definition of the rule is to be found in the Second Membership Case:

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. If, on the other hand, the words in their natural and ordinary meaning are ambiguous or lead to an unreasonable result, then, and then only, must the Court, by resort to other methods of interpretation, seek to ascertain what the parties really did mean when they used these words.

7. In a report on the interpretation of treaties prepared for the Institute of International Law, Lauterpacht (more recently Judge on the International Court of Justice) set out five situations in which there can be a lack of a real or common intention: (1) where each party understands the words used in a different sense; (2) where the language is deliberately approved by one party because of its ambiguity; (3) where both parties deliberately use ambiguous language, leaving the decision as to meaning for future agreement or for court or arbitral tribunal proceedings; (4) where the parties have failed to foresee a particular situation; and (5) where two or more provisions of a treaty are self-contradictory. 43(1) ANNuaIRE DE L'INSTITUT DE DROIT INTERNATIONAL 424-32 (1950).

This statement at once suggests the questions of how the Court ascertains the “natural and ordinary” meaning of the words used and what is meant by “context.”

In the Second Membership Case the Court was asked for an advisory opinion by the General Assembly on whether the admission of a state to the United Nations could be effected by a decision of the General Assembly in the absence of a recommendation by the Security Council where the absence was caused either by a resolution of recommendation failing to obtain seven favorable votes or being vetoed. The basic problem of interpretation presented was whether article 4(2) of the United Nations Charter presupposed a recommendation by the Security Council before the General Assembly could proceed to vote admission. The Court found no difficulty in ascertaining the normal meaning of the words used or in giving effect to them in that sense, namely that a “decision” by the General Assembly presupposed a “recommendation” by the Security Council. It added, however, that this meaning was consistent with the general purpose of the Charter and, impliedly, the division of the authority between the General Assembly and the Security Council. Thus it ascertained the ordinary meaning of the words, that is their generally accepted sense or “dictionary” definition. Next it compared this meaning with the context, not in the sense of the words of article 4, or chapter II, but of the general framework of the Charter. Finding consistency between such a meaning and the context, it considered the case proved.

The Court defined the issues put before it by the terms of the

9. Id. at 8. The only dissents in this case were written by Judges Alvarez and Azevedo. They differed, not on the definition of this rule, but on the meaning that should be ascribed to the General Assembly’s request. The Court was of opinion that the meaning of “recommendation” as used in article 4 of the Charter was not involved. Judges Alvarez and Azevedo disagreed. For a reference to the practice of the Permanent Court of International Justice with respect to ordinary meaning, see Hudson, op. cit. supra note 4, at 645.
10. The text of the request was as follows:

Can the admission of a state to membership in the United Nations, pursuant to Article 4, paragraph 2, of the Charter, be effected by a decision of the General Assembly when the Security Council has made no recommendation for admission by reason of the candidate failing to obtain the requisite majority or of the negative vote of a permanent member upon a resolution so to recommend?

13. See note 17 infra.
General Assembly request as envisaging "solely the case in which the Security Council, having voted upon a recommendation, has concluded from its vote that the recommendation was not adopted because it failed to obtain the requisite majority or because of the negative vote of a permanent Member." It specifically excluded the question of whether the Security Council alone was competent to decide the existence or nonexistence of a recommendation for the purposes of article 4. Judge Alvarez, on the other hand, concluded that the questions posed by the General Assembly brought in issue the power of the General Assembly to appraise the validity of a particular exercise of the veto in the Security Council. The resolution of the Assembly requesting the opinion presented a text for interpretation in just the same way as article 4 of the Charter did; it was the counterpart of a special agreement in contentious proceedings. Yet neither the Court nor the dissenting Judges gave a clear indication of their reasons for adopting one interpretation or the other. All seemed to assume that the words of the request were clear in the sense of their ordinary meaning and yet came to conflicting conclusions.

Following his interpretation of the request, Judge Alvarez suggested that in some circumstances the General Assembly could proceed to a decision when a recommendation had been blocked in the Security Council by a vote. Judge Azevedo contended that a meaning could be attributed to "recommendation" broad enough to include the case of a Security Council resolution frustrated by a veto. Their arguments for such interpretations were based on the rule of "purpose." Though the Court declined to consider the problem of abuse of right and veto, some of the remarks in the opinion have a reference to this question of the meaning of "recommendation." It assumed the word to be used in its ordinary sense and implied that, in that sense, it presupposed an action of the Security Council interpreted by the Security Council. An interpretation based on this sense, supported by the context was not displaced by other evidence. Thus it said:

While keeping within the limits of a Request which deals with the scope of the powers of the General Assembly, it is enough for the Court to say

15. Id. at 7.
16. Id. at 12, 19–20. He dissented from the Court, he said, because the opinion made "no distinction between the reasons for which the Security Council may fail to recommend the admission of a State as a Member of the United Nations, and because it [the Court] holds that it must consider only whether the Security Council has or has not made a recommendation." Id. at 19. See also the dissenting opinion of Judge Azevedo. Id. at 22.
17. Broadly stated, the argument is that the intention of the parties may be ascertained by construing the words of the treaty in the light of the purposes which the parties are proved to have had in mind at the time of the conclusion of the treaty. The rule will be discussed in a subsequent publication.
that nowhere has the General Assembly received the power to change, to
the point of reversing, the meaning of a vote of the Security Council.18

The analysis of the Court seems to have been that the words used,
interpreted according to their ordinary meaning, were sufficiently
 clear and free from ambiguity to raise a presumption that the signa-
tories had intended that meaning, and that there was no evidence
to rebut this presumption. The dissenting Judges, relying on purpose
arguments, impliedly concluded that the ordinary meaning of the
words gave rise to no presumption, and that effect should be given
to that meaning most consistent with the purpose of the Charter.

Thus, in considering all three issues of this case, the Court ascer-
tained the “dictionary” meaning of the words used and concluded
that the meaning thus arrived at was sufficiently clear to give rise
to a presumption which was not rebutted. On two of the issues
subsidiary reliance was placed on the test of purpose of the parties.
The fact that the majority and dissenters could come to opposite
conclusions on the second issue, after both presumably applied the
dictionary test, indicates that even the process of ascertaining the
ordinary meaning of the words conceals a positive function of the
Court.19

In a number of other cases the Court appears to have rested its
decision substantially on the evidence of intention derived from the
rule of ordinary or plain meaning. In the First Peace Treaties Case20
the Court was faced with another request21 which put in issue the
meaning of certain provisions in the peace treaties signed by Bul-
garia, Hungary and Romania after the Second World War.22 Certain

19. For a discussion of the problems relevant to this case and the earlier one,
Admission of a State to the United Nations (Charter, Art. 4), [1948] I.C.J. Rep. 57,
see Feinberg, L’admission de nouveaux membres à la Société des Nations et à l’O-
rganisation des Nations Unies, 80 Recueil des Cour 293 (1952); Rudzinski, Admis-
sion of New Members: The United Nations and the League of Nations, 480 Int’l
Conc. 141 (1952).
the First Peace Treaties Case].
22. Treaty of Peace with Bulgaria, 41 U.N.T.S. 21 (1949); Treaty of Peace with
Hungary, 41 U.N.T.S. 185 (1949); Treaty of Peace with Romania, 42 U.N.T.S. 3
(1949). The treaties were signed by the Allied and Associated Powers and the
respective states on February 10, 1947. Article 36 of the peace treaty with Bulgaria
reads as follows:

1. Except where another procedure is specifically provided under any Article
of the present Treaty, any dispute concerning the interpretation or execution
of the Treaty, which is not settled by direct diplomatic negotiations, shall be
referred to the Three Heads of Mission. ... Any such dispute not resolved by
them within a period of two months shall, unless the parties to the dispute
mutually agree upon another means of settlement, be referred at the request
of either party to the dispute to a Commission composed of one representative
Allied and Associated Powers, parties to the respective peace treaties, had charged the three countries with violations of the human rights provisions of the treaties and called on the three governments to join in appointing commissions pursuant to the provisions of the relevant articles. Attempts to solve the dispute through the heads of mission described in the peace treaties were unsuccessful but the three countries declined to appoint their representatives to the commissions. The Court was asked to advise whether a “dispute” within the meaning of these articles existed between the three countries and the Allied and Associated Powers; if such a dispute were found to exist, it was asked to advise whether the governments of the three countries were obligated to carry out certain provisions of these treaties including the provision requiring the appointment of representatives to the treaty commissions.

The Court in answering the first question concluded that “international disputes have arisen” and that a dispute arises when there is a “situation in which the two sides hold clearly opposite views concerning the question of the performance or nonperformance of certain treaty obligations.” This then, was an application of the dictionary method to arrive at the ordinary meaning of the words used.

In considering the issue of the obligation to appoint representatives to the treaty commissions, the Court found all the conditions of each party and a third member selected by mutual agreement of the two parties from nationals of a third country. Should the two parties fail to agree within a period of one month upon the appointment of the third member, the Secretary-General of the United Nations may be requested by either party to make the appointment.


24. Ibid.


To support the argument, the United States Government referred to the decision of the Permanent Court in the Mavrommatis Palestine Concessions, P.C.I.J., ser. A, No. 2, at 11 (1924), where the Court defined a dispute as “a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons.” It seems the United States Government did not urge this decision as more than an indication of the general meaning of the word “dispute.”

Articles 36, 40 and 38, by their express terms, did not extend to all disputes but only to those relating to the execution or interpretation of the treaties and as to which no other procedure of settlement was specifically provided elsewhere in the treaties. The Court concluded that there was no other such procedure applicable and that the disputes clearly concerned the interpretation or execution of the peace
TREATY INTERPRETATION

precedent to the settlement of the disputes by the commissions to have been fulfilled and concluded:

In view of the fact that the Treaties provide that any dispute shall be referred to a Commission "at the request of either party," it follows that either party is obligated, at the request of the other party, to co-operate in constituting the Commission, in particular by appointing its representative. Otherwise the method of settlement by Commissions provided for in the Treaties would completely fail in its purpose. . . .

apparently relying once again on the ordinary meaning rule.

The Corfu Channel Case came before the Court on the application of the United Kingdom under which relief was sought for damage caused to two ships of the Royal Navy when they hit mines in the Corfu Channel in 1946. The United Kingdom requested the Court to find that Albania was internationally responsible and was under an obligation to make reparation or pay compensation, and to determine the reparation or compensation. By letter the Albanian Government countered that the United Kingdom Government "was not entitled to refer this dispute to the Court by unilateral application" but added that it was "prepared, notwithstanding this irregularity in the action taken by the Government of the United Kingdom, to appear before the Court." The Albanian Government then filed a preliminary exception to the application alleging that it was not receivable and requested the Court to decide the issue in accordance with article 69 of the Rules of the Court. The Court was thus faced with deciding whether the application had been made according to the terms of the statute of the Court and,

treaties. [1950] I.C.J. Rep. 65, 75. Here then was another application of the rule of ordinary meaning and the dictionary test.

Three Judges dissented on the ground that the Court should have declined to answer the request. Id. at 89, 99, 105. Judge Krylov suggested the matter might also be one of domestic jurisdiction. Id. at 112. Although Judge Winiarski dissented on this ground, he added that he would "not hesitate to answer in the affirmative the question whether these are disputes for which the arbitration clauses of the Peace Treaties provide settlement procedure." Id. at 93.

27. Id. at 77.

28. The basis of the three dissents on this point was the same as that set forth in note 26 supra.


30. 1 CORFU CHANNEL CASE—PLEADINGS, ORAL ARGUMENTS, AND DOCUMENTS 8–9 (I.C.J. 1949).


32. Id. at 9–12.
therefore, whether the Court had jurisdiction. On the basis of the claims of the parties it had to decide: (a) whether a resolution, in which the Security Council recommended that the two governments refer the dispute to the International Court of Justice, created, in effect, a case of compulsory jurisdiction; or (b) whether by its letter the Albanian Government had made a valid submission to the jurisdiction of the Court, thereby correcting possible irregularities in the original application. This problem involved a decision of whether the Albanian Government intended the letter to be such a submission, and whether the letter and the application were of a form satisfying the requirements of article 36(1) of the statute of the Court.

Since the Court held the letter to constitute an acceptance of the jurisdiction, it considered an expression of opinion on the first issue unnecessary. It concluded that:

The letter . . . , in spite of the reservation stated therein . . . removes all difficulties concerning the question of admissibility of the Application and the question of the jurisdiction of the Court. . . . This language used by the Albanian Government cannot be understood otherwise than as a waiver of the right subsequently to raise an objection directed against the admissibility of the Application founded on the alleged procedural irregularity of that instrument.

The letter of July 2nd, 1947, is no less decisive as regards the question of the Court's jurisdiction. . . . The letter of July 2nd . . . in the opinion of the Court, constitutes a voluntary and indisputable acceptance of the Court's jurisdiction.

This then, is a further recognition and application of the rule of ordinary meaning, and a rejection of the "purpose" argument, put forward on behalf of Albania, that the letter must be read in the light of the Security Council resolution.

33. "The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force." Stat. Int'l Ct. Just. art. 36, para. 1.
35. Seven Judges, however, considering that logically, the questions must be answered in the order set out above, held against the United Kingdom's contentions on the first issue. Corfu Channel Case, [1948] I.C.J. Rep. 15, 31-32 [herein referred to as the Corfu Channel Case (Preliminary Objection)].
36. Id. at 26-27. The seven Judges who joined in a separate opinion in this case concurred in the judgment of the Court but differed on the question whether the court should have ruled on jurisdiction submitted by the United Kingdom in the original application. Id. at 31. Dr. Igor Daxner, Judge ad hoc, was the only member who dissented from the interpretation of the Court. Id. at 33-45.
37. This resolution, Albania claimed, indicated that in submitting the dispute to the Court, the two parties were to act together, subscribe one instrument of agreement. It was argued that an interpretation inconsistent with this indication of purpose should not be given to the letter. 2 Corfu Channel Case—Pleadings, Oral
The Court found it unnecessary to consider the second problem of interpretation raised before the Court by the agents for the United Kingdom. The seven Judges who joined in a concurring opinion concluded however, that the United Kingdom assertion that the Court had compulsory jurisdiction should have been determined before considering the effect of the Albanian letter. To substantiate this assertion, it was necessary to show that (a) the resolution could be interpreted as a command and not merely advice to the parties to refer the dispute to the Court, (b) that though adopted as a “recommendation,” it was in fact a “decision” within the meaning of article 25 of the Charter, and (c) that, if it could be so interpreted, it attracted the provisions of article 36 (1) of the statute of the Court.

In oral argument, counsel for the United Kingdom argued against the application of the “dictionary” test claiming that the context indicated the authors of the Charter had not used “decision” in article 25 in its normal sense, urging therefore that the Charter provided its own dictionary. He would apply the rule of ordinary
meaning but find that meaning not in a dictionary, but the context of the Charter itself.  

The seven Judges who delivered the separate opinion, concluded that the arguments were unconvincing. Again the test of ordinary meaning was applied. In light of the meaning attributed to "recommendation" in diplomatic language and in the practice of international conferences, of the general structure of the Charter and the statute of the Court, and of the terms of article 36 of the Charter, they found it impossible "to accept an interpretation according to which this article, without explicitly saying so, has introduced more or less surreptitiously, a new case of compulsory jurisdiction." To ascertain the ordinary meaning they seemed to apply the "dictionary" test and then reject the United Kingdom's argument as failing to prove that a meaning different from the "dictionary" sense had been intended. Apparently, they also implied a presumption against the displacement of this ordinary meaning particularly where a different interpretation would involve a more extensive derogation from sovereign rights.

To conclude that the Court declined to consider any other evidence of meaning in the foregoing cases, after it decided that the

---

40. Id. at 78. Sir Hartley Shawcross supported this assertion by an application of the rule of "surplus words," arguing that article 25 would be otiose if limited to decisions under chapter VII. The provisions of that chapter were binding on members by their very terms. Faced with preparatory work unfavorable to this interpretation, he contended that the meaning of article 25 was clear in the ordinary sense of the words used and that therefore the proceedings at the San Francisco Conference should not be referred to.

The main argument of the Albanian Government was that the Security Council resolution could not be interpreted in a mandatory sense. On that basis, it was not necessary to argue the meaning of article 25. Id. at 28-30.

42. Id. at 32.
43. Judge Daxner concurred in this opinion. Id. at 33. For a discussion of this case see Jones, Corfu Channel Case—Jurisdiction, 35 TRANSAC. GROT. SOC'Y 91 (1950); Waldock, Forum Prorogatum or Acceptance of a Unilateral Summons to Appear Before the International Court, 2 INT'L L.Q. 377 (1948).
44. Further examples of the Court's reliance on ordinary meaning are as follows. In the Asylum Case, [1950] I.C.J. Rep. 266, one of the problems of interpretation arising out of the application of the Havana Convention on Asylum of 1928 was whether article 2 (third) entitled the state granting asylum to require guarantees necessary for the departure of the refugee from the country in which the asylum had been granted. In deciding this question, the Court (only the Judge ad hoc appointed by Colombia dissenting) concluded that the article could "only mean that the territorial State may require that the refugee be sent out of the country, and that only after such a demand can the State granting asylum require the necessary guarantees as a condition of his being sent out." Id. at 279. This case will herein be referred to as the First Asylum Case.

In the Case Concerning Rights of Nationals of the United States of America in Morocco, [1952] I.C.J. Rep. 176 [herein referred to as the U.S. Nationals in Morocco Case], the dispute grew out of the application of a decree promulgated by the French authorities in Morocco in 1948 regulating imports into the French Zone. The
words in issue had a reasonable application in their ordinary sense, ignores the way in which a hearing before the Court is conducted. In a contentious proceeding the parties have the right to submit written briefs and make oral arguments. In an advisory opinion proceeding, any country interested in the outcome of the opinion has...

United States objected to the application of this decree to its citizens in the French Zone. It argued that the capitulatory system, which had been in existence in Morocco for nearly a century, could still be relied on as giving the United States a veto power with respect to the application of all laws and regulations promulgated in the French Zone and purporting to apply to U.S. citizens. It also claimed that the decree was discriminatory and therefore contravened rights under the General Act of Algeciras, 34 Stat. 2905 (1906), as well as a treaty concluded between the United States and Morocco on September 16, 1836, 8 Stat. 484; and that the basis of valuation of goods adopted in the decree was contrary to the same treaty rights. [1952] I.C.J. Rep. at 179-81. One of the more significant features of this case is the fact that although a number of problems of treaty construction were involved, relatively little use appears to have been made of the rules of construction by either the Court or the dissent. There is considerable reliance on the clear meaning of the language used, backed up, in the case of the Court opinion, by a brief reference to the purpose of the parties in the case of the problems arising out of the General Act of Algeciras. Thus, for instance, the Court was unanimous in finding that the decree was discriminatory, this finding being based on the ordinary meaning of the statement of principle “economic liberty without any equality,” contained in the preamble to the act of Algeciras. Id. at 183-85. It found an alternative ground for the same result in the most-favored-nation clause of the 1886 treaty between the United States and Morocco again presumably on the basis of ordinary meaning. Id. at 185-86.

In the Nottebohm Case (Preliminary Objection), [1953] I.C.J. Rep. 111, Guatemala raised the issue of the Court's jurisdiction to entertain the claim made by Lichtenstein on behalf of Mr. Nottebohm. Two questions of interpretation were put forward: (1) whether the Court's authority to determine its jurisdiction, under article 36(6) of the statute, was limited to the categories of dispute enumerated in paragraph 2 of that article; and (2) whether, pursuant to article 36(2) of the statute and the Guatemalan declaration, the Court's jurisdiction terminated on the expiration of the declaration notwithstanding the filing of an application prior to such expiration. Both of these questions were answered by the Court without resort to constructional arguments, both on the basis of ordinary meaning and necessary intendment of the provisions of article 36 and the terms of the Guatemalan declaration. Some reference in support of the construction of the Court statute was made to the general practice of international tribunals prior to the drafting of the statute. Reference was also made to two decisions of the Permanent Court of International Justice involving the meaning of the provision of that Court's statute comparable to article 36 of the present Court statute. Id. at 118-24. The Court was unanimous on these issues.

In the Case of the Monetary Gold Removed from Rome (Preliminary Question), [1954] I.C.J. Rep. 19 [herein referred to as the Monetary Gold Case], the problems of interpretation before the Court were raised by certain provisions of a statement signed at Washington in 1951 between France, the United Kingdom and the United States. The three powers agreed that if certain gold taken from Rome by the Germans in 1943 was held by arbitration to belong to Albania, they would deliver the gold, not to Albania but to the United Kingdom in partial satisfaction of the judgment awarded by the Court to the United Kingdom in the Corfu Channel Case (Assessment of Compensation). Id. at 21. The gold was not to be delivered to the United Kingdom if, within ninety days of the award of the arbitrator, either Albania applied to the Court for a determination of whether it was proper that this gold should be delivered to the United Kingdom, or Italy made an application to the Court for determination of the question whether the gold should be delivered to Italy rather
a comparable right to express its views to the Court. Before the Court takes the case under advisement then, it has been fully acquainted with all the available evidence governing meaning. Deciding that words apply in their ordinary sense and that no other evidence of meaning should be considered is no more than an “election” by the Court to prefer the evidence adduced from the ordinary meaning of the words used rather than other evidence available from different sources. Whether the Court, in a particular case, prefers this source of evidence because there is no substantial conflict with the evidence from other sources, or whether it is rejecting inconsistent evidence from other sources is often not spelled out in the opinions of the Court.

Clearly, in the foregoing cases the Court rejected an interpretation put forward by an unsuccessful party in a contentious proceeding, or an interested group in an advisory proceeding. But equally clearly the Court took the position that no real ambiguity was disclosed or raised in the language of the treaty under discussion. It might be said that the Court took a position based on overwhelming evidence of intention derived from the ordinary meaning of the words combined either (1) with an absence of contrary indication from other sources, or (2) with evidence from other sources supporting the meaning indicated by the ordinary sense of the words.

In two cases however, the Court has made a somewhat different use of this source of evidence and, in effect, has admitted the possibility of the words in question being ambiguous, but has concluded that one of the possible meanings is much more likely to have been intended by the parties than another. This one meaning, derived again from the ordinary sense of the words in context, has been used by the Court to raise a presumption that that was the meaning intended by the parties. No adequate rebuttal for this presumption is found in the rest of the evidence.

The first illustration of this usage is found in the Anglo-Iranian

than to Albania and agreed to accept the jurisdiction of the Court to determine priority between the United Kingdom and Italy if this issue should arise. Ibid. Italy filed an application within the time limit, but raised as a preliminary question the jurisdiction of the Court to consider Italy’s claim to the gold against Albania without the consent of Albania. The Court unanimously sustained the contention that it lacked jurisdiction without such consent. Id. at 34. In the course of the decision a number of questions of construction were raised pertaining to the meaning of article 36 of the Court statute, the rules of the Court and the Washington statement. The Court decided all these questions on the basis of the ordinary meaning of the words involved. On one issue it found support for its position in statements made by the parties in the course of oral argument. Id. at 33–34. The Court also held that it could not rule on the priority of the claims of the United Kingdom and Italy without Albania being a party. Id. at 34. Judge Carneiro dissented on this latter holding. Id. at 39–45.

Case (Preliminary Objection). Pursuant to an agreement concluded with the Government of Persia (now Iran), the Anglo-Persian Oil Company was granted a concession to extract and export oil from Persia. In 1951 the Iranian Government passed legislation which nationalized the oil industry in Iran and consequently terminated the agreement of 1933 with the Anglo-Iranian Oil Company. The company’s complaint was taken up by the United Kingdom Government. After the filing of the United Kingdom application, Iran filed an objection to the jurisdiction of the Court. Since the parties had not concluded any specific agreement to submit the dispute to the Court, its jurisdiction, if any, had to be found in the acceptance of the parties of compulsory jurisdiction under article 36(2) of the Court statute. One of the problems of construction raised by this case was whether the Court had compulsory jurisdiction by virtue of the Iranian declaration which provided in part:

The Imperial Government of Persia recognizes as compulsory ipso facto and without special agreement in relation to any other State accepting the same obligation, that is to say, on condition of reciprocity, the jurisdiction of the Permanent Court of International Justice, in accordance with Article 36, paragraph 2, of the Statute of the Court, in any disputes arising after the ratification of the present declaration with regard to situations or facts relating directly or indirectly to the application of treaties or conventions accepted by Persia and subsequent to the ratification of this declaration.

The United Kingdom argued that it was the “situations or facts” which the declaration required to have arisen subsequently to the ratification; Iran argued that the declaration conferred jurisdiction on the Court only with respect to treaties or conventions accepted by Iran after ratification. The Court adopted the Iranian position, only Judge Alvarez dissenting from this holding.

It was concluded that the declaration “considered from a purely grammatical point of view” was ambiguous. The words “and subsequent”

46. Anglo-Iranian Oil Co. Case (Jurisdiction), [1952] I.C.J. Rep. 93 [herein referred to as the Anglo-Iranian Case (Preliminary Objection)].
47. A British corporation whose name was later changed to Anglo-Iranian Oil Company.
48. Id. at 95–96.
49. See also note 44 supra.
50. Speaking of the Declarations deposited by Iran and the United Kingdom, the Court said: “By these Declarations, jurisdiction is conferred on the Court only to the extent to which the two Declarations coincide in conferring it. As the Iranian Declaration is more limited in scope than the United Kingdom Declaration, it is the Iranian Declaration on which the Court must base itself. This is common ground between the Parties.” [1953] I.C.J. Rep. at 103.
51. Ibid. (Emphasis added.)
52. Id. at 98–99.
53. Id. at 105–96.
54. Id. at 124, 134–95.
55. Id. at 104.
sequent to the ratification of this declaration” might be read as referring either to the words “treaties or conventions accepted by Persia,” or to “with regard to situations or facts.” The order of the words indicated to the Court that the reference was intended to be to “treaties or conventions accepted by Persia” because of the separation by a considerable number of words of the phrase “with regard to situations or facts” from the “and subsequent . . .” phrase. From this the Court derived a presumption:

This is, in the opinion of the Court, the natural and reasonable way of reading the text. It would require special and clearly established reasons to link the words “et postérieurs à la ratification de cette déclaration”, to the expression “au sujet de situations ou de faits”, which is separated from them by a considerable number of words. . . .

But the Court did not purport to place its reliance solely on a grammatical test:

[The Court cannot base itself on a purely grammatical interpretation of the text. It must seek the interpretation which is in harmony with a natural and reasonable way of reading the text, having due regard to the intention of the Government of Iran at the time when it accepted the compulsory jurisdiction of the Court.]

The United Kingdom sought to support its interpretation by resorting to similar language in other declarations, in particular that of Belgium, and by use of the rule that, if possible, meaning should be given to every word used. It was argued that the words “arising after the ratification of the present declaration” were otiose unless the declaration applied to treaties or conventions in force prior to the declaration’s ratification. The Court dismissed both arguments, the latter on the ground that the words must have been used out of an abundance of caution. Instead, it found strong support for its prima facie position in the fact that shortly before the making of the declaration Iran had denounced the whole system of capitulations. It was therefore unlikely that Iran would want disputes over the effect of such denunciations brought before the Court.

The second illustration of the use of ordinary meaning by the Court to create a presumption is found in the Second Peace Treaties Case. Two problems of interpretation were raised: (a) whether

56. Ibid.
57. Ibid.
58. Further support for this position was found in the language of an Iranian law of 1931 by which the declaration was approved. Id. at 104–07. For a discussion of this case see Nakasian, The Anglo-Iranian Oil Case, A Problem in International Judicial Process, 41 Geo. L.J. 459 (1953).
59. Interpretation of Peace Treaties (Second Phase), [1950] I.C.J. Rep. 221 [herein referred to as the Second Peace Treaties Case]. The General Assembly, in the resolution providing the request for an advisory opinion in the First Peace Treaties Case, see text accompanying notes 8–21 supra, added a further request:
the "disputes" article could be read so as to permit the Secretary-General to appoint a third member to the Commission before both parties to the dispute had appointed their representatives, and (b) if the Secretary-General did appoint a third member, whether the two member commission thus created could function as the "Commission" within the meaning of the terms of the treaties and be competent to render binding decisions.

On the first problem, the United Kingdom claimed that a literal reading of the "disputes" articles raised doubt of the competence of the Secretary-General to appoint a third member. This doubt was brought about by the use of the word "third" itself, together with the reference to selection "by mutual agreement of the two parties from nationals of a third country" which "seems primarily to contemplate a situation in which the two parties have already appointed their national Commissioners." It was the parties themselves, the argument continued, and not the appointees who were to perform the selection under these articles. The process of selecting the third member could be carried out before the selection of either of the national representatives and, a fortiori, after one had been selected. The argument was, then, that the rule of ordinary meaning should be applied, but that this meaning should be ascertained by means of the context and not the dictionary test. "Third" should be understood in the light of the provisions of the articles as a whole, and was to be read as "a piece of description" and not as "a condition precedent." This interpretation was supported by the rule of purpose.

The Court, however, applied the dictionary test, and refused to
find that “third member” was used in the articles “simply to distin-
guish the neutral member from the two Commissioners appointed
by the parties without implying that the third member can be ap-
pointed only when the two national Commissioners have already

tories under the system of trusteeship. The answers to the first series of problems
were not arrived at on the basis of the rule of ordinary meaning since they related
to the question of implied powers and not the precise words of the mandate or the
Covenant.

The second series of problems raised the question of whether the provisions of
Chapter XII were applicable to the Territory of South-West Africa and if so, in what
manner. The Court was of opinion that the request, on this point, raised two questions
of interpretation: (i) whether the provisions of chapter XII were applicable in the
sense that South-West Africa might be placed under the trusteeship system; (ii)
whether the provisions imposed an obligation so to place the Territory under trustee-
ship. The first problem, it said, was answered by a reading of article 77(a), implying
that the article was clear in the sense of the ordinary meaning of the words used.
[1950] I.C.J. Rep. 128, 139. The main issue however, was the existence of an obliga-
tion. On this point the Court accepted the views put forward by the Union of South
Africa and the United States that the language of articles 75 and 77 was permissive.
Ibid. Judges McNair and Read concurred in the Court opinion on this point. Id. at
146, 164. The Court then again relied on the ordinary meaning of the words used.

Article 77 of the Charter of the United Nations provides:

1. The trusteeship system shall apply to such territories in the following cate-
gories as may be placed thereunder by means of trusteeship agreements:
   a. territories now held under mandate; . . .
   c. territories voluntarily placed under the system by states responsible for their
      administration.

2. It will be a matter for subsequent agreement as to which territories in the
   foregoing categories will be brought under the trusteeship system and upon
   what terms.

The use of the word “voluntary” in article 77(c) was explained by the Court as
It rebutted an argument based on article 80(2) of the Charter suggesting an obliga-
tion to negotiate and conclude trusteeship agreements. That article provides:

2. Paragraph 1 of this Article shall not be interpreted as giving grounds for
delay or postponement of the negotiation and conclusion of agreements for
placing mandated and other territories under the trusteeship system as provided
for in Article 77.

It implied that the provisions of article 80(2) did not suggest an obligation to
conclude such an agreement and held that article 80(2) did not establish an
obligation to enter into negotiations with a view to concluding an agreement since
no distinction was drawn in the article between the negotiation and conclusion of
such an agreement. This reliance was strengthened by the fact that article 80(2)
refers not only to mandated territories but to the other territories mentioned in
article 77, paragraph 1(c) and, it said, there could be no question of obligation with
respect to those territories. Here then, the ordinary meaning of the words used was
ascertained by dictionary test and confirmed by the context. If however, article
80(2), as given meaning by the dictionary test, were to conflict with the other
articles of chapter XII, it had to be interpreted in the sense indicated by the other
articles of the chapter, that is by the context. Ibid.

The main dissent from this decision was contained in the opinion of Judge De
Visscher in which Judges Guerrero, Zoricic and Badawi Pasha concurred generally.
[1950] I.C.J. Rep. 128, 145, 186. He considered “that these provisions impose on the
Union of South Africa an obligation to take part in negotiations with a view to
concluding an agreement.” Id. at 186. Judge Alvarez was of opinion that the Union
was under “the legal obligation not only to negotiate this agreement, but also to
conclude it.” Id. at 183. See also the dissenting opinion of Judge Krylov at 191, 192.
been appointed. . .”63 Applying the dictionary test, it found that the text “in its literal sense does not completely exclude the possibility of the appointment of the third member before the appointment of both national Commissioners.”64 Nevertheless the Court held that the ordinary meaning indicated that the appointment of the latter “should precede that of the third member.”65 This interpretation, it suggested, was supported by the context of the article indicating this to be the normal sequence of events. It was also supported by the general practice of arbitration. An argument based on purpose was rejected by the Court but formed the basis of dissents by Judges Read and Azevedo.66

Basic to the disagreement between the Court and dissenters in this case was the issue of the evidential weight of the words in the treaty read in their ordinary sense. Both groups conceded the relevance of the rule but differed as to its application to the facts. The Court found a presumption implicit in the ordinary meaning of the words whereas the dissenters found them neutral. The Court seems to have placed considerable reliance on the presumption though it is important to note that it supported this initial position by reference to other presumptions against displacing a recognized customary practice and in favor of a restrictive interpretation. It is impossible to tell how much weight was assigned to these respective sources of evidence, but in the light of the treatment of these other presumptions in different cases as secondary sources of evidence, it would seem that primary weight was placed on the presumption from the words read in their ordinary sense.67

64. Ibid.
65. Ibid.
66. Ibid.
67. In Judge Azevedo’s opinion “the texts of the relevant clauses are completely neutral and provide for several solutions.” Id. at 250.
68. By giving a negative answer to the first question the Court avoided the need to answer the second. It seems to follow however, that here too, it would have given a negative answer on the basis of the ordinary meaning of the words used, which envisaged a commission composed of three members and not two. Id. at 228. Judge Read, on the other hand, again relied on the rule of purpose to justify an affirmative answer. Id. at 237–38. The difference once again would seem to be based on the initial presumption created by applying the test of ordinary meaning.

With the approach of the Court in these two cases can be compared that of the four dissenting Judges Hackworth, Badawi, Carneiro and Rau in the U.S. Nationals in Morocco Case, [1952] I.C.J. Rep. 176, 214. See note 44 supra. One of the points of departure from the Court’s view was the effect to be given to article 95 of the General Act of Algeciras with respect to valuation of merchandise coming into the French Zone and subject to the tax. The two alternatives contended for were a valuation based on the value of the goods on the local market (French claim), and one based on the value of the goods in the United States together with the expenses incidental to transportation to the custom-house in Morocco (American claim). [1952] I.C.J. Rep. at 176, 207–08. Article 95 specified four factors in such a valuation: “ . . . The ad valorem duties shall be liquidated according to the cash whole-sale value of the merchandise delivered in the custom-house and free from customs
Some doubts about the objectivity of this use of ordinary meaning are raised by the Court's holding on the second problem of construction raised in the Anglo-Iranian Case (Preliminary Objection) and in the Ambatielos Case (Merits). In these decisions both Court and dissenters appeared to rely almost exclusively on the evidence avail-

duties and storage dues. Damages to the merchandise, if any, shall be taken into account in appraising the depreciation thereby caused..." 34 Stat. 2936 (1906). The dissenters found two phrases of article 95 to be of particular importance, "delivered in the custom-house" and "free from customs duties and storage dues." In their opinion: "If the natural sense of these two phrases yields a coherent and reasonable proposition, then this proposition can only be set aside if sufficient evidence is adduced to prove that it could not have been contemplated." [1952] I.C.J. Rep. 176, 227-28. They concluded that both phrases pointed to the export or foreign market value of country of origin plus freight and insurance. Id. at 228. The

ordinary sense of these two phrases raised for them a presumption for which they failed to find any rebuttal in other evidence. They found support for the presumption in the preparatory work of the general act and also in the practice followed by the customs authorities in the period subsequent to the conclusion of that act. Id. at 229-33.

In the opinion of the Court no such presumption was raised by the ordinary sense of the words used in article 95: "The four factors specified by Article 95 are consistent with either interpretation..." Id. at 209. To aid in the problem of construction it was prepared to look at the preparatory work and the earlier practice with respect to valuation but concluded that not much guidance was obtainable from those sources. From this evidence it concluded that it was not the intention of the parties to make value at place of shipment the sole criterion. Id. at 211. The Court then held that it was the duty of the customs authorities to have regard to certain factors in fixing the value of goods, the factors including those contended for by both France and the United States. Id. at 211-13.

The difference of opinion over this issue then, can be referred to whether or not the words of article 95, read in their ordinary sense, gave rise to a presumption of the meaning intended by the parties. That the Court could divide six to five on the basis for any such presumption points up again the subjective element involved in the application of even the rule of ordinary meaning. (The name of the additional Judge who voted with the authors of the joint dissent on this issue does not appear from the report. Id. at 213.)


69. Ambatielos Case (Merits), [1953] I.C.J. Rep. 10. The Ambatielos Case was commenced by Greece against the United Kingdom in 1951. The basis of the Greek complaint related back to a contract made by a Greek national, one Ambatielos, with the United Kingdom Government in 1919 whereby Ambatielos agreed to purchase a number of ships then under construction. A dispute subsequently arose and Ambatielos litigated his claim in the English courts and lost. Later Greece formulated an international claim against the United Kingdom Government on the basis that Ambatielos had been unfairly treated before the English courts in breach of obligations contained in the Treaty of Commerce and Navigation signed by the two countries in 1886. The United Kingdom declined to submit to arbitration arguing that there was no obligation under the treaty to arbitrate that particular dispute. This refusal to arbitrate was the basis of the Greek application to the International Court. For a further statement of the facts, see AMBATIELOS CASE—PLEADINGS, ORAL ARGUMENTS, AND DOCUMENTS 6-12, 23-24, 279-83 (I.C.J. 1953). Greece requested the Court to hold that it had jurisdiction and that a Commission of Arbitration provided for in the treaty of 1886 should be constituted. In the alternative, Greece asked the Court itself to decide the merits of the dispute. The issue of the Court's jurisdiction was dealt with in a preliminary objection in the Ambatielos Case (Jurisdiction). [1952] I.C.J. Rep. 28 [referred to herein as the Ambatielos Case (Preliminary Objection)]. The Court held (13-2) that it had no jurisdiction to decide on
able from the ordinary meaning of the text and yet came to opposite conclusions as to what that text signified.\textsuperscript{70}

The United Kingdom argued in the \textit{Anglo-Iranian Case (Preliminary Objection)} that, even if the Court held the Iranian declaration to apply only to treaties or conventions concluded after the ratification of the declaration, there were still treaties upon which the United Kingdom application could be founded, and in particular, the treaty concluded between Iran and Denmark in 1934.\textsuperscript{71} The United Kingdom contended that its nationals were entitled to the benefit of these provisions by reason of the inclusion of most-favored-nation clauses in treaties of 1857 and 1903 concluded between Persia and the United Kingdom. Consequently the dispute related "directly or indirectly" to a treaty concluded after Iran's ratification of the declaration.\textsuperscript{72} The Court rejected this submission on the basis that the 1934 treaty was of no effect without reliance on the primary treaty containing the most-favored-nation clause, which treaty was concluded prior to the Iranian declaration.\textsuperscript{73} Judges Hackworth, Read and Carneiro dissented from this holding, being of opinion that the dispute was one relating "indirectly" to a treaty concluded after the ratification of the Iranian declaration.\textsuperscript{74} Both sides seemed to place primary reliance on the ordinary sense of the words in the Iranian declaration. The Court made no reference to any other evidence in support of its position. Judges Hackworth and Read appeared to rely somewhat on the assumption that the Court should have jurisdiction in this case unless there was clear evidence that such was not the intention of Iran in presenting the declaration. Judge Read also relied on the "surplus words"\textsuperscript{75} test, saying that the words "directly or indirectly" would be ignored if they did not provide for jurisdiction in this case. Perhaps it is implicit in the Court's position that the basic assumption should be that the Court lacks jurisdiction unless it is clearly shown that there was an intention to provide it with jurisdiction;\textsuperscript{76} but on the face of the opinions the reliance of both sides on the ordinary meaning of the words seems clear.

the merits of the Ambatielos claim but held (10–5) that it had jurisdiction to decide whether the United Kingdom was under an obligation to arbitrate, on the basis of a subsequent treaty concluded between the parties, the Treaty of Commerce and Navigation signed in 1926, including a declaration annexed thereto. \textit{Id.} at 46.

\textsuperscript{70} Compare the treatment in the \textit{Second Membership Case} of the meaning of the General Assembly resolution, at text accompanying notes 10–19 \textit{supra}.

\textsuperscript{71} Treaty of Friendship, Establishment and Commerce Between Denmark and Persia, 158 League of Nations Treaty Series 301.


\textsuperscript{73} \textit{Id.} at 109. See also the separate opinion of Judge McNair. \textit{Id.} at 116, 123.

\textsuperscript{74} \textit{Id.} at 136, 140–41, 142, 143–46, 151, 158, 168.

\textsuperscript{75} That is, the rule that, if possible, effect should be given to all the words used. This rule will be discussed in a subsequent publication.

\textsuperscript{76} The question whether the Court applies a rule of restrictive interpretation to instruments conferring jurisdiction on it will be discussed in a subsequent publication with specific reference to this case.
In the Ambatielos Case (Merits), Greece sought a declaration that the United Kingdom was obligated to submit the Ambatielos claim to arbitration. The United Kingdom claimed that there was no obligation arising from the declaration and the treaty of 1926. The words of the declaration now constituting the basis of the dispute were:

It is well understood that the Treaty of Commerce and Navigation between Great Britain and Greece of to-day’s date does not prejudice claims on behalf of private persons based on the provisions of the Anglo-Greek Commercial Treaty of 1886. . . .

The question was whether or not Ambatielos’ claim was “based” on the treaty of 1886. A majority of ten Judges found the claim to be based on the treaty, with four Judges dissenting. The difference of opinion stemmed from the different conclusions as to what the role of the Court should be pursuant to the declaration of 1926 in ascertaining whether or not there was an obligation to arbitrate. Both sides agreed that it was not the role of the Court to examine the truth of the facts alleged, but differed on whether it was the role of the Court, assuming the truth of the facts alleged, to embark on a construction of the language of the 1886 treaty. The minority took the position that, before the Court could find an obligation to arbitrate, it must construe the 1886 treaty and find that the claim was well founded in that language. The majority came to the conclusion that the role of the Court was limited to finding whether the Greek arguments “are of a sufficiently plausible character to warrant a conclusion that the claim is based on the Treaty.”

The majority arrived at their conclusion through the use of ordinary meaning together with a purpose argument. The minority looked at the words “based on the Treaty” and concluded that there could only be an obligation to arbitrate if the claim was founded on the treaty of 1886 as properly construed by the International Court. They concluded that their interpretation was founded on the natural and ordinary meaning of the words used in the declaration. This case presents a further illustration of both Court and dis-

78. Id. at 23.
79. Id. at 29–31.
80. Id. at 18.
81. Id. at 17–18. The “purpose” argument appeared to be that the parties could not have intended that definitive construction of the treaty could be given by any tribunal other than the Commission of Arbitration. To find that they did so intend would virtually require a trial of the dispute twice over before different tribunals. Ibid. A further argument was made that since the commission would have had jurisdiction to ascertain the meaning of the treaty prior to the declaration, there being no manifestation of intention to change this in the declaration, the same must still hold good. Ibid.
82. Id. at 25, 29.
senters relying on the evidence derived from ordinary meaning but coming to opposite conclusions.\textsuperscript{83}

To the extent that both the Court and dissenters place substantial reliance on evidence of ordinary meaning, without adducing other cogent arguments, and yet reach opposite conclusions on the meaning of the text, the Judges are endangering the persuasive force of their opinions. The ordinary meaning reliance in that context becomes dangerously close to the dispute between two children, the respective arguments being: “I did,” “You didn’t.” Indeed, the substantial reliance by either the Court or dissenters on such evidence in the face of the other Judges taking a position that the words are not clear, leaves the relying parties’ opinion open to question from the point of persuasiveness. It is persuasive only if the position taken by the other Judges is, to the eye of the reader, palpably erroneous. Positing the experience and undoubted ability of the Judges, the odds against a Judge, and a fortiori a group of Judges, making a palpable error of that sort are long. Such reliance then, tends to leave the reader with the feeling that the relying parties are not giving expression to the operative reasons underlying the position taken.

An illustration of this problem is to be found in the Second South West Africa Case.\textsuperscript{84} In the First South West Africa Case\textsuperscript{85} the Court had given its advisory opinion, \textit{inter alia}, that the obligations of the Union of South Africa towards the mandated Territory of South-West Africa continued in spite of the demise of the League of Nations, and that South Africa with respect to its administration of the Territory was subject to the supervision of the United Nations.\textsuperscript{86} The occasion of the second request for an advisory opinion was a “Special Rule F” drafted by a committee set up by the General Assembly and proposed by that committee for adoption by the General Assembly.\textsuperscript{87} The rule provided that decisions of the General

\textsuperscript{83} The authors of the joint dissent, having held that it was the duty of the International Court to interpret the provisions of the 1886 treaty to see whether the Ambatielos claim had a legal foundation, then construed that treaty and concluded that there was no such foundation in the language of that treaty. \textit{Id.} at 35.

In at least two other cases both the Court and dissenters have relied on ordinary meaning to come to opposite results. See the discussion of the Second Membership Case at text accompanying notes 8–19 \textit{supra}, with respect to the meaning to be given to the request of the General Assembly for an advisory opinion. See also the dissent of Judge Carneiro in the Monetary Gold Case, [1954] I.C.J. Rep. 19, 39.

\textsuperscript{84} South-West Africa—Voting Procedure, [1955] I.C.J. Rep. 67 [herein referred to as the Second South-West Africa Case].

\textsuperscript{85} International Status of South-West Africa, [1950] I.C.J. Rep. 128 [herein referred to as the First South-West Africa Case].

\textsuperscript{86} For an account of the Court’s opinion in the First South-West Africa Case, see note 62 \textit{supra} and text accompanying notes 120–35 \textit{infra}.

\textsuperscript{87} The General Assembly adopted the decision of the Court in the First South-
Assembly on questions relating to reports and conditions concerning the Territory of South-West Africa should be regarded as important questions within the meaning of article 18(2) of the Charter of the United Nations. The purpose of the request was to find out whether the degree of supervision constituted in that rule was within the limits of supervision laid down by the Court in its first opinion, and if not what voting procedure should be adopted.

Two problems of interpretation were placed before the Court in this case: the first was the meaning of a sentence from the 1950 opinion; the second was the meaning of article 18 of the Charter.

West Africa Case in 1950. U.N. Gen. Ass. Res. No. 449 (V), Question of South-West Africa, U.N. Gen. Ass. Off. Rec., 5th Sess., Plenary 55–56 (A/1775) (1950). At the same time they established a committee of five, later designated as the Ad Hoc Committee on South-West Africa, which was to confer with the Union of South Africa concerning the procedural measures necessary for implementing the advisory opinion of the Court. For an account of the development of the relevant facts from this point of time to the time of the request for the second advisory opinion, see Second South-West Africa Case—Pleadings, Oral Arguments, and Documents 15–19 (I.C.J. 1955). At the Eighth Session of the General Assembly, negotiations with South Africa having proved fruitless, a further resolution was adopted constituting a new committee on South-West Africa. This committee while being instructed to negotiate further, was also instructed inter alia to examine such information and documentation as might be available in respect of the Territory and to prepare for General Assembly consideration a procedure for the examination of reports and petitions. U.N. Gen. Ass. Res. No. 749 (VIII), Question of South-West Africa, U.N. Gen. Ass. Off. Rec., 8th Sess., Plenary 26–27 (A/2630) (1953). The committee formulated the two sets of rules which included the "Special Rule F." Report of the Committee on South-West Africa to the General Assembly, U.N. Gen. Ass. Off. Rec., 9th Sess., 13 (A/2666) (1954). The operative part of the resolution requesting the second advisory opinion provides:

The General Assembly,

... Requests the International Court of Justice to give an advisory opinion on the following questions:

(a) Is the following rule on the voting procedure to be followed by the General Assembly a correct interpretation of the advisory opinion of the International Court of Justice of 11 July 1950:

"Decisions of the General Assembly on questions relating to reports and petitions concerning the Territory of South-West Africa shall be regarded as important questions within the meaning of Article 18, paragraph 2, of the Charter of the United Nations."

(b) If this interpretation of the advisory opinion of the Court is not correct, what voting procedure should be followed by the General Assembly in taking decisions on questions relating to reports and petitions concerning the Territory of South-West Africa?


88. The sentence reads: "The degree of supervision to be exercised by the General Assembly should not therefore exceed that which applied under the Mandates System, and should conform as far as possible to the procedure followed in this respect by the Council of the League of Nations." First South-West Africa Case [1950] I.C.J. Rep. 128, 138; Second South-West Africa Case [1955] I.C.J. Rep. 67, 72.
If it be assumed that the principle of res judicata or perhaps in this context, stare decisis, should be applied to an advisory opinion\(^9\), the Court could legitimately examine the opinion of 1950 as a whole in order to determine whether the question of the appropriate voting procedure in the Assembly had been settled by that opinion. If that opinion contained an express or necessarily implied disposition of the voting problem, then no objection could be taken to the Court disposing of the second request by simply adverting to the language of the first opinion. The opinion of the Court was predicated on just such an approach.\(^9\) But that approach puts in issue the question whether the first opinion did resolve the issue put to the Court in the second request. The Court, in the course of its second opinion stated: (a) that:

The voting system of the General Assembly was not in contemplation when the Court, in its Opinion of 1950, stated that 'supervision should conform as far as possible to the procedure followed in this respect by the Council of the League of Nations'.\(^9\)

but (b) that:

The Opinion of 1950 left the General Assembly with Article 18 of the

89. The statute of the Court does not expressly cover this issue. In the case of contentious proceedings articles 59, 60 and 61 provide this answer:

Article 59. The decision of the Court has no binding force except between the parties and in respect of that particular case.

Article 60. The judgment is final and without appeal. In the event of dispute as to the meaning or scope of the judgment, the Court shall construe it upon the request of any party.

Article 61. An application for revision of a judgment may be made only when it is based upon the discovery of some fact of such a nature as to be a decisive factor, which fact was, when the judgment was given, unknown to the Court and also the party claiming revision, always provided that such ignorance was not due to negligence. . . .

There are no comparable provisions in the section of the statute dealing with advisory opinions. The only relevant provision is article 68: “In the exercise of its advisory functions the Court shall further be guided by the provisions of the present Statute which apply in contentious cases to the extent to which it recognizes them to be applicable.” The very fact that an advisory opinion is both “advisory” and an “opinion” would seem to suggest that if the Court expresses its opinion and then is later asked the same question again, it may reconsider the issue taking into account any further arguments or facts that may be relevant. On the other hand, if the same question is put to it twice, the Court would be beyond criticism in simply incorporating the reasoning of the prior opinion in the absence of new arguments or facts.

To the extent that the second request went beyond the answers of the first opinion it might have been expected that if the second opinion involved a projection of the reasoning in the first opinion, that projection would be given an express explanation. See Rosenn, The International Court of Justice 468–73 (1957), wherein some comments are made on the relevance of opinions of the Permanent Court of International Justice on this question.

90. The opinion of the Court in this case was unanimous. Judge Kojevnikov indicated some reservations with respect to the opinion but without spelling them out. [1955] I.C.J. 67, 78. Judges Basdevant, Klaestad and Lauterpacht delivered separate opinions. Id. at 80, 84, 90.

Charter as the sole legal basis for the voting system applicable to decisions in connection with its supervisory functions. 92

In the same breath the Court appears to have asserted that in the first opinion, it did not contemplate the precise voting procedure which should be applied to handling of the Territory of South-West Africa, and yet that the first opinion disposed of the problem. 93 On the admissions of the Court itself, it appears to stand convicted of having been ambiguous at the least in its first opinion. To these admissions may be added the history of the negotiations between the Ad Hoc Committee and the representatives of the Union of South Africa, the approach of a majority of the General Assembly who, again on the admission of the Court, acted on the assumption that voting procedure was involved in the 1950 opinion, and the fact that at least two of the Judges who wrote separate opinions in 1955 concluded that the first opinion was ambiguous. In the light of these facts the opinion of the Court, in so far as it spelled out its conclusions by reference to the "ordinary and natural" meaning of the language of the 1950 opinion is unsatisfactory. It approached the casuistical when it suggested that the request could be answered on the basis that "procedure" in the 1950 opinion did not contemplate voting procedure and therefore there was no inconsistency between Special Rule F and the first opinion because the first opinion did not make any stipulation as to voting. 94 While it is true that the request literally asked for a determination of whether the rule was consistent with the opinion, who would dare say, particularly in the light of the second part of the request, that the Assembly was not requesting a final disposition of the problem of how voting on the Territory was to be handled in the Assembly?

But in defence of the Court opinion, it must be said that it did not rely exclusively on the approach outlined above. It went on to consider the request on the assumption that "procedure" in the 1950 opinion did cover voting. This brought it to the second problem of interpretation in the case — the meaning of article 18 of the Charter. It asserted that this provision contemplated only two types of vote by the General Assembly, an ordinary majority ("other questions"), and a two-thirds majority ("important questions"). These types of vote were exclusive and the Assembly had no competence to adopt a different sort of voting procedure. This conclusion it reached again apparently, on the basis of the plain meaning of article 18. 95 No ref-

92. Id. at 77.
93. Judges Basdevant and Klaestad questioned the majority assertion that the Court in 1950 had not contemplated voting procedure. [1955] I.C.J. 67, 83, 86. See also Judge Lauterpacht, id. at 96.
94. Id. at 75.
95. Id. at 76–77.
ference was made to the preparatory material on this article; no reference was made with respect to whether the problem raised in the request was in the contemplation of the drafters of this article at San Francisco; no reference was made as to the consequences of applying this interpretation of the article to the handling of the Territory of South-West Africa in the light of the bases relied on by the Court in the first opinion in order to find any obligation at all on the part of South Africa to submit to supervision. In short the Court failed to spell out the reasons why a two-thirds vote should be the only permissible method of voting in the circumstances. To the extent that the Court failed to spell out the policy decisions implicit in its ruling it detracted from the force of its opinion and exposed itself to the telling criticism of Judge Lauterpacht who wrote a separate opinion. The fact that the opinion of the Court was unanimous because two of the Judges found they could vote with the Court because of the difference in legal effect between a decision of the Council of the League and a decision of the General Assembly, a position not traversed in the Court opinion, only goes to underline further the thought that the Court could have made their opinion much more persuasive.

96. Id. at 90-123.
97. Another case in which the Court did not spell out the reasons for its decision of an interpretation problem is the Interhandel Case (Interim Measures of Protection), [1957] I.C.J. Rep. 105. By an application of October 1, 1957, Switzerland commenced proceedings against the United States to obtain restoration to Switzerland of the assets of the Interhandel Company now in custody of the United States. Id. at 105-06. After filing the application Switzerland requested the Court to indicate provisional measures to prevent the United States from selling these assets. The United States had excluded in its acceptance of the optional clause "disputes with regard to matters which are essentially within the domestic jurisdiction of the United States of America as determined by the United States of America." Declaration signed by the President, August 14, 1946, 61 Stat. 1218 (1946), T.I.A.S. No. 1598, 1 U.N.T.S. 9. The United States filed a preliminary objection to the jurisdiction of the Court on the basis that this was a matter of domestic jurisdiction as determined by the United States. [1957] I.C.J. Rep. 105, 107. At the hearing of the request for interim measures the Swiss agent challenged the United States reservation on a number of grounds, id. at 111, but stated, as reported by the Court: "It is its examination of a request for the indication of interim measures of protection, the Court would not wish to adjudicate 'upon so complex and delicate a question as the validity of the American reservation. . . ." Ibid. The Court decided not to indicate provisional measures because "it appears that, according to the law of the United States, the sale of those shares can only be effected after termination of a judicial proceeding which is at present pending in that country in respect of which there is no indication as to its speedy conclusion. . . ." Id. at 112. It would appear then, that the Court was asserting jurisdiction to consider interim measures inspite of the United States preliminary objection. In the opinion of Judge Wellington Koo, who made a declaration after the opinion of the Court,

The reason of lack of urgency is a true circumstance, but the placing of its decision on this ground carries an implication that the Court considers the said Proviso (b) to the United States' Declaration is not applicable to the matter of provisional measures, whereas, in my view, it is applicable.
The problem of persuasiveness presented by this opinion of the Court is marked out the more remarkably by comparison with the Court's advisory opinion in the Third South-West Africa Case\(^9\) decided only a year after the Second. It would be difficult to imagine two opinions more widely separated on the basis of the reasoning used to reach a conclusion. In replying to this latest request the Court, instead of adopting a res judicata approach and looking to the language of the 1950 opinion for an answer, looked beyond the 1950 opinion\(^9\) for the reasons which had dictated the result there and sought to project from those reasons an answer to the request.\(^{100}\)

---

\(^{9}\) Id. at 113, 114. If this implication is correct then this order of the Court constitutes an important ruling on the meaning of article 41 of the statute and it is perhaps unfortunate that the Court should make such a ruling without indicating the basis of its interpretation in support of its conclusion.

Judge Klaestad delivered a separate opinion in which he held that Switzerland had not expressly contended on this motion that the United States reservation was invalid, that in the Norwegian Loans Case, [1957] I.C.J. Rep. 9, the Court had held it was not bound to consider invalidity unless raised by the parties, and that therefore the reservation should be given effect without examination of its validity. \(^{115}\)-\(^{116}\) President Hackworth and Judge Read concurred in his opinion which expressly preserved the issue of the Court's jurisdiction for determination in subsequent proceedings. \(^{117}\) Judge Lauterpacht, in a separate opinion, likewise expressed the opinion that the Court was without jurisdiction. Id. at 117.

98. Admissibility of Hearings of Petitioners by the Committee on South West Africa, [1956] I.C.J. Rep. 23 [herein referred to as the Third South-West Africa Case].

99. It is true that the majority (8-5) framed the task of the Court in the following words:

In determining the question whether in these circumstances it would be consistent with the Opinion of the Court of 11 July 1950 for the Committee on South West Africa to grant oral hearings to petitioners, the Court must have regard to the whole of its previous Opinion and its general purport and meaning.

\(^{100}\) This time the question put to the Court by the General Assembly was:

Is it consistent with the advisory opinion of the International Court of Justice of 11 July 1950 for the Committee on South West Africa, established by General Assembly resolution 749 A (VIII) of 28 November 1953, to grant oral hearings to petitioners on matters relating to the Territory of South West Africa?


The General Assembly had accepted and endorsed the advisory opinion of the Court of 1955. See note 85 supra. At the time the Committee drew up provisional rules of procedure, including the Special Rule F discussed in the Second South-West Africa Case, [1955] I.C.J. Rep. 67, it also adopted the following:

Section D

Transitional provisions

If the Committee should receive requests for oral hearings from inhabitants of
TREATY INTERPRETATION

the Territory of South West Africa or other sources, these shall be referred, with the comments of the Committee, to the General Assembly at its ninth session for a decision concerning the admissibility of oral hearings.

Report of the Committee on South West Africa to the General Assembly, U.N. Gen. Ass. Off. Rec., 9th Sess., 11 (A/2668) (1954). In 1955 the question of oral hearings was raised by two letters addressed to the Chairman of the 4th Committee and placed before the Committee on South-West Africa. The committee decided "in conformity with the intent of ... Section D of its provisional rules of procedure, to refer to the General Assembly at its tenth session the fact that it has received such a request, and to invite the General Assembly to arrive at a decision concerning the admissibility of oral hearings." Second Supplement to the Report of the Committee on South West Africa to the General Assembly, U.N. Gen. Ass. Off. Rec., 10th Sess., 3 (A/291/Add. 2) (1955). This reference to the General Assembly prompted it to request the advisory opinion. For a further history of the facts of this case see Third South-West Africa Case—Pleadings, Oral Arguments, and Documents 12–16 (Dossier transmitted by the Secretary-General of the United Nations) (I.C.J. 1955). In answering this request the Court expressed its opinion that:

the paramount purpose underlying the taking over by the General Assembly of the United Nations of the supervisory functions in respect of the Mandate for South West Africa formerly exercised by the Council of the League of Nations was to safeguard the sacred trust of civilization through the maintenance of effective international supervision of the administration of the Mandated Territory.

Accordingly, in interpreting any particular sentences in the Opinion of the Court of 11 July 1950, it is not permissible, in the absence of express words to the contrary, to attribute to them a meaning which would not be in conformity with this paramount purpose or with the operative part of that Opinion. [1956] I.C.J. Rep. 28, 28.

It then looked at the practice of the League and concluded that while oral hearings had never been granted to petitioners by the Permanent Mandates Commission, the Council of the League was competent to authorize the Commission to hold such hearings. Id. at 28–29. The proposition that the opinion of 1950 intended to recognize a crystallization of the degree of supervision applicable to a mandatory power as of the date of the dissolution of the League, was found unsupported in that opinion or in the Charter. Likewise the Court found no such support in the Covenant of the League or the resolution of the League of April 18th, 1946. Id. at 29. Nor did it find anything inconsistent between the sentence from the 1950 opinion so much discussed in the prior opinion and the granting of oral hearings. Id. at 30–31.

The General Assembly in this case then, appeared to put to the Court a question of interpretation, literally arising out of the opinion of 1950, but actually, in the thinking of the Court, going to the documents constituting the basis of the first opinion, namely the terms of the mandate and article 22 of the Covenant of the League, the relevant provisions of the League resolution and those of the Charter of the United Nations. The Court appeared to find its answer in an interpretation of those documents giving appropriate effect to their underlying purpose, namely the "sacred trust." The result can be explained on the basis of necessary implication, and while that implication could have only a fictional relevance to the intention of the signatories of the Covenant and the mandate, the Court attempted to make clear the limits within which it felt free to "legislate" for the new situation—namely the boundary set by the fundamental purpose of the mandate, the sacred trust. By this means purpose could provide an answer to the unanticipated situation produced by the uncooperative attitude of the Union of South Africa. Judges Winiarski and Lauterpacht delivered separate opinions but voted with the Court. Id. at 33, 35. Judges Badawi, Basdevant, Hsu Mo, Armand-Ugon and Quintana dissented. Id. at 60. The reasoning of the joint dissent is reminiscent of the opinion of the Court in Second South-West Africa Case, [1955] I.C.J. Rep. 67.
Comment

In these cases the Court has applied the rule of ordinary meaning when faced with a problem of interpretation. Moreover, in terms of its ruling in the Second Membership Case, it has attributed primary significance to the evidence derived from reading the words in their ordinary sense. It has not, however, held itself precluded from considering evidence of meaning from other sources, nor in the nature of its procedure could it do so. To the extent that the statement from that case suggests that the Court may not consider any other evidence when the words, read in their ordinary meaning and context, make sense, it is unrealistic and inconsistent with the actual practice of the Court. Even dissenting Judges, with perhaps the exception of Judge Alvarez, seem to have admitted that if the words used have a natural and ordinary meaning, then that meaning is the best source of evidence of what the intention of the parties to the treaty was; but in most cases differences of opinion have arisen from the issue whether the words in question did have but one natural and ordinary meaning.

What is natural and ordinary meaning? In every day speech, most people “understand” what is said to them in the sense in which the speaker intends. This tendency to understand arises from a common background between the speaker and the listener, a common association between the thought and the word used. The closeness of the relationship of thought, word and understanding will depend on the nature of the subject-matter postulating the ability of the speaker to give accurate expression to his thoughts. When the notion is a general one, the speaker may choose a word with a wide range of meaning, though by the way in which he uses it, or because of his background being familiar to the listener, the range of meaning may be limited. When the notion is a particularly concrete one, the meaning may be precisely limited by the nature of the subject-matter, and a close relationship may be established between the thought and the understanding.

That language is imperfect, however, as a means of communicating thought, is universally recognized and gives rise in law to the need of interpretation. The parties to a treaty may have thought they agreed to the words used in the same sense and then discovered that this was not so, or they may have simply overlooked or even intended a possible ambiguity in the words used. Assuming that the claims of the parties are bona fide, it is possible to conceive of both being right in a moral sense, that is that each one used the words as he understood them. It is of the nature of a treaty, however, like a contract, a statute or a constitution in municipal law, that it represents the “intentions” of the parties as legislators; it represents their
agreement on particular subjects. Ideally, there is a direct correspondence between the thought of the one party and the understanding of the other, at the time of signing. When a divergence is subsequently shown to exist between understanding and thought, two possibilities arise if the parties submit the dispute to judicial settlement. The tribunal can say either that there was no real agreement between the parties in spite of the form of words or that effect can be given to the instrument in some way. The second alternative involves holding that at least one of the parties has incurred an obligation which, if his claim is bona fide, he may not have intended to incur. In the United States and the United Kingdom, this difficulty has been surmounted by holding a party to the sense in which the words could reasonably have been understood by the other party. This too, seems to be the solution arrived at by the International Court. The test of meaning to be attributed to the words used is objective and not subjective. The ordinary meaning of the words comes to be that meaning which most nearly corresponds with the general experience of states.

It is possible, however, that the parties may have used words in a particular sense and that this particular sense may be common to both the thought and the understanding. Where such a particular sense is proved to be part of the agreement, the Court will give effect to it. This is the difference between the dictionary and the context tests.

It frequently happens that the words used are linked to particular situations in the thought and understanding of the parties at the time of signing. Where there is agreement in limiting the words used to those situations, then it may be shown that a particular use of the words was intended. When, however, the words used have reference to varying situations, some of which may not have been adverted to by the parties, the Court is again faced with giving an objective interpretation not based on any correspondence between the thought and the understanding of the parties at the time of signing. In exercising the function of interpretation then, the Court makes the rights of the parties. That it does not have an unfettered power is axiomatic, yet as shown above it has some power. The question becomes one of determining what limits are placed around the exercise of that power and it is precisely in the rules of interpretation and in particular in the rule of ordinary meaning that such limits are to be found.

The rule of ordinary meaning is an acknowledgment that where the thought and the understanding coincide, effect must be given to that agreement. Yet it is an acknowledgment also that where some or all of the parties could reasonably understand the words
in a particular sense, effect must likewise be given to that constructive agreement. The Court in laying down the rule of ordinary meaning however, besides acknowledging that its power is limited by this agreement, recognizes that the best evidence of any agreement is the ordinary meaning of the words used, that is the sense in which they may reasonably be understood.

Were the reader of a book to come across a word of the precise meaning of which he was not certain, he would turn to the dictionary for an explanation. It is just this process of the Court which has been described as the "dictionary" test. The Court may not physically turn to a dictionary but it uses the information which the compilers of a dictionary would have at hand. In the sphere of international relations, this may be the common usage of states. Thus the Judges in the Corfu Channel Case (Merits) who considered the meaning of article 25 of the Charter, based their interpretation of the word "decision" on consistent diplomatic practice. Again, in the Second Peace Treaties Case, the Court applied the test in an even more literal sense with respect to the meaning of the word "third." The decisions of the Court then, seem to indicate that where the words have a commonly accepted meaning, they will be understood in that sense until the contrary is proved. Where this meaning is consistent with the context, cadit quaestio.

The test of context is applied as a check going to the existence of a selection of a particular meaning by the parties themselves. If such a selection is shown, it will prevail over the dictionary test. This was the claim of the United Kingdom in the Second Peace Treaties Case, and it was also their claim with respect to the meaning of "recommendation" in the Corfu Channel Case (Preliminary Objection). Both arguments were directed to show that words having an ordinary meaning had in fact been used in another, perhaps a secondary, sense by the parties. Both arguments were rejected. In the First South-West Africa Case however, the Court did rely on the context of chapter XII to exclude a possible dictionary meaning that could have been given to the language used in article 80(2). Here the context was used to show that if one meaning was attached to the language of article 80(2) then that meaning would be inconsistent with other language in the same chapter. The criterion posed then, was one of internal consistency. With respect to consistency of language, the practice of the Court indicates that something less than the whole treaty may be meant. In some of the cases before the Permanent Court relating to the International Labor Organization and part XIII of the Treaty of Versailles, the Court treated part

101. Corfu Channel Case, [1949] I.C.J. Rep. 4 [herein referred to as the Corfu Channel Case (Merits)].
XII as a distinct and severable part for the purpose of applying a context test. Again in the First South-West Africa Case, the Court treated the trusteeship provisions as severable from the remaining portion of the Charter. Such a practice may be a recognition of the method of drafting treaties, particularly multilateral conventions. Such is the scope of the problems involved that often one committee is unable to cover all the topics in the time available. For this reason separate drafting committees are frequently constituted to deal with particular aspects of the agreement. It follows that words are more likely to be used in the same sense when they have been inserted by the same committee.

In other cases it would seem that the Court has understood the words "in the context in which they occur" to involve a consideration of more than all the language appearing on the face of the treaty. The word "context" itself is a good illustration of a word having a wide range of meaning. It could be understood to require a reading of the treaty as a whole, rather than a reading of particular clauses out of context. On the other hand it could be understood to require a reading of the treaty in the light of the factual background against which it was concluded. It seems clear that the Court has applied its dictum in the Second Membership Case in this latter sense on several occasions. For instance, in the Anglo-Iranian Case (Preliminary Objection) the Court placed considerable emphasis on the fact that its presumption was consistent with the factual situation in which Iran found itself at the time of making the declaration. Iran had just completed denunciation of the treaties which had provided for the system of capitulations. On the other hand in the First Asylum Case it was the complaint of the Colombian Judge ad hoc that the Court, in deciding that Colombia had no right to demand a safe conduct until Peru requested the removal of the refugee, failed to consider the Havana Convention in its factual context; failed that is to take into account the "unanimous practice of American States." The resort to context in this second sense becomes imperceptibly a resort to the evidence derivable from the purpose that the parties had in mind in concluding the treaty. One of the difficult issues which is raised by the rule of ordinary meaning is: when will a showing of purpose by evidence outside the instrument be enough to raise an ambiguity in the words of the treaty itself, words which, without that outside evidence could be regarded as having an ordinary meaning? This is part and parcel of the proviso that the Court

attached to its dictum in the Second Membership Case that the result arrived at on ordinary meaning must not be "unreasonable." The cases considered thus far would seem at least to support the proposition that if the natural and ordinary meaning of the words is consistent with the purpose of the parties as ascertainable from the face of the instrument itself, the Court will pay little attention to extrinsic evidence introduced in an attempt to show the unreasonableness of such an interpretation. In other words, the treaty itself may contain a recital of the significant surrounding facts, which recital is the best evidence of what those facts really were.

Where then, the words used in a treaty are clear in their natural and ordinary sense and are consistent with the context in that sense, the Court has not been faced with a difficult and truly controversial problem of construction. That the Court should, in such a situation, hold itself bound to the intention of the parties ascertained by an objective approach to the meaning of the language used, must be of great encouragement to states contemplating using the services of the Court. While the distinction between the Court applying its own notions of justice and equity to the facts presented, and applying the agreement which the parties have themselves made defies precise legal definition, it can be sensed. That the application of the rules of construction inexorably leads to the second result rather than the first would be an irrational conclusion. And yet it is clear that the Court has not attempted to use its discretion in the foregoing cases to make a silk purse out of a sow's ear. Few would doubt where the sympathies of the majority of the Court lay with respect to the breaches of the human rights clauses of the peace treaties. The stamp of the Court's approval on the decisions of a two man commission would have been of considerable value in marshalling world opinion against those three countries; but the Court declined to succumb to any such temptation, having concluded that the plain meaning of the language precluded the construction of such a two man commission. Few likewise would doubt where the sympathies of the Court lay in the First South-West Africa Case with respect to South Africa's pretensions to simply absorb the mandated territory. Yet the Court declined to find any binding obligation to enter into a trusteeship agreement with the United Nations, an obligation which, once again would have had considerable influence on informed world opinion.

The foregoing analysis indicates that the rule of ordinary meaning may be helpful in acting as a check on the Court's embarking on legislation pure and simple. Where substantially all the available evidence points to one meaning, then the Court will not rewrite

the agreement of the parties. But the problem of the value of this source of evidence remains once it appears that two or more meanings may possibly be assigned to the words used in the treaty. Many words have a dual or even a triple meaning and it may not be clear from the context which meaning was selected by the parties. Many words, apparently clear when read literally, may be ambiguous when read in the light of the overall purpose of the parties. \(^{106}\) Again the problem may not relate to the meaning of particular words but may be one of necessary implication. In those cases, while it may be impossible to point to one ordinary meaning or to say that the words

---

106. The apparent failure of tribunals on some occasions to recognize that fact and the consequent reliance on the literal meaning of a text have led some writers on treaty interpretation to condemn "ordinary meaning" as a guide. Professor Hyde has concluded that:

Accordingly, one must reject as an unhelpful and unscientific procedure the endeavor to test the significance of the words employed in a treaty by reference to their so-called "natural meaning" or any other linguistic standard, and then attempt to reconcile therewith the thought or conduct of the contracting parties. Such a method involves the implication that those parties must be deemed to have employed words in a sense that usage may have decreed, even though contrary to their common design. It transforms the function of the interpreter from a fact-probing endeavor to ascertain the actual sense in which the parties used the words of their choice, to an effort to find what usage appears to decree as to the significance of those words, and thereupon to reconcile the conduct of the parties therewith. In so far as the interpreter essays to make that effort he is diverted from the task of ascertaining the truth concerning the design of the parties as exemplified by the text of their agreement, and endangers the success of such an attainment.

---

2 Hyde, International Law, Chiefly as Interpreted and Applied by the United States 1470 (2d ed. 1945). The passage appears to equate "ordinary meaning" with "literal" meaning, an equation which does not reflect the views of the Court on context. The passage also apparently fails to take account of any presumption that the parties, in selecting the particular words, intended them in the sense decreed by usage. In his famous dissenting opinion in The Interpretation of the Convention of 1919 Concerning Employment of Women During the Night, P.C.I.J. ser. A/B No. 50 (1922), Judge Anzilotti did not express his criticism of the rule so broadly:

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

Id. at 383. Judge Lauterpacht has said of the rule, "its only—but, upon analysis, decisive—drawback is that it often assumes as a fact that what has still to be proved and that it proceeds not from the starting point of the inquiry but from what is normally the result of it." Lauterpacht, The Development of International Law by the International Court 52 (1958). But at the same time he also concedes the relevance of the rule to determine the burden of proof:

It is therefore legitimate to insist, in the interest of good faith and of a requisite minimum of certainty in legal transactions, that the burden of proof should
can only be understood as necessarily implying a certain result, it may yet be argued that one such meaning is more likely than another. That is to say that though a word may have several distinct meanings, it may be generally understood in one sense and only rarely in other senses. In at least two of the foregoing cases the Court has held that the ordinary meaning indicated creates a presumption which may be rebutted by evidence derived from the application of other rules. The weight to be attached to this presumption would appear to depend on the relative importance of the various possible meanings. Clearly this would give rise to considerable discretion in assessing the relative frequency with which the words are understood in different senses. It is not surprising that substantial splits appeared on the Court in those cases where such a presumption was relied on. If the Court can split on the factual issue of the existence of a particular custom, and they have on several occasions, then the possibility of such a split is much the stronger when the inquiry is the relative frequency with which certain words are understood in one particular meaning rather than another. The result in any particular situation is by no means inexorable once it is admitted that the words used could have two meanings but there is a presumption in favor of one of those meanings. The problem which the decisions in the Second Peace Treaties Case, the Anglo-Iranian Case (Preliminary Objection) and the dissent in the U.S. Nationals in Morocco Case pose is: where did the Judges find the evidence which convinced them that one meaning of the words used was more common than another? No light is shed on this problem by the language of the judgments, and at face value the presumption seems little more than an assertion by the individual Judges unsupported by further evidence. In the absence of such evidence the inquiry is at once prompted: why did the Court make one assertion, and the dissenters another; what really underlay the taking of this primary position?

rest upon the party asserting that the term in question is used not in its ordinary but in an unusual connotation or that the “clear meaning” is not what on the face of it it appears to be.

Id. at 58.

To attempt to answer the second question is to attempt to analyze the subjective working of the legal mind when the only evidence available is words printed on paper, clearly a hazardous proceeding. But the fact that the analysis seems hazardous is a strong argument against substantial reliance by the Court on such reasoning. If their judgments are to be sold to world opinion as rational, then it would seem preferable that the premises underlying a decision should be made explicit rather than left to inference. While to make such premises explicit might in some cases indicate the quasi-legislative function of the judicial process, it would seem preferable to admit the function openly and make the self-imposed limits on that function justify themselves in world opinion. Moreover, such explanation might tend to encourage uniformity in the application of such premises. One may sense in the Anglo-Iranian Case (Preliminary Objection) that the underlying premise of the Court was that jurisdiction over Iran should not be found unless a clear intention to consent to such jurisdiction could be attributed to Iran. If that was the premise then it would appear to be inconsistent with the approach of the Court to similar questions in the Corfu Channel Case (Preliminary Objection) and the Ambatielos Case (Preliminary Objection). With respect to the Second Peace Treaties Case it might be sensed that there was some feeling that it would be futile to go through with a two man commission performance because obviously Hungary would frustrate any attempt to glean evidence with respect to the alleged breaches of the human rights guarantees, and assuredly Hungary would not heed any decisions of such a two man commission. If indeed that were the implicit premise then the decision appears dangerously close to a usurpation of authority on the part of the Court. The Court would not seem placed in the best situation to decide whether or not world opinion should be brought to bear on Hungary’s conduct or whether any significant world opinion would be brought to bear by the activities of such a two man commission.

To hazard these guesses is perhaps to set up straw men: but the significant point about the usage of ordinary meaning in this way is that because such a presumption sometimes fails to set forth adequate reasoning for a particular conclusion, it invites the erection of just such straw. To invite such straw men detracts from the convincing quality that a decision of the Court should have, as has been pointed out above in relation to the Second South-West Africa Case.

And yet it is clear that the use of the presumption derived from ordinary meaning in some cases does have probative value. With the approach of the Judges in these cases can be compared that of the
Court in the *Ambatielos Case* (*Merits*). There the Court seemed to take a position based on a presumption from the plain meaning of the words "based on the provisions of the Anglo-Greek Commercial Treaty of 1886." But this presumption was strongly supported by the argument that because, prior to 1926, the Commission of Arbitration would have had jurisdiction to interpret the 1886 treaty as well as to decide issues of fact, there being no manifestation of intention to change this in the declaration, the same must still hold good after the declaration. The argument of the dissent in opposition to such an interpretation ignored the word "claims" which appears immediately before "based" in the declaration of 1926 and also failed to meet the argument of the Court that its interpretation would lead to a very complex result requiring litigation of practically the whole issue twice, once before the Court and once before the Commission of Arbitration, and the presumption against the parties intending to produce such a cumbersome procedure. In this case then, while the Court took a position initially founded on a presumption derivable from the ordinary meaning of the words appearing in the instrument, it supported that presumption by cogent evidence from other sources. Once it is conceded that words used may have been intended in more than one sense, it would seem unwise to give significant weight to the commonness of the one meaning rather than another unless the disparity between the use of the word in the two senses is obvious. Absent such obvious disparity, the rule of natural or ordinary meaning ceases to be a significant tool in the hands of the Court and further evidence of meaning should be sought and spelled out.

The foregoing discussion has been limited to the situations where the Judge acknowledges that if the words have a commonly accepted meaning and make sense in the context, other considerations should not displace that meaning. Some of the conflicts in the cases already considered might be explained on a disinclination by Judges in particular cases to make any such acknowledgment. It would seem that one or two of the Judges have shown a disposition on occasion to go beyond the words of the treaty and in such a case to ignore the rule of ordinary meaning as a limiting factor.

Judge Alvarez in the *Membership cases* and the *South-West Africa Case* has given a clear indication of his approach to questions of treaty interpretation. The words of the text are not to be slavishly followed and the major criterion is to be its consistency with the "new international law." For him then, the function of treaty interpretation goes beyond an ascertainment of any objective intention attributable to the parties. This immediately suggests the question

of what limits he recognizes on this power of the Court to make law.\textsuperscript{108}

Another factor affecting decisions in some cases is the nationality of the particular Judge. Judge Loder it was who inveighed against perpetuating the notion of the Judge \textit{ad hoc} with the Permanent Court.\textsuperscript{109} He considered that the Judges should act as impartial arbiters even when deciding a case in which their country was a party. He urged that a departure should be made from the previous practice of arbitral tribunals whereby the national commissioners regarded themselves as agents of their countries rather than impartial assessors. Despite his arguments provision was made for the appointment of Judges \textit{ad hoc} to the Permanent Court and now to the International Court. There is still force in the argument then, that Judges are entitled to take into consideration their own national interests where their country is a party to a case. Some of the dissenting opinions discussed above can be explained on this basis, rather than on a more technical approach to problems of interpretation.

\textbf{B. The Rule of "Necessary Imlication"}

This rule was described by the Court in the \textit{Reparations Case}.\textsuperscript{110} Having stated that the answer to the question posed was "not settled by the terms of the Charter," it continued:

The Charter does not expressly confer upon the Organization the capacity to include, in its claim for reparation, damage caused to the victim or to persons entitled through him. The Court must therefore begin by enquiring

\begin{quote}
108. The significance of Judge Alvarez's approach to problems of interpretation will be discussed in a subsequent publication.

109. He was opposed to Article 27 of the Root-Phillimore plan, because this Article still involved the idea of arbitration instead of justice. He believed that the idea of giving the parties representatives upon the Court was wrong. If the right to choose such judges were given to the parties, this would give the proceedings a characteristic essentially belonging to arbitration. Again, by stipulating that the various legal systems should be represented, a mistaken idea would be introduced. Furthermore, there was a contradiction between the attempts which had been made to ensure the establishment of a Court composed of the best judges and the proposal to bring temporary judges in the Court.

\textbf{MINUTES OF THE PROCEEDINGS OF THE ADVISORY COMMITTEE OF JURISTS 531 (1920).} See also id. at 169–70; Hudson, \textit{op. cit. supra} note 4, at 182.

For a discussion of the significance of nationality of the Judges see Samore, \textit{National Origins v. Impartial Decisions: A Study of World Court Holdings}, 34 CH.-KENT L. REV. 193 (1956). Professor Samore reaches the conclusion that "the scales of justice at the international level have generally been balanced with as pleasing a degree of impartiality as ever graced an American courthouse." \textit{Id.} at 194–95. It may be questioned how far his statistics bear out his conclusion however, particularly with reference to \textit{ad hoc} Judges.

whether the provisions of the Charter concerning the functions of the Organization, and the part played by its agents in the performance of those functions, imply for the Organization power to afford its agents the limited protection that would consist in the bringing of a claim on their behalf for reparation for damage suffered in such circumstances. Under international law, the Organization must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties. This principle of law was applied by the Permanent Court of International Justice to the International Labour Organization in its Advisory Opinion No. 13 of July 23rd, 1926 (Series B., No. 13, p. 18), and must be applied to the United Nations.\textsuperscript{111}

This case was brought before the International Court by a request of the General Assembly for an advisory opinion.\textsuperscript{112} In 1948 Count Bernadotte, United Nations Mediator in Palestine and Colonel Serot, a United Nations observer were murdered while performing services for the United Nations Organization. These and other deaths and injuries suffered by Secretariat employees and members of United Nations commissions in the course of their duties prompted the Secretary-General of the United Nations to place the question of reparation for the injuries on the agenda of the General Assembly

111. Id. at 182–83. Advisory Opinion No. 13 of the Permanent Court was given in response to a request from the Governing Body of the International Labour Office (channeled through the Council of the League) to the following effect:

Is it within the competence of the International Labour Organization to draw up and to propose labour legislation which, in order to protect certain classes of workers, also regulates incidentally the same work when performed by the employer himself?


The Court concluded that the answer to the question was to be found in the language of part XIII of the Peace Treaty of Versailles which defined the competence of the International Labour Organization. P.C.I.J., ser. B, No. 13, at 6, 14 (1926). The Court found no express language therein governing the question put to it but found as follows:

It results from the consideration of the provisions of the Treaty that the High Contracting Parties clearly intended to give to the International Labour Organization a very broad power of co-operating with them in respect of measures to be taken in order to assure humane conditions of labour and the protection of workers. It is not conceivable that they intended to prevent the Organization from drawing up and proposing measures essential to the accomplishment of that end. The Organization, however, would be so prevented if it were incompetent to propose for the protection of wage-earners a regulative measure to the efficacious working of which it was found to be essential to include to some extent work done by employers. If such a limitation on the powers of the International Labour Organization, clearly inconsistent with the aim and the scope of Part XIII, had been intended, it would have been expressed in the Treaty itself. On the other hand it is not strange that the Treaty does not contain a provision expressly conferring upon the Organization power in such a very special case as the present.

\textit{Id.} at 18.

at its third session in 1948. In a supporting memorandum he raised the issue whether the United Nations Organization should claim reparation for these injuries or for its own consequential loss from the states or governments in whose territories the injuries had occurred, assuming that a case of international responsibility was disclosed. The request put to the Court the issue whether the Organization could claim reparation, and in particular inquired whether the Organization had capacity to bring an international claim against the responsible government for damage caused (a) to the United Nations; and (b) to the victim or to persons entitled through him.

The Court had no difficulty in deciding that the Organization had the capacity necessary to bring claims for damage caused to its own interests. The analysis of the main opinion was as follows. The Organization was intended to exercise and enjoy and was in fact exercising and enjoying rights and duties involving direct contact with States; it had “a large measure of international personality and the capacity to operate on an international plane.” That it had this capacity followed necessarily from the functions it was designed to perform. The fact that it had some international capacity did not mean that it had all the rights and duties of a state but that it could exercise the right to claim reparations if an intention to confer such a right could be found in its “purposes and functions as specified or implied in its constituent documents and developed in practice.” Speaking of the necessity of such a right when damage had been caused to the Organization itself the main opinion continued:

When the Organization has sustained damage resulting from a breach by a Member of its international obligations, it is impossible to see how it can obtain reparation unless it possesses capacity to bring an international claim. It cannot be supposed that in such an event all the Members of the Organization, save the defendant State, must combine to bring a claim against the defendant for the damage suffered by the Organization.

There was no dissent from the holding on this point.

The more controversial problem of necessary implication, however, was raised by the second question — whether the Organization had capacity to make a claim on behalf of the victim or those persons entitled through him. Here the basic approach of the Court was the

114. The decisions of the Court on the ability of the Organization to claim reparation for such damage whether against a member or nonmember state were unanimous. The decisions that a right existed to claim reparation for the victim or persons entitled through him against a member or nonmember state were taken by votes of eleven to four. [1949] L.C.J. Rep. 174, 187.
116. Id. at 187.
same: was the possession of such a right *necessary* to the fulfilment of a function vested in the Organization. It found a showing of necessity in the following factors. Many missions would involve the Organization's agents in danger and in the event of injury occurring, the agent's national state might not be justified or might not feel disposed to bring an international claim. To ensure the efficient and independent performance of these missions these agents had to be provided with adequate protection, a protection which could only be founded on a right in the Organization to make a claim for reparation in their behalf. If an agent were forced to rely on the protection of his own state, his independence might well be compromised contrary to the principle contained in article 100 of the Charter. Furthermore discrepancy should be avoided between the cases of agents who might be nationals of strong states, as opposed to those of nationals of weak states or even those of stateless agents, or of agents nationals of the responsible state itself.\footnote{117. *Id.* at 181-84.}

All the Judges affirmed the existence and validity of the rule of construction expressly or implicitly by concluding that the Organization had a right to claim reparation for its own injury. A difference of opinion arose out of the application of the rule and the showing of necessity required. Judge Hackworth dissenting, stated the traditional international practice whereby the national state could claim such reparation on behalf of its citizen. He continued:

> Powers not expressed cannot freely be implied. Implied powers flow from a grant of expressed powers, and are limited to those that are "necessary" to the exercise of powers expressly granted. No necessity for the exercise of the power here in question has been shown to exist. There is no impelling reason, if any at all, why the Organization should become the sponsor of claims on behalf of its employees, even though limited to those arising while the employee is in line of duty.\footnote{118. *Id.* at 198. Judge Badawi made similar arguments. *Id.* at 214, 216. For Judge Krylov's reasoning see *id.* at 217.}

That a considerable measure of subjectivity was involved in determining the existence or absence of a case of "necessity" is clear from this case. On the other hand this rule was not used wholly arbitrarily since its application did require at least a finding of a purpose or function in the language of the instrument or elsewhere which could not be effected without the further implied term. The case suggests two problems: the first relates to the proof which will satisfy the Court that the parties had a purpose or function which will be frustrated or impaired unless a term is implied. The second is whether it must appear to the Court that such a purpose or function would wholly fail without the implied term, or be only partially impaired.\footnote{119. In the above case Judge Badawi took exception to the Court's position...}
The First South-West Africa Case indicates that the Court has not felt itself restricted to finding a showing of the purpose or function spelled out specifically in the express language of the text. Some of the problems raised in the case were answered by the Court in terms of the rule of ordinary meaning. However, the first problem put by the resolution of the General Assembly was whether the obligations of the Union of South Africa under the mandate continued to remain in effect despite termination of the League of Nations. This was not answered by an express provision of the mandate or the Covenant but depended on whether it was necessary on the express ground that it was not shown that the existence of such a right was the only method of protecting agents. Id. at 214.

120. This case was brought before the Court on a request for an advisory opinion from the General Assembly in the following terms:

What is the international status of the Territory of South West Africa and what are the international obligations of the Union of South Africa arising therefrom, in particular:

(a) Does the Union of South Africa continue to have international obligations under the Mandate for South West Africa and, if so, what are those obligations?

(b) Are the provisions of Chapter XII of the Charter applicable and, if so, in what manner, to the Territory of South West Africa?

(c) Has the Union of South Africa the competence to modify the international status of the Territory of South West Africa, or, in the event of a negative reply, where does competence rest to determine and modify the international status of the Territory?


After the end of the First World War the Union of South Africa received the Territory of South-West Africa as a mandate. With the demise of the League of Nations after the end of the Second World War the problem arose of making provision for South-West Africa and the other mandated territories. Chapter XII of the Charter of the United Nations was designed, inter alia, to meet this problem. In December 1946, however, the Union of South Africa requested the General Assembly to approve the incorporation of the Territory by the Union. U.N. Gen. Ass. Off. Rec., 1st Sess. Pt. 2, Plenary 1326 (1946). This proposal was rejected by the General Assembly, which recommended that the territory be placed under the trusteeship system. U.N. Gen. Ass. Res. No. 65(1), Future Status of South West Africa, U.N. Gen. Ass. Off. Rec., 1st Sess. Pt. 2, Plenary 123–24 (A/64/Add. 1) (1946). The Union did not present any draft agreement for placing the Territory under trusteeship and in 1949 refused to submit reports on the administration of the Territory. These facts prompted the request for the advisory opinion. For further details see First South-West Africa Case — Pleadings, Oral Arguments, and Documents 160–86 (L.C.), 1950, being the text of a statement to the Court by Mr. Kerno representing the Secretary-General of the United Nations. See also note 62 supra.

121. The problems of interpretation raised in this case were, broadly speaking, of two categories: (a) those concerning the interpretation of the mandate together with the provisions of the Covenant of the League of Nations relating to mandates; and (b) those concerning the meaning of the provisions of the Charter of the United Nations relating to the placing of mandated territories under the system of trusteeship. This second group of problems were answered by the Court on the basis of ordinary meaning. [1950] L.C., Rep. 128 at 138–40. On this point see supra note 62.
ily implied from these instruments that the obligation should survive the League.

The Government of the Union of South Africa argued that the terms of the mandate and the relevant provisions of the Covenant gave rise to a right-duty relationship, analogous to the municipal law concept of mandate, that a right could only be effective if it was possessed by someone, that it could not be possessed by the League of Nations and that there was no evidence of legal succession to that right by the United Nations. Their argument then, was that the concept of mandate in international law should be understood as analogous to the municipal law concept and that therefore any terms to be supplied must be consistent with the latter concept.

The Court refused to accept this argument being of the opinion that the characteristics of a mandate in international law were entirely different from those of the municipal law concept. All the members of the League, it held, including the Union of South Africa, had recognized the international status of South-West Africa and the creation of the mandate as a “sacred trust” of civilization. The Court then drew a distinction between the obligations directly related to the administration of the mandate, corresponding to the “sacred trust of civilization referred to in Article 22 of the Covenant” on the one hand, and the others relating “to the machinery for implementation . . . closely linked to the supervision and control of the League.” It concluded that since the first group of obligations did not depend for their fulfillment on the existence of the League “they could not be brought to an end merely because this supervisory organ ceased to exist. Nor could the right of the population to have the Territory administered in accordance with those rules depend thereon.”

It is not clear by what process the Court arrived at this interpretation. Seemingly it postulated that the texts of the mandate and Covenant did not provide an answer by their very words, but that this result was to be necessarily implied from the notion of “sacred trust” basic to the mandate. This interpretation it held to be confirmed by reference to the rule of purpose and to the terms of article 80(1) of the Charter. In placing reliance on that article, the Court did not seem to imply that it created a rule on this point superseding the provisions of the mandate, but that it was evidence of the intention of most of the states who had been parties

123. Ibid.
124. Id. at 133.
125. Ibid.
126. Id. at 133–34.
to the mandate and members of the League. Thus the Court seemed to apply it as evidence of an authentic interpretation of the parties.\footnote{127} In a similar way, it placed reliance on a resolution of the League of April 18, 1946 and subsequent declarations of the representatives of the Union of South Africa.\footnote{128}

Turning to the second group of obligations related to the supervisory functions of the League, the Court continued:

The obligation incumbent upon a mandatory State to accept international supervision and to submit reports is an important part of the Mandates System. . . . It cannot be admitted that the obligation to submit to supervision has disappeared merely because the supervisory organ has ceased to exist, when the United Nations has another international organ performing similar, though not identical, supervisory functions.\footnote{129}

Again, the process by which it arrived at this interpretation is not explicitly set forth but would seem to follow the lines of the argument on the previous point based on necessary implication.\footnote{130}

The rule of necessary implication then, seems to have been applied by all the Judges as regards the continuance of the Union's obligations. As regards the transfer of the League's supervisory powers, the Court was prepared to give the rule a broad application since the resulting conclusion was supported by the rule of authentic interpretation. The two dissenting Judges would restrict its operation within much narrower limits.\footnote{131}

A second problem of interpretation with respect to the mandate and the Covenant was raised in the General Assembly's request: namely, whether the Union of South Africa was competent to modify the international status of the territory of South-West Africa, or if not, where such competence rested to determine and modify that

\footnote{127} The rule of authentic interpretation, covering the use of statements and conduct of the parties after conclusion of a treaty, will be discussed in a subsequent publication.
\footnote{128} \cite{1950} LC.J. Rep. 128, 134-5.
\footnote{129} \cite{Id. at 136.}
\footnote{130} Further reliance was placed on article 80(1) of the Charter and the resolution of the League. The Court concluded that the "Union of South Africa is under an obligation to submit to supervision and control of the General Assembly and to render annual reports to it." \cite{Id. at 137.}
\footnote{131} Judges McNair and Read concurred in the conclusions of the Court that the obligations of the Union of South Africa under the mandate continued in force. \cite{Id. at 146, 156-57, 164. They dissented, however, from the holding that the League's supervisory functions should be transferred to the General Assembly. \cite{Id. at 159, 164. Judge McNair considered that "the dissolution of the League . . . did not automatically terminate the Mandates," but that an international status had been created which supplied "the element of permanence which would enable the legal condition of the Territory to survive the disappearance of the League." He distinguished the obligations of the mandatory to the League itself from those due to the members of the League. The former, he said, had come to an end, the latter subsisted "except in so far as their performance involves the actual co-operation of the League, which is now impossible." \cite{Id. at 158-58. He therefore regarded the administrative supervision of the League as having lapsed. \cite{Id. at 159. The contention that there had}
Having defined status as resulting "from the international rules regulating the rights, powers and obligations relating to the administration of the Territory and the supervision of that administration, as embodied in the Article 22 of the Covenant and in the Mandate," the Court answered this problem in much the same way as the previous one. Relying on the express provisions of article 7 of the mandate, it concluded that the Union had no competence to modify unilaterally the Territory's international status. The rule of ordinary meaning, however, failed to show how that status could be modified after the termination of the functions of the Council of the League of Nations. Since the Council had been dissolved and the states formerly members of the League had ceased to act together as members, the express directions of the mandate and the Covenant on this point could not be fulfilled. It remained to be seen whether an alternative form of consent could be found by necessary implication. The Court, applying the same arguments as before, concluded that such a power of consent in the United Nations could be implied.

In the Genocide Case, some further guidance can be found as to the type of evidence which has been relied on by the Court to been "an automatic succession by the United Nations to the rights and functions of the Council of the League in this respect" he rejected as based on pure inference. He was prepared to hold then, that the continuance of the Union's obligations was a necessary implication of the terms of the mandate and the Covenant. He declined to find such an implication however, with respect to transfer of supervision. To support his interpretation he relied on the rule that if this result had been intended an express provision to that effect could have been inserted in the Charter. He declined to find in article 80(1) of the Charter, the resolution of the League and the declaration of the Union, a basis for the application of the rule of authentic interpretation. Id. at 159–63.

Judge Read took the position that the decision of the Court as to the transfer of the supervisory powers did not involve an interpretation but an amendment of the provisions of the mandate. This transfer could not in law be effected "without the consent and authority of the League, or of Members of the League whose legal rights could be thus impaired." Id. at 165.

See the terms of the request note 120 supra. 13. [1950] I.C.J. Rep. at 141. 14. "This is shown by Article 7 of the Mandate, which expressly provides that the consent of the Council of the League of Nations is required for any modification of the terms of the Mandate." Ibid.

15. Id. at 142. For a discussion of this case see Kahn, The International Court's Advisory Opinion on the International Status of South-West Africa, 4 INT'L L.Q. 78 (1950); Parry, The Legal Nature of the Trusteeship Agreements, 27 Brit. YB. INT'L L. 164 (1950). The latter writer concludes that there was some evidence of the intention of the draftsmen of the Charter that the negotiation and conclusion of trusteeship agreements with respect to mandated and ex-enemy territories should be the legal duty of members of the United Nations concerned. He also concludes however, that the intentions of the draftsmen were not translated into law. See particularly 27 Brit. YB. INT'L L. at 184.

make a case for implication. The case arose out of a dispute over the validity of certain reservations made to the Convention on the Prevention and Punishment of the Crime of Genocide. The dispute was brought about by a failure to include any provision in the convention regarding the permissibility of reservations. On signing the convention, the USSR, the Byelorussian SSR, the Ukrainian SSR and Czechoslovakia all made reservations with respect to articles IX and XII as did Bulgaria, Romania and Poland in their instruments of accession. The instrument of ratification deposited by the Philippines contained reservations to four articles. In 1950, the General Assembly requested the International Court of Justice to give an advisory opinion, in substance, as to the validity and effect of these reservations. It inquired whether a reserving state could be regarded as a party to the convention if one or more parties to the convention objected to the reservation; if such a state could be a party, what the effect of such a reservation would be between the reserving state and (1) the parties objecting to such a reservation, and (2) the parties accepting such a reservation. It also inquired as to the effect of an objection to a reservation made by a state who had signed the convention but not yet ratified it, and by a state entitled to sign or accede but which had not yet done so.

The main problem of construction produced by the case was
whether or not the convention permitted or forbade the making of reservations by states becoming parties to the convention.

A minority of four members of the Court came to the conclusion that the absence of a specific clause permitting reservations indicated an intention on the part of the contracting parties not to permit

presented a case in which the Court should exercise the discretion given it by article 65(1) of the Court's statute which reads as follows: "The Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request." (Emphasis added.) See also U.N. Charter art. 96, para. 2. The Court considered and rejected three arguments made in an attempt to persuade it to decline to give an opinion. One involved the allegation that the request was an interference by the General Assembly in the affairs of the states parties to the convention; the second was that article IX of the convention deprived the Court of power to give an advisory opinion interpreting the convention. The third involved the allegation that the request pertained to a dispute between two or more states, and that to avoid adjudicating that dispute without the consent of the parties, the Court should decline to give an opinion.

This third argument had been considered by the Permanent Court in the Eastern Carelia Case, P.C.I.J., ser. B, No. 5, at 7, 24–29 (1923). There the Court noted that at the time of the request Finland and Russia were in acute controversy over the issue submitted to the Court for an advisory opinion. Id. at 22–24. It did not consider necessary a decision on the broad question whether a request for an advisory opinion involving such a dispute could be entertained without the consent of the parties. Instead it distinguished between the obligations of members and nonmembers of the League and held that Russia, not being a member, had given no general consent to the advisory jurisdiction of the Court. There was a clear implication however, that the Court could have proceeded to give an advisory opinion in the circumstances if the dispute had been between two members. Id. at 27–28. It is worthy of note that the jurisdiction of the Permanent Court to give advisory opinions was given a different formulation under the Covenant than under the Charter. Article 14 of the Covenant provided in part: "The Court may also give an advisory opinion upon any dispute or question referred to it by the Council or by the Assembly." (Emphasis added.) The Court's decision not to answer the question put by the request was reinforced by the factual character of the dispute, a character which would make any decision given in the absence of a party "very inexpedient." Id. at 28.

A similar type of argument was put to the International Court of Justice in the First Membership Case. It was pointed out to the Court that the subject matter of the request had been "the subject of the exchange of views which took place in that body [the Security Council]." [1948] I.C.J. Rep. 57, 61. But the main thrust of the argument against the giving of an opinion was based on the alleged political rather than legal character of the question contained in the request. Ibid. This argument was, of course, based on the language of article 96(1) of the Charter and article 65(1) of the Court's statute. In rejecting this argument the Court said:

The Court cannot attribute a political character to a request which, framed in abstract terms, invites it to undertake an essentially judicial task, the interpretation of a treaty provision. It is not concerned with the motives which may have inspired this request, nor with the considerations which, in the concrete cases submitted for examination to the Security Council, formed the subject of the exchange of views which took place in that body. It is the duty of the Court to envisage the question submitted to it only in the abstract form which has been given to it; nothing which is said in the present opinion refers, either directly or indirectly, to concrete cases or to particular circumstances.

Ibid. There were two dissents on this issue. Id. at 94, 107. This then, has been the solution of the International Court to the problem suggested by the Eastern Carelia Case, supra, the problem of reconciling the contentious jurisdiction of the Court,
the making of reservations.\textsuperscript{142} Starting from the premise that, "the consent of the parties is the basis of treaty obligations,"\textsuperscript{143} they found proved a rule of international law that unanimous consent is required to render the reserving state a party to the convention.\textsuperscript{144} Their argument then, took the form that a term should not be implied if it is inconsistent with a general rule of international law.\textsuperscript{145} Furthermore they attacked the term which the Court found premised on consent of the parties, with its jurisdiction to give advisory opinions.

While the answer is derived from the ordinary meaning of the words "legal question," that answer would seem supported by a purpose argument. Judge Hudson pointed out that, with respect to the requests for advisory opinions brought before the Permanent Court, "No case has arisen in which the Court has been requested to give an advisory opinion on a purely hypothetical question." Husson, \textit{op. cit. supra} note 4, at 496. In every case then, the request was prompted by an actual difference of opinion between states. Were "legal question" to be interpreted as excluding all disputes actual or pending, on the ground either that such situations were "disputes" and not questions, or on the basis that such difference of opinion made the question "political" and not "legal," the Court's jurisdiction to give advisory opinions would be reduced virtually to nothing.


For a discussion of a different problem arising out of the Court's discretionary power to give an advisory opinion, see text accompanying notes 167–200 infra, dealing with the case, Judgments of the Administrative Tribunal of the I.L.O. (upon complaints made against the U.N.E.S.C.O.), [1956] I.C.J. Rep. 77.


\textsuperscript{142} Judges Guerrero, McNair, Read and Hsu Mo joined in a common dissent and Judge Alvarez dissented in an individual opinion. [1951] I.C.J. Rep. 15, 31, 49.

\textsuperscript{143} \textit{Id.} at 31–32.

\textsuperscript{144} The proof was found in the writings of a number of text writers, in a report taking the same view, approved by the Council of the League of Nations in 1927, in the texts of a number of conventions wherein an express requirement of unanimous consent to any reservations had been stipulated or else the permissible scope of such reservations had been defined. They also found support in the practice of the Secretary-General. They acknowledged that Pan-American practice was in conflict with the existence of any such rule but explained that such was the case because of express agreement between Latin American countries. \textit{Id.} at 32–39.

\textsuperscript{145} Having taken an initial position on this basis they found further support in the fact that a stereotyped clause permitting reservations is common in treaties and that therefore the omission of such a clause was significant. Turning to the preparatory work, they pointed out the following comment which had appeared in the Secretary-General's original draft: "at the present stage of the preparatory work, it is doubtful whether reservations ought to be permitted and whether an article
to be implied; it was so complex they argued, so difficult to apply 
that they found it inconceivable that if the General Assembly had 
intended such a rule, they would have left it to implication.\(^{146}\)

The Court began by admitting that a multilateral convention 
arises from the agreement of the parties and that formerly the notion 
of the integrity of a convention as adopted had been linked to the 
principle that no adoption accompanied by a reservation was effec-
tive without the consent of all the other contracting parties. In order 
to rebut any presumption that the parties must have contracted in 
the light of such a notion, it relied, however, on the purpose behind 
a multilateral convention such as this one and the results which 
might accrue from admitting or rejecting reservations. It defined a 
number of circumstances which must lead it in this case to accept a 
more flexible rule including the "universal nature of the United 
Nations under whose auspices the convention was concluded" and 
"the very wide degree of participation envisaged by Article XI of 
the Convention." It referred to an increasing use of reservations in 
multilateral conventions and then to the fact that this particular 
one was drafted clause by clause on the basis of majority vote. The 
Court therefore concluded that the absence of a clause permitting 
reservations raised no presumption that reservations were not to be 
permitted. Moreover there was a reasonable explanation to be found 
for the failure of the drafters to include such a clause—namely the 
"desire not to invite a multiplicity of reservations."\(^{147}\) The Court 
then concluded that such was the importance of the general aim 
underlying the convention that it could not have been the intention 
of the contracting parties that "an objection to a minor reservation 
should produce such a result," the result of excluding one or more 
states from the convention.\(^{148}\) But the same argument also persuaded 
it that the object of the convention limited the freedom of making 
reservations:

It follows that it is the compatibility of a reservation with the object and 
purpose of the Convention that must furnish the criterion for the attitude 
of a State in making the reservation on accession as well as for the appraisal 
relating to reservations ought to be included in the Convention. . . ." They found 
the rest of the preparatory work inconclusive. \textit{Id.} at 40–41.

\(^{146}\) \textit{Id.} at 43–44.

\(^{147}\) \textit{Id.} at 22. To support the conclusion thus tentatively reached the Court 
resorted to the preparatory work and concluded from the fact that in the Sixth 
Committee debate various delegates had announced that their governments would 
be unable to ratify the convention in its present form, "an understanding was 
reached within the General Assembly on the faculty to make reservations . . . and 
. . . that States becoming parties to the Convention gave their assent thereto." \textit{Id} 
at 22–23.

\(^{148}\) \textit{Id.} at 24.
It followed that the validity of any reservation was a question of judgment for each individual state and that the convention would not be in force between states who declined to accept a reservation and the state making such a reservation.\textsuperscript{149}

The Court and the dissenters agreed that the answer in this case was to be derived from the “intention of the parties” but agreed on little more. The difference of opinion appears to stem from divergent applications of the rule of necessary implication. That a decision for or against permitting reservations was essential to the working of the convention does not appear to have been argued by either side. The doctrine of implication is then taken a step further in this case. From the point of view of the Court’s opinion it would seem that a term may be implied if the term will facilitate the attainment of the purpose of the parties even if that purpose would not be wholly frustrated without such a term. The test then is impairment of purpose rather than total frustration of it. Moving from a premise that universality was the prime objective of the parties, the Court concluded that there could not have been an intention to detract from universal acceptance by a requirement that reserving states could not be regarded as parties where such reservations were of minor importance. The dissenters parted company with the Court on the issue of just what that purpose was.\textsuperscript{160}

With the Court’s treatment of the relevance of general rules of international law to necessary implication in this case can be compared its analysis in the \textit{First and Second Asylum Cases} and the \textit{U.S. Nationals in Morocco Case}.\textsuperscript{151}

In the \textit{First Asylum Case}, the first problem of interpretation was raised by Colombia’s claim that it alone, in terms of article 2 of the Havana Convention, was entitled to qualify, with definitive effect, the nature of the offence of Haya de la Torre as a political or common crime.\textsuperscript{152} Such a right was not to be found in the express words of the convention, but it was Colombia’s claim that it should be implied and was inherent in the institution of asylum.

The Court declined to conclude that the implication in this case

\textsuperscript{149} As a final touch the Court added that even if the rule of integrity of a convention could be proven, in this instance an intention to derogate therefrom had been shown. \textit{Ibid.}


\textsuperscript{151} For a prior reference to these cases see note 44 supra.

\textsuperscript{152} First Asylum Case, \textit{[1950]} I.C.J. Rep. 266, 269. This claim was made on the basis of an alleged custom as well as on the provisions of the convention.
was a necessary one. It held that in the institution of asylum, as a general practice under international law, there was no right of unilateral qualification, that therefore a competence of this kind was of exceptional character and was not to be implied. Furthermore, it added, this interpretation was consistent with the purpose of the convention, namely, to prevent “abuses which had arisen in the previous practice by limiting the grant of asylum.” The Court relied then on the rule of purpose and the presumption against superseding an established practice without an express provision to that effect. That the convention was workable without implying such a right was shown by Judge Alvarez in his separate opinion.

In the Second Asylum Case the Court was requested to determine the manner in which effect should be given to its first judgment of November 20th, 1950 and alternatively to adjudge and declare whether the Government of Colombia was or was not bound to deliver Haya de la Torre to the Government of Peru. Since the Court had held in its prior judgment that the grant of asylum had not been made in conformity with article 2, (“First”) of the Havana Convention and since it held in this second case that, as a consequence of the asylum not having been granted properly Colombia was bound to put an end to this illegal situation, it might have been supposed that the convention required either that Peru grant a safe-conduct thereby permitting the refugee to leave the state or that Colombia surrender the refugee to the Peruvian authorities. Since the Court had already held that the state granting asylum, even where the asylum was properly granted, was not entitled to demand a safe-conduct unless the territorial state had requested the

153. Id. at 275. The only dissent on this point was written by Judge Calcedo Castilla, Colombia’s ad hoc appointee. Id. at 359.

154. Id. at 275.

155.

This qualification [by the state granting refuge] may be questioned by the territorial State, and if agreement cannot be reached on this respect, the case must be submitted to arbitration or to another means of peaceful settlement. Thus, in the last resort, it is a third party, or international justice, which decides on the nature of the offence.

Id. at 297. Judge ad hoc Castilla dissented from this result. He considered apparently, that “asylum” as used in the Havana Convention incorporated the customary law of the American continent, a law having a different context from general international law. Concluding that this custom recognized a right of unilateral qualification and that such a right was essential in order to make asylum a workable thing, he arrived at an interpretation opposite to that of the rest of the Court, that such a thing must exist under the convention by necessary implication. Id. at 360–72.

156. Haya de la Torre Case, [1951] I.C.J. Rep. 71 [herein referred to as the Second Asylum Case].

157. Id. at 72–73.


removal of the refugee from its territory, it might be supposed that no argument could be made for interpreting the convention as requiring a safe-conduct to be given where the asylum had been granted improperly. In such a situation it would not be difficult to imply an obligation to terminate this situation by surrender of the refugee. To support such an inference it could be argued that the whole purpose of the convention, as discussed by the Court in its earlier opinion, was to put an end to the haphazard practice theretofore prevalent in the granting of asylum. Logically, one might suppose that where some act has been performed that should not have been performed, and there is an obligation to remedy the situation, that the only clear remedy is to restore the status quo if this is possible. The Court however, declined to find any such duty to surrender Haya de la Torre in the Havana Convention. And to sustain its construction, the Court relied on the principle that where, prior to the treaty, there is an existing practice, the parties cannot have intended to terminate that practice unless they said so expressly.

In the U.S. Nationals in Morocco Case, one of the issues put to the Court by the American application was whether the Madrid Convention and the General Act of Algeciras impliedly gave the capitulatory system a status independent of the most-favored-nation clause, a status which could not be lost to the United States without specific renunciation. No provision producing such a result could be pointed to in either of the treaties; the issue was thus whether such a result could be necessarily implied. The Court rejected the United States argument in favor of the implication with respect to

162. Id. at 81. With respect to the absence of a term providing a solution for this situation the Court said:

This silence cannot be interpreted as imposing an obligation to surrender the refugee in case the asylum was granted to him contrary to the provisions of Article 2 of the Convention. Such an interpretation would be repugnant to the spirit which animated that Convention in conformity with the Latin-American tradition in regard to asylum, a tradition in accordance with which political refugees should not be surrendered. There is nothing in that tradition to indicate that an exception should be made where asylum has been irregularly granted. If it had been intended to abandon that tradition, an express provision to that effect would have been needed, and the Havana Convention contains no such provision.

Ibid. As a result of this position the Court was forced to conclude that “the Convention does not give a complete answer to the question of the manner in which an asylum shall be terminated.” Id. at 80.


the general act on the grounds that it would involve a fundamental change in the treaty rights of the parties as they existed prior to the conclusion of the general act. But nevertheless it found that the general act did imply the continuance of the exercise of consular jurisdiction in certain particular cases independent of the most-favored-nation clause. It admitted that such a conclusion

leads to results which may not appear to be entirely satisfactory. But that is an unavoidable consequence of the manner in which the Algeciras Conference dealt with the question of consular jurisdiction. The Court can not, by way of interpretation, derive from the Act a general rule as to full consular jurisdiction which it does not contain.

The Court declined then, to use the process of implication to avoid the creation of anomalies under the convention, in effect recognizing the imperfections of that text.

These three cases indicate an approach to the problem of implication substantially different from that shown on the part of the Court in the Genocide Case. Whether the difference is explainable solely on the basis of the character of the respective instruments will be discussed at a later point.

The problem of identifying the factors which will influence the decision of the Court to imply or not to imply terms in a text is complicated still further by the decision in the Administrative Tribunal Case. The issue put to the Court in this case arose under the following circumstances. The Secretary-General of the United Nations sought a supplementary appropriation from the General Assembly in 1953 to enable him to satisfy certain awards made by the United Nations Administrative Tribunal in the case of eleven staff members, all United States citizens. These staff members had been discharged from the Secretariat after they refused to answer questions before a United States Senate subcommittee and invoked the fifth amendment. The request for the advisory opinion raised,

164. Id. at 198. A similar answer was given to the United States submission with respect to the Madrid Convention:

... the Court can not adopt a construction by implication of the provisions of the Madrid Convention which would go beyond the scope of its declared purposes and objects. Further, this contention would involve radical changes and additions to the provisions of the Convention. The Court, in its Opinion—Interpretation of Peace Treaties (Second Phase) (I.C.J. Reports 1950, p. 229) —stated: 'It is the duty of the Court to interpret the Treaty, not to revise them.'

Id. at 196.


166. It was on this point that Judges Hackworth, Badawi, Carneiro and Rau parted company with the Court. See [1953] I.C.J. Rep. at 215–22, particularly 217–18.


in substance, the issue whether the General Assembly had the right
to refuse to give effect to an award of compensation made by the
tribunal in favor of a staff member whose contract of service had
been terminated without his assent.\textsuperscript{169}

Two problems of construction were raised by this request: (a)
whether the language of the Statute of the Administrative Tribunal
provided for review of tribunal decisions by the General Assembly;
and (b) whether the language of the Charter permitted the creation
of a tribunal whose judgments would bind the General Assembly
without any power of review in that body.

The Court's opinion placed primary weight on the meaning of the
statute of the tribunal and held that the terms of the statute as
interpreted were within the language of the Charter. An intention
was found in the tribunal's statute that its judgments should be final
and without right of review. This result was derived from the
ordinary meaning of the words of articles 2, 9 and 10 of that statute.\textsuperscript{170}
Thus, the Court found the tribunal to have been established, not as
a mere subordinate committee of the General Assembly, but as a
judicial body pronouncing final judgments without appeal within
the limited field of its functions.\textsuperscript{171}

The more difficult issue in this case however, from the point of
view of necessary implication, was the question whether, under the
Charter, the General Assembly had power to create a tribunal whose
judgments would bind the General Assembly without right of
review.

The Court divided this question into two parts: (1) whether the
General Assembly had power to establish a judicial tribunal; and (2)
whether the Assembly had power to establish such a tribunal with
authority to pass judgments which would bind the United Nations as
a whole.\textsuperscript{172}

Under article 22 of the Charter the Assembly is given authority to
"establish such subsidiary organs as it deems necessary for the per-
formance of its functions." These words were accepted by both the
Court and dissenters as adequate to confer a power to constitute
a judicial tribunal. Unless, argued the Court, the Assembly had
authority to constitute a tribunal there would be no forum for staff

\textsuperscript{169} U.N. Gen. Ass. Res. No. 785 (VIII), \textit{Supplementary Estimates for the Fi-
\textsuperscript{170} [1954] \textit{ICJ} Rep. 47, 50-56. The language of article 10(2) does not make
it crystal clear whether the judgments are to be final and without appeal as between
the staff member and the Secretary-General only, or as between the staff member
and the United Nations as a whole. The Court held that, on the basis of \textit{respondeat
superior}, the Organization was a party to the dispute and that therefore the concept
of \textit{res judicata} was applicable. \textit{Id.} at 53.
\textsuperscript{171} \textit{Ibid.}
\textsuperscript{172} \textit{Id.} at 56-59.
members to test the rights given them under the staff regulations. The existence of such a forum was deemed "essential to ensure the efficient working of the Secretariat." 173 On this holding, the implication of a power to create a judicial tribunal was consistent with the formulation of the rule in the Genocide Case. Whether an equal case of necessity was made for the further implication that such a tribunal could be invested with power to bind the Assembly and the United Nations as a whole was the source of disagreement between the Court and the dissenters. 174 The conclusion of the Court that this second power was to be implied appears founded on the argument that the necessity, if any, for the implication of such a power was to be ascertained by the General Assembly rather than the Court.

In the first place, it is contended that there was no need to go so far, and that an implied power can only be exercised to the extent that the particular measure under consideration can be regarded as absolutely essential. There can be no doubt that the General Assembly in the exercise of its power could have set up a tribunal without giving finality to its judgments. In fact, however, it decided, after long deliberations, to invest the Tribunal with power to render judgments which would be "final and without appeal," and which would be binding on the United Nations. The precise nature and scope of the measures by which the power of creating a tribunal was to be exercised, was a matter for determination by the General Assembly alone. 175

Judge Hackworth met the Court head on with respect to the implication of such a power in the General Assembly. Starting from the position that the only authority under the Charter for the creation of such a tribunal by the General Assembly was article 22, he argued that it was

... unrealistic to assume that a subsidiary organ with certain delegated authority could bind the principal organ possessing plenary powers under the Charter. . . .

One cannot lightly assume that the Assembly, in approving the Statute of the Administrative Tribunal, had any intention of inhibiting itself from acting where action might be needed. . . .

The doctrine of implied powers is designed to implement, within reasonable limitations, and not to supplant or vary, expressed powers. The General Assembly was given express authority by Article 22 of the Charter to establish such subsidiary organs as might be necessary for the performance of its functions, whether those functions should relate to Article 101 or to any other article in the Charter. Under this authorization the Assembly may establish any tribunal needed for the implementation of

173. In these circumstances, the Court finds that the power to establish a tribunal, to do justice as between the Organization and the staff members, was essential to ensure the efficient working of the Secretariat, and to give effect to the paramount consideration of securing the highest standards of efficiency, competence and integrity. Capacity to do this arises by necessary intendment out of the Charter.

174. Judges Alvarez, Hackworth and Carneiro dissented. Id. at 63.

175. Id. at 58.
its functions. It is not, therefore, permissible, in the face of this express power, to invoke the doctrine of implied powers to establish a tribunal of a supposedly different kind, nor is there warrant for concluding that such a thing has resulted.\footnote{176}

Comment

The cases discussed above indicate a recognition by the Court that there is a rule of necessary implication.\footnote{177} The logic which underlies the rule seems clear and is well recognized in Anglo-American law. Suppose that in a corporate charter various powers to carry on business were set out, but no express authority to operate a bank account were mentioned. If the corporation's authority to operate a bank account were challenged, and if the court were satisfied that the corporation could not commence business without opening a bank account, little doubt would exist as to the court's ruling. The explanation would be that the clear intention of the incorporators was to set up a corporation which could function and carry out the purposes for which it was created. Their expressed intention was to set up a corporation which could trade, therefore, they must have supposed that the corporation would have all the powers necessary to enable it to trade. The power to operate a bank account is such a necessary power. Although the conclusion assumes the cloak of logical necessity, it seems clear that in referring to the intention of the incorporators, the court may or may not be referring to a state of mind which existed in the incorporators. In certain circumstances they may have signed the charter in the belief that the law confers a power to operate a bank account on all such corporations. In other circumstances they may have signed without

\footnote{176} \textit{Id.} at 79–81.

Judge Carneiro, followed an analysis similar to that of Judge Hackworth. \textit{Id.} at 92–97. Judge Alvarez, the third of the dissenters, took a somewhat different position:

\textit{If classical international law is applied to the case now before the Court, there can be no doubt as to the solution: the General Assembly of the United Nations must not give effect to awards of the Administrative Tribunal if it considers that they are vitiated by some important defect.}

\textit{Id.} at 68. Applying concepts of the “new international law” however, he concluded:

\textit{The Assembly constitutes the supreme power; it is bound only by the Charter which established it, or by its own resolutions. There is nothing above the Assembly except moral forces, particularly public opinion, which may censure the acts of the Assembly if it considers them open to criticism.}

\textit{A logical and practical consequence of the foregoing is that any attempt to limit the power of the General Assembly of the United Nations would run counter to the realities of international life.}


\footnote{177} \textit{For a discussion of this rule see Lauterpacht, The Development of International Law by the International Court} 267–81 (1938); McNair, \textit{The Law of Treaties} 233–51 (1938).
giving any thought at all to the problem of the bank account, in other words their “intention” may be a careless oversight, a failure to intend anything. This distinction can be brought out by comparing two sets of situations familiar in the law of contract in this country. Suppose $A$ takes his car to a garage and instructs the mechanic to do a change of oil and lubrication job; nothing is said about paying for the work nor what the price shall be. The implication of a promise to pay a reasonable sum for the work is obvious. $A$ will not be heard to say that he did not intend to pay or that the arrangement did not include such a promise. While it is remotely possible that $A$ did not intend to pay, such an intention is inconsistent with the manifestation of his acts, and objective manifestation is accepted in municipal as well as international law as the criterion. Positing then, a rule of objective manifestation, the implied term is referable to an “intention.” With this situation may be compared the familiar case of *Taylor v. Caldwell.*

A hired the use of his theatre to $B$ for four specified days. After the making of the contract and before the arrival of the specified days, the theatre burned. No provision was included in the contract as to the risk of destruction of the building. The conclusion of the court that the contract was discharged as a result of the fire was reached on the following basis:

\[ \ldots \text{there are authorities which, as we think, establish the principle that where, from the nature of the contract, it appears that the parties must from the beginning have known that it could not be fulfilled unless when the time for the fulfillment of the contract arrived some particular specified thing continued to exist, so that, when entering into the contract, they must have contemplated such continuing existence as the foundation of what was to be done; there, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor.} \]

Yet in the paragraph immediately preceding the one quoted in part above, Mr. Justice Blackburn acknowledged that “the parties when framing their agreement evidently had not present to their minds the possibility of such a disaster. . . .” If it is the doctrine of necessary implication which is being applied in these cases, at least with respect to the last case, it is clear that its operation is not the ascertainment of any real intention of the parties but rather the filling in of lacunae in their agreement. The rationale is that if the parties had considered the problem, obviously they would have made such a provision in order to give effect to their fundamental

180. *Id.* at 833, 122 Eng. Rep. at 312.
intentions. The rule of necessary implication poses then, this difficulty: that it can be used as a means of ascertaining a real intention of the parties but likewise it can be used as an excuse to reform an imperfect agreement reached between the parties. The one use merges imperceptibly into the other.

It is not surprising therefore, that if the rule is being given this wider operation by the International Court there should be some vigorous dissent that the Court is arrogating to itself the right to remake the agreement of the parties, a right which is inconsistent with the premise underlying the Court's jurisdiction—consent of the parties. And yet it is now readily conceded on all sides that any interpretive process involves some element of positive creation of rights and duties. With respect to necessary implication, just as in ordinary meaning, the problem which decisions of the Court pose is the limitations which the Court has seen fit to place around the power of implication.

The first point on which there has been a major divergence of view on the Court is the ascertainment of the purpose or function which, the allegation runs, will be frustrated but for the implication of a term. The doctrine presupposes that the parties to the treaty had a definite purpose or intended the body created to have a definite function. Some of the positions which have been taken by individual members of the Court against the implication of a particular term are referable to a refusal to find a purpose or function proved, rather than to disinclination to find a particular implication necessary to the attainment of such a purpose or function.

Where the purpose or function, which would allegedly be frustrated but for the implication of a term, is expressed in clear language in the instrument, the application of the rule gives rise to a wide measure of subjective judgment with respect to the presence or absence of the element of necessity. Where however, the purpose or function is sought to be established by implication from the language of the text or from evidence outside the text, that element of subjectivity is still further increased. In the Genocide Case a factor was suggested which might have the effect of limiting to some extent the subjectivity of judgment involved in this second step. Since the rule of necessary implication is premised on the "intention of the parties," it follows that no implication will be permitted where the term to be implied conflicts with the express and unambiguous language of the text. The dissenters in this case carried the logic of this position one stage further. In their opinion, if the term sought to be implied was inconsistent with a general rule of international law then a change in that rule could not rest in implication but must require express language showing an intention
to depart from the general rule. The argument would seem to run then, that if the term sought to be implied would involve a change in prior international practice, and the purpose allegedly espoused by the drafters would require for its fulfillment the implication of such a term, then it should not be presumed that the drafters had such a purpose in mind. The proof of a prior international practice is evidence of the intention of the parties not to make a change in that practice. The prior practice is *some* evidence, evidence which must be weighed against that derivable from other sources. Presumably more weight would be given to this evidence if the practice were clearly established and frequently invoked; less weight where the universality of the practice is in doubt or where the practice is resorted to only on rare occasions. In this particular case the dissenters argued that, prior to the conclusion of the Genocide Convention, the international practice with respect to the permissibility of reservations was uniform; and that the content of such practice was not to permit the making of reservations without the unanimous consent of the other parties to the convention.

The factual evidence here of the existence of such a rule was much more substantial than has been the case in other fact situations before the Court. In addition to general agreement among text writers, the dissenters were able to cite a ruling on the very point by the Council of the League of Nations and a resulting administrative practice by the Secretary-General. True, they were faced with the proof of a Latin-American custom contrary to such a rule but this was explained on the ground that that custom among Latin American countries is specifically referable to a contractual agreement among those countries, namely an agreement reached in Lima in 1938. It may be doubted whether the inferences available to the Court from other evidence were equally well founded. The Court found the intention to permit reservations in the fact that "it was the intention of the United Nations to condemn and punish genocide as 'a crime under international law.'" As a consequence the principles underlying the convention "are principles which are recognized by civilized nations as binding on States, even without any conventional obligation." It was therefore intended to be universal in scope. To refuse to allow reservations would be to impair the universal recognition of the principles involved:

181. For a discussion of the relevance of existing international law to problems of treaty interpretation see HUDSON, THE PERMANENT COURT OF INTERNATIONAL JUSTICE, 1920–1942, at 655 (1943) where the author says "any international instrument must be interpreted in the light of the prevailing international law, by which the parties must be taken to have chartered their course." See also GROSSEN, LES PRÉSOMPTIONS EN DROIT INTERNATIONAL PUBLIC 115–17 (1954); LAUTERPACHT, op. cit. supra note 177 at 368–93.

The complete exclusion from the Convention of one or more States would not only restrict the scope of its application, but would detract from the authority of the moral and humanitarian principles which are its basis. It is inconceivable that the contracting parties readily contemplated that an objection to a minor reservation should produce such a result.

But as the joint dissent pointed out, there was no evidence that the parties to the convention intended to secure complete universality at the cost of dilution of the terms of the agreement. It could be argued that the convention fell short of an effective instrument recognizing the crime of genocide if reservations as to the jurisdiction of the Court were admitted just as much as where certain states were ruled not to be parties because of nonacceptance of their reservations.

The Court's freedom of choice in implying terms might be substantially limited if it recognized the existence of a prior international practice as evidence against the implication of a term inconsistent with such practice. That the seven members who joined in the Court's opinion in this case gave little weight to this source of evidence seems clear from the fact that they saw fit to attribute weight instead to inferences from relatively vague statements in the convention. In the First and Second Asylum Cases and in the U.S. Nationals in Morocco Case however, the position of the Court

---

183. Id. at 24.
184. Id. at 46.
185. It is interesting that Judge Alvarez could adopt a construction based primarily on a purpose argument and come to a conclusion completely opposite to that of the Court. He distinguished from the general run of conventions those which:

... are, in a sense, the Constitution of international society, the new international constitutional law. They are not established for the benefit of private interests but for that of the general interest; they impose obligations upon States without granting them rights, and in this respect are unlike ordinary multilateral conventions which confer rights as well as obligations upon their parties.

Id. at 51. He concludes:

These conventions, by reason of their nature and of the manner in which they have been formulated, constitute an indivisible whole. Therefore, they must not be made the subject of reservations, for that would be contrary to the purposes at which they are aimed, namely, the general interest and also the social interest.

Id. at 53.
186. See also the Administrative Tribunal Case, where the fact that the Assembly of the League of Nations in 1946 had seen fit to reject certain awards made by its comparable tribunal was urged on the Court as a reason to hold that the United Nations General Assembly had a power to act similarly. ADMINISTRATIVE TRIBUNAL CASE—PLEADINGS, ORAL ARGUMENTS, AND DOCUMENTS 171–81 (I.C.J. 1954). It could be argued that the League precedent constitutes a "prior international practice," and that therefore the existence of this practice was some evidence that the signatories of the Charter and the members of the General Assembly who passed the tribunal statute did not intend to abdicate all power of review. This fact was regarded as relevant by Judge Carneiro but was sloughed off by the Court on the basis that that was the League and this is the United Nations. [1954] I.C.J. Rep. 47, 62, 94.
seems to have been premised on the assumption that evidence of a prior international practice is entitled to substantial weight in determining whether a case for necessary implication has been made out. Indeed it might be said that the position taken by the Court in those cases was based primarily on the evidence of purpose derivable from the existence of a prior practice which would be inconsistent with the term sought to be implied. It should be noted however, that in these three cases the evidence of purpose of the parties derivable from sources other than prior practice, was regarded by the Court as consistent with the inference from such practice. Moreover, it seems clear from the language of the Court’s opinion in the U.S. Nationals in Morocco Case that it would not necessarily regard the evidence from prior practice as entitled to primary weight where there was other substantial evidence of purpose inconsistent with such a prior practice.

Since the Court regarded the evidence from prior practice as being relatively strong in these three cases, but so weak in the Genocide Case, it might be wondered whether the character of the convention as opposed to the character of the treaties involved in the other three cases was a determining factor. The Court in the Genocide Case gave no indication of its thoughts on the validity of this rule in other settings but at least it made the point that the convention before it was not one involving individual state interests. It might be inferred that in the case of litigation between states on the interpretation of a commercial treaty, more weight might be given to the background of existing law and practice. Yet more than a commercial treaty was involved in the First and Second Asylum Cases. The Havana Convention, like the Genocide Convention was peculiarly concerned with the freedom of the individual, though on a regional rather than on a world-wide basis. Perhaps the difference of treatment in these cases reflects a feeling in the Court that in the Genocide Case its proper role was as much legislative as judicial.

The dissenters in the Reparations Case derived much of their support from the existing international practice with respect to making international claims. The result arrived at by the Court, they said, was in conflict with the right of a state to make claims on behalf of its national, a right which traditionally, was regarded as the exclusive privilege of the national state. The position taken by the Court in that case makes a point with respect to the relevancy

187. “Consequently, in a convention of this type one cannot speak of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties.” [1951] I.C.J. Rep. 15, 23.
of the evidence from prior practice. Only if the term to be implied is incompatible with that prior practice is the evidence entitled to substantial weight. The Court was satisfied that the term it implied was not incompatible with that traditional right. While the Court's explanation of the compatibility of the implied term with the traditional practice might leave some doubts, unless the term to be implied is clearly inconsistent with the proved practice the weight to be attached to this form of evidence is not substantial.

In the various judgments delivered in these cases several other arguments against the implication of a term were advanced. In the Genocide Case the dissenters made the point that a standard clause permitting the making of reservations is a familiar tool to the drafters of treaties. The argument runs that where there is such a common form clause, the failure to include it is evidence of an intention not to permit the making of reservations. Such an argument has logical force only in so far as the rule of implication is founded on a true intention of the parties. To the extent that the rule is used as a device for curing imperfect drafting, the argument does not appear strong. This argument, moreover, if logically extended would exclude all implied terms on the premise that if the parties had intended such a term they could have formulated it in express terms, and therefore their failure to use express language indicates their intention not to make any such provision. At some point however, this argument does merge in the prior practice rule, as where for instance the evidence establishes that states in the past have regarded the omission of the clause de style as indicative of agreement in a particular sense.

Another common argument is derived from the presence or absence of a reasonable excuse for the failure to include an express provision. If by definition, the parties had a particular purpose in mind, and if they regarded that purpose of sufficient importance, it would seem unlikely that they would leave a term necessary for the fulfillment of that purpose to the doubts and uncertainties of implication. So, in the Genocide Case explained the Court: "Account should also be taken of the fact that the absence of such an article or even the decision not to insert such an article can be explained by the desire not to invite a multiplicity of reservations." Similarly, in the U.S. Nationals in Morocco Case, the authors of the joint dissent sought to explain the failure to include an express provision adopting the capitulatory system in the following terms:

The consular system has been adopted in the Act, not so much by express provision as by necessary implication. It would have occurred to no one

189. Id. at 185–86.
191. Id. at 22.
It is suggested that this argument is not significantly more cogent than the preceding one. In many situations the gap in the text may be due to an oversight or a deliberate choice of the parties and in either case the reasonableness of the explanation which the Court finds for the failure to include an express term will not have much relevance to a solution of the question.

Another argument of the joint dissent in the *Genocide Case* involved the complexity of the term implied by the Court. Its conclusion was that some but not any or all reservations were permitted. The test of permissibility was compatibility with the object and purpose of the convention, compatibility which apparently was to be determined by each party to the convention for itself. The authors of the joint dissent attacked the implication of this term on the grounds of its complexity arguing the improbability of the Assembly intending to leave to chance implication the details of such a provision. Again the argument is premised on perfection in drafting. But at the same time this argument has relevance to the permissible lengths the Court may go to in correcting an imperfect agreement made by the parties. Once it is admitted that the power of the Court, exercisable through the rule of necessary implication, exceeds any real common intention of the parties to the treaty, a problem arises as to the limits, if any, which surround that corrective power. Since by premise the purpose of the parties dictates the implication of a term, that showing of purpose should also dictate the content of that term. As the content becomes more involved, it becomes more difficult to find an inexorable connection between the purpose of the parties and that particular content. The degree of legislation rather than judicial application becomes more apparent.

Though the argument based on complexity of the term to be implied failed to persuade the Court in this case it might have persuasive merit on other facts.

The second point on which there has been a substantial divergence of view on the Court pertains to the relative necessity of the particular implication. The rule as formulated in the *Reparations Case* would require a showing that the term to be implied was "essential" to the fulfillment of the purpose of the parties. Yet the decision of the Court in that case with respect to the making of claims on behalf of victims shows that a term can be and was implied although the staff of the Secretariat and the commissions could have.

194. *Id.* at 29–30.
performed their tasks without the implication of the term. They had already been performing them for three years by the time the problem was presented to the Court. The analysis of the Court was that only with the implication of such a term could the staff perform their duties to the best of their capabilities. That is to say, without such a term there was a likelihood that staff performance would be substantially impaired. Similarly, with respect to claims for direct damage to the Organization, it would seem clear that the Organization could carry on its functions without possessing the power to make claims against responsible states. The absence of such a power might increase the budget; the individual members might have to present claims to the responsible state; but it can scarcely be said that the Organization would be unable to function but for such a power. Here then, by a unanimous vote of the Court, the doctrine was applied to cover a case of substantial impairment of the purpose of the parties rather than a total frustration thereof. The inquiry is immediately suggested: How substantial must the impairment be in order to bring about the application of the doctrine?

In the First South-West Africa Case without the implication of a provision in the mandate agreement that the obligations of South Africa, with respect to the peoples of the mandated territory, should continue after the dissolution of the League of Nations, the main purpose of the parties to that agreement would have been wholly frustrated. It is not surprising therefore that the Court found unanimously that the obligations continued after the demise of the League. The point of departure for the dissenters was the necessity for implying a transfer of the supervisory functions of the League to the United Nations. It was the Court's conclusion that a power of supervision in the United Nations was necessary to make the concept of the "sacred trust" workable. Judge McNair, in particular, was not prepared to go so far. He considered that effect could be given to the concept without a finding of a transfer of the supervisory functions; that therefore, a finding of such a transfer was not necessary to make a workable whole. On the issue of consent to change the status of the mandated territory however, he was forced to find some basis for conceding a power of approval to the General Assembly on pain of depriving the "sacred trust" of all significance.193

That the Union of South Africa could be held subject to an obligation with respect to the mandated territory absent any supervisory power in the United Nations seems self-evident. That this obligation could be far more effectively policed if the Union were under the

193. He chose to find such a basis in a general consent of the interested states rather than in an application of the doctrine of necessary implication. [1950] I.C.J. Rep. 128, 163.
further obligation to furnish annual reports to the Assembly containing detailed information about the handling of the territory, and if the Union honored this second obligation, seems equally self-evident. The detection of any breach of the obligations would be greatly simplified. But to reach these conclusions is the equivalent of saying that the provisions of the Charter with respect to the disposition of the mandated territories could have been drafted more skillfully. The question remains however, whether the doctrine of necessary implication should be used as a device to write a new agreement for the parties because of a feeling that the parties failed to make the most suitable provision possible in the text of the treaty.

There is some doubt whether the Court’s decision in the Administrative Tribunal Case implying a power in the General Assembly to create a subsidiary organ with ability to bind the Assembly was in any sense founded on necessity — whether that is, there was any showing of substantial impairment of purpose. The language of article 22 clearly gives the Assembly a discretion over the subsidiary organs which may or may not be required “for the performance of its functions.” Manifestly a conclusion that the Assembly could only create an organ if the organ were, in the opinion of the Court, essential to the working of the Assembly affairs would be inconsistent with the power expressly given to the Assembly under that article. The decision of whether the organ is required is left to the Assembly. But it does not inevitably follow that the scope of the powers to be given that organ are equally within the Assembly’s discretion. The logic underlying the rule of necessary implication indicates that the Assembly must be capable of conferring those powers on the organ which are required to enable it to function as a subsidiary organ.” The real problem of necessary implication raised by this case, seems to be whether the conferring of a power to bind the Assembly was necessary to the functioning of the tribunal as a subsidiary organ. The opinion of the Court apparently accepted a finding, imputed to the Assembly, that such a necessity was established. That a finding by the Assembly that such a power was necessary would be accorded considerable weight by the Court seems likely. But that such a finding by the Assembly should preclude an analysis by the Court of necessity seems doubtful. If in the First Membership Case the General Assembly had resolved that in order to enable the United Nations to function effectively the language of article 4 must be interpreted to imply that the five conditions were exclusive, it seems beyond question that the Court would not have held itself precluded from making its own inter-

pretation of that article. Given then, the statement of the Court that "there can be no doubt that the General Assembly in the exercise of its power could have set up a tribunal without giving finality to its judgments" a doubt may be raised whether this decision is reconcilable with the principle as literally enunciated in the Reparations Case. The holding might be rationalized by an implicit finding of the Court that the Assembly's determination of necessity had a reasonable foundation in fact. When it is remembered however, that such determination was ascertained by the Court from an inference derived from the Court's characterization of the tribunal as judicial rather than administrative, it is clear that the result reached was little dependent on the rule of necessary implication. Rather, it reflected a determination that such a result was, in the opinion of the Court, desirable.

The treatment of the doctrine of necessary implication in the First South-West Africa and Administrative Tribunal Cases makes a strong contrast with that in the First and Second Asylum Cases and the U.S. Nationals in Morocco Case. In the First Asylum Case it was Judge Alvarez who pointed out that the Havana Convention created a workable system for the granting of asylum without the implication of a right of unilateral qualification. In the Second Asylum Case, though the Court was reduced to finding that the Havana Convention did not provide a solution for the particular dilemma posed by the Haya de la Torre Case and though it concluded that "the silence of the Convention implies that it was intended to leave the adjustment of the consequences of this situation to decisions inspired by considerations of convenience or of simple political expediency," nevertheless it declined to use the power of necessary implication to rewrite the convention and make it a complete answer for problems of asylum. In the U.S. Nationals in Morocco Case the Court admitted that its conclusion that the General Act of Algeciras confirmed the capitulatory system with respect to some situations but not others, did not produce entirely satisfactory results: that is, it concluded that the general act did not constitute a perfect disposition of the problem. It felt no temptation however, to write a more comprehensive agreement for the parties.

The notable difference of approach in the two groups of cases creates doubt whether, in some circumstances, the rule of necessary implication plays any significant role in the results which the Court has reached. Is that result indicated by an analysis of the relative impairment of a proved purpose?

Perhaps the basic problem which arises out of the Genocide Case

is what the Court should do where it finds that parties to a treaty have deliberately failed to include a provision in a treaty and that provision, in the opinion of the Court, is required to give the agreement full effect. Should the Court take up the gauntlet which the parties have thrown down and in effect write an agreement for the parties? Or should the Court take the position that the binding force of a treaty stems from agreement of the parties and their "intentions," and if it is clear that they have not agreed on a term which if included would make the treaty more effective, simply refer the matter back to the parties to make up their minds? The answer to the Court’s problem in this case may lie close to the answer to the question of why there was a conflict of opinion on the admissibility of reservations, and of who stood to gain by a decision of the Court that reservations were permitted or excluded. It seems probable that the dominant motive underlying the submission of the whole question to the Court was the propaganda value which might be derived from a holding by the Court that Russia and its satellites could not be regarded as parties to the convention because they would not accept the terms which had received unanimous approval from every other country bar the Philippines. Political capital could have been made out of this situation. The Court might well have thought what the result would be of a finding that the parties had failed to reach any agreement on the issue of reservations. This might have necessitated a reference back to the General Assembly for the redrafting of the convention. Such a reference might well have resulted in the failure to agree on any convention at all.

The position which the Court took in the Administrative Tribunal Case on the extent of the binding character of the tribunal judgments illustrates the importance of the position originally taken in questions of necessary implication. At the bottom of the Court's analysis was the conclusion that the tribunal was judicial in character and that the decisions of a judicial body bind all parties thereto. Fundamental to the analysis of the dissenters, or at least of Judge Hackworth, was the conclusion that the tribunal was a "subsidiary organ" which could not bind its principal organ. Each of these positions gave rise to a presumption; the one that the language of article 10(2) of the statute meant to include the United Nations as a whole in the binding effect of the judgment, the other that this language meant that only the staff member and the Secretary-General should be bound. Again, on the constitutional level, that is in relation to the power of the Assembly to create a tribunal with the ability to bind the Assembly, this initial position is equally significant. It was from the judicial nature of the tribunal that the Court

drew a showing of necessity of implication; it was from the notion of delegation which Judge Hackworth found connoted in "subsidiary" that he drew a presumption against any showing of necessity. The basis of the difference between the two parties seems to go far beyond the discussion of the relative impairment of a proved purpose. To understand that difference invites an attempt to ascertain what motivated the Court in attributing a judicial character to the tribunal together with the consequences which it attached to that characterization. One passage in the Court's opinion casts some light on its motivation. Having stated that the Assembly could amend the tribunal statute and provide for means of redress by another organ, the opinion continued:

Should the General Assembly contemplate, for dealing with future disputes, the making of some provision for review of the awards of the Tribunal, the Court is of opinion that the General Assembly itself, in view of its composition and functions, could hardly act as a judicial organ - considering the arguments of the parties, appraising the evidence produced by them, establishing the facts and declaring the law applicable to them - all the more so as one party to the disputes is the United Nations Organization itself.201

It is reasonable to suppose that in essence, the fact that led the Court to take its position on the judicial character of this tribunal was the feeling that the function being performed by it was not one which the Assembly ought to undertake either originally or by way of review, and was not one which ought to be subjected to the effect of political considerations which would intervene if the decision were taken before the General Assembly. This motivation is further highlighted by the failure of the Court to face up squarely to one problem raised by the request - the issue of what power the Assembly would have if the tribunal handed down an award which was beyond its competence. The first part of the Court's opinion avoided this issue by presuming that the request premised a judgment within the tribunal's competence. Subsequently the opinion went on to make some comments on the situation which would arise if the tribunal did exceed its competence. Suppose, for instance, that contrary to the terms of the amended article 9 of the statute, an award was given exceeding the equivalent of two years' net salary for the applicant. The conclusion of the Court was that even then

in order that the judgments pronounced by such a judicial tribunal could be subjected to review by any body other than the tribunal itself, it would be necessary, in the opinion of the Court, that the statute of that tribunal or some other legal instrument governing it should contain an express provision to that effect.202

201. Id. at 56.
202. Ibid.
This statement immediately provokes the comment: why should the Court presume that, in the absence of express language to the contrary, the Assembly could not review even where the tribunal which they had set up had acted beyond the bounds of competence given it? If the Court were to take the position that the Assembly should not be meddling in decisions of this sort because politics should be kept out of such disputes, then obviously a loophole for Assembly reentry into the field would be opened if the Court held that decisions were reviewable for excess of competence. The Assembly might take the position that a merely incorrect application of the law was an excess of competence and the fundamental stand of the Court would be subverted. The interesting problem remains however, from the point of view of the interpretative process, why the Court should presume that express language would be required to give the Assembly a right of review, in the absence of proof of contrary intent on the part of the Assembly. The doctrine of necessary implication does not appear to dictate any such result. Nor does anything in the language of the statute or the Charter.

Lastly, it might be wondered whether the result reached in the Second Asylum Case was the product of a desire not to reach the conclusion that Haya de la Torre should be surrendered, and presumptively later executed, rather than the product of an analysis of the relative necessity of a particular implication.

That the range of subjective decision is significantly greater in the process of implication than in the process of interpretation of the express language of a text, appears from the discussion of the foregoing cases. The rule of necessary implication, if carried to extremes, could result in the writing of a new agreement for the parties, the only limitation being that what is to be implied should not conflict with anything expressed clearly in the text. The rule could be used as a blank check to add to though not to contradict the agreement of the parties as incorporated and clearly expressed in the text. If the rule is to be narrowed any further, the limitations must be self-imposed by the Court. Whether the Court will regard its power as subject to further limitations will depend on its evaluation of the role it should play as an arbiter between States. If it conceives of its power as involving a significant degree of policy making, further limitations applied will be few. In cases involving interpretation of the Charter or other analogous constitutional documents it may feel justified in filling out a purpose somewhat generally stated by reference to desirable rather than necessary implication. It might be argued that a delegation of such power is implicit in the broad formulations of such a document. But if in interpreting other kinds of treaties it conceives of its policy-making power as ancillary
to the function of applying to particular facts the policy which the parties themselves have determined, the limitations will be more extensive. If its jurisdiction is to depend on the *ad hoc* consent of states parties to a particular dispute, and if it arrogates to itself a significant policy making power in this second kind of situation, the cases brought before it will be limited to those relatively infrequent situations where states are prepared to delegate the power of determining policy. The cases discussed above may suggest that the Court does take one view of its policy-making power when the Charter of the United Nations or some activity of one of its organs is involved; another view where the text is a commercial treaty. It is significant that thus far the broader use of its power has been reserved for advisory proceeding cases rather than contentious ones.

In either situation the Court has set up criteria for the application of the rule: (1) there must be a proved purpose intended by the parties to the treaty; and (2) there must be a showing that such purpose would be impaired but for the implication of a term. The difference in approach is reflected in the proof of purpose and necessity required in the two situations, a difference of degree. The operation of the rule might be described as negative rather than positive. Where words used have an ordinary meaning, the ascertainment of that meaning is positive evidence of the intention of the parties to use the words in that sense. Where however, the rule of necessary application is invoked, the absence of an express provision is some evidence of an intention of the parties *not to intend* any implied term. The rule has then, the effect of a presumption against any implication, a presumption which can only be rebutted by an adequate showing of purpose and impairment of that purpose but for the application. Its effect as a presumption is dependent on all the other evidence of meaning available. Its effect as a presumption is also dependent on a finding that no express language in the text, as properly interpreted, provides an answer to the problem.