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The International Court: Rules of Treaty Interpretation II

The author here continues his analysis of the rules of interpretation used by the International Court of Justice in resolving disputes as to the meaning of treaties. Having already scrutinized the rules of "Ordinary Meaning" and "Necessary Implication," he proceeds to examine the rules of "Surplus Words," "Expressio Unius," "Restrictive Interpretation," "Travaux Préparatoires," "Authentic Interpretation," and "Purpose." He concludes that the practice of the Court should encourage increasing resort to its jurisdiction.

James F. Hogg*

Potentially, the International Court of Justice is one of the most important organs of the United Nations. If the future peace of the world is to be secured by agreement among states, the first requirement for the preservation of that peace will be faithful adherence to the agreements which will have been entered into. The history of the development of domestic law indicates that no matter how far-sighted and meticulous the drafters of those agreements are, disputes as to their scope and application to future fact situations will arise. Some form of adjudicatory hearings will have to be provided for those disputes before any steps of enforcement can be taken, and once again the history of domestic law indicates that the body which adjudicates will assume an important role in spelling out the content of the agreements, in applying general rules to particular facts, in filling out the general purposes of the parties and in molding the agreements to cope with new and unforeseen situations. In the first section of this Article, the author embarked on an examination of the decisions of the International Court involving treaty interpretation which were handed down between 1947 and 1958.1 The purpose of the examination was to evaluate the means by which

* Professor of Law, University of Minnesota Law School.

1. This is the second part of a paper, the first part of which appeared in 43 Minn. L. Rev. 369 (1959). Consideration is limited to the same cases discussed in the first part namely, those handed down by the International Court of Justice from 1947 through 1958 which involve interpretation of treaties. The Case concerning the Application of the Convention of 1902 Governing the Guardianship of Infants (Netherlands v. Sweden), [1958] I.C.J. Rep. 55, was received too late for inclusion in the textual discussion, but it is briefly considered in note 158 infra.
the Court adjudicated the scope and application of treaties. In particular, reference was made to the standard of interpretation which the Court has espoused, "intention of the parties," and to two particular types of evidence which the Court has taken into account in finding or giving content to that intention subsumed under the rules of construction known as "ordinary meaning" and "necessary implication." This section of the Article continues an investigation of other sources of evidence of meaning used by the Court, again subsumed under further familiar rules of construction. It is the author's belief that an examination of these decided cases should justify extension of the authority of the Court and that this tribunal might well be clothed, by delegation from states, with authority to interpret any such agreements as may be concluded in the future.

C. The "Surplus Words" Rule

Judge De Visscher has described the rule in the following terms:

It is an acknowledged rule of interpretation that treaty clauses must not only be considered as a whole, but must also be interpreted so as to avoid as much as possible depriving one of them of practical effect for the benefit of others.  

In considering the second series of problems which arose in the First South-West Africa Case, relating to the application of chapter XII of the Charter, Judge De Visscher based his interpretation on an application of this rule. The authors of the Charter, he argued, would not have included article 80(2) "if the scope of this provision amounted simply to the expression of an expectation or, at the most, of a wish or an advice." Turning to article 77 of the Charter, he pointed out that it provided that the trusteeship system should apply to such of the three types of territories thereafter described as might be placed under the system by means of trusteeship agreements. These three types were (a) territories held under mandate; (b) territories which might be detached from enemy states as a result of the Second World War; and (c) territories voluntarily placed under the system by states responsible for their administration. He concluded that it was only with respect to the territories listed in the third category that "the conclusion of a Trusteeship Agreement has been contemplated by the Charter as being free from any pre-existing obligation, even in the realm of

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3. Id. at 186-90. The opinion of Judge De Visscher was concurred in generally by Judges Guerrero, Zoricic and Badawi Pasha. Id. at 145.
He was suggesting, then, that considering the use of the word "voluntary" and the presence of article 80(2), the meaning of the provisions of chapter XII was ambiguous. To solve the ambiguity in a way which gives effect to all the words used, including "voluntary," required a conclusion that there was an obligation to negotiate. The Court, however, concluded that the articles of chapter XII, understood in their ordinary meaning, did not give rise to an ambiguity. It was prepared to recognize the surplus words rule but said that to interpret "voluntary" as used "out of an abundance of caution" did not deprive it of all meaning and was consistent with the sense of article 77 as a whole, understood in its ordinary meaning. But in any case it added that that word alone could not override the principle derived from articles 75, 77 and 79 considered as a whole.

The chief difference between the Court and Judge De Visscher stemmed from the weight to be given to the surplus words rule. Judge De Visscher adopted as his basic premise that the authors of the Charter must have meant something by drawing up article 80(2) and inserting the word "voluntary" in article 77(1)(c). The Court conceded the existence of the rule but claimed that it had no application to the facts. Adopting a more limited approach than Judge De Visscher concerning the context of articles 75 and 77, the Court ascertained the ordinary meaning and found it to be sufficiently free from ambiguity to create a presumption of its correctness. Having ascertained this presumption, it said the ordinary meaning must override an application of the surplus words rule if the two imply conflicting conclusions. On the other hand, because Judge De Visscher failed to show what meaning could be attributed to article 77(2) if his interpretation were adopted, it could be argued that he did not apply the rule consistently. Because neither the interpretation of the Court nor the dissent could give effect to all the provisions of chapter XII, what the Court may actually have been doing was choosing between two sets of provisions within chapter XII which, to some extent, contained divergent implications. In such a situation the surplus words rule is of little value in suggesting a preference for one meaning as opposed to the other.

6. He concluded by implying that this interpretation was consistent with the purpose of the Charter. [1950] I.C.J. Rep. 128, 189-90. Judge Krylov adopted a similar view. Id. at 191-92. Judge Alvarez came to the same conclusion on the basis of the "nature, aims and purposes" of the "new international law." Id. at 175, 183-84.
7. Id. at 188-40. The Court likewise dismissed the argument concerning article 80(2) on the ground that to interpret it in a manner consistent with the sense of the other articles did not involve straining its meaning. Id. at 139-40.
The opinion of the Court in the Corfu Channel Case (Merits) turned in part on application of this rule. On the day the judgment on Albania’s preliminary objection was rendered, the parties deposited a special agreement submitting two questions to the Court for determination. The text of this agreement raised a question of interpretation as to whether or not it constituted an authorization for the Court to proceed to an assessment of damages.

The Court looked to the special agreement and applied the rule that, if possible, effect should be given to all the words used. Since the first question put before the Court by the terms of the agreement required a determination of Albania’s international responsibility, there would be no necessity to add the further query, “is there any duty to pay compensation?” if an assessment of damages was not intended. It would be superfluous to add this point unless the Parties had something else in mind than a mere declaration by the Court that compensation is due. It would indeed be incompatible with the generally accepted rules of interpretation to admit that a provision of this sort occurring in a special agreement should be devoid of purport or effect.

The Court supported the conclusion reached on this basis by two further arguments: first, that until the closing argument for Albania neither side had suggested that the special agreement limited the competence of the Court to a decision merely upon the principle of compensation; second, that there was nothing showing that the United Kingdom had abandoned an important part of its original claim, namely, the part requesting the Court to assess damages. How much reliance the Court placed on the evidence derived from the surplus words rule cannot be ascertained.


9. The text of these questions was:

(1) Is Albania responsible under international law for the explosions which occurred on the 22nd October 1946 in Albanian waters and for the damage and loss of human life which resulted from them and is there any duty to pay compensation?

(2) Has the United Kingdom under international law violated the sovereignty of the Albanian People’s Republic by reason of the acts of the Royal Navy in Albanian waters on the 22nd October and on the 12th and 13th November 1946 and is there any duty to give satisfaction?


11. Id. at 24. To support its statement of this rule the Court quoted, inter alia, from the order of the Permanent Court of International Justice in Case of the Free Zones, P.C.I.J., ser. A, No. 22, at 13 (1929), where it said:

in case of doubt, the clauses of a special agreement by which a dispute is referred to the Court must, if it does not involve doing violence to their terms, be construed in a manner enabling the clauses themselves to have appropriate effects.

judgment creates the impression, however, that substantial reliance was put on the purpose argument, on the presumption that in the absence of evidence before the Court to the contrary, the parties must have intended the claim to go forward in its original terms. It is significant too, that the point of departure in several of the dissenting opinions was precisely the question of the validity of any such presumption. While, then, the surplus words rule was relied on by the Court, such reliance does not appear to have been substantial.

In the Anglo-Iranian Case (Preliminary Objection) the United Kingdom invoked the rule in support of its argument that the Iranian declaration under article 86(2) of the Court statute was not limited to treaties or conventions concluded after the ratification of that declaration. The argument was directed to the words of the declaration providing that the Court should have jurisdiction 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.

It alleged that the italicized words would be otiose if Iran's construction were accepted, namely, that "and subsequent to the ratification of this declaration" referred to "treaties or conventions" rather than to "situations or facts." Even though it recognized the

13. See the opinions of Judges Winiarski and Azevedo. Id. at 57, 96. Judge Badawi thought such jurisdiction was "clearly" excluded. Presumably he relied on the rule of ordinary meaning, but he also supported his argument by reference to the concept of novation, and, in effect, refused to adopt the Court's presumption. Id. at 67. Judge Krylov was also of the opinion that the meaning was "perfectly clear" and that no such jurisdiction was conferred. Id. at 73. Judge Ecer, appointed by Albania ad hoc, agreed with Krylov. Id. at 128.

14. In this decision the Court decided to reserve "for further consideration the assessment of the amount of compensation." Id. at 36. The Albanian agent subsequently alleged that the Court had exceeded its jurisdiction in placing this interpretation on the special agreement, and did not appear before the Court at the subsequent oral hearing. 2 CORFU CHANNEL CASE—PLEADINGS, ORAL ARGUMENTS, AND DOCUMENTS 400 (I.C.J. 1950). In its subsequent judgment assessing damages, the Court held that the question of its competence was now res judicata, Judges Krylov and Ecer alone dissenting. Corfu Channel Case, [1949] I.C.J. Rep. 244, 248, 251, 252-53 [herein referred to as the Corfu Channel Case (Assessment of Compensation)].

15. Anglo-Iranian Oil Co. Case (Jurisdiction), [1952] I.C.J. Rep. 98 [herein referred to as the Anglo-Iranian Case (Preliminary Objection)].

16. For a statement of the facts of the Anglo-Iranian Case (Preliminary Objection), see Hogg, supra note 4, text commencing at 585 n.46.


18. In its memorial the United Kingdom argued in the following manner that every word must be given effect, if possible:

"Moreover, "it is a fundamental rule in interpreting legal texts that one should not lightly admit that they contain superfluous words: the right course, whenever possible, is to seek for an interpretation which allows a reason and a meaning to every word in the text."" (Lighthouses Case between France and
existence of the rule, the Court dismissed the United Kingdom's argument by stating that the surplus words rule does not apply to a document unilaterally drafted. However, it is doubtful whether the logical necessity of the rule is derived from the fact that the words in question are the result of bilateral or multilateral negotiation. The Court's opinion leads to the inference that the evidence to be derived from an application of this rule will be outweighed by substantial evidence of purpose suggesting another meaning.

Greece, Series A/B, No. 62, p. 31, per Judge Anzilotti in a separate opinion).

If the construction now suggested by Iran, namely, taking 'postérieurs' as governing 'traités ou conventions,' is correct, the words 'qui s'éleveraient après la ratification de la présente déclaration' are completely otiose, and their omission would leave the effect of the sentence quite unchanged, for a dispute concerning a treaty or convention posterior to the ratification of a declaration could not possibly arise or have arisen before such ratification.

In an individual opinion, Judge McNair reached the same result as the Court on the basis of a purpose argument. *Id.* at 117–21. He did not refer to the Court's treatment of the "surplus words" argument. Judge Alvarez's dissent also was not founded on any application of this rule; indeed, he stated that "out-and-out reliance upon the rules of logic is not the best method of interpretation of legal or conventional texts, for international life is not based on logic. . . ." *Id.* at 126. Judge Hackworth agreed with the Court's conclusion on this point without commenting on the relevance of this rule. *Id.* at 136. Judge Read dissented on other grounds and did not find it necessary to consider this point. *Id.* at 147. He lodged an objection, however, to the "contention that the principles of international law which govern the interpretation of treaties cannot be applied to the Persian declaration because it is unilateral." *Id.* at 142.

Two further invocations of the surplus words rule are to be found in the Corfu Channel Case, [1948] I.C.J. Rep. 15 [herein referred to as the Corfu Channel Case (Preliminary Objection)]. There the United Kingdom supported its interpretation of the Albanian letter of July 2, 1949, by reference to this rule. Unless the letter were an indication in express terms of a willingness to appear before the Court, it was argued, it had no meaning whatsoever. *Corfu Channel Case — Pleadings, Oral Arguments, and Documents* 60 (I.C.J. 1950). Albania contended that the letter was susceptible of a different meaning, suggesting, moreover, that some meaning must be attributed to the reservations contained in the letter. *Id.* at 139–46. In its judgment the Court accepted the main contention of the United Kingdom that the meaning of the letter was clear in the ordinary sense of the words used. For a statement of the facts of the Corfu Channel Case, see Hogg, supra note 4, text commencing at 379 n.29. The Court seemed to admit the application of the rule, however, as claimed by Albania, that some meaning must be given to the reservation expressed in the letter. It concluded that the reservation had a clear reference to the arguments put forward by the United Kingdom in the application and that it was "intended only to maintain a principle and to prevent the establishment of a precedent as regards the future." [1948] I.C.J. Rep. 15, 28.

The rule was again invoked by the United Kingdom with respect to the question of the interpretation of article 25 of the Charter. In an attempt to show that "de-
Comment

The operation of this rule establishes a presumption that, if possible, every word used in a treaty should be given effect. It is an application of the test of context to one particular type of fact situation. Context may operate to give individual words a broader or a narrower meaning than that which they would otherwise have by reason of ordinary usage. For context to be an effective factor in interpretation, it is not necessary to show that if some words in question are understood in their ordinary sense, others will be deprived of significance. But the surplus words rule has a much narrower field of operation. Its application presupposes that there are two words or groups of words in the text; that one of these words or groups of words is susceptible of two or more reasonable meanings; that the text is ambiguous as to which of the meanings was intended by the parties; and that the choice of one of those meanings would deprive the other word or words of all significance. The logic of the rule stems from the hypothesis that the parties must be presumed to have used the particular word or words intending that they should have some significance. The rule would be a cogent one if treaties were drafted with meticulous precision. However, the fact that the process of drafting often requires numerous changes before a final text is obtained, and that in the process consequential alterations are frequently overlooked, tends to detract from the cogency of the rule.

The application of the rule presupposes a showing that the word or words in question are being deprived of all reasonable significance by a suggested interpretation. It is not enough that a particular interpretation assigns to these words a secondary rather than a primary meaning. Thus the Albanian argument in the Corfu Channel Case (Preliminary Objection) that some effect must be given to the words of reservation in the letter consenting to the Court’s jurisdiction, was answered implicitly in the statement of the Court that the purpose of the reservation was only to maintain a principle and

cision,” as used in that article, included certain types of recommendations, it argued that the word would be otiose if interpreted in the limited sense, since decisions under chapter VII of the Charter were binding on Members by their very terms. Furthermore, it was suggested that unless “recommendation,” as used in article 36 of the Charter, attracted the provisions of article 36(1) of the statute of the Court, the reference to the Charter in that latter article was meaningless. 3 Corfu Channel Case—Pleadings, Oral Arguments, and Documents 78, 94 (I.C.J. 1950).

In the opinion of the seven Judges who considered it necessary to pass on the merits of the original application, these arguments were not convincing. [1948] I.C.J. Rep. 15, 31. The words were clear in the sense of their ordinary meaning. They did not seem to imply that the rule has no significance, but that article 24, in particular, was not shown to be deprived of effect if the words were understood in their ordinary meaning.
prevent the establishment of a precedent.\textsuperscript{21} In arriving at its conclusion the Court claimed to be giving some meaning to the words of reservation. Likewise the Court in the First South-West Africa Case justified its interpretation by insisting that it did not deprive either the word “voluntary” or article 80(2) of all significance. It acknowledged the rule but purported to avoid it by claiming that a case for its application had not been established, that is, that no words were being deprived of significance. But given the explanation that the word “voluntary” was inserted, with respect to the third type of territory which could be brought under trusteeship, ex abundanti cautela, and given the conclusion that bringing any of the three types of territory under the system was voluntary anyway,\textsuperscript{22} it is clear that the Court decided that the operative effect of the word “voluntary” was nil. In fact if not in words, the Court deprived the word of any positive significance. It achieved a similar result by its interpretation of article 80(2), and said that the provision that nothing in the first part of the article should be interpreted as furnishing grounds for delay or postponement of the negotiation and conclusion of trusteeship agreements was wholly negative. Given the conclusion that there was no obligation to conclude such agreements, it would seem to follow that the existence or absence of excuses for not concluding such agreements carries no significance. Thus the provision that nothing in article 80(1) should provide an excuse does not add anything to the situation which would exist if it were omitted.

In the Anglo-Iranian Case (Preliminary Objection) also, although the Court held that the rule had no application to a unilaterally drafted declaration, it added that in any case the words in question were added ex abundanti cautela. The same analysis applies. Although they claimed not to deprive the words of significance, their actions belied their words.

Only in the Corfu Channel Case (Merits) has the Court relied on

\textsuperscript{21} The relevant words of the letter were:

Nevertheless, the Albanian Government makes the most explicit reservations respecting the manner in which the Government of the United Kingdom has brought the case before the Court in application of the Council’s recommendations and more especially respecting the interpretation which that Government has sought to place on Article 25 of the Charter with reference to the binding character of the Security Council’s recommendations. The Albanian Government wishes to emphasize that its acceptance of the Court’s jurisdiction for this case cannot constitute a precedent for the future.


The Albanian position was that these words did not constitute a waiver of any jurisdictional defense that Albania might have, and to support that position, it argued that a finding of a waiver would deprive the reservations made of all significance.

\textsuperscript{22} For previous discussion of the First South-West Africa Case, see Hogg, supra notes 4, n. 62.
the evidence derivable from an application of the rule, and even in that case its reliance was apparently secondary. In the other cases the rule has been the refuge of the losing party and dissenters. To the majority of the Court, the results of an application of the rule have never been conclusive but have merely furnished some evidence which must be weighed against that obtained by an application of the other rules, particularly that provided by the rule of purpose. But the rule cannot be dismissed as being entirely inconsequential. An application of the rule may constitute some evidence of the purpose of the parties, and is therefore likely to be of value in providing one of a series of straws all leaning in the same direction. That such is the case reflects the mechanical nature of the rule, a mechanical nature premised on a degree of perfection in drafting which is frequently not attained.

D. The Rule of Expressio Unius

This rule, well-known in Anglo-American law, is illustrated by the following quotation:

When certain persons or things are specified in a law, contract, or will, an intention to exclude all others from its operation may be inferred.23

The difficulty of isolating an application of the rule of ordinary meaning from an application of this rule and the others based on internal evidence is pointed up in the First Membership Case,24 in which the General Assembly asked the Court for an advisory opinion interpreting article 4 of the Charter.25 The Court understood the first question posed by the Assembly as a request to determine the character, exhaustive or otherwise, of the conditions stated in article 4.26 Apparently it applied the rule of ordinary meaning and concluded that the text clearly demonstrates the intention of its authors to establish a legal rule

25. The terms of the request were as follows:
   Is a Member of the United Nations which is called upon, in virtue of Article 4 of the Charter, to pronounce itself by its vote, either in the Security Council or in the General Assembly, on the admission of a State to membership in the United Nations, juridically entitled to make its consent to the admission dependent on conditions not expressly provided by paragraph 1 of the said Article? In particular, can such a Member, while it recognizes the conditions set forth in that provision to be fulfilled by the State concerned, subject its affirmative vote to the additional condition that other States be admitted to membership in the United Nations together with that State?

26. [1948] I.C.J. Rep. 57, 61. The main question of interpretation in this case was that posed by the terms of the request with respect to the meaning of article
which, while it fixes the conditions of admission, determines also the
reasons for which admission may be refused. . . . The natural meaning
of the words used leads to the conclusion that these conditions consti-
tute an exhaustive enumeration and are not merely stated by way of guid-
ance or example. The provision would lose its significance and weight,
if other conditions, unconnected with those laid down, could be de-
manded.27

At first sight this appears to be merely an application of the rule of
ordinary meaning directly to the words of article 4.28 It is submit-
ted, however, that without the operation of a further step of inter-
pretation—the application of the rule of expressio unius—the ordi-
nary meaning of the text in fact was ambiguous. It was clear that
a state not fulfilling the five conditions could not be admitted, but
it was not clear whether a state fulfilling those conditions might
still be required to satisfy additional conditions imposed by an op-
posing Member. The process through which the Court may have
gone was to read the text and ascertain that its ordinary meaning
dictated no definite answer to the problem. When, however, the pre-
sumption created by application of the rule of expressio unius was
employed, the Court was able to conclude that the clear meaning
of the text was that the conditions were exhaustive. Since the words
which were not clear in their ordinary meaning are nevertheless the
sole evidence on which the presumption of expressio unius can be
raised, a dilemma is encountered. But it does seem useful to make
a distinction between the two steps, particularly since the joint dis-
senting opinion appears to part company with the Court on this
point, whether application of the rule of expressio unius be con-
sidered as a logical step in itself or only part of the step of ascer-
taining the ordinary meaning. The Court, having taken this further
step, then concluded that the words used, as understood in their
ordinary sense, created a presumption which had not been displaced
by other evidence.29

4 of the Charter. There was a division of opinion among the Judges, however, about
how the request itself should be interpreted. The Court interpreted the request to
raise the legality of statements made by a Member concerning the vote it pro-
posed to give. Id. at 60. The four authors of the joint dissent thought that the
request could not be understood as limited to the question of the legality of state-
ments or arguments put forward in the General Assembly or Security Council, but
must be interpreted as referring to the reasons on which a Member bases its vote.
Id. at 82. There were two additional dissents. Id. at 94, 107.

27. Id. at 62.

28. The Court referred, in particular, to the opening words of article 4(1),
"Membership in the United Nations is open to all other peace-loving States which
. . . ." and to the opening words of article 4(2), "The admission of any such state
. . . ." which commence in the French text, " . . . tout état . . . ." Id. at 62-63.

29. Having determined the exhaustive character of the provisions of article 4(1),
the Court added:

It does not, however, follow from the exhaustive character of paragraph 1
In a separate opinion Judge Alvarez asserted that the question cannot be answered merely by a clarification of the texts, nor by a study of the preparatory work; another method must be adopted and, in particular, recourse must be had to the great principles of the new international law. Nevertheless, like the Court, he applied the rule of expressio unius. "These conditions are exhaustive because they are the only ones enumerated," he said. Therefore, according to the plain terms of his opinion, he applied the same rule of construction and derived the same presumption from it as the Court; but he also relied for evidence on his concept of an international society, that is, he felt that the purpose of the Organization cast a strong light on the meaning of the provisions of the Charter. In his opinion he implied that if this rule were to clash with the concept of the "new international law," the latter would prevail.

The authors of the joint dissent acknowledged that for a state to be admitted it must possess at least those qualifications specified in article 4(1). They parted company with the Court, however, by finding the language of article 4 ambiguous and then deriving a presumption from a purpose argument that the conditions were not exhaustive. Taking the rule of purpose, then, as their basic criterion, they concluded that the admission of a new Member was pre-eminently a political act and that therefore the conditions of article 4 were to be presumed minimal in the absence of express provision to the contrary.

of Article 4 that an appreciation is precluded of such circumstances of fact as would enable the existence of the requisite conditions to be verified.


31. Id. at 71. For an explanation of Judge Alvarez’s approach to treaty interpretation, see text accompanying notes 161-68 infra.

32. Id. at 67-71. Judge Azevedo likewise concurred in the Court’s conclusion but delivered a separate opinion. Id. at 73, 78.

33. Thus, in Competence of Assembly Regarding Admission to the United Nations, [1950] I.C.J. Rep. 4 [herein referred to as the Second Membership Case], he refused to apply this rule to article 4(2) of the Charter. He contended, then, that although article 4(2) presupposed, in a normal case, a recommendation followed by a decision, it did not exclude the possibility of the General Assembly’s making a decision in the absence of a recommendation, produced by a veto cast in abuse of right. [1950] I.C.J. Rep. 4, 12-21.


35. Id. at 84-86, 90.

36. Ibid. They resisted the argument that this would allow the General Assembly and Security Council an unfettered range of appreciation, thereby rendering the provisions of article 4(1) otiose, by saying that these provisions clearly indicated the minimum requirements a state must possess. Id. at 85.

Judge Zoricic dissented on the ground that the Court should have declined to answer the request because it was made "for a definitely political purpose." Id. at 95. He added, however, that in any case he could not accept the conclusions of the
Application of the rule has been raised in at least two other cases. In the *Reparations Case*\(^3\) an argument suggesting that the United Nations did not have power to bring international claims against states *could* have been made on the basis of this rule.\(^3\) Article 104 of the Charter provides that:

> The Organization shall enjoy in the territory of each of its Members such legal capacity as may be necessary for the exercise of its functions and the fulfillment of its purposes.

This, the only reference in the Charter to the legal capacity of the Organization, is a provision respecting capacity under the municipal systems of the Members. Since the authors of the Charter expressly provided for such capacity at municipal law, it might have been argued that no such capacity was intended at international law. However, on the basis of the normal meaning of the words used in the Charter and the necessary implications of those words as supported by the rule of authentic interpretation, the Court unanimously found that the Organization had such legal capacity at international law and accepted the argument of counsel for the Secretary-General that the rule of *expressio unius* did not apply in this case.\(^3\)

In the opinion of the Court, the second question posed by the Assembly was resolved by an application of the answer to the first question. The imposition of a condition by a Member "making its consent to the admission of an applicant dependent on the admission of other applicants . . . clearly constitutes a new condition, since it is entirely unconnected with those prescribed in Article 4." *Id.* at 64-65. In the light of its interpretation of the request, this means that the Court ruled that a Member, in making statements concerning the vote it proposed to give, might not demand this further condition. The joint dissent, interpreting the request to be an inquiry about the legality of a vote cast by a Member against admission, even though that Member conceded that all the conditions of article 4 were fulfilled, considered this to be a political question and, therefore, concluded that it should not be answered. *Id.* at 93. Judges Zoricic and Krylov thought that the answer to the second question followed from the answer to the first one, in the sense that this condition was clearly a political consideration and permissible under their interpretation of the text. *Id.* at 104-06, 114-15.


38. "We submit it is . . . clear that the Article does not mean that the United Nations has only such domestic legal capacity and not capacity under international law." *Reparations Case*—PLEADINGS, ORAL ARGUMENTS, AND DOCUMENTS 72 (I.C.J. 1949). The Belgian government made a similar submission. *Id.* at 95.

In the Ambatielos Case (Preliminary Objection) Judge McNair, dissenting, sought to apply this rule to the question whether the declaration signed by the parties at the time of signing the 1926 Treaty was intended to constitute an integral provision of that treaty, or to be a separate agreement. He pointed out that three documents were approved on the same day—a treaty, a customs schedule and the declaration. The customs schedule was not signed and was specifically incorporated in the treaty by reference. The declaration, on the other hand, was individually signed and lacked an incorporating clause. The argument, then, was that the express incorporation of the schedule should exclude the implied incorporation of the declaration. However, the Court found the declaration to be incorporated by reason of the terms of the United Kingdom's instrument of ratification and by reason of the very nature of the declaration itself.

The weakness of this rule in some fact situations can be illustrated by the First South-West Africa Case, involving interpretation of the provisions of the mandate and the Covenant. In that case the Court applied the rules of necessary implication and authentic interpretation and, in effect, refused to apply the rule of expressio unius. On the issue of how the status of South-West Africa might be altered, an argument might have been made on the basis of the latter rule. The terms of article 7 of the mandate stated expressly that consent of the Council was required to make any change. Since there was no other reference to change, the Court could conceivably have concluded that any further implication was excluded by this express enumeration. The same logic might have been applied to the issue of transfer of the supervisory powers of the League, for express provision was made for supervision to be by the League. On the second point, such an application would have resulted in a finding that all powers of supervision had terminated with the League, and the Court explicitly stated that the "sacred trust" could not be safeguarded in the absence of such powers of supervision. On the first point, the conclusion would have been reached that under the mandate the Union could not unilaterally change the status of the Territory, but that no other body had been given power to consent to any change other than to one of trusteeship. Application of the rule of expressio unius, then, would have achieved a
result directly contrary to that which the Court found dictated by the rule of purpose.

Comment

The Court in the First Membership Case may have derived its interpretation in part from an application of the rule of *expressio unius*. In every other case, however, in which the suggestion has been made that the rule should be applied, a substantial majority of the Court have declined to follow the suggestion. Given as a fundamental premise that the purpose of interpretation is to ascertain and apply the intention of the parties, where the intention is expressed in clear language in the text, the rule states the axiomatic conclusion that nothing to the contrary can be implied. The rule ceases to be of assistance, however, at the point where assistance is first needed, namely, where an ambiguity in the text is disclosed. While a positive provision must exclude the converse, yet the specification of one thought does not necessarily exclude the implication of similar thoughts. The cases above indicate the unsuccessful attempts of counsel to persuade the Court to apply the rule to the second situation rather than the first. Like the rule of surplus words, the logical basis of this rule presumes perfect drafting. If the cogency of this rule depends on human perfection, then it breaks down just because of human fallibility. The First Membership Case illustrates that the Court has not regarded the argument as wholly lacking in merit, however, in certain circumstances. The authors of the Charter spelled out five conditions of admission to membership. Human experience might suggest that when someone takes the trouble to spell out five conditions, if others had been intended they would have been included in the list. This argument is linked to that made when the *ejusdem generis* rule is invoked. If a city ordinance provides that sheep, goats, horses, cows and pigs shall not be kept within the city limits, there is some force in the argument that dogs and cats are permitted. The difficulty raised by application of the rule in the First Membership Case is pointed out by the authors of the joint dissent. If the drafters of the Charter were concerned with excluding a state which was unable to comply with each of the five conditions, then with that purpose in mind, there was no compelling reason why they should go on to spell out any additional factors that might affect a decision to admit a particular state which could comply with all five. One who formulates minimal requirements which must be met before an exercise of discretion will be considered does not necessarily, as a matter of human experience, at the same time categorize all the factors which may affect the exercise of discretion in a particular case. He concen-
trates on the negative rather than the positive. The difficulty about the case, then, is that the text is unrevealing on the significant question whether the list was contemplated by the drafters as minimal or something more. If there is a rule of law that animals may be kept unless there is a specific prohibition in appropriate legislation or regulations, then the composing of a list of prohibited animals has meaning as an exclusive list. There was no general rule or practice to give any such significance to the list of conditions set out in article 4.

The practice of the Court indicates, then, that beyond the point where its application is axiomatic, the rule is of dubious value in providing evidence of the intention of the parties. Even in the First Membership Case it may be doubted whether an application of the rule was the significant factor which led the Court to its conclusion.

E. THE RULE OF RESTRICTIVE INTERPRETATION

... [R]ules as to a strict or liberal construction of treaty stipulations can be applied only in cases where ordinary methods of interpretation have failed. said the Permanent Court in the Polish Postal Service in Danzig Case.\textsuperscript{43} The applicability of this rule has been argued before the International Court principally where the treaty provision to be interpreted is the one conferring jurisdiction on the Court.\textsuperscript{44}

In the Corfu Channel Case (Preliminary Objection),\textsuperscript{45} anticipating an Albanian argument that the letter to the Court should be interpreted restrictively—that in case of doubt, the Court should decline jurisdiction\textsuperscript{46}—the United Kingdom cited\textsuperscript{47} the decision of the Permanent Court in the Chorzow Factory Case to the following effect:

The fact that weighty arguments can be advanced to support the contention that it has no jurisdiction cannot of itself create a doubt calculated to upset its jurisdiction. When considering whether it has jurisdiction or not, the Court's aim is always to ascertain whether an intention on the part of the Parties exists to confer jurisdiction upon it. The question as


\textsuperscript{44} Arguments have also been made that the rule should apply where a treaty sets forth a general principle and one of the parties seeks to prove a restriction on that principle. See \textit{infra} note 79.

\textsuperscript{45} For a statement of the facts of this case, see Hogg, \textit{supra} note 4, text commencing at 379 n.29.

\textsuperscript{46} See the concluding comment of the Albanian Judge \textit{ad hoc}, Dr. Daxner: "In view of my reading of the letter of July 2nd, I was not obliged to make use of the rules of interpretation \textit{in dubio stricto sensu}, ... the rules which should undoubtedly be applied, if necessary, in the present case." \textit{Corfu Channel Case (Preliminary Objection)}, [1948] I.C.J. Rep. 15, 44–45.

\textsuperscript{47} 2 \textit{Corfu Channel Case—Pleadings, Oral Arguments, and Documents} 17 (I.C.J. 1950).
to the existence of a doubt nullifying its jurisdiction need not be considered when, as in the present case, this intention can be demonstrated in a manner convincing to the Court.48 However, the Court held that the meaning of the letter was clear in the ordinary sense of the words used, and therefore it did not refer to the rule of restrictive interpretation.49

In the Corfu Channel Case (Merits), again the Court concluded that the terms of the special agreement clearly conferred jurisdiction on the Court to assess compensation.50 Judge Badawi Pasha, dissenting, thought that the words of the agreement clearly excluded jurisdiction, but added that in case of doubt, the Court should apply the rule of restrictive interpretation and decline jurisdiction.51

In the Second Peace Treaties Case,52 the jurisdiction of the Court was not involved, but the Court seemed to draw an analogy between the exercise of the power of appointment by the Secretary-General and the exercise of jurisdiction by the Court. It interpreted the "disputes" articles according to the ordinary meaning of the words used, but added that if doubt still remained it should be resolved by adopting a restrictive interpretation of the treaties:

[B]y its very nature such a clause must be strictly construed and can be applied only in the case expressly provided for therein.53

Judge Read, dissenting, declined to apply the analogy. He felt that a rule of restrictive interpretation must not be applied and noted that the provision in question was not contained in a special agreement for arbitration but in a general treaty of peace.54

If the judges considered this rule to be of any substantial consequence in limiting the discretion of the Court, they probably would have discussed its application to the facts in the Ambatielos Case (Preliminary Objection),55 where the Court concluded that the declaration was an interpretative provision and an integral part of the Treaty of 1926 to which article 29 of that treaty would apply.56

In his individual opinion Judge Carneiro revealed a reason for the Court's conclusion, which was undoubtedly in the forefront of the

50. For a statement of the facts of this case, see Hogg, supra note 4, text commencing at 379 n.29. It has also been discussed in the text accompanying notes 8–14 supra.
52. Interpretation of Peace Treaties (Second Phase), [1950] I.C.J. Rep. 221 [herein referred to as the Second Peace Treaties Case]. For previous discussion of this case, see Hogg, supra note 4, text commencing at 386 n.59.
54. Id. at 232.
55. For previous discussion of this case, see Hogg, supra note 4, at 390–91 n.69.
thinking of the Court though not expressly referred to in its opinion. He focused on the point that but for the interpretation which the Court gave to the declaration and the Treaty of 1926, there would be no pre-established procedure for the settlement of a dispute arising out of the declaration—no forum in which Greece could obtain a hearing on the question of whether the United Kingdom was obliged to refer the dispute to arbitration. He concluded that since the parties had entered into two treaties providing for the friendly settlement of disputes, he could never believe that they would fail to provide a solution for such disagreement. But perhaps more significantly in his thinking, such a gap was contrary to the general aim of the United Nations—that legal disputes should be subject to judicial settlement. It is difficult to distinguish in his opinion whether he came to his conclusion because of an intention imputed to the parties or because, from the standpoint of general international law, it was desirable that the Court should have jurisdiction in cases such as this. It seems likely that one compelling reason for the conclusion of the Court was its desire that utmost effect be given to agreements to confer jurisdiction on the Court. If there were any doubt about the existence of its jurisdiction, the Court would resolve such doubt in favor of finding jurisdiction.

The dissenters, particularly Judge McNair, excepted in this case to the presumption of jurisdiction. In his opinion Judge McNair used a burden of proof argument as a reason for the Court to decline jurisdiction. He felt that such a slender consensual foundation as illustrated by the words of the United Kingdom's ratification was not intended to be the basis of the Court's jurisdiction. His position was apparently that the Court should find clear and convincing evidence of such a special agreement.

57. Id. at 53-54.
58. Id. at 62. It is noteworthy that when the Court considered the Greek submission that the Court should hold that it had jurisdiction to deal with the merits pursuant to an offer allegedly made by the United Kingdom's counsel during oral argument, it there took the position that such an agreement to submit must be founded in a "clear agreement," and declined to find any such agreement. Id. at 38-39.

In the Ambatielos Case, (Merits) [1953] I.C.J. Rep. 10, the Court proceeded to hold that the claim was based on the Treaty of 1886, and that, therefore, the United Kingdom was under an obligation to submit to arbitration. [1953] I.C.J. 10, 23. The joint dissenters (Judges McNair, Basdevant, Klaestad and Read), having taken the position that such an obligation could only exist if the claim was based on that treaty as interpreted by the International Court, went on to examine the terms of that treaty. They found that the Greek case invoked article XV, paragraph 3 of that treaty which provided for "free access to the Courts." They found the alleged denial of justice to be the failure of the United Kingdom to produce certain evidence at the trial of Mr. Ambatielos' action against the United Kingdom government. They concluded that "free access to the Courts" did not include any guar-
Failure of the Court to advert to this rule in two recent cases may also be significant. In the *Norwegian Loans Case* France instituted an action against Norway by application, relying on the fact that both countries had filed declarations pursuant to article 36 of the statute of the Court. The basis of the French claim was that certain loans, some floated by the government of Norway, others made by two Norwegian banks, between the years of 1896 and 1909, could be discharged only "by the payment of the gold value of the coupons on the date of payment and of the gold value of the redeemed bonds on the date of repayment." Norway raised a preliminary objection to the jurisdiction of the Court on, *inter alia*, the following bases: (a) that the dispute was within the domain of municipal law and not international law as required by the declarations of both countries; and (b) that, by reason of the requirement of reciprocity stipulated in the Norwegian declaration, Norway was entitled to rely on the following reservation in the French declaration:

> This declaration does not apply to differences relating to matters which are essentially within the national jurisdiction as understood by the Government of the French Republic.

antee concerning the right to the production of evidence, reaching this conclusion on the basis of restrictive interpretation:

> With two interpretations of Article XV, paragraph 8, before us, we cannot subscribe to the one which would extend it to the production of evidence and thereby enlarge the obligation to submit to arbitration. It is particularly difficult to accept an interpretative extension of an obligation of a State to have recourse to arbitration. The Permanent Court in the *Phosphates in Morocco* case stated that a jurisdictional clause must on no account be interpreted in such a way as to exceed the intention of the States that subscribed to it.

*Id.* at 33.

Similarly, they rejected the Greek argument based on a most-favored-nation clause in the 1886 treaty in these words:

> But, having regard to its terms, Article X promises most-favoured-nation treatment only in matters of commerce and navigation; it makes no provision concerning the administration of justice. . . . The most-favoured-nation clause in Article X cannot be extended to matters other than those in respect of which it has been stipulated. We do not consider it possible to base the obligation on which the Court has been asked to adjudicate, on an extensive interpretation of this clause.

*Id.* at 34.

The most-favored-nation clause was to apply to "all matter relating to commerce and navigation." Article X, quoted *id.* at 19. It is a little difficult, having regard to article 24 of the Treaty of Peace and Commerce between the United Kingdom and Denmark of July 11th, 1670, which required the United Kingdom to "cause justice and equity to be administered to the subjects and people of each other" (quoted *id.* at 21), to argue that judicial justice was not a part of commerce.

59. *Case of Certain Norwegian Loans*, [1957] I.C.J. Rep. 9, [herein referred to as the *Norwegian Loans Case*].

60. *Id.* at 13. From 1914 to 1931 the Norwegian government made several changes in Norwegian national law, first permitting the loans to be converted into gold, then forbidding such convertibility. Since 1931 the loans have not been convertible into gold. *Id.* at 18.

61. *Id.* at 21.
After the preliminary objections had been joined to the merits by agreement of the parties, the Court held that it lacked jurisdiction and that Norway was entitled to the benefit of this French reservation via the reservation of reciprocity in the Norwegian declaration. 62 The Court took account of the Norwegian statement, made in the course of its preliminary objections, that it was convinced that the dispute was within its domestic jurisdiction, and reached a conclusion on the basis of that assertion. 63 The Court’s disposition of this issue leaves open the following question: Did it interpret the French reservation as depriving the Court of jurisdiction automatically on notification of the government of its understanding that the dispute was one of domestic jurisdiction, or did this formula in the declaration allow the Court some leeway in which to judge the merit of the basis of that government’s understanding? Did the Court have, for instance, the power to review the good faith or legal validity of that understanding? The answer to this question becomes important in light of the number of states which, since the war, have made similar reservations in their declarations to the compulsory jurisdiction of the Court. 64 The fact, however, that the Court considered, in short compass, an argument of France that the question was one of international law because of the applicability of the Hague Convention of 1907 adds color to the conclusion that the Court felt itself free, under the terms of the reservation, to make some review of the basis of the Norwegian assertion of domestic jurisdiction. 65 It might be thought that if a rule of restrictive inter-

62. Id. at 27.
63. Id. at 23–24. Judges Quintana, Badawi and Lauterpacht felt that the Court should have resolved the case on the basis of the first objection of Norway, that the dispute was not one governed by international law. Id. at 28, 29, 34, 35–36. Judge Guerrero dissented on the ground that the French reservation was invalid, id. at 70, a conclusion which Judge Lauterpacht shared in, even though he voted with the Court on other grounds. Id. at 59. Judge Basdevant placed his dissent on the basis of an interpretation of Norway’s position before the Court as to jurisdiction. Id. at 71. Judge Read thought that the Court should have rejected all the preliminary objections. Id. at 79.
64. In his separate opinion, Judge Lauterpacht lists seven such states, including the United States. Id. at 63. The interpretation of the United States declaration has been raised in the Interhandel Case recently before the Court. Interhandel Case (Interim Measures of Protection), [1957] I.C.J. Rep. 105. For a reference to the holding of the Court in that case on a request for the indication of interim measures, see Hogg, supra note 4, at 397 n.97. The Indian declaration which involves a reservation of matters within domestic jurisdiction concerning the right of passage over Indian territory, is likewise now pending before the Court on the merits. The validity and meaning of this reservation were not decided in the decision of the Court on India’s preliminary objections, discussed infra notes 66–75 and accompanying text.
65. [1957] I.C.J. Rep. 9, 24. The Court noted that this argument was directed against both the Norwegian claim that this issue was one of municipal law and the claim based on the French reservation. Id. at 26.
On the possibility of review, compare the opinion of Judge Read, id. at 94–95,
pretation were relevant, the Court would have construed the reservation to exclude a power of review even for good faith.

In the *Right of Passage Case*\(^6\) Portugal brought a claim against India, asserting that the latter was preventing the exercise of a right of passage between the Portuguese territory of Daman and its enclaved territories of Dandra and Nagar-Aveli.\(^7\) Portugal made the application in reliance on article 36 of the statute of the Court, both Portugal and India having deposited declarations. Portugal deposited her present one on December 19, 1955, three days before filing this claim against India. India subsequently filed six preliminary objections to the jurisdiction of the Court.\(^8\)

The Court rejected the first four objections and ordered the fifth and sixth joined to the merits.\(^9\)

with that of Judge Lauterpacht, *id.* at 34, 42–43, 52–55. The latter concluded that the French reservation left no room for review. He then held that the French reservation was inconsistent with article 36(6) of the Court’s statute, because such a reservation deprived the Court of its right to settle a dispute over its jurisdiction. He found it impossible to sever this invalid reservation from the rest and, therefore, concluded that there was no effective French declaration upon which Norway could rely. The Court declined to pass on this issue of the validity of the reservation, since the question was not raised by the parties. *Id.* at 27. In reaching his conclusion, Judge Lauterpacht felt compelled to explain the Court’s having taken jurisdiction 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*], where both parties to the dispute had included this particular type of reservation. He explained that case on the basis that the validity of the reservation was not raised by the parties, and also on the basis of *forum prorogatum*. He then damaged logical internal consistency by proceeding to review the validity of the reservation in the present case where, likewise, the validity question was not raised by the parties. *Id.* at 59–60.

66. *Case Concerning Right of Passage Over Indian Territory (Preliminary Objections)*, [1957] I.C.J. Rep. 125 [herein referred to as the *Right of Passage Case*].

67. *Id.* at 128.

68. *Id.* at 129–31. The first alleged that the following reservation to the Portuguese declaration was contrary to article 36 of the statute and that, therefore, the whole of the Portuguese declaration was invalid:

The Portuguese Government reserves the right to exclude from the scope of the present declaration, at any time during its validity, any given category or categories of disputes, by notifying the Secretary-General of the United Nations and with effect from the moment of such notification. *Id.* at 141.

The remaining objections were as follows: (a) that the filing of the Portuguese application in the circumstances violated the principle of equality of states and disregarded the condition of reciprocity in India’s declaration; (b) that since Portugal had not exhausted diplomatic negotiations before filing the application, no legal dispute existed; (c) that the filing of the application violated the reciprocal right of India to exercise the power in the Portuguese declaration to make reservations, and was an abuse of the optional clause; (d) that the dispute related to a question which, under international law, was in principle a question falling exclusively within the jurisdiction of India; and (e) that the dispute related to a situation prior to February 5, 1950, the critical date established in a reservation to the Indian declaration. *Id.* at 129–31.

69. There were five dissenting opinions. *Id.* at 152.
One of the problems of interpretation considered by the Court arose out of the meaning to be attributed to article 36 of the statute and the Indian declaration thereto. India alleged that the principles of equality, mutuality and reciprocity recognized in article 36 and the condition of reciprocity expressly inserted in its declaration were violated by the lodging of the Portuguese application before the lapse of enough time to enable the Secretary-General to notify India of Portugal's new declaration. The Court formulated this question as whether Portugal's conduct violated "any right of India under the statute or under its declaration." The Court noted that:

In the course of the oral argument the Government of India disclaimed any intention of contending that Portugal was not entitled to file its Application until the notification of the Secretary-General had reached the Government of India. The latter merely maintained that before filing its Application Portugal ought to have allowed such period to elapse as would reasonably have permitted the notification of the Secretary-General to take its "appropriate effects." But for this statement of the Court, it might have been supposed that the issue of interpretation at stake was precisely whether the new declaration could be regarded as having taken effect at the time of filing with the Secretary-General, or at some later time after allowance of a period for transmission of the new declaration to other states. At least this appears to have been the understanding of Judges Badawi and Chagla in their dissent. But in any case the Court ruled on that issue and held the declaration to be effective on filing. Apparently the Court relied on the clear language of article 36, and particularly the words "ipso facto and without special agreement..." The Court supported its conclusion by the argument that any other interpretation would produce uncertainty in the operation of the optional clause system. The Court then disposed of the complaint of India that her rights were impaired, with the following comment:

The Court has been unable to discover what right has, in fact, thus been violated.

It seems fairly clear that India was complaining about the absence of any opportunity on notification of the Portuguese declaration to except the Portuguese claim from the operation of her declaration. She was simply outmaneuvered by Portugal. Such a position would be difficult to put to the Court tactfully, but this underlying position must assuredly have affected the Court's reading of the "clear

70. Id. at 145.
71. Ibid.
72. Id. at 155-58, 169-71.
73. Id. at 146-47.
74. Id. at 147.
meaning" of article 36, a meaning which was in no way limited by the application of any rule of restrictive interpretation.75

While the last two cases and the two Ambatielos cases indicate a tendency to find jurisdiction in the Court rather than to apply a converse presumption derived from restrictive interpretation, the Anglo-Iranian Case (Preliminary Objection) shows a contrary tendency. Although Iran had argued that its declaration must be given a restrictive interpretation,76 the Court did not expressly refer to this proposition. But Judge Hackworth, one of the dissenters, rejected the argument.77 Another dissenter, Judge Read, also opposed restrictive interpretation of such a document, pointing out that in the Ambatielos Case (Preliminary Objection) the Court did not adopt that approach. To have done so would have led to the result of finding no jurisdiction there.78 And yet, the approach of the Court on the second problem raised in the case, namely, the meaning to be given to the words "directly or indirectly" in the Iranian declaration manifests some sympathy for the Iranian argument; a presumption against jurisdiction is not difficult to read into its opinion.79

75. Another problem of interpretation relating to the jurisdiction of the Court was raised by the Indian contention concerning the meaning of "legal disputes" in article 36(2) of the statute of the Court. India claimed that Portugal had not exhausted diplomatic negotiation of her claim and that, therefore, it did not constitute a "legal dispute" under article 36(2) or under the Indian declaration. Neither article 36 nor the declaration expressly mentioned diplomatic negotiation. The Court found as fact that Portugal had made repeated complaints about access to the enclaves, but that the complaints were unsuccessful and "that the negotiations had reached a deadlock." Id. at 148-49. The Court then held that even if article 36(2) required a definition of the dispute through negotiations, that prerequisite was met in this case. The Court, therefore, did not really resolve the issue of the precise meaning of "legal disputes" in the article. It is noteworthy that on this occasion the Court did not refer to its prior decisions on this point. The meaning of "dispute" had arisen in the case of Interpretation of Peace Treaties [1950] I.C.J. Rep. 65 [herein referred to as the First Peace Treaties Case]. In that case, discussed previously in Hogg, supra note 4, text commencing at 377 n.20, the Court gave to the word "dispute" the meaning of a complaint made on the one side and denied on the other. [1950] I.C.J. Rep. 65, 74.


77. It is no part of the functions of the Court to give to such a declaration a broader meaning or a more restrictive meaning than the State itself has seen fit to prescribe. Our duty is to find that plain and reasonable meaning which more nearly comports with the purpose of the State as disclosed by the language which it itself has employed. [1952] I.C.J. Rep. 93, 140.

78. Id. at 143.

79. In two cases the rule of restrictive interpretation has been applied to a different type of situation — one where the treaty in question sets forth a general principle and one of the parties seeks to prove a restriction on that principle. The authors of the joint dissent in the First Membership Case (discussed in text accompanying notes 34-36 supra) applied the rule of purpose to the provisions of article 4 of the Charter and concluded that a general principle in favor of freedom
Comment

Many Judges of the Court have acknowledged the existence of a rule of restrictive interpretation in one case or another. However, the enunciation of the rule in the Postal Service in Danzig Case and its treatment by the present Court indicate that the presumption will be applied only where there is no other satisfactory evidence of meaning. In contentious proceedings the rule may be no more than an acknowledgment that the party seeking to convince the Court has failed to discharge its burden of persuasion. When the Court hears a case upon request for an advisory opinion, it can apply this as a rule of construction and not as a conclusion on the burden of persuasion. The definition given the rule by the Court differs from that sometimes given the rule in municipal law. The statement that penal statutes should be construed strictly is familiar, although it is almost impossible to predict the application of that statement to any particular circumstances. If anything, the phrase describes a method of approach. It indicates a tendency to exercise restraint in particular circumstances in ascertaining meaning from a text over and beyond that set out clearly in the express words. Normally decisions are made on the preponderance of evidence. In certain circumstances, including those where a statute is to be strictly construed, municipal courts often speak of a requirement of clear and convincing evidence. The practice of the International Court would tend to support the proposition that it does not contemplate a higher degree of proof in questions involving its jurisdiction.

The rule as applied to these questions appears to rest on the assumption that, subject to the general rules of international law, a state is free to act as it likes unless it has bound itself by treaty to

in choosing reasons for a particular decision was thereby established. They then posed the question whether this freedom of choice was to be cut down in relation to article 4(1) and answered it by reference to the rule of restrictive interpretation. When a rule of law is established, they held, and it is sought to maintain a restriction on that rule, in case of doubt the principle must prevail against the restriction. The application of this rule was not considered in the Court opinion. [1948] I.C.J. 57, 85-86.

In the First South-West Africa Case the Court, in considering application of the provisions of chapter XII of the Charter, concluded that the ordinary sense of the words used in articles 75, 77 and 79 indicated an absence of obligation to conclude or negotiate a trusteeship agreement. On the basis of ordinary meaning, the Court held that the terms of article 80(2) were not intended as an exception to the principle derived from those articles. Nevertheless, it supported this conclusion by what appears to be a restrictive interpretation argument. [1950] I.C.J. Rep. 128, 139-40.

80. See, e.g., People v. Lund, 382 Ill. 213, 215, 46 N.E.2d 929, 930 (1943):

A criminal or penal statute, by well settled principles of law, is to be strictly construed in favor of the accused and nothing is to be taken by intendment or implication against him beyond the literal and obvious meaning of such statute.
act in a particular manner. The state which alleges that another state has so bound itself has the burden of proving the allegation. The rule appears to follow logically from such an assumption. Whether, however, the rule is of any substantial value in indicating a real intention of the parties is open to question. It may be doubted whether application of the rule was the operative factor in leading either majorities or dissenters to a conclusion in any of the preceding cases. As in the case of preparatory work, the Court, though holding that the rule may only be applied as a last resort, nevertheless has used it to support a conclusion arrived at on the basis of other evidence. The rule could provide a vehicle for a judge's determination of the permissible limits of judicial discretion when giving content to an imperfect agreement, but it is submitted that the rule rarely constitutes the basis for that determination or explains any individual determination in a particular case. For instance, it is difficult to believe that the authors of the joint dissent in the First Membership Case arrived at their conclusion because of an application of the rule. The general principle that the admission of a new Member was pre-eminently a political act, and that, therefore, the conditions of article 4 of the Charter were presumptively minimal, was found by them only after a process of interpretation. It was not set out in the clear language of the Charter. The actual basis for their decision would seem to lie in the reasons for their definition of their general principle rather than in the assumption that once the principle was spelled out, exceptions to it should be restrictively interpreted.

F. The Rule of Travaux Préparatoires (Preparatory Work)

Referring to the practice of the Permanent Court, Judge Hudson has said:

The conclusion to be drawn from the jurisprudence is that while the Court professes a willingness to look into travaux préparatoires only for the purpose of resolving a doubt as to the text, it has on some occasions done so to confirm constructions as to which it had no doubt. In spite of the frequency of these occasions, it must be said that the Court has not exercised a complete freedom in the use of travaux préparatoires; a resort to them only after a conclusion has been reached is not the same as a resort to them before the conclusion is formulated.

81. Article 4 provides:
(1) Membership in the United Nations is open to all other peace-loving states which accept the obligations contained in the present Charter and, in the judgment of the organization, are able and willing to carry out these obligations. (2) The admission of any such state to membership in the United Nations will be effected by a decision of the General Assembly upon the recommendation of the Security Council.
82. See supra note 79.
In the Second Membership Case the Court found the meaning to be clear in the ordinary sense of the words used.\textsuperscript{84} In this situation, said the Court, it was not permissible to resort to the \textit{travaux préparatoires}.\textsuperscript{85} A similar position was taken in the Ambatielos Case (Preliminary Objection).\textsuperscript{86} The last problem of construction considered by the Court, and taken up only in its opinion, was posed by the United Kingdom's argument that the declaration was intended to preserve only those claims arising out of the 1886 treaty which had been formulated prior to the conclusion of the 1926 treaty.\textsuperscript{87} To support such an argument the United Kingdom relied on preparatory work. The Court referred to this material but then decided that it did not support the United Kingdom's argument. And in conclusion it stated that, in any case, a resort to preparatory work is not permissible where the text is clear.\textsuperscript{88} In the First Membership Case also, the Court did not resort to preparatory work, since it considered the ordinary meaning of the words used as clear.\textsuperscript{89} The joint dissenter, however, supported their interpretation, \textit{inter alia}, by reference to the proceedings of the San Francisco Conference, and said that "they contain no indication of any intention to regard them [the conditions expressed in article 4] as sufficient to impose upon the Organization a legal obligation to admit the State which possesses them."\textsuperscript{90}

\textsuperscript{84}. For a previous discussion of the Second Membership Case, see Hogg, \textit{supra} note 4, text commencing at 375 n.10.
\textsuperscript{85}. When the Court can give effect to a provision of a treaty by giving to the words used in it their natural and ordinary meaning, it may not interpret the words by seeking to give them some other meaning. In the present case the Court finds no difficulty in ascertaining the natural and ordinary meaning of the words in question and no difficulty in giving effect to them. Some of the written statements submitted to the Court have invited it to investigate the \textit{travaux préparatoires} of the Charter. Having regard, however, to the considerations above stated, the Court is of the opinion that it is not permissible, in this case, to resort to \textit{travaux préparatoires}.
\textsuperscript{86}. See Hogg, \textit{supra} note 4, at 390–91 n.69.
\textsuperscript{87}. \textit{[1952]} I.C.J. Rep. 28, 44–45.
\textsuperscript{88}. "In any case where, as here, the text to be interpreted is clear, there is no occasion to resort to preparatory work." \textit{Id.} at 45.
\textsuperscript{89}. See text accompanying notes 24–29 \textit{supra}.
\textsuperscript{90}. \textit{[1948]} I.C.J. Rep. 57, 87. Judges Zoricic and Krylov in separate dissents also referred to the \textit{travaux préparatoires} and came to the same conclusion as the authors of the joint dissent. \textit{Id.} at 98–101, 110.
In the *Genocide Case* the Court supported its interpretation reached on the basis of other evidence by resort to preparatory work. It held that the drafters had expressly decided to exclude an article on the subject of reservations, though they contemplated the possibility of such reservations being made. Indeed, it went so far as to find an informal understanding on this point in the General Assembly.

The authors of the main dissenting opinion placed reliance on the presumption selected by the Court and derived from prior international practice, but they came to the opposite conclusion about what the established practice was. They too referred to the preparatory work to support their arguments, but concluded that although the subject of a reservations article was raised in the Secretary-General's draft of the Convention, no proposal for such an article was made in the General Assembly committee or plenary meetings. They denied that any agreement concerning reservations was implicit in these debates.

Both Court and dissenters referred to preparatory work to support their conclusions in the *U.S. Nationals in Morocco Case*, with respect to the effect to be given to article 95 of the Act of Algeciras governing the valuation of merchandise coming into the French Zone. The Court concluded that “not much guidance is obtainable from these sources. . . .” It did give some weight, however, to a German draft of the article, which spelled out precisely the position claimed by the United States. This draft was defeated in the course of the negotiations, and from this the Court concluded that it was not the intention of the parties to make value at the place of shipment the sole criterion. The dissenters likewise discussed the significance of the German draft proposal, but argued that its rejec-

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91. Reservations to the Convention on Genocide, Advisory Opinion, [1951] I.C.J. Rep. 15 [herein referred to as the *Genocide Case*]. For previous discussion of this case, see Hogg, supra note 4, text commencing at 416 n.136.


93. Id. at 40-41. The Court apparently found such an implication in the fact that in the Sixth Committee debate, various delegates announced that their governments would be unable to ratify the convention in its present form, together with the fact that the convention was then adopted without a reservations provision. Id. at 22-23. If there had been such an understanding it might be thought that the types of reservation to be permitted might have been ascertained from such understanding, but that was not the case as found by the Court. The facts would seem to raise the equally plausible implication that a reservations article was deliberately omitted because of lack of agreement on its inclusion.

94. For previous discussion of this case, see Hogg, supra note 4, at 382-83 n.44.


96. Id. at 210. Likewise, the Court in the *Administrative Tribunal Case* found confirmation of their position in the preparatory work of the statute of the tribunal. [1954] I.C.J. Rep. 47, 54-55.
tion was premised on other grounds than a disagreement with the basis of valuation therein set out. 97

In the ILO Administrative Tribunal Case, 98 the Court apparently ignored preparatory material, or at least did not adopt or dispose of it in the course of its opinion. This case came before the Court on a request for an advisory opinion from the Executive Board of UNESCO. In 1954 the Director-General of that organization declined to renew the contracts of four employees of the organization. These four employees had been serving under fixed-term appointments which expired that year. The Director-General justified his failure to renew the contracts by explaining that the four employees had been invited to appear before the International Organizations Employees Loyalty Board 99 at the United States Embassy in Paris but had declined to do so. After exhausting other remedies, the four employees appealed to the Administrative Tribunal of the ILO, 100 which found itself competent to entertain the complaints and granted relief to the four employees. The request for an advisory opinion was made pursuant to article XII of the statute of the Administrative Tribunal of the ILO. 101

One of the problems dealt with by the Court in this case involved an interpretation of article 65 of the Court's statute—whether this was a case in which the Court should respond to the request for an advisory opinion. The Court's problem stemmed from the fact that the character of the question in issue was that of a contentious proceeding, a dispute between the four employees and UNESCO. Article 34(1) of the statute of the Court provides that "only states may be parties in cases before the Court." Article 65(1), on the other hand, provides:

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.

97. In short, the German amendment was not adopted, not because it was controverted on the point with which we are now concerned, but because of its other unsatisfactory features.


99. This Board of the United States Civil Service Commission had been set up by Executive Order of the President of the United States. Id. at 81–82; Exec. Order No. 10422, 18 Fed. Reg. 239 (1953).

100. UNESCO had previously recognized the jurisdiction of this tribunal over appeals from the UNESCO appeals board, by making the declaration provided for in article II, paragraph 5 of the statute of that tribunal. [1956] I.C.J. Rep. 77, 81.

101. Article XII of the Statute of the Administrative Tribunal of the ILO provides:

1. In any case in which the Executive Board of an international organiza-
The Court concluded without discussion that the request involved a legal question. It then discussed and resolved three obstacles to giving an opinion: first, that the provision in the statute of the Administrative Tribunal of the ILO made the opinion binding on the complainants and the organization; second, that another provision in the statute allowed only UNESCO and not the employees a right of appeal to the Court; and third, that only UNESCO and not the employees had a right of audience before the Court.\(^2\)

The significance of this part of the opinion lies in the failure of the Court to expressly consider the preparatory work of the statute of the Court. Four Judges voted against the Court's giving an opinion,\(^1\) but only Judges Cordova and Winiarski referred to the discussions that preceded the adoption of the statute of the Court at the San Francisco Conference in 1945.\(^104\) From this material it is clear that a draft proposal for article 34 of the statute, which made express provision for the Court to have appellate jurisdiction over cases tried under original jurisdiction by international administrative tribunals was submitted. It is equally clear that this proposal was defeated. At least some members of the Committee of Jurists apparently thought that the Court would have such appellate au-

\(\text{Id. at 78; U. N. EcoSoc Council Doc. No. 8C/ADM/27, Annex H (1954).}\)

The operative terms of the request were as follows:

I. Was the Administrative Tribunal competent, under Article II of its Statute, to hear the complaints introduced against the United Nations Educational, Scientific and Cultural Organization on 5 February 1955 by Messrs. Duberg and Leff and Mrs. Wilcox, and on 28 June 1955 by Mrs. Bernstein?

II. In the case of an affirmative answer to question I:

(a) Was the Administrative Tribunal competent to determine whether the power of the Director-General not to renew fixed-term appointments has been exercised for the good of the service and in the interest of the Organization?

(b) Was the Administrative Tribunal competent to pronounce on the attitude which the Director-General, under the terms of the Constitution of the United Nations Educational, Scientific and Cultural Organization, ought to maintain in his relations with a Member State, particularly as regards the execution of the policy of the Government authorities of that Member State?

III. In any case, what is the validity of the decisions given by the Administrative Tribunal in its Judgments Nos. 17, 18, 19 and 21?\[^{[1956]}\]

\(^{102}\) Id. at 84–87.

\(^{103}\) Nine Judges out of thirteen voted to give an advisory opinion, with Judges Winiarski, Klaestad, Zafrullah Khan and Cordova voting against doing it. Judges Hackworth, Badawi and Read voted against the decision of the Court concerning the competence of the administrative tribunal. \(\text{Id. at 101.}\)

\(^{104}\) \(\text{Id. at 160–61, 107.}\)
authority pursuant to article 36(1) of the Court statute. This misunderstanding appears to have developed in the committee from a confusion between appeals from international arbitral tribunals hearing complaints between states, and appeals from international administrative tribunals. That the preparatory material relates to

105. The question of whether the International Court should be given appellate jurisdiction in the international administrative system was raised by a memorandum presented by the Venezuelan delegation to the Committee of Jurists, dated April 10, 1945. Doc. No. Jurist 16, G/15, 14 U.N. Conf. Int’l Org. Docs. 388, 373-74 (1945). The memorandum contained the suggestion that:

17. The court shall have the following complementary duties:

a). It should be a supreme court within the international administrative system. In this regard, it should have the power to settle conflicts of competence between international bodies and should be able to set itself up as a court of appeal for questions coming in first instance under the jurisdiction of other international administrative courts which may be created.

This proposal was subsequently incorporated in a proposed draft of article 34 submitted by the Venezuelan delegation to Committee IV/1, as follows:

(2) As a Court of Appeal, the Court will have jurisdiction to take cognizance over such cases as are tried under original jurisdiction by international administrative tribunals dependent upon the United Nations when the appeal would be provided in the statute of such Tribunals.

Doc. No. WD 188, IV/1/24(1), 13 U.N. Conf. Int’l Org. Docs. 482 (1945). The Venezuelan representative spoke in favor of this draft at the 13th meeting of Committee IV/1 as follows:

He stated that the proposed amendment was intended to accomplish two things: (1) to enable the Court to settle conflicts of jurisdiction between intergovernmental international organizations dependent on the United Nations; (2) to empower the Court to hear appeals from other international administrative tribunals dependent upon the United Nations. He was supported by the Brazilian Representative who stated that he would desire to give the Court jurisdiction to hear appeals from any arbitral tribunal.

Doc. No. 615, IV/1/45, 13 U.N. Conf. Int’l Org. Docs. 215, 217 (1945). See also a statement of the Brazilian delegation in support. Doc. No. 1024, IV/1/45(a), 13 U.N. Conf. Int’l Org. Docs. 221 (1945). This proposed draft was considered by the committee at its 16th meeting, the relevant part of that consideration being reported as follows:

The Committee then considered the second part of the Venezuelan proposal. As amended, it would empower the International Court to take appeals from international administrative tribunals when the statute of such tribunals provide for such possible appeals. Some support was evidenced for this proposal, while other delegates thought that the power was already to be found in paragraph 1 of Article 36 of the Statute. In support of this last proposition, it was pointed out that Article 67 of the Rules of the old Permanent Court provided procedures for this purpose. It was decided to discontinue the discussion until the Venezuelan Delegation had submitted its proposal in revised form.

Doc. No. 801, IV/1/64, 13 U.N. Conf. Int’l Org. Docs. 270, 271 (1945). The report of the nineteenth meeting of the committee reads as follows:

2. Article 34 of the Statute

The Committee considered the proposal submitted by the Delegation of Venezuela (WD 188, IV/1/24(1)).

Decision: The Committee rejected a Venezuelan proposal to give the Court appellate jurisdiction.


With respect to the expression of opinion by some members of the committee that
an article under the heading "Competence of the Court" rather than under "Advisory Opinions" does not seem to lessen the impact of the fact that a decision was taken at San Francisco not to set up the Court as the highest stage in the hierarchy of administrative tribunals. This case, then, presents a striking illustration of the Court both deliberately ignoring and possibly going contra to some fairly clear evidence derived from the preparatory work. Moreover, the Court did not attempt to marshal contrary evidence from other rules of construction.

It would seem, then, that this facet of the decision constitutes an illustration of judicial legislation. The reason for such a step is contained in a sentence from the Court opinion:

Notwithstanding the permissive character of Article 65 of the Statute in

this problem was covered by article 36(1) of the statute, the following excerpts from the discussion of that article during the seventh meeting of the Committee of Jurists may be relevant:

Dr. Moneim-Bey (Egypt) called attention to the fact that there was an article in the Rules of the Court dealing with appeals and pointed out that Article 60 of the Statute provided that there should be no appeal. Judge Hudson explained that Article 60 declared that the judgment of the Court should be final and without appeal and that the rule to which attention had been called was intended to provide for procedure under agreements between States, providing that appeals from other international tribunals might be carried to the Court. . . . Judge Hudson observed that the Statute was flexible enough to permit appeals to the Court from other tribunals if the parties so desire.


106. Judge Winiarski made a point by saying:

Of course what is involved [in the present case] is not a regular appeal. Such appeals were contemplated by the delegation of Venezuela at the San Francisco Conference and would have necessitated an appropriate modification of Article 34 of the Statute. . . .

[1956] I.C.J. Rep. 77, 107 (separate opinion). But the comments in the preparatory work could be referable to the problem of appeals brought directly or indirectly. See his remarks earlier in the opinion:

[H]owever, as is noted in the Opinion, the procedure thus brought into being 'appears as serving, in a way, the object of a judicial appeal' against the four judgments of the Administrative Tribunal, and this utilization of the advisory procedure was certainly not contemplated by the draftsmen of the Charter and of the Statute of the Court.

Id. at 106.

107. The Court also appears to ignore the inconsistency between the procedure of no oral hearings and the terms of Article 66 of the statute of the Court. See, for instance, Judge Klaestad's view:

In order to prevent such an eventuality and to ensure, as far as possible, the necessary equality between the Organization and the individuals concerned, the Court was compelled to dispense with oral hearings in the present advisory case, though Article 66 presumes that oral hearings may be fixed by the Court, and in spite of the fact that such hearings have hitherto been fixed in all advisory cases which have been considered by this Court, as being a normal and useful, if not an indispensable, part of its proceedings.

Id. at 110.
the matter of advisory opinions, only compelling reasons could cause the Court to adopt in this matter a negative attitude which would imperil the working of the régime established by the Statute of the Administrative Tribunal for the judicial protection of officials. Any seeming or nominal absence of equality ought not to be allowed to obscure or to defeat that primary object.108

Comment

The practice of the Court indicates that it is permissible to resort to preparatory work in an attempt to clarify an ambiguity in the text. Whether or not the practice authenticates the significant limitation on the resort thereto which Judge Hudson suggests, may be open to question. The cases leave some doubt whether the Court looks at the preparatory work first and then concludes that the text is clear, or whether it looks at the text, finds it clear and then checks the preparatory work for consistency. If the problem is whether the judges should permit themselves to investigate this material before deciding whether the text is plain, the difficulty lies only in the form of words. Any evidence relevant to the meaning of the text is submitted to the Court with the written statements of the parties or in the oral arguments. When the Court is prepared to make a determination, it has all this evidence at hand. To say, then, that it is not permissible to look at the preparatory work if the text is plain is to say that, even with any doubts which that material may raise, the Court is satisfied that the meaning disclosed on the face of the text should prevail. The formulation of the rule given by the Court, and the quotation from Judge Hudson indicate, however, that more is involved than the order in which the evidence may be appraised. The practice can be taken as supporting the proposition that the Court will not permit evidence derived from preparatory work to extend or contradict a meaning found in the language of the text, unless it is prepared to find an ambiguity in that text. Read in this sense, the rule is subject to a significant limitation. Expressed in this form the rule reflects the same thinking found in the familiar common law rule relating to the admissibility of parol evidence to vary, add to or contradict a written document.109


109. 3 CORBIN, CONTRACTS §§ 576, 579 (1951); 11 HALSBURY, LAWS OF ENGLAND § 658 (3d ed. 1955). The parol evidence rule is sometimes given an operation which penalizes one of the parties for not having a particular term reduced to
But merely because the text affords the best evidence of the intentions of the parties by no means leads to the conclusion that the text is the only evidence thereof. In none of the cases before the Court has a party been precluded from offering evidence or argument based on preparatory work. The Court has ostensibly declined to refer to it but has not taken the more drastic step of declining to admit it.

The usefulness of the preparatory work varies as widely as the forms which the work may assume. Reference may be made to individual speeches at the negotiating table, to committee reports, to statements made at the time of voting or signature. Reference may also be made to a memorandum approved by all the negotiators, which embodies their common understanding of the meaning which particular words in a draft were intended to bear. The form which the material takes in a particular case will have a direct effect on the weight to be assigned to it. The *U.S. Nationals in Morocco Case* points up the problem of weighing the evidence available from this material. The introduction of a draft resolution covering the matter in dispute and the subsequent rejection of that draft by the negotiators may indicate a clear intention of the parties to exclude the provision contained in the draft from the final text either expressly or by implication. And yet, the other argument has considerable force, namely, that dangers lurk in assuming that one particular motive prompted rejection of the draft. Statements made during the course of a debate may be even more open to suspicion, although such material would appear to underly the holding of the Court in the *Genocide Case*. As the logical necessity for any particular inference from the material decreases, the opportunity to use that material as a cloak for covering a conclusion reached on other grounds increases. In many situations different parts of the material may give rise to contradictory inferences; in others the material may dispose of the issue beyond doubt, as in the case of an interpretative resolution. The difficulty in evaluating the evidence derivable from this source affords no reason, however, for excluding it from the consideration of the Court.

In the *Corfu Channel Case (Preliminary Objection)* the United Kingdom made a strong attack against the use of such material in interpreting the United Nations Charter. It claimed first that such a reference could be made only when the other rules of interpretation had failed to indicate one of the possible meanings clearly. But in addition it argued that since the preparatory work was never ad-

writing and incorporated in the final agreement. The objection then goes to form and not to real intention. None of the foregoing cases indicates any such application of the rule to preparatory work by the Court. Indeed, the *Genocide Case* may indicate an attitude inconsistent with any such use of the rule.
missible against a party who had not taken part in the negotiations; the use of the San Francisco documents against some of the Members of the United Nations and not against others would be most unfair. The seven Judges who considered the United Kingdom's argument directed to the meaning of article 25 of the Charter, found it unconvincing, but in holding against it they did not expressly refer to the problem of preparatory work with respect to the Charter. From the two Membership cases it appears that the Court has not felt itself estopped from considering the San Francisco documents in spite of the fact that the two opinions would affect, either directly or indirectly, the obligations of Members who took no part in the negotiations of the Charter.

The notorious unreliability of some forms of preparatory work as evidence of the intention of the parties may explain why courts of the United Kingdom have excluded all such material in interpreting a statute. But there is an equally clear tradition in this

110. The Permanent Court had established this rule in the Case Relating to the Territorial Jurisdiction of the International Commission of the River Oder, P.C.I.J., ser. A, No. 23, at 41-43 (1929) (order annexed to the judgment).

111. 3 CORFU CHANNEL CASE—PLEADINGS, ORAL ARGUMENTS, AND DOCUMENTS 115-17 (I.C.J. 1950).

112. See, for instance, Vacher & Sons v. London Society of Compositors, [1912] A.C. 107, particularly per Viscount Haldane at 113:

For my own part, I do not propose to speculate on what the motive of Parliament was. The topic is one on which judges cannot profitably or properly enter. Their province is the very different one of construing the language in which the Legislature has finally expressed its conclusions, and if they undertake the other province which belongs to those who, in making the laws, have to endeavour to interpret the desire of the country, they are in danger of going astray in a labyrinth to the character of which they have no sufficient guide.

In endeavouring to place the proper interpretation on the sections of the statute before this House sitting in its judicial capacity, I propose, therefore, to exclude consideration of everything excepting the state of the law as it was when the statute was passed, and the light to be got by reading it as a whole, before attempting to construe any particular section. Subject to this consideration, I think that the only safe course is to read the language of the statute in what seems to be its natural sense.

See also CRAIES, STATUTE LAW 121-32 (5th ed. 1952). Lord Watson, delivering the advice of the Judicial Committee of the Privy Council in the case of Administrator-General of Bengal v. Prem Lal Mullick, [1895] 22 L.R. Indian App. 107, 118 (cited in Craies, op. cit. supra, at 122), stated:

Their Lordships observe that the two learned Judges who constituted the majority in the Appellate Court, although they do not base their judgment upon them, refer to the proceedings of the Legislature which resulted in the passing of the Act [No. II] of 1874 as legitimate aids to the construction of Sect. 31. Their Lordships think it right to express their dissent from that proposition. The same reasons which exclude these considerations when the clauses of an Act of the British Legislature are under construction are equally cogent in the case of an Indian statute.

See also 31 HALSBURY, LAWS OF ENGLAND § 621, at 490-91 (2d ed. 1938).

A similar position has been taken by the Supreme Court of Canada: Gosselin v. The King, [1903] 38 Can. Sup. Ct. 255. But see Thorsen, P., delivering the judg-
ment of the Exchequer Court of Canada in Mountain Park Coals Ltd. v. Minister of National Revenue, [1952] Can. Tax Cas. Ann. 392, 395:

It is stated in Maxwell on Interpretation of Statutes, 9th edition, page 29, that it is unquestionably a rule that what may be called the parliamentary history of an enactment is not admissible to explain its meaning. While there are many instances where the Courts have resorted to the parliamentary history of an enactment in aid of its construction and while on grounds of principle it may be argued that the so-called rule should be regarded as a counsel of caution rather than a canon of construction, the weight of judicial authority supports the statement in Maxwell.

A similar position has been taken by the High Court of Australia: see South Australia v. Commonwealth, 65 Commw. L.R. 373 (1942), particularly per Latham, C.J., at 409-10:

The words of a statute, when applied to the state of facts with which the statute deals, speak for themselves. They express the intention of Parliament. A statute may be based upon the report of a committee or of many committees, or upon cabinet memoranda, or upon a resolution of a political party or of a public meeting, or upon an article in a newspaper. The intention of Parliament as expressed in the statute cannot be modified or controlled in a court by reference to any such material. . . . Reports of speeches in Parliament are also irrelevant and inadmissible.

Whether the spirit always goes with the word may be put in issue by some comments of Commissioner Piddington in Re Standard of Living Determination and Living Wage Declaration, Adult Male Rural Employees, [1927] A.R. (N.S.W.) 250, quoted in 19 Australia Digest 274:

I have made use, and shall make use, of the history of this legislation not as in any way altering the view we ought to take of the meaning of the words now found in the law, but as guiding the tribunal to analyse their meaning, knowing how they came to be used. It is clear law that the debates of Parliament cannot be used for construction purposes, but a lawyer may often find a line of enquiry opened to him by reading the debates and seeing from them what was contemplated.

In an article, L'interprétation des traités, 24 RECUILL DES COURS 5, 120 (1928), Ehrlich noted that (at that time) the courts of at least two European countries made use of legislative history in interpreting statutes:

Cette coutume de citer soit les débats parlementaires, soit les motifs écrits des projets de lois et les rapports des comités est suivie encore par les tribunaux continentaux, par exemple en Allemagne et en Pologne. De même, le code civil du Chili prescrit que s'il y a dans une loi une expression obscure, il est permis d'avoir recours à l'intention ou à l'esprit nettement manifesté dans la loi même, ou dans l'histoire digne de foi de son établissement. Par contre, il a surgi, par exemple actuellement en France, une tendance en cas de doute à s'en tenir à des considérations autres que celles tirées des recherches purement historiques au sujet de la signification d'une clause.

(This custom of citing either parliamentary debates or written statements of the reasons for presenting a draft bill and committee reports is still followed by continental tribunals, for instance in Germany and in Poland. Likewise the Chilean civil code requires that if a law contains an obscure expression recourse may be had to the intention or to the spirit clearly manifested in the same law, or to that part of the history of its adoption which is reliable. On the other hand, a tendency has arisen in France in a case of doubt to rely on considerations other than those drawn from purely historical research as to the meaning of a clause.)

See also his statement in Ehrlich, Comparative Public Law and the Fundamentals of its Study, 21 COUL. L. Rev. 623, 637 n.61 (1921):

On the Continent of Europe debates, statements of grounds which prompted the government to present the bill, and statements of committees reporting bills to the full house, are frequently referred to in argument and in decisions of courts. . . .
country of using such material.\textsuperscript{113} In fact, the practice is so common that one skeptic has been heard to say that the language of the statute will not be looked at unless the legislative history is obscure. The courts of both countries, however, agree that such evidence should be admitted where an ambiguity in a private document is shown.\textsuperscript{114}

If the problem were to arise as one of first impression, some difficulty might be encountered in explaining which words in article 38(1) of the statute of the Court\textsuperscript{116} justify the use of preparatory material as an aid to interpretation. The use of such material can scarcely be justified by reference to "the general principles of law recognized by civilized nations," unless the analogy is accepted between a treaty and a contract rather than the competing analogy of treaty and statute.\textsuperscript{116} The use of such material became firmly established in the case law of the Permanent Court of International Justice and is now confirmed by the International Court of Justice so that this aspect of the question appears to be moot.

The advisability of giving substantial weight to this source of evidence seems to depend on the facts of the individual case. The real value of this evidence depends on the relative trustworthiness of the published records of the negotiations. The substantial use made of the \textit{Congressional Record} and the equivalent state legislative records in interpreting statutes in this country no doubt bears a direct relation to the extensive safeguards that surround the preparation and preservation of those records. It may be doubted whether the same tradition of careful checking and preparation will be reflected in the records of some treaty-negotiating conferences. Such records may be published long after the negotiators have departed from the council table and indeed may be published after the treaty has formally ratified.\textsuperscript{117} Then too the dictates of diplomacy

\begin{itemize}
  \item \textsuperscript{113} See, e.g., Schwengmann Bros. v. Calvert Distillers Corp., 341 U.S. 384 (1951); United States v. American Trucking Ass'ns, 310 U.S. 534 (1940).
  \item \textsuperscript{114} See, e.g., 3 Corbin, \textit{Contracts} § 579 (1951); 11 Halsbury, \textit{Laws of England} § 658 (3d ed. 1955).
  \item \textsuperscript{115} Article 38(1) of the statute of the Court provides:
    \begin{itemize}
      \item The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
        \begin{itemize}
          \item a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
          \item b. international custom, as evidence of a general practice accepted as law;
          \item c. the general principles of law recognized by civilized nations;
          \item d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.
        \end{itemize}
    \end{itemize}
  \item \textsuperscript{116} For a discussion of the analogy between a treaty and a private law contract, see Lauterpacht, \textit{Private Law Sources and Analogies of International Law} 155–80 (1927).
  \item \textsuperscript{117} One argument against the use of preparatory material which might be made is as follows: In the case of a number of treaties the operative consent of the
\end{itemize}
lead notoriously to behind-the-scenes compromises—understandings which may not be reflected in the minutes of the conference. Such difficulties merely serve to emphasize the need for caution in the use of this material. Perhaps this caution explains the consistent use of this evidence by the Court to support a particular interpretation indicated on the basis of other evidence. Only in the Genocide Case can it accurately be said that a majority of the Judges may have placed primary reliance on such evidence in arriving at their conclusion. And even in that case the Court was prepared to base its conclusion on either of two grounds, only one of which was dependent on the agreement allegedly found in the debates of the Sixth Committee of the United Nations.

G. The Rule of Authentic Interpretation

In the First South-West Africa Case the Court referred to this rule in the following terms:

Interpretations placed upon legal instruments by the parties to them, though not conclusive as to their meaning, have considerable probative value when they contain recognition by a party of its own obligations under an instrument.\textsuperscript{118}

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individual states is derived not from the signing of the text by their representatives but from subsequent ratification by the appropriate branch of the government. Where no legislative approval is required for the ratification, it may be assumed that the representative has adequately briefed those with the executive power about what took place during the negotiating process. Indeed, it is common practice for a negotiator to send daily cables or reports to his state department containing such information. Where legislative action is required, the full communication of such information to the individual members may rest in presumption rather than fact. A Court could fall back on the notion of respondeat superior, but if the material is being used to indicate a real intention, and if what is important is the intention of the legislators, the material may become a somewhat less reliable guide.

\textsuperscript{118} [1950] I.C.J. Rep. 128, 135-36; see Hogg, supra note 4, at 387-88 n.62.

This form of evidence is clearly admissible in this country for the purpose of interpreting a contract. 3 Corbin, Contracts § 558 (1951):

In cases so numerous as to be impossible of full citation here, the courts have held that evidence of practical interpretation and construction by the parties is admissible to aid in choosing the meaning to which legal effect will be given. The admissibility of such evidence in the United Kingdom is not so clear. The following statement appears in 11 Halsbury, Laws of England § 666 (3d ed. 1955):

If, after other methods of interpretation have been exhausted, there remains a doubt as to the effect of the instrument, it is permissible to give evidence of the acts done under it as a guide to the intention of the parties, in particular, of acts done shortly after the date of the instrument. Evidence of the acts done cannot, however, be admitted to contradict the clear meaning of the instrument. Many of the authorities cited in Halsbury for the admissibility of evidence of subsequent usage involve the interpretation of ancient documents. It appears that in the United Kingdom, the law as to declarations against interest does not provide a vehicle for the introduction of evidence concerning subsequent statements by parties to a contract as to its meaning. See Pepson, Evidence 292-95 (9th ed. 1952). Nor does the law of admissions provide such a vehicle. Id. at 599:

When a transaction has been reduced to, or recorded in, writing either by
It interpreted the provisions of the mandate and the Covenant as requiring the continuance of South Africa's obligations thereunder despite the dissolution of the League of Nations, supporting its conclusion by reference to article 80(1) of the United Nations Charter which maintains the rights of States and peoples and the terms of existing international instruments until the territories in question are placed under the Trusteeship System. . . . this provision presupposes that the rights of States and peoples shall not lapse automatically on the dissolution of the League of Nations.119

The Court admitted, however, that the article only says that nothing in Chapter XII shall be construed to alter the rights of States or peoples or the terms of existing international instruments.120

Since this article could not create a new obligation for South
Africa, the Court appeared to use it as evidence of an understanding among most of the states who had been parties to the mandate and members of the League, including South Africa itself, as to what the obligations under the mandate and the Covenant were. The Court relied in a similar fashion on a resolution of the League of April 18th, 1946, and the declarations of the representatives of South Africa made then and afterwards.\footnote{121}

In the \textit{Reparations} and \textit{Corfu Channel (Merits)} cases also, the conduct of the parties, subsequent to signing the text in question, was taken as evidence of the meaning they intended to assign to particular provisions of the agreements.\footnote{122}

\footnote{121}{That resolution, the Court stated, “said that the League’s functions with respect to mandated territories would come to an end; it did not say that the Mandates themselves came to an end.” \textit{Ibid.} It held that the declarations of the Union of South Africa government constituted: “recognition . . . of the continuance of its obligations under the Mandate and not a mere indication of the future conduct of that Government.” \textit{Id.} at 135. Judge McNair dissented from the application of this rule to the question of transfer of supervisory functions to the General Assembly. He failed to see the relevance of article 80(1) on this point and regarded the declarations of the Union of South Africa government as “contradictory and inconsistent” and, therefore, inadequate as evidence of assent to such succession. He likewise dismissed the argument made on the basis of the resolution of the League. \textit{Id.} at 160–61. In rejecting the application of this rule, he seemed to adopt the view that a new agreement between the parties would be required to achieve such a result. Judge Read explicitly stated that the Court’s conclusion did not involve an interpretation but an amendment to the provisions of the mandate, a transfer which would not, in law, be effected “without the consent and authority of the League, or of Members of the League whose legal rights would thus be impaired.” \textit{Id.} at 165.}

Concerning the issue of competence to change the status of the territory, the Court applied much the same type of argument. The power of consent, it said, was analogous to the supervisory powers. \textit{Id.} at 141. Articles 79 and 85 of the Charter, it added, gave “the General Assembly authority to approve alterations or amendments of Trusteeship Agreements. By analogy, it can be inferred that the same procedure is applicable to any modification of the international status of a territory under Mandate which would not have for its purpose the placing of the territory under the Trusteeship System.” This conclusion is “strengthened by the action taken by the General Assembly and the attitude adopted by the Union of South Africa which is at present the only existing mandatory Power.” \textit{Id.} at 142.

Judge McNair concurred in the decision on this point, not on the basis of an interpretation of the mandate but of the resolution of the League of April 18th, 1946, whereby he said, the members had “consented to any arrangements for the modification of the terms of the Mandate that might be agreed between the United Nations and the Union Government. . . .” \textit{Id.} at 163. Judge Read reached a similar conclusion. \textit{Id.} at 168–69.

\footnote{122}{For previous discussion of the \textit{Reparations Case}, see Hogg, \textit{supra} note 4, text commencing at 409 n.110. For previous discussion of the \textit{Corfu Channel Case (Merits)}, see text accompanying notes 8–14 \textit{supra}. In the \textit{Reparations Case}, as regards the general question whether the United Nations Organization had capacity to bring a claim at international law, the Court invoked this rule, saying: [T]he Organization was intended to exercise and enjoy, and is in fact exercising and enjoying, functions and rights which can only be explained on the basis of the possession of a large measure of international personality and the capacity to operate upon an international plane. \cite{[1949] I.C.J. Rep. 174, 179.} The answer was found then, in the provisions of the}
In three further cases the conduct or statements of one of the parties after signing were relied on to support a particular interpretation, but in these cases the evidence provided was more in the nature of declarations against interest rather than of common agreement concerning the intended meaning of particular words in a treaty. In the Ambatielos Case (Preliminary Objection) the decision of the Court that the 1926 declaration was an interpretative provision forming an integral part of the 1926 treaty, was based substantially on evidence found in the terms of the United Kingdom's instrument of ratification.

Charter together with the necessary implication from those provisions, supported by an application of the rule of authentic interpretation.

In considering the question of whether the parties had intended the Court to assess compensation, the Court in the Corfu Channel Case (Merits) supported its conclusions by reference to this rule. Thus it said:

The subsequent attitude of the Parties shows that it was not their intention, by entering into the Special Agreement, to preclude the Court from fixing the amount of the compensation.

[1949] I.C.J. Rep. 4, 25. The Albanian agent did not raise this issue prior to his last oral statement before the Court, and he had previously claimed that it could decide what kind of satisfaction was due under the second part of the special agreement. Id. at 23–25. Since the construction of the two parts was parallel, the Court implied that this claim could be understood as an admission of its jurisdiction to assess compensation. Id. at 26. Judge Krylov, in his dissenting opinion, found this argument to be without merit since the reaffirmation of the United Kingdom's submission was “contrary both to the letter and the spirit of the Special Agreement...and it was disputed by the Albanian Counsel.” Id. at 73. The other dissenting judges did not discuss the application of this rule but arrived at their conclusions on other grounds.

Individual judges have referred to this rule in two other cases. In the First Membership Case Judge Azevedo supported his conclusion based on the rule of expressio unius and the use of travaux préparatoires, by reference to it. The current practice of the organs of the United Nations, he suggested, indicated that the conditions expressed in article 4 of the Charter were exhaustive. [1948] I.C.J. Rep. 57, 79. None of the other judges relied on this practice, and its value as evidence of an authentic interpretation may be doubted. The decisions in the General Assembly which could perhaps support such an interpretation, were not unanimous but taken on a qualified majority vote. To admit that the consistent practice of the organs could give rise to an authentic interpretation would result in the conclusion that the Charter could be interpreted with conclusive effect by a two-thirds vote in the General Assembly. In the Asylum Case, [1950] I.C.J. Rep. 266 [herein referred to as the First Asylum Case], Judge Badawi Pasha looked to the conduct of the states after they had concluded the Havana Convention, to determine the meaning of the words "urgent cases." Like the Court, he placed primary reliance on the prior Latin American practice. He alone, however, looked to the subsequent practice and concluded that every grant of asylum, without exception, had had the common characteristics of a connection with revolution or rebellion. He, therefore, considered that this practice had either brought about an abrogation of the requirement of urgency or amounted to an authentic interpretation. [1950] I.C.J. Rep. 266, 304–06. The First Asylum Case is discussed previously in Hogg, supra note 4, text commencing at 421 n.152.

123. See Hogg, supra note 4, at 390–91 n.69.
124. [1952] I.C.J. Rep. 28, 43. Judge McNair, whose opinion was typical of the other dissents on this point, took the position that the language of the instrument...
Both the Court and dissenters made use of this rule in the U.S. Nationals in Morocco Case. In concluding that the Act of Algeciras confirmed consular jurisdiction in particular situations spelled out in the Act, the Court supported its conclusion by reference to articles 10 and 16 of the Convention between Great Britain and France of July 29th, 1937. Similarly, the dissenters supported their interpretation of article 95 of the Act by reference to the practice followed by the French customs authorities in the period subsequent to the Act of Algeciras. They also cited an unratified Treaty of Commerce of 1938 between Morocco and the United Kingdom and the negotiations which accompanied it. From this evidence they concluded:

All this shows that the view now put forward by France as an interpretation of Article 95 was described by France and the United Kingdom in 1938 as an abrogation of that Article.

The evidence relied on was statements made by France in the course of negotiations with the United Kingdom, material which of ratification was entitled to little weight as evidence of the intention of the parties. He did not challenge resort to this form of evidence but argued that since the words relied on by the Court had been in standard use for the last six hundred years, they were of an archaic or purely routine character. Id. at 61–62. Judge Basdevant carried the same point a little further by stating that primary importance ought to be attached to the words selected by those persons responsible for formulating the will of the parties, that is to say, the actual drafters of the treaty and the declaration. He pointed out that at the formal ratification stage, drafters rarely have anything to do with the formal language of the instrument of ratification, and that in this situation the operation of ratification commonly takes a form deriving from tradition, “which is followed scrupulously, and therefore blindly.” Id. at 69–71.

Reliance by the Court on a mechanical rather than a purpose test seems somewhat inconsistent with other decisions of the Court. It is particularly surprising that Judge Alvarez was included among the majority in this decision. It is also noteworthy that the Court chose to place great weight on the language of the ratification but declined to attach any significance to the other mechanical argument made by the United Kingdom, namely, the argument based on the reference in the declaration to “the treaty,” rather than to “the present treaty” or “this treaty,” as might be expected if the parties intended the declaration to be incorporated in the main treaty. Id. at 41–42. Judge Basdevant added emphasis to this issue when he noted that the words “the treaty” were selected by those persons responsible for expressing the will of the parties, whereas the words of the ratification and the act of publishing the treaty, schedule and declaration in one document were governed by the actions of officials who, unlike plenipotentiaries, were not responsible for elaborating and stating that will. Id. at 70. The analogy might be drawn to the Anglo-American presumption in a partly written, partly printed document, that the written words override the printed ones.

125. See Hogg, supra note 4, at 382–83 n.44.
127. Id. at 233. Note also the Court’s reliance on French declarations to support its conclusion that Spain had relinquished all capitulatory jurisdiction in the zone. Id. at 195. In his dissent, Judge Hsu Mo objected to the use of such evidence:

In any case, the rights of the United States vis-à-vis Morocco in matters of jurisdiction, must be determined by their own treaty relations, and could not derive from any admission made by France on Morocco’s behalf to a third party.

Id. at 214.
could be said to be res inter alios acta qua the intentions of France (Morocco) and the United States. This could raise the issue whether such unilateral evidence of intention is only available when it is against interest.\(^{128}\)

The use of these declarations might be compared with the Court's use in the Anglo-Iranian Case (Preliminary Objection)\(^ {129}\) of the law passed by the Iranian Majlis. The Iranian law of 1931, approving the text of the declaration to the Court's statute, made it clear that Iran regarded the declaration as limited to disputes arising out of treaties thereafter concluded.\(^ {130}\) The Court's consideration of this evidence, over the objection of the United Kingdom that it was inadmissible, is interesting. Iran was relying on its own internal statute to support a restricted interpretation of its declaration. This might be described as a declaration "in favor of interest."\(^ {131}\)

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128. The first of the Indian preliminary objections in the Right of Passage Case (see note 68 supra) involved the alleged incompatibility of the third reservation of the Portuguese declaration with article 36 of the statute of the Court. In reaching a conclusion that the reservation was compatible, the Court relied, inter alia, on a new declaration substituted by India on January 7th, 1956, whereby India claimed to terminate her prior declaration by simple notification, without any obligatory period of notice. [1957] I.C.J. Rep. 125, 143–44. This evidence was apparently used by the Court as an admission by India that a declaration subject to change without notice is valid under the Court's statute. A part of India's objection was that the Portuguese reservation, as asserted by India, contained the power for Portugal to dispossess the Court of jurisdiction after it had become seized of a case. The Court took note of an express denial by Portugal that its reservation was intended to have any such retroactive effect, id. at 142, but the Court did not advance this Portuguese admission as a reason to support its conclusion, presumably because, in the particular circumstances, this was a self-serving admission. Judge Chagla was critical of any reliance on the admission. In his opinion:

No canon of construction is more firmly established than the one which lays down that the intention of a party to an instrument must be gathered from the instrument itself and not from what the party says its intention was. Id. at 167. He also thought that the argument with respect to the Indian declaration was "specious." Ibid.

129. See Hogg, supra note 4, text commencing at 391 n.71.


131. The Court justified its use of this particular evidence in the following terms:

It is contended that this evidence as to the intention of the Government of Iran should be rejected as inadmissible and that this Iranian law is a purely domestic instrument, unknown to other governments. The law is described as "a private document written only in the Persian language which was not communicated to the League or to any of the other States which had made declarations."

The Court is unable to see why it should be prevented from taking this piece of evidence into consideration. The law was published in the Corpus of Iranian laws voted and ratified during the period from January 15th, 1931, to January 15th, 1933. It has thus been available for the examination of other governments during a period of about twenty years. The law is not, and could not be, relied on as affording a basis for the jurisdiction of the Court. It was filed for the sole purpose of throwing light on a disputed question of fact, namely, the intention of the Government of Iran at the time when it signed the Declaration.

Id. at 107. Judges McNair and Hackworth both took exception to the use of this
Comment

Where parties to a treaty have used ambiguous language, at first sight it does not seem unreasonable to place credence in their subsequent declarations if the declarations coincide in assigning one particular meaning to those ambiguous words. Similarly, where their subsequent conduct is consistent with one possible meaning and inconsistent with another, it is reasonable to suppose that they originally intended the first meaning and not the other—states are presumed to have observed their treaty obligations rather than to have broken them. Further reflection on the merit of resorting to subsequent declarations of the parties will indicate, however, that those declarations can take one of two forms: they can have the effect of expressly formulating the meaning which the parties always intended the text to bear, but which, perhaps through oversight, they expressed imperfectly in the written text; they can also have the effect of constituting a new agreement between the parties on a point on which there was not any true prior agreement because of the oversight of a latent ambiguity, or because previously they had intended a different agreement. In the second situation the declaration may have the effect of creating a new agreement rather than declaring the intention of the parties. It would be practically impossible to ascertain in a particular case which of the two situations is involved. If, then, the declarations are to be given effect in one situation, it is difficult not to give them equal effect in the other.

Is there any reason why the subsequent declarations of the parties should not be given effect even assuming that they involve a new agreement? The Court's decision in the First South-West Africa Case concerning change in the status of the territory seems explainable only on the basis that it found a new agreement relating to this point entered into at the time of the dissolution of the League. Judge McNair voted with the Court expressly on this basis. And yet the dissents of Judges McNair and Read on the question of transfer of supervisory powers to the United Nations seem to rest on the ground that a new agreement would be required to achieve that result. It is not clear from their opinions whether they took this position on the ground that there was inadequate evidence of consent or that consent would require reduction to a particular form, that is, a treaty in writing and approved by the appropriate domestic authorities. The only objection to placing reliance on evi-

particular evidence of Iran's intention in filing the declaration. Id. at 121, 136. The approach, they indicated, could be equated to the criterion of objective interpretation familiar in American and English contracts cases. Judge Carneiro also affirmed the need for objective interpretation, though not specifically with reference to this particular piece of evidence. Id. at 168.
dence of declarations of the parties after the signing of a treaty would appear to go to this question of form. In the above decisions it does not appear that the Court has addressed itself to this problem. Implicit in the First South-West Africa Case is the assumption that the South African delegate had authority to bind his country by his statements made at the time of the dissolution of the League and afterwards. If the representative’s State does not put in issue the authority of the representative to make binding admissions of this sort, there seems to be no reason for the Court to consider the problem of proof of authority or the particular form of the declaration. Even where the issue of authority was put before the Permanent Court in the Eastern Greenland Case, the Court gave effect to an oral declaration by a responsible state official. This raises the question: Why did the Court in defining the use of this sort of evidence in the First South-West Africa Case hold that this form of evidence was not conclusive? If the intention of the parties is the criterion of interpretation, it may be doubted if the time of joining in a common intention is very material, that is, if anything turns on whether the intention dates from the time of signing the original treaty or from a later informal understanding. Perhaps doubts on problems of form may underly the Court’s qualification of the use of this evidence. No doubt the lack of formality would be evidence in itself to be considered where the declaration was ambiguous. Where the declaration leaves some doubt, it may be fair to infer that a binding admission was not intended, on the assumption that such a commitment might properly take a more formal guise if really intended to constitute a commitment. But given a clear and unambiguous declaration, the reason for the Court’s qualification is less obvious.

It is not wholly clear from the opinion in the First South-West Africa Case whether the Court was basing its interpretation on evidence of consent to a particular meaning by all parties interested in the League and the mandate or on what might be described as a unilateral declaration against interest. The use of subsequent conduct in the Reparations and Corfu Channel (Merits) cases appears to be premised on agreement rather than on a unilateral act, but the reliance on such evidence in the U.S. Nationals in Morocco Case appears clearly to be founded in unilateral declarations rather than in an agreement between the United States and France on the meaning of the treaty obligations. In one sense evidence of subsequent agreement is evidence of unilateral admission taken together with a corresponding admission by the other parties. But the use of such evidence in the Morocco case raises the question whether

declarations or conduct ought to be given weight as evidence of intention where there is no evidence of subsequent agreement as to meaning, but only of unilateral admission as to meaning.

Granted that a unilateral admission against interest may be used against the state making it, the Anglo-Iranian Case (Preliminary Objection) raises further doubt whether admissions in favor of interest should be considered evidence of meaning. Where a meaning is asserted by one party and communicated to the second party, if the latter does not challenge it, the asserted meaning might legitimately be considered by the Court along with second party's silence, as some evidence of agreement as to meaning. In the Anglo-Iranian Case the United Kingdom expressly denied having received any knowledge of the Iranian assertion either by communication from the Iranian government or otherwise. In such a situation the assertion would seem to the writer to be no evidence of common intention of the parties concerned. An admission against interest becomes such evidence of common intention because the admission is adopted before or at the trial by the other party who did not make the admission. Absent such adoption the admission or assertion is evidence merely of the intention of one party to the treaty.

The preceding discussion has been premised on the assumption that the particular admission or agreement was clear and unambiguous in its content. From the foregoing cases it is obvious that subsequent declarations or conduct pose problems of interpretation in themselves just as much as the basic text, and that the weight to be given this evidence will be wholly dependent on the individual appreciation of the particular declaration or conduct. An attempt to rely on subsequent conduct, as opposed to declarations, may pose particularly difficult problems. As noted at the outset of the comment, it may not be sufficient for a state to show that the conduct of another state was consistent with one interpretation; it may be necessary to go further and show that the conduct is inconsistent with any other possible interpretation of the basic text. For instance, the cogency of the argument of the dissenters in the U.S. Nationals in Morocco Case—that their interpretation of article 95 of the Act of Algeciras was supported by the subsequent conduct of France in basing customs dues on cost at port of shipment for a substantial period after the conclusion of the Act—may be questioned. If for a number of years the French saw fit not to exercise what they may have regarded as their full power in assessing customs dues, this failure would seem but slight evidence of the meaning they attached to article 95.
H. The Rule of Purpose

It has been shown that in the practice of the Court the purposes which the parties to a treaty are proved to have had in mind at the time of signing plays a vital part in the decision on implication of terms. The Court’s use of evidence of purpose, however, goes far beyond the cases of necessary implication. In nearly every case of treaty interpretation which has come before the Court, some reference has been made to the purpose which the parties had or must have had in mind, as affecting the meaning of the language found in the text. No hard and fast declaration of the admissibility and probative value of such evidence has been made, apart from the statement in the Second Membership Case that where the language of the instrument is plain it is not permissible to resort to other evidence of meaning. However, the Court frequently resorts to this form of evidence, as illustrated by the following passage from the Genocide Case:

- The object and purpose of the Genocide Convention imply that it was the intention of the General Assembly and of the States which adopted it that as many States as possible should participate. 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.133

In one sense of the word all the rules discussed thus far depend for their significance on the light they shed on the purpose of the parties as reflected in the words the parties selected and incorporated in the agreed text. There is much sense in the assertion of Humpty-Dumpty in Through the Looking-Glass that:

- when I use a word ... it means just what I choose it to mean—neither more nor less.134

but in the legal context this phrase becomes: “words mean what I manifest I choose them to mean,” and the words themselves become the best evidence of manifestation. Thus the Court’s use of context indicates that the purpose of the parties may be derived from the whole instrument, including a preamble or recitals, if any. Legisla-

That interpretation is to be favored which will make the instrument effective to serve its purpose. ... Quite clearly, the Court would not be justified in dealing with an international instrument as if it had been concluded in vacuo. It must take account of the circumstances in which the parties acted if it would understand their purposes, and its construction of an instrument may very properly be influenced by factors of a political or social significance.

134. LEWIS CARROLL, THROUGH THE LOOKING GLASS 124 (1906).
tive history (preparatory work) or the prior practice of states is likewise evidence of the purpose of the parties, but here the resort is not to the words of the instrument itself but rather to evidence outside the instrument. The decisions make it clear, however, that the Court does not feel confined to these particular forms of evidence in an attempt to ascertain the purpose of the parties. Under the heading of "purpose," then, will be discussed sources of evidence of purpose derived from outside the instrument which are not considered under other specific headings in this paper. The area of inquiry might be roughly delimited as the history of the subject matter of a treaty, excluding negotiations, together with the setting in which the treaty was concluded. The problem in evaluating the use of the rule will be found in a consideration of the types of evidence which the Court has considered as proof of the purpose of the parties.

Assuming that the plain meaning of a disputed clause provides no definite answer, the purpose of the parties to a particular treaty can be established in one of three ways: (1) by express recitals of purpose in the text including the preamble or inferences drawn therefrom; (2) by statements of purpose not incorporated in the text but made in the course of negotiations or elsewhere; and (3) by inferences of purpose derivable from the conduct of the parties and the factual background of the treaty.

It is relatively rare to find a treaty containing a detailed specification of the purposes of the parties in addition to operative clauses. A general statement of purpose, on the other hand, is common, but the general and vague statement of purpose frequently gives little guidance to a court when the meaning to be given specific language or the possibility of an implied term is under consideration. The problem usually becomes one of deciding the specific purpose of the parties with respect to the particular disputed clause of the treaty. In one case, *U.S. Nationals in Morocco,* the Court did place reliance on a recital of purpose in disposing of one of the issues raised. One of the arguments advanced by the United States in the case was that the capitulatory system had achieved a status independent of the most-favored-nation clause in the 1886 treaty by reason of the provisions of the Madrid Convention of 1880. This argument was disposed of in the Court opinion in the following words:

The purposes and objects of this Convention were stated in its Pre-
amble in the following words: "the necessity of establishing, on fixed and uniform bases, the exercise of the right of protection in Morocco and of

135. See Hogg, *supra* note 4, at 882–83 n.44.

136. As stated by the Court, the claim was that the United States had acquired "an autonomous right to the exercise of such jurisdiction" by reason of the Convention. [1952] I.C.J. Rep. 176, 196.
settling certain questions connected therewith. . . ." In these circum-
cstances, 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 in-
volve 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 Treaties, not to revise them." 137

In effect, the Court rejected the attempt of the United States to
prove a purpose inconsistent with the recital in the Convention.
Any evidence offered as proof of the purpose of the parties must be
subordinate to definite indications of purpose in the text.

Statements of purpose, not incorporated in the text but forming
part of the preparatory work, or constituting authentic interpreta-
tions of the text or admissions against interest, have been discussed
above.

The cases in which members of the Court have placed reliance on
evidence of purpose derived from historical fact or surrounding
circumstances have involved the drawing of inferences. The very
process of drawing inferences presages the possible range of proof
and the possible degrees of logical compulsion militating for or
against the making of the inference.

One of the clearest cases in which the Court placed substantial
reliance on an inference of purpose in order to reach its conclusion
is the Anglo-Iranian Case (Preliminary
Objection). 138 Reference has
already been made to the Court's resort to evidence of the facts of
Iran's relationship with other countries at the time of the making
of the declaration pursuant to article 36(2) of the statute of the
Court. The facts surrounding the making of that declaration led
the Court to draw an inference from those facts of the purpose
which Iran must have had, and to describe this inference as a
"reasonable" assumption. 139

Another illustration of the use of this form of evidence as the
basis of an inference of purpose is found in the Ambatielos Case
(Merits). The United Kingdom had claimed that it was under a duty

137. Ibid. See also the similar disposition of the United States' claim that the
Act of Algeciras confirmed the capitulatory regime and the Court's reliance on the
language of the preamble to that treaty. Id. at 197-98.
138. For a statement of the facts of this case, see Hogg, supra note 4, text com-
mencing at 384 n.46.
139. [1952] I.C.J. Rep. 93, 105-06. In the words of the Court:
It is reasonable to assume, therefore, that when the Government of Iran
was about to accept the compulsory jurisdiction of the Court, it desired to ex-
clude from that jurisdiction all disputes which might relate to the application
of the capitulatory treaties, and the Declaration was drafted on the basis of this
desire. In the light of these considerations it does not seem possible to hold that
the term "traités ou conventions," used in the Declaration, could mean treaties
or conventions concluded at any time, as contended by the Government of the
United Kingdom.
to arbitrate only if the Court found that the Greek claim was properly founded in the Treaty of 1886 as interpreted by the Court. It was the Greek position that the Commission of Arbitration had been given authority to interpret the 1886 treaty and that the Court’s task was limited to passing on the existence of a prima facie claim. The Court accepted the Greek argument, finding support for its conclusion in the fact that while the 1886 treaty was in force the Commission of Arbitration would have had the responsibility of interpreting the treaty. From this conclusion it inferred that since the parties had preserved the jurisdiction of the Commission in certain cases as a result of the declaration to the 1926 treaty, they could not have intended to deprive the Commission of a part of its previous competence. This result, therefore, was based on an inference from historical facts. The basis for the inference was strengthened by the fact that if the United Kingdom interpretation were adopted, the dual jurisdiction of the Court and the Commission of Arbitration would involve to a substantial extent, a double trial of the facts. It might be “unreasonable” to assume that parties to a treaty would set up such a cumbersome procedure for the settlement of their disputes. The Court felt impelled to reach this result by what “must have been their [the parties’] intention. . . .” In the Corfu Channel Case (Merits) the Court found support for its conclusion that it had jurisdiction to assess compensation on the basis of similar evidence.

140. [1953] I.C.J. Rep. 10, 12–18. In the words of the Court:
At the time of the signature of the Declaration, it could hardly have entered the minds of the Parties that before arbitration should be in order, the Party requested to accept that procedure might insist that the question whether a claim was genuinely based on the Treaty of 1886 should first be examined and definitively settled by that Party itself or by an organ other than the Commission of Arbitration. It must have been their intention that the genuineness of the treaty basis of any claim, if contested, should be authoritatively decided by the Commission of Arbitration, together with any other questions relating to the merits of the claim, just as, before 1926, any question as to whether a certain controversy was concerned with the interpretation or execution of the Treaty of 1886 would have been settled by such a commission. . . . In the absence of any manifestation of a common intention of the Parties to the contrary, the Commission of Arbitration cannot be deprived of a part of its competence and no other body can be invested with the authority to determine definitively the validity of the treaty basis of the Ambatielos claim.

Id. at 17.

141. Id. at 16.

142. Id. at 17.

143. In its application the United Kingdom had requested the Court to assess compensation. The special agreement subsequently signed by the parties was arguably ambiguous as to whether this particular request had been preserved. The Court appeared to draw the inference from the facts of the original application that the purpose of the parties was to carry forward the request for assessment of compensation into the special agreement. [1949] I.C.J. Rep. 4, 24. Judge Winiarski drew an opposite inference, namely, that absent an express provision in the
The evidence relied on to support the inferences in these cases may be compared with that considered in the First and Second Asylum cases.\textsuperscript{144} In the First Asylum Case the Court, construing the provisions of the Havana Convention, refused to imply therein a unilateral right of qualification.\textsuperscript{145} In arriving at this interpretation

special agreement, the parties were to be presumed to have abandoned their respective positions under the previous procedure. \textit{Id.} at 57. There were other dissents on this point.

The cogency of the Court's inference is perhaps open to doubt. Judge Azevedo appeared to encounter considerable difficulty in reaching a decision concerning the necessity of any such inference:

As regards the assessment of the reparation, it must be remembered that the application was replaced by a kind of novation in the Special Agreement, which modified the normal course of procedure.

It is true that a renunciation cannot be presumed; but in a case of novation, an express reservation must always be made, as in the case of a guarantee for a debt.

\textit{Id.} at 96.

\textsuperscript{144} Haya de la Torre Case, [1951] I.C.J. Rep. 71 [herein referred to as the Second Asylum Case]. For prior discussion of the First and Second Asylum cases, see Hogg, supra note 4, text commencing at 421 n.152.

\textsuperscript{145} [1950] I.C.J. Rep. 266, 278. The relevant provisions of the Convention on Asylum, adopted at Havana, February 20th, 1928, read:

The Governments of the States of America, being desirous of fixing the rules they must observe for the granting of asylum, in their mutual relations have agreed to establish them in a Convention and to that end have appointed as Plenipotentiaries. . . .

\textbf{Article 1.} It is not permissible for States to grant asylum in legations, warships, military camps or military aircraft, to persons accused [of] or condemned for common crimes, or to deserters from the army or navy.

Persons accused of or condemned for common crimes taking refuge in any of the places mentioned in the preceding paragraph, shall be surrendered upon request of the local government.

Should said persons take refuge in foreign territory, surrender shall be brought about through extradition, but only in such cases and in the form established by the respective treaties and conventions or by the constitution and laws of the country of refuge.

\textbf{Article 2.} Asylum granted to political offenders in legations, warships, military camps or military aircraft, shall be respected to the extent in which allowed, as a right or through humanitarian toleration, by the usages, the conventions or the laws of the country in which granted and in accordance with the following provisions:

\textbf{First:} Asylum may not be granted except in urgent cases and for the period of time strictly indispensable for the person who has sought asylum to ensure in some other way his safety.

\textbf{Second:} Immediately upon granting asylum, the diplomatic agent, commander of a warship, or military camp or aircraft, shall report the fact to the Minister of Foreign Relations of the State of the person who has secured asylum, or to the local administrative authority, if the act occurred outside the capital.

\textbf{Third:} The Government of the State may require that the refugee be sent out of the national territory within the shortest time possible; and the diplomatic agent of the country who has granted asylum may in turn require the guaranties necessary for the departure of the refugee with due regard to the inviolability of his person, from the country. . . .

it relied principally on the presumption against superseding a rule or practice of international law. But the Court added that the interpretation thereby suggested 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." In considering the meaning of the words "urgent cases" in article 2 ("First") of the Convention, the Court again stressed that its purpose was to restrict abuses and implied that this meant reducing the number of grants of asylum. It then concluded that it is inconceivable that the Havana Convention could have intended the term "urgent cases" to include the danger of regular prosecution to which the citizens of any country lay themselves open by attacking the institutions of that country. . . .

The conclusion was that not all political offenders were intended to

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146. This presumption might itself be classed as an inference of purpose derived from surrounding circumstances. A presumption similar in operation and applied by the Court in two cases is that against giving retroactive effect to a treaty. In the *Ambatielos Case (Preliminary Objection)*, one of the Greek claims was that the treaty of 1926 related back to provide for jurisdiction of the Court in cases arising prior to its conclusion. The Greek contention on this point was described by the Court in the following terms:

These points raise the question of the retroactive operation of the Treaty of 1926 and are intended to meet what was described during the hearings as "the similar clauses theory," advanced on behalf of the Hellenic Government. The theory is that where in the 1926 Treaty there are substantive provisions similar to substantive provisions of the 1886 Treaty, then under Article 29 of the 1926 Treaty this Court can adjudicate upon the validity of a claim based on an alleged breach of any of these similar provisions, even if the alleged breach took place wholly before the new treaty came into force.

[1952] I.C.J. Rep. 28, 40. The Court rejected this contention by applying a presumption against an intention of the parties to give retroactive effect to treaty provisions, but noted that this presumption might have been rebutted if there had been any special clause or any special object necessitating retroactive interpretation. *Ibid.* Retroactivity was also mentioned by the Court in the *Right of Passage Case*, where India's assertion that the Portuguese reservation contained a power to take away the Court's jurisdiction after the Court was seized of a case, was disapproved by the Court in the following terms:

[The words of the reservation] cannot be construed as meaning that such a notification would have retroactive effect so as to cover cases already pending before the Court.

[1957] I.C.J. Rep. 125, 142. But apart from the connotation of the word "retroactive," the Court indicated another presumption which supported its position, one which might be called a "presumption in favor of constitutionality." The Court referred to the rule it had formulated in the *Nottebohm Case (Preliminary Objection)*, [1953] I.C.J. Rep. 111, that the lapse or denunciation of a declaration could not deprive the Court of jurisdiction already established. From this it moved to a presumption against interpreting the Portuguese declaration in a sense which would be inconsistent with that rule of law:

It is a rule of interpretation that a text emanating from a Government must, in principle, be interpreted as producing and as intended to produce effects in accordance with existing law and not in violation of it.


148. *Id.* at 284.
be comprehended in the right of asylum. This conclusion was reached as the result of an inference drawn from the purpose of the parties which was construed to be to provide against arbitrary action.\textsuperscript{149} From the opinion as a whole, it is clear that the Court approached the problem of interpreting the Havana Convention with the notion of reading it restrictively.\textsuperscript{150} The argument based on derogation from sovereignty seems inadequate as an explanation for such a finding of purpose. Where the parties have expressly contracted on a subject which involves just such a derogation, the presumption of an intention not to derogate would seem of slight value. It becomes important, therefore, to ascertain what evidence the Court relied on to support the inference that the purpose of the parties was to "prevent abuses . . . by limiting the grant of asylum." Except for the reference to the terms of the Convention including the preamble, the opinion did not spell out the evidence on which these inferences were founded. From a statement in the Colombian reply, however, it would seem that the basis for such a finding of purpose was to be found in the preparatory work of the Havana Convention.\textsuperscript{151}

In the Second Asylum Case the Court held that under the Convention there was no obligation to surrender a political refugee even where the asylum had been irregularly granted.\textsuperscript{152} Once again the basis for this holding was the previous practice of the Latin-American states. In finding such a practice and applying it to the facts in this second case, it could be argued that the Court reversed the

\textsuperscript{149} \textit{Ibid.} The evidence expressly relied upon to support this inference was "[t]he intention . . . to put an end to the abuses which had arisen in the practice of asylum and which were likely to impair its credit and usefulness. This is borne out by the wording of Articles 1 and 2 of the Convention which is at times prohibitive and at times clearly restrictive." \textit{Id.} at 282. It may be seriously doubted whether the two articles referred to necessarily support such a conclusion.

\textsuperscript{150} See, for instance, the following view expressed earlier in the opinion:

In the case of diplomatic asylum, the refugee is within the territory of the State where the offence was committed. A decision to grant diplomatic asylum involves a derogation from the sovereignty of that State. It withdraws the offender from the jurisdiction of the territorial State and constitutes an intervention in matters which are exclusively within the competence of that State. Such a derogation from territorial sovereignty cannot be recognized unless its legal basis is established in each particular case.

\textit{Id.} at 274-75.

\textsuperscript{151} \textit{Les travaux préparatoires de la Convention de La Havane indiquent, en effet, que les États américains avaient envisagé une réglementation plus stricte des matières contenues à l'article 2 de cette convention.}

(The preparatory work of the Havana Convention indicates, in effect, that the American states had envisaged a more strict regulation of the matters contained in article 2 of that convention.)

\textit{FIRST ASYLUM CASE—PLEADINGS, ORAL ARGUMENTS, AND DOCUMENTS 343 (I.C.J. 1950).}

position which it had taken in the prior case on the purpose of the parties to the Havana Convention. Since the Convention was intended to regulate the practice of asylum, and in terms of the earlier judgment, resembled a codification, it could have been argued that an intention should be attributed to the parties to make as complete a regulation as possible of this practice. If one interpretation would provide a complete and workable system while another would not, there would seem to have been a strong case for adopting the first meaning on the basis of inference as to purpose.\(^{153}\) Yet, in the words of the Court:

Such an interpretation [imposing an obligation to surrender the refugee where asylum was granted contrary to the provisions of article 2 of the Convention] would be repugnant to the spirit which animated that Con-

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153. Doubt was cast, however, on the strength of this argument based on purpose, because the Convention appeared to make no provision for the termination of asylum regularly granted to political offenders. In its first judgment, the Court had ruled that a safe-conduct could not be demanded until the territorial state had first requested the refugee to be removed from the country. [1950] I.C.J. Rep. 266, 278–79. In view of the Latin-American practice, the intention seemed clear that in such cases a grant of asylum would eventually result in the departure of the refugee from the country. An interpretation in that case that there was no obligation to surrender the refugee, would be consistent with the practice of asylum and with the spirit and words of the Convention. These arguments do not seem to apply with the same force to the case of an irregular grant of asylum. In the case of such irregular grant it might be thought that the grant of asylum would be invalid. If the grant were invalid, it might be regarded as no grant at all, or at best, one which could not place the refugee in a more favorable position than that he would be in but for the invalid grant. The result thus indicated is that in such a case the refugee should be surrendered. Such a view would have been consistent with the holding of the Court in the first instance that Colombia had granted asylum in a case not provided for in the Convention. Id. at 287. This holding was indeed interpreted in the Second Asylum Case as entailing the legal consequence “of putting an end to an illegal situation.” [1951] I.C.J. Rep. 71, 82.

In the Case Concerning the Application of the Convention of 1902 Governing the Guardianship of Infants (Netherlands v. Sweden), [1958] I.C.J. Rep. 55, reported after this paper was completed, the Court made considerable use of inferences as to purpose in interpreting the relevant treaty. The Netherlands requested the Court to find in this case that the order of a Swedish tribunal subjecting an infant, Marie Elizabeth Boll, to protective upbringing (skyddsuppfostran) constituted a breach of a 1902 Convention pertaining to the guardianship of minors. Marie Boll was a Dutch national, though apparently born in Sweden and living there at the time of the making of the order. Her guardian, Catharina Postema, appointed by a Dutch Court, appealed together with the infant’s father and another against the order of the Swedish tribunal. After the Supreme Administrative Court of Sweden upheld the order the Netherlands espoused the guardian’s case. The Dutch case was founded on the proposition that, pursuant to the Convention, the law of nationality of the infant governed matters of guardianship and that the Swedish order interfered with the exercise of the right to custody of the infant conferred on Mme. Postema pursuant to the order of the Dutch Court. The Court described the effect of the Swedish order in the following terms:

Finally, under the regime thus maintained, the person to whom the Child Welfare Board has entrusted the infant has not the capacity and rights of a guardian. He receives her, watches over her, provides for the care of her health: the in-
fant is entrusted to his care... The protective upbringing applied to the infant, as it appears in these decisions, i.e. according to the facts in the present case, cannot be regarded as a rival guardianship to the guardianship established in the Netherlands in accordance with the 1902 Convention.” *Id.* at 66.

Speaking again of the effect of the Swedish order, the Court said:

*[I]*t placed an obstacle in the way of the full exercise of the right to custody belonging to the guardian. Does this constitute a failure to observe the 1902 Convention, Article 6 of which provides that “the administration of a guardianship extends to the person... of the infant”? *Id.* at 66-67.

Subsequently, the Court invoked the purpose of the parties in the following terms:

*Is the 1902 Convention to be construed as meaning—tacitly, for the reason that it provides that the guardianship of an infant shall be governed by his national law—that it was intended to prohibit the application of any legislative enactment of a different subject-matter the indirect effect of which would be to restrict, though not to abolish, the guardian’s right to custody?* So to interpret the Convention would be to go beyond its purpose. That purpose was to put an end, in questions of guardianship, to difficulties arising from the conflict of laws. That was its only purpose. It was sought to achieve it by laying down to this end common rules which the contracting States must respect. To understand the Convention as limiting the right of contracting States to apply laws on a different topic would be to go beyond that purpose. ... The 1902 Convention was designed to put an end to the competing claims of several laws to govern a single legal relationship. There are no such competing claims in the case of laws for the protection of children and young persons. ... The problem which was at the basis of the 1902 Convention does not exist in respect of these laws, and the only danger which could threaten them would lie in the negative solution which would be reached if, as a result of an extensive construction which has not heretofore been considered justified, the application of Swedish law was refused to Dutch children living in Sweden; since Dutch law on the same subject could not be applied to them, the protection of children and young persons, desired both by Swedish law and by Dutch law, would be frustrated. The 1902 Convention never intended that a negative solution should be reached in the domain with which it is concerned: this confirms that what is understood by the protection of children and young persons does not fall within the domain of the Convention. *Id.* at 68-71.

While the vote was 12-4 in favor of the judgment, it would appear from the concurring opinions that a number of the Judges who voted for the decision would not have been prepared to accept the interpretation of the Convention as spelled out in the Court opinion. The reliance on inferences of purpose in that opinion is controversial. First, the inference drawn from the proposition that but for the Court’s interpretation there would be a vacuum of supervisory powers over alien children lacks cogency. There would be no such vacuum were the Court to hold that Sweden was entitled to apply the protective upbringing law to alien children while they were within Swedish jurisdiction, leaving the guardian free to remove the child from Swedish territory, and presumptively, to take the child back to its state of domicile where the national law of similar content would apply. One of the difficulties in understanding this case, however, stems from the ambiguity in the report as to whether the Dutch guardian was asserting a right to custody of the infant while leaving her residing in Sweden, or whether the guardian was asserting the right to remove the child from Sweden. The Court opinion on this point would be more persuasive if limited to answering only the former assertion.

But the more general reliance of the Court on inferences as to purpose of the parties, comprised in the statement that the purpose of the parties to the Convention was to resolve issues of conflict of laws and that this problem did not exist with respect to the child welfare legislation is equally controversial. No factual background for the Court’s inferences is spelled out in the opinion. In fact, the Convention expressly provided that the law of nationality was to govern in matters
vention 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.\textsuperscript{164}

It is difficult to reconcile the "spirit" referred to in this last passage with the same spirit of the same Convention which embodied the intention to prevent abuses and which made it "inconceivable that the Havana Convention could have intended the term 'urgent cases' to include the danger of regular prosecution. . . ." And yet inferences of purpose drawn from this same spirit played a significant part in both decisions.

In the \textit{Second Peace Treaties Case}\textsuperscript{155} an inference of purpose was urged on the Court without success. In that case the United Kingdom submitted that the power of appointment in the Secretary-General was not contingent upon the appointment of the national members to the treaty commissions. Any other interpretation, it was claimed, would frustrate the purpose of the parties which was to provide a workable system of arbitration.\textsuperscript{156} The Court, however, re-

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155. For a previous discussion of this case, see Hogg, \textit{supra} note 4, text commencing at 386 n.59.

156. The argument of the United Kingdom under this head can, in fact, be reduced to an application of the well-known principle of treaty interpretation—\textit{ut res magis valeat quam pereat}, i.e., that treaty provisions must be deemed to have been intended to possess force and content, and must, therefore, in general, be so interpreted and applied as to give them adequate meaning and effect, and avoid their purpose being nullified. It has several times been pointed out in the course of the present written Statement, that if the contentions of the three ex-enemy Governments were accepted, it would mean that the Peace Treaty provisions for the settlement of disputes would be operable only at the option of each of the Parties concerned, instead of constituting, as they were clearly intended to do, an obligatory process for the settlement of disputes. If a Party to the Treaty, charged with breaches of it giving rise to a dispute which has not been settled by diplomatic negotiations, or through the Three Heads of Mission, can, by refusing to appoint his representative on the Treaty
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fused to accept this argument based on purpose, and arrived at a contrary interpretation indicated by the ordinary meaning of the words used and the consistent practice of arbitral tribunals. It declined to recognize any force in this argument since, even if the Secretary-General were to proceed with the appointment of the third member of the commissions, such an exercise of the power would still fail to give effect to the paramount purpose of the parties, namely, the constitution of commissions which could make decisions. Such an exercise on the facts, the Court said, would merely result in the creation of a two-man commission which was not the kind intended by the treaties:

In every respect, the result would be contrary to the letter as well as the spirit of the Treaties.

It did not reject the rule but found that the purpose contended for by those opposing its interpretation was not proved in a clear and unambiguous manner; nor was it shown that the interpretation contended for in the light of that principle would result in the achievement of the purpose thus relied upon. It is clear, then, that before a state can invoke the rule of purpose, it must prove that purpose beyond the point of ambiguity. A vague showing of a general intent

Commission, or to participate in the appointment of the third Commissioner, prevent the Commission from functioning, and thus prevent the dispute from being settled, then it is clear that the Treaty procedure for the settlement of disputes, obviously intended to be binding and compulsory on the Parties, can, in fact, in the last resort, only be operated with the consent, express or tacit, and given ad hoc in each case, of the very party against whom the charges of breach of treaty are made. Such a result would fail to give the relevant provision its intended meaning and effect, or, indeed, any real meaning or effect at all, because it is in any case always open to parties to a treaty to have voluntary recourse to arbitration in order to settle disputes arising under it: and unless a provision for arbitration or judicial settlement is compulsory, there is no object in including it.


158. Id. at 228. In their dissenting opinions, Judges Read and Azevedo adopted the rule of purpose as the basic test. Judge Read argued that the Allied Powers could not possibly have intended to set up machinery for the settlement of disputes which could be frustrated by the sole will of one of the governments concerned. Id. at 237–41. Judge Azevedo agreed that where the text was ambiguous, that interpretation was preferable which was most consistent with the purpose of the parties. Id. at 250.

159. That a clear connection must be shown between the purpose relied on and the interpretation giving effect to that purpose, is illustrated again in the First Membership Case (see text accompanying note 24 supra). There the authors of the joint dissent parted company with the Court precisely over the choice of this rule as the basic test. The dissenters said:

[Since] the admission of a new Member is pre-eminently a political act . . . . [and since] the main function of a political organ is to examine questions in their political aspect, which means examining them from every point of view . . . . , it follows that the Members of such an organ who are responsible for
will not be sufficient to cover a case where the parties have failed to provide for a particular contingency against which they could have made provision had they adverted to the problem. This notion is best, though cryptically, expressed in the words of the Court:

It is the duty of the Court to interpret the Treaties, not to revise them.\textsuperscript{160}

In the \textit{Second Membership Case}\textsuperscript{161} the Court concluded that the words of article 4(2) were clear in their ordinary sense and consistent with the context. Judge Alvarez, however, dissented from the holding that the provisions of article 4(2) relating to the procedure for admission were exclusive. He supported this interpretation, \textit{inter alia}, by reference to the “new international law,” the “general interest,” “interests of international society,” the requirement of “harmony with the new conditions in the life of the peoples,” “the purposes of the institution concerned” and “the new conditions of international life.”\textsuperscript{162} He contended, then, that a meaning must be given to the text which first of all was consistent with the purposes of the Organization and the intention of the parties, viewed against the background of the new relations of states. In placing such weight on the rule of purpose, he apparently did not exclude the rule of ordinary meaning but implied that the text raised an ambiguity which could only be resolved by the test of purpose. It may be doubted whether, in his judgment, words used could ever be clear in the sense of their ordinary meaning, if the meaning thus indicated was not in harmony with the purpose of the instrument and the interests of international society. Thus he said:

The text must not be slavishly followed. If necessary, it must be vivified so as to harmonize it with the new conditions of international life.\textsuperscript{163}

He would carry the process of interpretation even further:

[I]t is possible, by way of interpretation, to attribute to an institution

\begin{footnotes}
\item[161] For previous discussion of this case, see Hogg, \textit{supra} note 4, text commencing at 374 n.8.
\item[162] \cite[1950] I.C.J. Rep. 4, 12-17.
\item[163] \textit{Id.} at 17.
\end{footnotes}
rights which it does not possess according to the provisions by which it was created, provided that these rights are in harmony with the nature and objects of the said institution. . . . A fortiori, the Court has the power to limit rights, or to give them an effect other than that prescribed by the literal text where the circumstances mentioned above make it necessary to do so. . . . A treaty or a text that has once been established acquires a life of its own. Consequently, in interpreting it we must have regard to the exigencies of contemporary life, rather than to the intentions of those who framed it.\textsuperscript{164}

For Judge Alvarez, then, the concept of purpose as evidenced by "the nature and objects of the said institution," had a broader application than most of the other members of the Court would be prepared to attribute to it. Moreover, evidence of this purpose can be gained not only from the instrument itself, the situation of the parties and the objects which they intended it to fulfill, but also from the interests of international society. Purpose, then, comes to be more like an ideal intention to be attributed to the parties by the Court, than evidence of their own intention.\textsuperscript{165} The problem posed by the approach of Judge Alvarez to questions of interpretation stems from the unavailability of the sources which may be tapped, the evidence which will indicate what the "nature and objects” of the treaty are and from which inference as to meaning is to be drawn. In his dissent in the Anglo-Iranian Case (Preliminary Objection), Judge Alvarez further expounded his position on problems of interpretation. Once again he emphasized the "spirit" of the document under consideration and, as a result of his consideration of that spirit, he concluded that the Court had jurisdiction.\textsuperscript{166} Yet once again, his opinion gives no

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\item \textsuperscript{164} Id. at 18.
\item \textsuperscript{165} Judge Azevedo also dissented on the basis of the test of purpose. He said: "The Charter is a means and not an end. To comply with its aims one must seek the methods of interpretation most likely to serve the natural evolution of the needs of mankind." Id. at 23. He would seem to confine evidence of that purpose, however, to the instrument itself and to the situation of the parties at the time of its conclusion.
\item \textsuperscript{166} One preliminary observation of cardinal importance must be made in this connection. As a result of the profound and sudden transformations which have recently occurred in the life of peoples, it is necessary to consider in respect of the above questions, first the way they have been settled until recent times, that is to say, in accordance with \textit{classical international law}, and secondly, how they are settled to-day, that is to say, in accordance with the \textit{new international law}.
\end{itemize}

There is a fundamental difference between the two. \textit{Classical international law} was \textit{static}, it scarcely altered at all, because the life of peoples was subject to few changes; moreover, it was based on the \textit{individualistic regime}. The \textit{new international law} is \textit{dynamic}; it is subject to constant and rapid transformations in accordance with the new conditions of international life which it must ever reflect. This law, therefore, has not the character of quasi-immutability; it is constantly being created. Moreover, it is based upon the \textit{regime of interdependence} which has arisen and which has brought into being the \textit{law of social interdependence}, the outcome of the revitalized juridical con-
guidance on the evidence which he was tapping in order to reach a conclusion. His application of the "spirit" to the language of the Declaration was explained in the following passage:

Applying the foregoing considerations to the determination of the scope of Iran's adherence to the provisions of Article 36, paragraph 2, of the Statute of the Court, this adherence must be interpreted as giving the Court jurisdiction to deal with the present case. The scope of this adherence is not to be restricted by giving too great an importance to certain grammatical or secondary considerations. Justice must not be based upon subtleties but upon realities. 167

But what are these realities of which he speaks, and what is their relationship to the intention of the parties? In reliance on such realities he developed the thesis that in the case of certain types of dispute, and in this case a dispute involving protection of nationals, the Court has jurisdiction without any express consent of the parties. If the states which are parties to the statute had intended to exclude jurisdiction in such cases, he concluded, an express statement to that effect would have been required. 168

Comment
The purpose of the parties or their intention is basic to the solution of a problem in interpreting a treaty. Wherever that intention is

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science, which accords an important place to the general interest. This is social justice. This law is not, therefore, mere speculation; nor is it the ideal law of the future, but it is a reality; it is in conformity with the spirit of the Charter as it appears from the Preamble and from Chapter I thereof.

The Court must not apply classical international law, but rather the law which it considers exists at the time the judgment is delivered, having due regard to the modifications it may have undergone following the changes in the life of peoples; in other words, the Court must apply the new international law.

It is necessary to avoid slavish adherence to the literal meaning of legal or conventional texts; those who drafted them did not do so with a grammar and a dictionary in front of them; very often, they used vague or inadequate expressions. The important point is, therefore, to have regard above all to the spirit of such documents, to the intention of the parties in the case of a treaty, as they emerge from the institution or convention as a whole, and indeed from the new requirements of international life.

Recourse should only be had to travaux préparatoires when it is necessary to discover the will of the parties with regard to matters which affect their interests alone. A legal institution, a convention, once established, acquires a life of its own and evolves not in accordance with the ideas or the will of those who drafted its provisions, but in accordance with the changing conditions of the life of peoples. . . .

It is, moreover, to be observed that out-and-out reliance upon the rules of logic is not the best method of interpretation of legal or conventional texts, for international life is not based on logic; States follow, above all, their own interests and feelings in their relations with one another. Reason, pushed to extremes, may easily result in absurdity.

167. Id. at 127.
168. Id. at 130-31.
doubtful because of a failure by the parties to spell out that intention clearly, the Court must inevitably resort to a process of inference to determine what that intention was. In some situations the inquiry concerns the nature of that intention with respect to the solution of the particular problem. The assumption basic to the inquiry is that the parties did contemplate the problem and reached a solution for it but failed to express that solution in unambiguous language. In other situations the inquiry seeks to determine what that intention would have been with respect to the solution of the particular problem if the parties had adverted to its solution, the assumption being that they did not do so. The process involved in this second situation is the projection of a showing of purpose, more or less general, in order to forecast what result in a particular case that general purpose would have dictated. In either case, however, it is clear that the result is being dictated or indicated by the more or less general purpose which the parties to the treaty did have in mind. The process of inference being what it is, however, the shift from searching for the purpose of the parties to assigning a purpose which the particular judge thinks the parties should have had in mind is difficult to identify. To the extent that the judge exercises a subjective discretion within certain limits, the second process is bound to invade the first. That the vast majority of the members of the Court have defined as their primary objective the ascertainment of the purpose which the parties really entertained, is abundantly clear from the opinions. That they regard this search when it proves fruitful as delimiting the boundary within which the Court may permissibly “create” rights is equally clear. But by reliance on inference from facts perhaps not adequately proved in a few cases, the Court has on these occasions put in doubt the question whether this boundary is real or only the subject of lip-service. It is unlikely that many people would quarrel with the actual decision in the Second Asylum Case on account of the human factor involved, so that the apparent substitution of the Court’s purpose for that of the parties might pass uncriticized. However, if the decisions in the Genocide, South-West Africa and Administrative Tribunal cases are to be explained on a similar basis, they create more difficulty. If the Court were to take the position of Judge Alvarez on interpretation, the results in these cases would be unassailable, given the assumption of the premises on which that position is founded. If the role of the Court is to formulate the agreement which, in its opinion, is the best arrangement which the parties could have entered into in relation to a specific subject, then Judge Alvarez’s position follows. But the difficulty involved in taking such a position is immediately perceivable. It involves a departure from the traditional concept of a Court as an arbiter rather than a legislator, even if this departure is only a question of degree. In these three advisory opin-
ion cases, however, the Court may have been left with little real choice concerning the assumption of this position. It could be argued that the evidence in the three cases indicated that not only was there no real agreement between the parties concerned on the specific issue, but there was not even any real agreement as to the general purpose applicable to a solution of the question. The Court, in effect, was handed the problem with no criterion of intention of the parties upon which to formulate an answer. The alternatives were to give no opinion, to say that the treaty was defective in that it provided no answer to the question propounded, or else to create a workable arrangement for the parties on the basis of the Court’s own judgment as to what that agreement should be. There is significance in the

169. In the ILO Administrative Tribunal Case, see text accompanying note 98 supra, the Court was, on the plain meaning of the relevant text, given the responsibility of making a particular decision, and yet the text did not spell out the criteria for that decision, or else the criteria were defined in such vague terms as to be lacking in substantial content. In that case the Court was confronted with the language of article 65 (1) of its own statute to this effect:

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 the language of article 86 of the Charter of the United Nations. In this case the Court had no difficulty in holding the issue put to it to be a legal one, but spent some time exploring the question whether this was a proper case for the exercise of the discretion vested in the Court to give an advisory opinion. The Court gave expression to the boundaries which it felt surrounded the exercise of its discretion in the following passage:

The Court is a judicial body and, in the exercise of its advisory functions, it is bound to remain faithful to the requirements of its judicial character. [1956] I.C.J. Rep. 77, 84. It then stated as a concept of the judicial function that the parties should be in a position of equality before the Court. The Court found this equality to exist despite the fact that only UNESCO could bring the case to the International Court and despite the fact that the UNESCO employees had no right of audience under the statute of the Court. The latter holding was made possible by an agreement of UNESCO to forward to the Court a written statement of the employees’ case and to agree to refrain from presenting oral argument. The Court concluded:

Notwithstanding the permissive character of Article 65 of the Statute in the matter of advisory opinions, only compelling reasons could cause the Court to adopt in this matter a negative attitude. . . .

Id. at 86. The Court failed to find any such compelling reasons.

The second problem of interpretation raised in that case presented a situation in which the Court was requested to give a decision where the criteria were vague. This second problem involved the meaning of articles II and XII of the statute of the Administrative Tribunal of the ILO. The competence of the Tribunal was defined in article II(5) as “to hear complaints alleging non-observance, in substance or in form, of the terms of appointment of officials and of provisions of the Staff Regulations. . . .” The authority of the Governing Board of UNESCO (so far as relevant to the request in this case) to request an advisory opinion was defined by article XII of the statute of the Administrative Tribunal as including any case in which the Governing Board “challenges a decision of the Tribunal confirming its jurisdiction. . . .”

In the opinion of the Court, what was put in issue by the request was the decision of the Tribunal confirming its jurisdiction. [1956] I.C.J. Rep. 77, 87. It
fact that if the Court has assumed such a creative role, it has done so only in cases of advisory opinions.

contrasted the decision on jurisdiction with a decision concerning the merits. Its jurisdiction, said the Court:

is to be judged in the light of the answer to the question whether the complaint was one the merits of which fell to be determined by the Administrative Tribunal in accordance with the provisions governing its jurisdiction. That distinction between jurisdiction and merits is of great importance in the legal régime of the Administrative Tribunal. Any mistakes which it may make with regard to its jurisdiction are capable of being corrected by the Court. . . . Errors of fact or of law on the part of the Administrative Tribunal in its Judgments on the merits cannot give rise to that procedure.

Ibid. The fundamental issue posed to the Court was this: “Should the Court review the Tribunal’s interpretation of the terms of the contract and the regulations, in order to determine whether the Tribunal’s assertion that the terms and the regulations covered the complaint, was well founded? The Court appeared to deduce its answer from the clear language of articles II and XII of the statute. It looked at the words “competent to hear complaints alleging non-observance . . .”, remembered its decision in the Ambatielos (Merits) Case and held:

Similarly, in applying Article II, paragraph 5, the Court considers that this intermediate position must be adhered to, namely, that it is necessary that the complaint should indicate some genuine relationship between the complaint and the provisions invoked, but that it is not required that the facts alleged should necessarily lead to the results alleged by the complainants. Any such requirement would confuse the question of jurisdiction with that of the substance.

Id. at 89. The Court was, therefore, taking the position that if a reasonable tribunal might reach the conclusion that this one did as to the application of the regulations, then the fact that the Court might reach a different conclusion would not cause the Court to substitute its discretion for that of the tribunal. The scope of review selected is reminiscent of that selected by courts in this country, but to assert that the answer in this case was dictated by the clear language of the statute would be to stretch plain meaning. This appears to be essentially a policy judgment by the Court rather than a literal application of the relevant texts, but it is a policy judgment which UNESCO, in adopting the statute of the Tribunal, appeared to intend the Court to exercise. That is, by the use of the ambiguous word “competence,” it appears that considerable leeway was intended to be left to the Court. The basic factual considerations which affected the Court’s decision are shown in the following passage:

The Court has acted upon that provision [article II] and upon the other relevant provisions of the Staff Regulations. In doing so the Court has relied on the wording of the texts in question as well as on their spirit, namely, the purpose for which they were adopted. That purpose was to ensure to the Organization the services of a personnel possessing the necessary qualifications of competence and integrity and effectively protected by appropriate guarantees in the matter of observance of the terms of employment and of the provisions of the Staff Regulations. It is in that way that the Court arrived at what it considers to be the correct interpretation of Article II(5) of the Statute of the Administrative Tribunal and the proper application of that provision to the case submitted to it. It was not necessary for it, for that purpose, to have recourse to any principles of either restrictive or extensive interpretation.

Id. at 98.

In such situations the states or organizations who agreed to confer the decision-making power on the Court, must be held to have run the risk of the Court’s formulating its own criteria, or to have intended such a formulation. The only limiting criterion appears to be good faith.
Where the treaty before the Court has a constitutional character, its very subject matter and the way in which that subject matter is handled, may indicate an intention of the parties to draw up an agreement with broad strokes, leaving for subsequent formulation details desirable for supplementing the broad policy standards. To the extent that there is any evidence within or without the treaty about the formulation of any particular detail, of course, the Court would be bound by this evidence of “intention.” However, in the absence of any such evidence the Court apparently is free to assert a delegation to it to frame the supplementary detail. It is within the range of reasonable inference to assert that with respect to the Charter, article 96 constitutes just such a delegation to the International Court. Since the Court’s opinions on the Charter and related instruments are “advisory,” it may be deduced that the Court’s competence to formulate is not exclusive. That such may be the case, however, is no reason why the Court should refrain from giving its formulation. If, then, in these three cases, the Court decided to create a workable arrangement rather than to decline to answer the question on the basis of non licet, the decision would seem wise. Bearing in mind the nature of the instruments involved, the decision is properly within the limits of interpretation. If such an exercise of power is to be acceptable, however, the Court must show that there is truly an absence of ascertainable intention, taking into account all the relevant evidence; and an examination of the various types of evidence categorized under the rules is appropriate to such a showing. The Court also should show in what manner its creation fits into the broad scheme as formulated by the drafters of the treaty.

I. Conclusion

In its other decisions the Court has indicated an intention to restrain the judicial creative power within the limits of projection of the ascertainable purpose or intention of the parties, and the rules of construction discussed above have played a useful part in maintaining those limits.

It cannot be argued that all the rules, if applied to the facts, will suggest the same result. The need may arise to give more weight to the evidence derived from one rule than to that from another. The foregoing analysis gives some indication of the way in which the Court approaches the problem of applying appropriate rules. While it could not be said that the Court has established a hierarchy among the rules, yet it has held that the rule of ordinary meaning, absent any ambiguity, takes precedence over all others, whereas those relating to the use of preparatory work and to restrictive interpretation have been classed as worthy of use only as a last resort. The other
rules seem to fall between these extremes, their relative importance varying with the subject-matter and form of the treaty and the number of parties. Multilateral conventions might well require different treatment from bilateral trade agreements, political treaties from double tax arrangements. It must be admitted that, even postulating the application of the rules, a wide range of discretion remains in the Court.

A wealth of literature abounds supporting or opposing the use of rules of construction by the International Court and its predecessor and, of course, national courts. Professor Hyde, for instance, made this statement:

As the sense which contracting states have attached to the terms of their agreement is controlling in the estimation of those to whom are entrusted the duty of interpreting treaties, as all circumstances probative of that fact are admissible for the purpose of its establishment, the formation of rules of interpretation can hardly serve a useful purpose.170

With this might be compared a statement by Sir Eric Beckett:

The first question is, "are there, or should there be, rules of international law for the interpretation of treaties at all?" The present writer's view is that this question must be answered in the affirmative. . . . In fact, the fundamental reason for the existence of rules of interpretation at all is the same reason which requires a court to give reasoned judgments, and in reaching its conclusions so far as possible to base itself on principles of law of general application and to show that in reaching the conclusions which it has done in the particular case, it is proceeding in the same manner in which it has been the practice for the courts to proceed in all the other cases which have come before them. In brief, the reason is to defend the court from the charges of reaching its conclusions on arbitrary or subjective grounds. This reason has been found sufficient for the development of rules of interpretation in municipal law, and, in the present writer's opinion, an international court, above all others, has to be free from the suspicions of deciding cases on subjective or arbitrary grounds.

The second question is, "can a system of rules of interpretation which is logical and practical be evolved?" The present writer . . . answers that the task is no more difficult of producing a system of rules for the interpretation of treaties than it is to produce a system of rules for the interpretation of municipal enactments or private contracts.171

Writers on the interpretation of treaties have covered the whole range of opinion between these two poles, but at the heart of all the discussion is a definition of the object which a court is to attain in the interpretation of a treaty. This object is almost invariably defined as the ascertainment of the "intention of the parties," but to debate that

170. Hyde, Concerning the Interpretation of Treaties, 3 Am. J. Int'l L. 46, 54 (1909). See also Brierly, THE LAW OF NATIONS 163 (1st ed. 1928), where he asserted that "there are no technical rules in international law for the interpretation of treaties; its objective can only be to give effect to the intention of the parties as fully and fairly as possible."

171. Lauterpacht, De l'interprétation des traités, 43(1) ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL 368, 455-56 (1950).
as the object of interpretation without considering the permissible ways of ascertaining that intention is to conduct a debate without premises. Consider for instance the statement of Sir Gerald Fitzmaurice, discussing the approach of the International Court to interpretation:

The thought of the majority could be summed up by saying that in their view the intentions of the framers of a treaty, as they emerged from the discussions or negotiations preceding its conclusion, must be presumed to have been expressed in the treaty itself, and are therefore to be sought primarily in the actual text, and not in any extraneous source. Furthermore, treaties must be interpreted as they stand, and subject to the limitations inherent in the fact that they only contain so many articles, phrases, and words. The intentions or presumed intentions of the framers cannot be invoked to fill in gaps, or import into the treaty something which is not there, or to correct or alter words or phrases the meaning of which is apparently plain, or to give them a sense different from that which they possess according to their normal and natural meaning. In short, the attitude of the Court to a text is not, primarily, to ask itself what was this text intended to mean (still less of course what ought it to mean, or to be made to mean), but what does it in fact mean on its actual wording? 172

With this may be compared a statement by Sir Hersch Lauterpacht:

On ne soutiendra pas que ces travaux offrent, seuls, une méthode permettant de rechercher l'intention des parties. La logique, le contexte, la grammaire, le "sens naturel," les presumptions, le principe de l'effet utile, les conditions historiques et l'objet présumé du traité (pour la découverte duquel les travaux préparatoires ont une certaine importance), l'attitude des parties postérieurement à l'adoption dudit traité, tous ces éléments jouent un rôle considérable et légitime dans la recherche de l'intention des parties... L'intention des parties est la loi du juge. Il faut examiner avec prudence toute considération (d'efficacité ou autre) qui tendrait à transformer l'intention des parties en un facteur d'importance secondaire. 173

Although they are both discussing the interpretation of treaties and are both using the word "intention" of the parties to formulate the object of interpretation, the use of the same word is all that they have in common. No state holding the view of Sir Gerald Fitzmaurice


Translation of text: No one will maintain that this preparatory work alone provides a way of searching for the intention of the parties. Logic, context, grammar, "natural meaning," presumptions, the principle of practical effect, historical conditions and the presumed object of the treaty (for the discovery of which preparatory work has a certain importance), the attitude of the parties after the adoption of the aforesaid treaty,—all these elements play a considerable and legitimate role in the search for the intention of the parties... The intention of the parties is the judge's law. Every consideration (effective or otherwise) must be examined carefully which would tend to transform the intention of the parties into a factor of secondary importance.
would be any more encouraged by the Court’s use of rules of construc-
tion than it would be by the decisions of the Court unadorned by such rules. The difference between his view and the practice of the Court is one of premise. The thesis of this paper that the Court’s use of the rules should encourage submission to its jurisdiction, must be limited to the situation where the country or countries to be persuaded hold the same premise on the permissible range of the Court’s jurisdiction as the Court has expressed through its words and actions.

The position that any reasoned decision will be satisfactory whether it is written in terms of the rules of construction or not, is unsatisfactory. First, such a position fails to take into account the very practice of the Court which is to explain its decisions in terms of those rules as classifying types of evidence. Second, it ignores the almost universal practice of counsel before the Court, which is to make argument in terms of those rules. Third, it ignores the fact that the rules operate to classify the various sources of evidence which have been considered in prior decisions as valuable in elucidating that intention. Fourth, it ignores the fact that the very existence of classes of evidence indicating such intention forces the Court to provide an adequate explanation where there is evidence of one type in the record which it sees fit to accept or reject. Fifth, it ignores the utility of the rules in tending to produce uniformity of decision with respect to specific classes of evidence.

But to defend the use of the rules as a vehicle for a reasoned judgment is not to contend for a hierarchy, a fixed order determining the relative value of the evidence derivable from an application of each rule. That the Court feels bound by any such hierarchy is clearly negated by the foregoing analysis of its decisions. Even the rule of ordinary meaning is clearly subject, in the practice of the Court, to a showing of intention from other sources. The practice of the Court, then, is wholly consistent with the position taken in the Harvard Draft Convention on the Law of Treaties. This practice

174. See on this point the comments of Lauterpacht, id. at 371–72:
A déclarer que les règles relatives à l’interprétation restrictive ou à l’usage des travaux préparatoires ne peuvent être invoquées que lorsque le traité n’est pas clair, on pose une condition qui constitue le résultat et non pas le point de départ du processus d’interprétation.
(To hold that the rules relating to restrictive interpretation and the use of preparatory work cannot be invoked except when the treaty is ambiguous, presupposes a finding which constitutes the conclusion and not the point of departure of the process of interpretation.)

175. Article 19: Interpretation of Treaties
(a) A treaty is to be interpreted in the light of the general purpose which it is intended to serve. The historical background of the treaty, travaux préparatoires, the circumstances of the parties at the time the treaty was entered into, the change in these circumstances sought to be effected, the subsequent
appears to the writer to offer a maximum of guarantee to states that the Court will not act arbitrarily and will keep the exercise of its judicial discretion within the limits currently acceptable to states. The true problem has been put concisely by Professor Stone: 176 Is conduct of the parties in applying the provisions of the treaty, and the conditions prevailing at the time interpretation is being made, are to be considered in connection with the general purpose which the treaty is intended to serve.


The resolutions adopted by the Institute of International Law at its session at Granada, 11-20 April 1956, appear to have a similar content:

II. The Interpretation of Treaties (12th Commission)

The Institute of International Law is of the opinion that when it becomes necessary to interpret a treaty, States, and international organizations and tribunals may be guided by the following principles:

Article 1

1. The agreement of the parties having been embodied in the text of the treaty, it is necessary to take the natural and ordinary meaning of the terms of this text as the basis of interpretation. The terms of the provisions of the treaty should be interpreted in their context as a whole, in accordance with good faith and in the light of the principles of international law.

2. If, however, it is established that the terms used should be understood in another sense, the natural and ordinary meaning of these terms will be displaced.

Article 2

1. In the case of a dispute brought before an international tribunal it will be for the tribunal, while bearing in mind the provisions of the first article, to consider whether and to what extent there are grounds for making use of other means of interpretation.

2. Amongst the legitimate means of interpretation are the following:

(a) Recourse to preparatory work;
(b) The practice followed in the actual application of the treaty;
(c) The consideration of the objects of the treaty.

(19 April 1956.)


176. The ostensible policy behind loyalty to the canons is that even when, and indeed especially when, interpretation cannot proceed on any actual intention of the parties, an international court must have principles of interpretation as a check on caprice and subjectivity. It is by no means always clear, when this reason is given, whether it means that the principles of interpretation (a) do in fact give objectivity to the Court’s conclusions, or (b) merely free the Court (in Sir Eric Beckett’s words) ‘from the suspicion of deciding cases on subjective or arbitrary grounds’. . . . In this situation canons of treaty interpretation have served certain practical purposes, even where they were not capable of compelling one single meaning. They have, in the first place, served as captions under which the tribunal could Marshall existing precedents, so as to afford a general indication of relevant factors. They have, in the second place, given to tribunals a sense of continuity of tradition, relieving the psychological loneliness inseparable from the responsibility of policy-making. They have, in the third place, given some support (though often quite illusory support), to the claim of tribunals that their reasoning and the decisions arrived at had an objective validity even before they reached them, and have thus lightened the felt burden of responsibility. The first of these roles seems unexceptionable. The second, though involving illusory elements, need not neces-
the adherence to the rules of construction by the Court based in the belief that they do limit caprice or subjectivity, or on the belief that the rules merely present a facade of objectivity, justice thereby appearing to be done? If the discussion of the rules by the Court is believed to be a facade, then the result of that belief is certainly not the encouragement of litigation before the Court. But if the rules do in fact constitute a limiting factor on the boundaries within which the Court is free to exercise discretion, then they do serve a valuable purpose. One cannot quarrel with the position that Professor Stone takes that the rules do not dictate a particular conclusion as a matter of inexorable logic. Even if such a belief were once held by some commentators on the common law, at this point such a view must be classed as naive. But to say that the rules do not inexorably lead to a particular result in the case is not to say that they have no value. A conclusion that they do have no value might be inferred from language used by Professor Radin in his famous article in the Harvard Law Review. Yet Professor Radin premised his position on the fact that there are limits to the permissible area of judicial discretion in interpretation. The rules of construction play little part for him in delimiting that area. Mr. Justice Frankfurter, while criticising reliance on rules of construction, has likewise agreed that such limits exist; yet he offers no yardstick by which those limits can be


177. Radin, Statutory Interpretation, 43 Harv. L. Rev. 863, 881-82 (1930), where he said:

We are therefore still sadly to seek in attempting to discover on what basis a statutory determinable is made to stop just outside a particular determinate. The 'plain meaning' of the statute offers us a large choice between a maximum and a minimum of extension. The 'intent of the legislature' is a futile bit of fiction. The 'purpose' requires a selection of one of many purposes. The 'consequences' involve prophecy for which the courts are not particularly prepared, and in which, by any calculus of probabilities, several choices of results are open.

But since a choice implies motives, it is obvious that, somewhere, somehow, a judge is impelled to make his selection—not quite freely, as we have seen, but within generous limits as a rule—by those psychical elements which make him the kind of person that he is. That this is pure subjectivism and therefore an unfortunate situation is beside the point. It is hard to see how subjectivism can be avoided or how the personality of the judge can be made to count for nothing in his decision on statutory interpretation as on everything else. The most deplorable results of subjectivism need not be apprehended, since the tendency to follow precedents in statutory interpretations as well as elsewhere relieves the court of some of its burdens, and since judges are members of their several groups and, like all other citizens, exhibit more group traits than individual ones.

178. Frankfurter, Some Reflection on the Reading of Statutes, 47 Colum. L. Rev.
measured. He does not spell out the content of "the constraints" which are "imposed by the judicial function in our democratic society." Where the jurisdiction of the Court is compulsory, its business is not dependent on the writing of reasoned opinions to support its decisions and yet, if it wishes to carry with it the support of the educated public, it will expound the bases on which important decisions are reached. In this way a verification of premises is made possible, as well as providing a check on the degree of creativity of the particular judges. The "constraints of a democratic society" can more easily be marshalled where the judge feels obliged to explain how he arrives at a particular result. If he defines the limitations which he thinks surround the judicial function and explains how his particular decision fits within those limitations, then the reader may accept or reject his premise. The rejection of the premise may give little satisfaction where the court is municipal and its jurisdiction compulsory. Where, however, the court is international and its jurisdiction optional, the first prerequisite of business is the acceptance by the parties concerned of the premises on which the court operates. Where a litigant accepts the premise, he may question the result in a particular case as erroneous, but the risk of a decision which he regards as erroneous is the risk he must run in delegating a determination of his rights to a court. But unless he is satisfied with the premise, there can be no basis for delegation.

That the Court does apply certain rules in the interpretation of treaties and that these rules constitute a limitation on its freedom of decision, have been proved. They are self-imposed and there is no reason in law why in future decisions new tests could not be added or even substituted for some of those outlined above. Moreover, the

527, 529, 533 (1947). In his opinion:

The process of construction, therefore, is not an exercise in logic or dialectic: The aids of formal reasoning are not irrelevant; they may simply be inadequate. The purpose of construction being the ascertainment of meaning, every consideration brought to bear for the solution of that problem must be devoted to that end alone. To speak of it as a practical problem is not to indulge a fashion in words. It must be that, not something else. Not, for instance, an opportunity for a judge to use words as 'empty vessels into which he can pour anything he will'—his caprices, fixed notions, even statesmanlike beliefs in a particular policy. Nor, on the other hand, is the process a ritual to be observed by unimaginative adherence to well-worn professional phrases.

Even within their area of choice the courts are not at large. They are confined by the nature and scope of the judicial function in its particular exercise in the field of interpretation. They are under the constraints imposed by the judicial function in our democratic society. As a matter of verbal recognition certainly, no one will gainsay that the function in construing a statute is to ascertain the meaning of the words used by the legislature. To go beyond it is to usurp a power which our democracy has lodged in its elected legislature. The great judges have constantly admonished their brethren of the need for discipline in observing the limitations. A judge must not rewrite a statute, neither to enlarge nor to contract it.
membership of the bench changes and the application of the rules depends to a degree on the personal views of each judge. If the consistent practice of the Permanent Court and the International Court is any guide, however, it seems likely that these rules will be preserved at least as a core.

Rules do not make results. It is all the evidence of intention real and objectively inferred, together with the creative discretion involved in appraising all this evidence, which does. But if the creative discretion is exercised without a proper consideration of all the evidence, it is in danger of becoming arbitrary. The Court has used the rules as shorthand references to types of evidence. Properly used, they are helpful in explaining the premises and reasons underlying an opinion. Improperly used, they may become windowdressing, a facade resorted to in an attempt to disguise a process of reasoning thought by a judge to be better concealed from view. Their proper application, then, not as task masters but as guides, cannot but encourage states who sincerely wish a just determination of their rights, to submit disputes of interpretation to the Court, and in so doing increase the respect for and trust placed in obligations incurred by treaty.