

(ii) The Attitude of South African Courts

The dissolution of the Federation of Rhodesia and Nyasaland on 31 December, 1963, has led to the question of succession to treaties being discussed by South African courts on several occasions. Although the problem of succession is most frequently debated in connection with the succession of newly independent States to the treaties of their colonial predecessors, the dissolution of a Federation raises similar issues.

The Transvaal Provincial Division first had occasion to consider whether Southern Rhodesia had succeeded to the treaties of the now defunct Federation in the case of *S v. Eliasov*.⁶³ The appellant, Eliasov, a South African citizen resident in the Republic, was wanted by the Rhodesian Government on twenty-five counts of fraud. The question arose as to whether he could be extradited to Southern Rhodesia in terms of an extradition agreement entered into with the Federation prior to its dissolution. Subsequent to this original extradition agreement and on the eve of dissolution an exchange of notes took place between the then Prime Minister of Southern Rhodesia⁶⁴ and the acting accredited diplomatic representative of the Republic⁶⁵ whereby they agreed to continue the treaty after the dissolution. This exchange of notes was not published by the State President by Proclamation in the Government Gazette as required by section 2(3) of the South African Extradition Act⁶⁶ with the result that it was of no force or effect within the Republic. To succeed with the extradition the State was, therefore, obliged to rely on the continued validity of the prior agreement between South Africa and the Federation. It was contended that this prior agreement continued to exist between each of the three constituent territories of the Federation on the one hand and the Republic on the other. Hiemstra J. rejected this submission and regarded the matter as a 'simple' one to solve:

'An extradition agreement [he said] was concluded with the Government of the Federation of Rhodesia and Nyasaland. The Federation as a whole was a State with treaty-making capacity. That State was dissolved into three territories and so ceased to exist. With it ceased its treaties. That is the natural and normal sequel.'⁶⁷

⁶³. 1965 (2) S.A. 770(T).

⁶⁴. Mr. Winston Field.

⁶⁵. Mr. D.P. Olivier.

⁶⁶. Act 67 of 1962.

⁶⁷. *S v. Eliasov* 1965 (2) S.A. 770(T) at 773.

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Hiemstra J. did, however, add that it is legally possible for a constituent part of the dissolved State and the other party to the treaty to continue the treaty 'by unequivocally continuing to act according to its terms'⁶⁸ but that this had not happened here. On the contrary, the two Governments of South Africa and Southern Rhodesia had attempted to replace the original treaty by a new one, but this attempt failed to comply with the pre-requisite of publication demanded by the South African governing legislation.

Commenting on this decision in an article entitled 'Succession to Federal Treaties on the Dissolution of a Federation',⁶⁹ John Dugard submits that it is by no means a 'natural and normal sequel' that upon dissolution of a federation all its treaties cease to exist. State practice favouring the continuity of treaties of a federation, confederation or union on dissolution has led many writers on international law to conclude that succession to treaties does occur in these cases. Nevertheless, Hiemstra J.'s argument that the dissolution of a federation does involve a change in personality of its constituent parts and that new States emerge from the dissolution, is not without its merits. To argue, however, that when the Federation of Rhodesia and Nyasaland ceased to exist, its treaties ceased with it, is to over-simplify the rules relating to State succession. Apart from the personal-dispositive dichotomy whereby it has long been argued that dispositive treaties, which create real rights in respect of a territory, survive a change in personality, while personal treaties being purely contractual in nature and thus dependent on the personality of the contracting States come to an end; there is a considerable body of State practice and judicial precedent in favour of the continuation of extradition treaties, despite the fact that these may be labelled as 'personal' treaties.⁷⁰ This presumption of succession to

68. Ibid.

69. (1965) 82 South African Law Journal 430 at 431.

70. See the views of Wilfred Jenks 'State Succession in Respect of Law-Making Treaties' (1952) 29 British Yearbook of International Law 126; Mervyn Jones 'State Succession in the Matter of Treaties' (1947) 24 British Yearbook of International Law 368; D.P. O'Connell The Law of State Succession (1956) 43 and (1963) 69 British Yearbook of International Law 117, 126 and 132; Rosalyn Cohen 'Legal Problems arising from the Dissolution of the Mali Federation' (1960) 36 British Yearbook of International Law 375 at 383.

71. John Dugard op.cit 433ff. details these.

extradition treaties⁷² may be rebutted where there is evidence on the part of newly independent States of an intention to discontinue the treaty. This appears to be the rationale of Justice Hiemstra in Eliassov's case, for he stated that '(i)t appears that both Rhodesia and South Africa considered that the agreement would lapse on dissolution because an exchange of letters, designed to prevent this, took place on 23 December, 1963'.⁷³ If Hiemstra J. was correct in his assessment of the purpose of the exchange of notes, namely that it proved that both South Africa and Southern Rhodesia intended the original treaty to lapse on dissolution, his ultimate decision that succession to treaties by Southern Rhodesia had not taken place would have been correct. But it has been suggested⁷⁴ that the real purpose of the exchange of notes was to keep the original treaty in force, rather than to replace it with a new one, and was done ex abundante cautela because the parties were unsure of the status of the original extradition treaty. This reasoning is supported by the fact that the exchange of notes took place before rather than after the dissolution of the Federation, at a time when the original treaty was still operative.⁷⁵

In 1967, the question of State succession to treaties was again subjected to examination by the Transvaal Provincial Division, this time in the matter of S v. Bull.⁷⁶ The court was here called upon to decide whether the newly independent State of Malawi had succeeded to the extradition treaty of the former Federation of Rhodesia and Nyasaland and whether it was entitled to claim extradition of the appellant from South Africa in terms of that treaty. It was shown that when Nyasaland seceded from the Federation on 31 December, 1963, the extradition agreement was maintained in force by the law of Nyasaland by virtue of the Extradition of Offenders Enactments (Adaptations and Modifications) Regulations, 1964.

72. I. Shearer Extradition in International Law (1971) 51 remarks that despite evidence of increasing judicial recognition of succession by new States to extradition treaties, the overall picture is still one of confusion and uncertainty.

73. S v. Eliassov 1965 (2) S.A. 770(T) at 771-2.

74. John Dugard op.cit. 436.

75. The matter subsequently went on appeal to the Appellate Division in S v. Eliassov 1967 (4) S.A. 583 (AD) by which time the exchange of notes had been duly proclaimed in the Government Gazette as required by statute. The court was able to grant extradition under the new agreement and did not need to discuss the earlier decision of Hiemstra J.

76. 1967 (2) S.A. 636 (7).

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76. 1967 (2) S.A. 636 (7).

Thereafter, when Nyasaland achieved independence as the State of Malawi on 6 July, 1964, the agreement was kept in force as part of the law of Malawi by virtue of the Malawi Independence Order of 1964. As far as the Republic of South Africa was concerned, the official attitude of the Government was reflected in an executive certificate signed by the Minister of Justice, Police and Prisons, which indicated that the agreement should continue in force between South Africa and Nyasaland after the secession and thereafter between South Africa and Malawi. The certificate stated that the South African Government accordingly considered itself bound by the agreement.

Counsel for the appellant, relying on the decision in S v. Eliasov,⁷⁷ argued that the extradition agreement had come to an end with the dissolution of the Federation and that, as far as the Republic was concerned, revival was possible only if and when the provisions of section 2(3)(a) of the Extradition Act⁷⁸ were complied with, as this section provides that no agreement or any amendment thereof shall be of any force and effect until it has been published by the State President by Proclamation in the Government Gazette.

Boshoff J. (De Kock J. concurring) disagreed that much assistance was to be derived from Eliasov's case⁷⁹ or from past State practice.⁸⁰ Relying on the findings of the International Law Association Committee on State Succession,⁸¹ he adopted the distinction drawn by that Committee between succession in the case of the orderly and progressive transfer of constitutional power to dependent territories, which occurred frequently after 1947, and succession in the case of secession outside a constitutional framework. He concluded that

'independence of colonial territories at the present time is a process constitutionally and sociologically distinguishable from the traditional forms of secession, and that the problem of State succession to treaties, which arises from the fact of independence, is contextually novel. It follows that precedents afforded by previous instances of succession cannot be regarded as completely relevant'.⁸²

77. S v. Eliasov 1965 (2) S.A. 770(T).

78. Act 67 of 1962.

79. S v. Bull op.cit. 639.

80. Ibid. 638.

81. Published in The Effect of Independence on Treaties (1965) 1-3.

82. S v. Bull op.cit. 640.

Boshoff J. accepted the conclusion of the Committee on State Succession that newly independent States have been reluctant to commit themselves to any rule on state succession and instead 'prefer to deal with problems as they arise (which) in the great majority of cases ... has meant continuity of treaty operation'.⁸³

With regard to Malawi's succession to the extradition agreement concluded between the Federation and the Republic, the court held:

'Constitutional steps were taken to ensure that the agreement continued in force as part of the law of Nyasaland upon the secession of Nyasaland from the Federation. In the same way constitutional steps were taken to continue it in force as part of the law of Malawi upon the achievement of independence by Nyasaland as the State of Malawi. In this way continuity was ensured as also succession to the agreement. The Republic of South Africa, as a party to the agreement, at all times desired such continuity and succession, and accepted that there was such continuity and succession... In the circumstances the conclusion is unavoidable that the agreement never lapsed despite the dissolution of the Federation. There is thus no room for the contention advanced on behalf of the appellant that a new agreement had to be concluded in respect of which the formalities of section 2(3)(a) had to be complied with before the extradition agreement can be revived and brought into operation. The extradition agreement must, therefore, be regarded as 'till being of full force and effect'.⁸⁴

The court distinguished its previous decision in S v. Eliasov.⁸⁵ in which it had held that Southern Rhodesia had not succeeded to the same extradition treaty, on the ground that in that case the Governments of South Africa and Southern Rhodesia had intended to conclude a new agreement because they had considered that the old agreement would lapse.

83. Ibid.; it might be noted in this regard that the principle of continuity favoured by Professor D.P. O'Connell and his colleagues in the International Law Association has since been overtaken by the 'clean-slate' principle as the operative principle for succession by newly independent States as demonstrated by the recent United Nations Conference on Succession of States in Respect of Treaties, First Session, held in Vienna on 4 April - 6 May, 1977. 'Clean-slate' was the catch-cry of the Conference and one to which all delegations paid tribute, and is reflected in Article 15 of the International Law Commission's Draft Articles on Succession of States in respect of Treaties. 'Clean-slate' today is a metaphor for the principle that newly independent States are not obliged to succeed to treaties of their predecessor States, but they may elect to succeed to most of them.

84. S v. Bull loc.cit.

85. Supra.

while in the present case, the Governments of South Africa and Malawi clearly intended that that part of the agreement relating to South Africa and Malawi should continue in force.⁸⁶

By refusing to apply some vague and imprecise 'general rule' as regards State succession, and by stressing instead the intention of the parties to the treaty, the court in Bull's case proved itself to be in tune with recent developments in this field. Sir Francis Vallat, writing in 1955, was one of the first to emphasize the importance of the factor of intention in the process of State succession.⁸⁷ Subsequently, under his influence as Special Rapporteur for the International Law Commission's investigation into the succession of States in respect of treaties, and as one of the principal draftsmen of the Commission's Draft Articles on the subject, this element of intention acquired paramount importance and is reflected in many of the Articles. Article 23, for example, provides that bilateral treaties in force at the date of a succession of States will continue in force between the newly independent State and the other State party when they 'expressly so agree or by reason of their conduct they are to be considered as having so agreed'.⁸⁸

Clearly, both South Africa and Malawi evidenced a firm intention to be bound by the extradition treaty in the light of their conduct subsequent to the constitutional changes in the status of Malawi. In recognizing this, and by giving this intention practical effect, the court in S v. Bull made an important juridical contribution to the development of international law in this regard and the decision is to be welcomed as a reflection of modern opinion on the subject of State succession to treaties.⁸⁹

The question whether the 1962 extradition agreement between South Africa and the Federation of Rhodesia and Nyasaland had survived the dissolution of the Federation in respect of Malawi came up for judicial consideration once again in 1971. In S v. Devoy⁹⁰ the Natal Provincial

86. S v. Bull op.cit 638.

87. F.A. Vallat 'Some Aspects of the Law of State Succession' (1955) 41 Transactions of the Grotius Society 123.

88. Articles 23 and 26, which provide for provisional entry into force of multilateral and bilateral treaties respectively, are worded in similar fashion.

89. See comment by C.J.P. Dugard 'Succession to Federal Treaties Revisited' (1967) 84 South African Law Journal 250 at 252.

90. 1971 (1) S.A. 359 (N).

Division found itself in agreement with the approach of Boshoff J. in Bull's case and ordered the extradition of Mr. Devoy to Malawi. Here, too, the court stressed the element of intention to continue the agreement as manifested in the actions of both States.⁹¹ The matter duly went on appeal to the Appellate Division⁹² where, after a review of the authorities on the subject, Ogilvie Thompson C.J. (Rumpff J.A. and Corbett A.J.A. concurring) held that

'It does not appear to me to be possible to formulate any universal international law rule regarding the continuation or otherwise of treaties consequent upon the dissolution of the Federation of Rhodesia and Nyasaland. Each case must, I think, be decided on the particular facts relating to it, but, especially as regards extradition treaties, at the same time bearing in mind the existence of a general tendency in favour of their continuance'.

In this case the 'particular facts' included that by the 'tacit consent' of all parties concerned - that is to say, the Republic of South Africa on the one hand and first Nyasaland and then Malawi on the other hand - the agreement continued to be reciprocally binding notwithstanding the dissolution of the Federation on 31st December, 1963.⁹⁴ Thus, while the ruling of the Appellate Division did not really take the matter any further, it did at least confirm the finding of the Transvaal Provincial Division in S. v. Bull.⁹⁵

Even after such extensive investigation by the South African courts, the problem of State succession to the treaties of the defunct Federation of Rhodesia and Nyasaland has still not been laid to rest. On a recent appeal from a Magistrate's Court against the granting of an extradition order issued in terms of the extradition agreement between South Africa and Southern Rhodesia in December, 1963, the Natal Provincial Division in S v. Oosthuizen⁹⁶ yet again discussed the issue whether the extradition

91. S v. Devoy op.cit. 362.

92. S v. Devoy 1971 (3) S.A. 899 (AD)

93. Ibid. 905. See the comments on this case by A.J.H.M. Sanders 'Our State cannot speak with Two Voices' (1971) 88 South African Law Journal 413.

94. S v. Devoy op.cit. 908.

95. Supra; The Appellate Division did not overrule S v. Eliasov (supra) but simply distinguished it on the facts. See, too, the note by C.J.R. Dugard 'The Treaty-making Process' (1968) 85 South African Law Journal.

96. 1977 (1) S.A. 823 (N).

agreement had survived the breakup of the Federation, at least, as regards Southern Rhodesia. By the time this action was brought to court, the new exchange of notes had been duly incorporated into South African law, as required by the Extradition Act⁹⁷, by Proclamation in the Government Gazette.⁹⁸ On this occasion, Counsel for the appellant argued that the magistrate had erred in finding that the agreement continued in force despite Rhodesia's unilateral declaration of independence on 11 November, 1965. The effect of UDI on the treaty was the issue to which the court devoted its attention in this case. Kriek J. (Van Heerden J. concurring), took into account what he described as four relevant facts:

- (i) that when the extradition agreement was concluded Rhodesia was a British Crown Colony;
- (ii) that since 11 November, 1965, Rhodesia had acted as an independent State;
- (iii) that South Africa has not recognized Rhodesia as an independent State either expressly or implicitly;
- (iv) that the fact that Rhodesia has not been recognized internationally does not mean it is not a State, but the 'new' Rhodesia is not the Rhodesia with which the extradition agreement had been concluded'.⁹⁹

The court then turned to the case of S v. Davoy in which the extradition agreement between South Africa and the newly independent State of Malawi had been upheld. It distinguished that case from the present one on the ground that there both the South African Government and the Malawian Government had clearly manifested to the court their intentions to continue with the extradition treaty. By contrast, in Costhuizen's case, there was a distinct absence of any such executive directive on the part of the South African or the Rhodesian Government, and as a result, the court felt bound to conclude that the treaty had lapsed in the absence of any intention to keep the treaty in existence. The appeal was, accordingly, allowed and the extradition order set aside.

A major objection to the decision in S v. Costhuizen is that

'it takes no account of the problem of recognition and constitutes a clear usurpation on the part of the judiciary of the Executive's right to be the sole arbiter in matters

97. Act 67 of 1962, section 2(3).

98. Proclamation R 151 G.G. Extraordinary 1156 of 25 June 1965 Reg.Gaz. 507.

99. S v. Costhuizen op.cit. 824-5.

1. 1971 (3) S.A. 899 (AD).

affecting South Africa's foreign relations. Clearly the correct approach in this case would have been for the court to have requested an executive certificate from the Department of Foreign Affairs on its official attitude towards Rhodesia and the treaty in question....its failure to do so has resulted in our State speaking with two voices'.²

Yet another disturbing aspect of this decision is that it appears to have ignored and to conflict with the judgement of the Appellate Division in S. v. Eliasov³ in which the higher court considered the validity of the same extradition agreement of 1963 in respect of extradition proceedings commenced before the unilateral declaration of independence as if that declaration had not affected the treaty in the proceedings. The facts in Eliasov's case as they were when the matter eventually came before the Appellate Division are very difficult to distinguish from the facts in the present case, and in the light of this the Natal Provincial Division has surely erred in not following the precedent set by the highest South African court of appeal. In any event, as Dugard suggests,⁴ the attitude of the Appellate Division in that case, which resulted in an extradition order being made in favour of Rhodesia after UDI. 'is in full keeping with the policy of the Executive to recognize the status quo ante UDI and for that reason alone it should have been followed.'

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2. John Dugard 'Rhodesia: Does South Africa Recognize it as an Independent State?' (1977) 94 South African Law Journal 127 at 129-30.
 3. 1967 (4) S.A. 583 (AD).
 4. John Dugard op.cit. 130.

7 THE SOUTH AFRICAN APPROACH TO TREATY INTERPRETATION

Introduction

To be of any value, a study of the South African approach to treaty interpretation should not take place in splendid isolation but should instead be set against current international practice in this regard. It is therefore proposed to examine briefly the general rules of treaty interpretation followed and accepted by the international community and to compare the South African approach with this. Even prior to the Vienna Convention on the Law of Treaties¹ different attitudes towards this problem had been adopted by States and international lawyers, and a detailed body of working rules had come into existence. The International Law Commission aimed to codify the main rules for the guidance of States and international tribunals. Articles 31 and 32 of the Vienna Convention are the results of its efforts. A strong element of progressive development is present in these articles, which by no means entirely supercede the rules in practice before the conclusion of the Convention; they should rather be regarded as complimentary to the rules already in force. In any event these articles are themselves subject to interpretation.

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

The South African approach to treaty interpretation has manifested itself mainly in the international sphere through arguments submitted on a number of occasions to the International Court of Justice in the various

1. On 19 August, 1977, Finland became the 31st State to ratify the Convention. Thirty-five ratifications are required to bring the Convention into force: (1977) 14 I.L.N. Chronicle 47.

South-West Africa Advisory Opinions and judgements. These submissions, therefore, form the primary basis of this study. It will become apparent that the South African approach has, through the years, remained rigidly textual. The advent of the Vienna Convention on the Law of Treaties has served only to consolidate this attitude and no effort has been made to accommodate or even to understand the teleological point of view that has gained widespread acceptance in many parts of the world.

(a) Varieties of Approach to Treaty Interpretation

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

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

(i) The Intentions Approach

Adherents of the 'intentions' school believe that 'the only consid-
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2. G.G. Fitzmaurice 'The Law and Procedure of the International Court of Justice: Treaty Interpretation and Certain Other Treaty Points' (1951) 28 British Yearbook of International Law 1 at 1-2.
 3. This Convention is reproduced in (1959) 63 American Journal of International Law 875.
 4. See Charles Fairman 'The Interpretation of Treaties' (1935) 20 Transactions of the Grotius Society 122 for an early look at this problem.

tion that matters in the process of interpretation is to discover the intention of the parties ... [and that] (n)o rule of interpretation purports ... to serve a purpose other than the revealing of the intentions of the parties'.⁵ Such overriding concern with the intentions of the parties has been criticized⁶ for a number of reasons. One of the most fundamental is that this school ignores the fact that the treaty was drafted precisely to give effect to the intentions of the contracting parties and therefore it must be presumed to do so. This intention is accordingly to be found in the text itself and thus the primary question is not what the parties intended but what the text means. Whatever it clearly means will be deemed to reflect the intentions of the parties. In addition, the intentions approach to treaty interpretation is inadequate in the interpretation of multilateral treaties where often many of the parties have joined by accession and have taken no part in the framing of the convention. Here the presumption arises that they have joined on the basis of what the text itself says rather than what the original contracting parties intended.⁷

Situations may well arise in which an international tribunal or national court, faced with the task of interpreting a disputed provision of a treaty, is not able to do so on the basis of a common intention of the contracting parties because such a common intention may not exist at all in relation to that provision.⁸ It is possible that the parties, although using identical terminology, might in good faith have attached different meanings to it, perhaps dictated by the peculiarities of their own respective languages. Perhaps one party, bent on benefiting from an ambiguity in expression, has deliberately allowed this to be included in the body of the treaty. Often where the parties have been unable to reach

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5. Per Hersch Lauterpacht International Law-Collected Papers (1970) I General Works 361; Judge Anzilotti in his Dissenting Opinion in the Night Work case heard before the Permanent Court of International Justice, Series A/B, No. 50, p. 383 expressed this attitude by saying 'the words have no value except as an expression of the intention of the parties'.
 6. See G.G. Fitzmaurice *op. cit.* 3-6 and 14-17; also Sir Gerald Fitzmaurice 'The Law and Procedure of the International Court of Justice 1951-4: Treaty Interpretation and Other Treaty Points' (1957) 32 British Yearbook of International Law 203 at 205 ff.
 7. *Ibid.*
 8. H. Lauterpacht 'Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties' (1949) 26 British Yearbook of International Law 48 at 76 ff.

an agreed solution, they will be content to couch a phrase or term in deliberately non-committal or ambiguous language, leaving the problem open for solution in the future by further agreement, negotiation or arbitration.

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

(ii) The Textual Approach

Contraposed to the 'Intentions' school are the textualists whose prime object is to establish the meaning of the text of the treaty. The emphasis here is to give all words and phrases their natural and ordinary meanings and to allow the text to reveal the intentions of the contracting parties rather than to attribute a meaning to the text in the light of the intentions of the parties. The starting-point of the textualist school is that any approach to the interpretation of a treaty must begin with the words actually used. First and foremost, the intentions of the parties are to be deduced from the way in which these intentions have been expressed in the text. As Sir Gerald Fitzmaurice stated so succinctly:¹⁰

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

Perhaps the single most important consideration that adherents of the textual school take into account is the 'natural and ordinary' meaning of the words of the treaty. A court will give effect to a provision of a treaty in the sense required by its clear and unambiguous wording, unless

9. Ibid.

10. Sir Gerald Fitzmaurice 'The Law and Procedure of the International Court of Justice 1951-4: Treaty Interpretation and Other Treaty Points' (1957) 32 British Yearbook of International Law 203 at 207.

some valid ground can be shown for interpreting the provision in a different way. This approach was amply demonstrated in the Competence of the General Assembly case¹¹ where the International Court of Justice was asked to decide whether the General Assembly could admit a State to the United Nations without the Security Council having made any recommendation on the matter. According to Article 4(2) of the Charter, the admission of a State to the United Nations 'will be effected by a decision of the General Assembly upon the recommendation of the Security Council'. Although the Court went on to consider other reasons supporting its view that the Assembly acting alone was not competent to admit new States to the organization, the real basis for its decision was the fact that Article 4(2) had a clear and obvious meaning to which the Court was bound to give effect:

'The Court considers it necessary to say that the first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty, is to endeavour to give effect to them in their natural and ordinary meaning in the context in which they occur. If the relevant words in their natural and ordinary meaning make sense in their context, that is an end of the matter.... When the Court can give effect to a provision of a treaty by giving to the words used in it their natural and ordinary meaning, it may not interpret the words by seeking to give them some other meaning. In the present case the Court finds no difficulty in ascertaining the natural and ordinary meaning of the words in question and no difficulty in giving effect to them.'¹²

(iii) The Teleological Approach

The third approach to treaty interpretation is that of the teleological or sociological school, on which a substantial amount of American theory and practice is based¹³ and amongst whose chief and most vocal advocates are to be found Professors McDougal, Lasswell and Miller.¹⁴ Teleologists argue primarily that the text of the treaty should be regarded simply as the formal embodiment of the parties' shared intentions and that any interpreter is required to make, as a matter of course, a far-ranging enquiry into non-textual matters.¹⁵ The main goal of treaty interpretation

11. 1950 ICJ Reports 4.

12. Ibid 8.

13. J.G. Merrill. 'Two Approaches to Treaty Interpretation' (1968-9) Australian Yearbook of International Law 55 at 64 ff gives a lucid exposition of the American viewpoint.

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

here is to ascertain the objects and purposes of the treaty and then to interpret the treaty so as to give effect to those objects and purposes.¹⁶ The enquiry is of necessity much broader in scope than that of the textual school. To a certain extent, however, the teleological approach is simply an amalgam of elements of the first two approaches. In so far as it relies on the objects and purposes of the treaty as they are expressed in the text and in the preamble, the teleological approach is essentially a variant of the textual approach.¹⁷ On the other hand, by going beyond the text and seeking to ascertain the original aims of the parties to the convention by reference to the entire course of negotiations and the circumstances surrounding its conclusion, it manifests a kinship with the intentions approach. The teleological stance is, nonetheless, unique, in that it acknowledges, in accordance with the doctrine of the 'emergent purpose', that the objects and purposes which determine the true interpretation of a treaty may be those which exist at the time of interpretation rather than at the time of its conclusion.¹⁸ This aspect of the teleological approach is not textual because the emergent purpose cannot be gathered from the text, nor is it intentional, since it is independent of the original intentions of the parties.¹⁹

One model formulation of the teleological approach is contained in the Draft Convention on the Law of Treaties prepared in 1935 as part of the Harvard Research in International Law.²⁰ This Draft Convention stipulates²¹ that '(a) treaty is to be interpreted in the light of the general purpose which it is intended to serve'. It then lists a variety of factors which 'are to be considered in connection with the general purpose which the treaty is intended to serve'.²² These include the historical background of the treaty, *travaux préparatoires*, the circumstances of the parties at the time of its conclusion as well as the change in these circumstances sought to be effected, any subsequent conduct of the parties in applying

16. I.M. Sinclair 'Vienna Convention on the Law of Treaties' (1970) 19 *International and Comparative Law Quarterly* 47 at 61.

17. Francis G. Jacobs 'Varieties of Approach to Treaty Interpretation: With Special Reference to the Draft Convention on the Law of Treaties Before the Vienna Diplomatic Conference' (1969) 18 *International and Comparative Law Quarterly* 318 at 319.

18. *Ibid* 320.

19. *Ibid*.

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

21. *Ibid* at 937, Article 19.

22. *Ibid*.

the treaty, and the condition prevailing at the time of interpretation. One important factor is that the Draft Convention, unlike the 'intentions' and the 'textual' approaches, makes no attempt to establish any hierarchical order among these principles of treaty interpretation. It simply lists them. In similar fashion, the Restatement of Foreign Relations Law of the United States, published in 1965 by the American Law Institute, lists a large number of 'factors to be taken into account by way of guidance in the interpretative process' other than the ordinary meaning of the words of the agreement in their context.²³ It emphasizes that this list is not intended to be exhaustive. Paragraph 147(2) of the Restatement specifically provides that there is no established priority as between these aids to the interpretative process.

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

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

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

Professor McDougal, in his subsequent role as a member of the United States delegation to the Vienna Conference on the Law of Treaties, had ample opportunity to elaborate further on the teleological viewpoint. In a statement made on the 19 April, 1968, to the Committee of the Whole,²⁶ he pointed out²⁷ that 'the long historic trend in the great bulk of decisions is for an interpreter to take into account any circumstance which may affect the common intention which parties seek to express in a text'.

23. Paragraph 147.

24. Myres S. McDougal 'The International Law Commission's Draft Articles Upon Interpretation: Textuality Redivivus' (1967) 61 American Journal of International Law 992 at 998.

25. *Ibid* 997.

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

27. *Ibid* 1022.

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

With these thoughts in mind, among others, the United States delegation tabled an amendment³¹ to the draft articles³² submitted by the International Law Commission. This amendment attempted to eliminate the rigidities and restrictions of the two draft articles and to merge these two articles into one 'open-ended itemization of elements relevant to rational interpretation'.³³ According to the proposed amendment 'any treaty was to be interpreted 'in good faith in order to determine the meaning to be given to its terms in the light of all relevant factors'. There followed a non-exhaustive list of nine factors, including *inter alia* the context of the treaty, its objects and purposes, the preparatory works, and the circumstances surrounding the conclusion of the treaty. Through this proposed amendment, which sought to place an 'economic emphasis' on the contents of the text, the United States delegation sought to avoid any fixed hierarchy of aids to interpretation and to make all elements which might be helpful in any particular set of circumstances accessible to interpreters, be they 'ordinary meaning', 'subsequent practice', 'preparatory works', or indeed, any other. The American stated that '(t)he aspiration of our draft is to

28. Ibid 1025-6.

29. Ibid 1026.

30. Ibid.

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

32. At that stage draft articles 27 and 28.

33. (1968) 62 *American Journal of International Law* 1027.

34. Reproduced in the (1969) 62 *American Journal of International Law* 1021 n 2.

encourage an economic, systematic and disciplined canvass by interpreters of all elements which may aid in the identification and clarification of common intent'.³⁵

(b) The Vienna Convention on the Law of Treaties

The question of the approach adopted in the Vienna Convention on the Law of Treaties may now be considered. The International Law Commission realized from the outset that they were faced with an embarrass de riches. The Commission acknowledged that the jurisprudence of international tribunals had furnished examples of all these approaches to treaty interpretation, and that while the textual approach seemed to predominate, none of the three methods was exclusively the correct one, in that their use in any given case was to some extent a matter of choice and appreciation.³⁶ The Commission also realized³⁷ that there were many different principles of interpretation whose appropriateness in any particular instance depended largely on the particular context and on a subjective appreciation of varying circumstances. For these reasons, it at first considered inserting a permissive provision stating simply that recourse might be had to the principles in question for the purpose of interpreting a treaty. The Commission ultimately rejected this proposition as undesirable because of the danger that any inadvertent omission of a principle from the list might be construed in a way which would throw doubt upon its status even as a subsidiary aid to interpretation. In the outcome the Commission concluded that the choice before it was either to omit altogether the topic of interpretation of treaties from the Convention or to seek to isolate and codify the comparatively few rules which, to its mind, constituted the strictly legal basis of the interpretation of treaties.³⁸ It embarked on the latter course of action for a variety of reasons. Primarily it valued the certainty and uniformity in interpretative methods that such a codification would provide. It recognised that the interpretation of

35. American Journal of International Law op. cit. 1027.

36. Third Report on the Law of Treaties by Special Rapporteur Sir Humphrey Waldock (Doc. A/CN.4.4716) (1964) Yearbook of the International Law Commission 54.

37. *Ibid.*

38. *Ibid.*

treaties without arbitration and according to law was a vital linch-pin of the pacta sunt servanda rule, important in practice both for the application and the drafting of treaties.

Another factor which influenced the decision of the Commission was the realization that doctrinal differences concerning methods of interpretation had tended to weaken the significance of the text as the expression of the will of the parties, and the Commission deemed it desirable to take a clear position on the rule of the text in this regard. The conclusion was reached that, in the international community where the role of treaty interpretation was of such importance, there was particular value in codifying as rules such basic principles of interpretation which, in the course of their investigations, they had found to be generally accepted as law.³⁹ The Special Rapporteur accordingly prepared for the consideration of the International Law Commission draft articles dealing generally with the interpretation of treaties. These took their inspiration from two major sources. The first was the 1956 Resolution of the Institute of International Law⁴⁰ which provided:

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

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

The second major source of inspiration for the Commission was Sir Gerald Fitzmaurice's formulation of the major principles of treaty interpretation which were based on the jurisprudence of the International Court of Justice

39. See the comments of Special Rapporteur Sir Humphrey Waldock in his Sixth Report on the Law of Treaties (DOC A/CN. 4/186) (1966) 2 Yearbook of the International Law Commission 94.

40. 1956 Annuaire de l'Institut de Droit International 364-5.

41. Article 1(1).

42. Article 1(2).

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

during the period 1946 to 1954. These principles were stated in the following terms:⁴⁴

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

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

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

Subject to the foregoing Principles

IV. Principle of Effectiveness (*ut res magis valeat quam pereat*). Treaties are to be interpreted with reference to their declared or apparent objects and purposes, and particular provisions are to be interpreted so as to give them their fullest weight and effect consistent with the normal sense of the words and with other parts of the text, and in such a way that a reason and a meaning can be attributed to every part of the text.

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

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

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

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

This last principle could perhaps be regarded as constituting in a

44. Sir Gerald Fitzmaurice 'The Law and Procedure of the International Court of Justice: Treaty Interpretation and Other Treaty Points' (1957) 33 *British Yearbook of International Law* 201 at 211-2.

sense no more than a qualification to the principle (No. II) of the natural and ordinary meaning. But, on account of its affinities with the principle of the inter-temporal law and for other reasons (see below, subsection (4)) it seems to go beyond that, and to merit the status of an independent principle of interpretation.⁴⁵

Sinclair⁴⁶ notes that Fitzmaurice, in stressing the principles of actuality and that of the natural and ordinary meaning of the treaty, attaches primary importance to the textual approach. However, he by no means ignores the other two approaches although they are clearly relegated a secondary and supportive role. A place is found for the teleological school in the principle of effectiveness while recourse to extraneous means of interpretation, (one of the hallmarks of the intentions school) is regarded by Fitzmaurice as permissible in certain defined circumstances.

The International Law Commission worked from the basic assumption that 'the text must be presumed to be the authentic expression of the intentions of the parties, and that, in consequence, the starting point and purpose of interpretation is to elucidate the meaning of the text, not to investigate nitio the intentions of the parties'.⁴⁷ This led the Commission to

interpretation as a two-stage process: the provision that eventually became Article 31 describes the primary method of interpretation, while Article 32 lists the main supplementary aids to interpretation.

Shabtai Rosenne⁴⁸ maintains that the most striking difference between the American Restatement and the approach of the ILC lies in the fact that the principle that the authors of the Restatement included in one paragraph,⁴⁹ appeared originally in three Articles of the Commission's text.⁵⁰ The Commission itself rejected suggestions made during the second reading that the material should be combined in one single article. Rosenne traces this basic difference back to the fact that many members of the ILC were legal positivists and to the distrust that many international lawyers have towards the teleological approach to treaty interpretation.⁵¹ Nevertheless, although the way in which the material is presented in Articles 31 and 32 seems designed to stress the dominant position of the text in the interpretative process, the attitude of the International Law Commission is

45. Sinclair *op. cit.* 510-11.

46. Commentary of the International Law Commission (1963-1964) 2 Yearbook of the International Law Commission 56 paragraph 13.

47. Shabtai Rosenne 'Interpretation of Treaties in the Restatement and the International Law Commission's Draft Articles: A Comparison' (1966) 5 Columbia Journal of Transnational Law 205 at 221.

48. Section 147.

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

50. Further remarks in this regard are made on pp. 342 ff. below.

not exclusively textual.

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

Article 31(2) defines the text of a treaty as inclusive of the preamble and annexes, and states that the context of a treaty for the purposes of interpretation shall comprise, in addition to this 'text', any collateral agreements relating to the treaty (which presumably might include even oral agreements), provided that these were made by all the parties involved in the conclusion of the treaty; or, if such collateral agreement was made by only one or some of the parties, that it was accepted by the other parties as an instrument related to the treaty. The provision was based on the principle that a unilateral document cannot be regarded as forming part of the 'context' unless it was made in connection with the conclusion of the treaty and if, in addition, its relation to the treaty had been

51. Italics added.

52. (1966) *Yearbook of the International Law Commission* 219-20, paragraph 8.

53. Ibid, paragraph 9.

54. *Yearbook* op. cit. 221, paragraph 12.

55. D.P. O'Connell *International Law* 2 ed. 1 (1970) 255.

accepted in the same manner by all the parties.⁵⁶

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

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

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

56. Yearbook op. cit. 21, paragraph 13.

57. In the *Ambatielos* case (preliminary objections) 1953 ICJ Reports 44, the Court held that 'the provisions of the Declaration are in the nature of an interpretation clause and as such should be regarded as an integral part of the treaty'.

58. (1966) 2 Yearbook of the International Law Commission 221, paragraph 14.

59. Per Judge Torki in the *Case Regarding the Application of the Convention of 1907 Governing the Guardianship of Infants* (Netherlands v. Sweden) 1958 ICJ Reports 55 at 171.

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

61. See D.P. O'Connell op. cit. 261.

62. Per Judge Jessup in the Second Phase of the *South-West Africa* dispute (Ethiopia v. South Africa; Liberia v. South Africa) 1966 ICJ Reports 6 at 351.

The International Law Commission lists 'subsequent practice' of the parties as a primary means of interpretation.⁶³ In so doing it appears to be based heavily on Sir Gerald Fitzmaurice's findings⁶⁴ which pronounced recourse to subsequent practice as not only permissible but desirable in that it affords 'the best and most reliable evidence, derived from the treaty has been interpreted in practice as to what its correct interpretation is'. While not denying the importance of such practice, at least one critic⁶⁵ has queried the labelling of subsequent practice as a primary method of interpretation. Jacobs contends⁶⁶ that this principle has traditionally been regarded only as a supplementary aid to the interpretative process.⁶⁷ Oppenheim,⁶⁸ for example, would allow resort to subsequent practice 'in some cases' only. McNair⁶⁹ advocates the use of this principle when there is doubt as to the meaning of a provision or expression of a treaty. Here the subsequent practice of the parties will carry a high probative value as to their intentions at the time they concluded the treaty. Presumably if the meaning is clear an interpreter would have no occasion to look at subsequent practice at all. Certain caveats in the application of this rule should be borne in mind, namely, that the conduct of the parties may have been in disregard of the treaty.⁷⁰ Furthermore, that the probative value of subsequent conduct is doubtful in the case of multilateral treaties, especially where the number of parties has increased or decreased to any significant extent.⁷¹

The commentary of the International Law Commission⁷² cites four cases in support of its contention that recourse to subsequent practice is a well-established rule in the jurisprudence of international tribunals. In the Competence of the ILO to Regulate Agricultural Labour case⁷³ the question

63. Article 31(3)(b).

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

65. Jacobs *op. cit.* 527.

66. *Ibid.*

67. See, too, D.W. Greig International Law 2 ed. (1976) 451; D.P. O'Connell *op. cit.* 261.

68. L. Oppenheim International Law - A Treatise 1 Peace 8 ed. (1964) 957.

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

70. Oppenheim *loc. cit.*

71. Per Judge Spender Certain Expenses of the United Nations case 1962 ICI Reports 130 at 191.

72. 1960 2 Yearbook of the International Law Commission 22, paragraph 15.

73. 1932 PCIJ, Ser. B, No. 2, p. 30.

arose whether the sphere of agricultural labour fell within the competence of the ILO. The Permanent Court held that the treaty constituting the ILO quite clearly gave the ILO this competence, but added, nevertheless, that '(if there were any ambiguity, the Court might, for the purpose of arriving at the true meaning, consider the action which was taken under the Treaty'. The Court also approved recourse to subsequent practice in configuration of a meaning which it had deduced from the text and which it considered to be unambiguous.⁷⁴

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

Jacobs observes⁷⁷ that the cases used by the Commission to support the use of subsequent practice carry as their natural corollary the idea that if the original intentions of the parties are clear or if the provisions of the treaty are unambiguous, there will be no need to resort to subsequent practice at all. He contends that in placing subsequent practice among the principal means of interpretation, the International Law Commission departed considerably from the practice of the Court. The Commission, however, considered⁷⁹ that subsequent practice establishing the understanding

74. Ibid at 40-1; More recently, in the Status of South-West Africa case 1950 ICJ Reports 128, the ICJ was required to decide whether South Africa was still bound by the terms of its Mandate over South-West Africa. The Court referred to a number of declarations made by the South African Government to the League of Nations and to the United Nations and then stated: 'These declarations constitute recognition by the Union Government of the continuance of the obligations under the Mandate ... Interpretations placed upon legal instruments by the parties to them, though not conclusive as to their meaning, have considerable probative value when they contain recognition by a party of its own obligations under an instrument. In this case the declarations of the Union of South Africa support the conclusion already reached by the Court'.

75. 1949 ICJ Reports 25.

76. Similarly see the Interpretation of Article 3, paragraph 2, of the Treaty of Commerce case, 1925 PCIJ, Ser. F, No. 12, p. 24.

77. Jacobs op. cit. 328-9

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

79. (1966) 2 Yearbook of the International Law Commission 222, paragraph 15.

of the portion regarding the interpretation of a treaty should logically be included in paragraph 3 as an authentic means of interpretation alongside interpretative agreements, presumably since both interpretative agreements and subsequent practice show the common understanding of the parties as to the meaning of the terms of their agreement. The final word on the subject might be given to Fitzmaurice⁸⁰ who points out that reference to subsequent practice is not so much a principle of interpretation as it is a rule of evidence, 'a question of the probative value of the practice of the parties as indicative of what the treaty means'.

Article 31(3)(c) adds as a third element to be taken into account together with the context 'any relevant rules of international law applicable in the relations between the parties'. In the text provisionally adopted in 1964, this rule was formulated in a slightly different but effectively significant manner. The text at that time read that the ordinary meaning to be given to the terms of a treaty was to be determined 'in the light of the general rules of international law in force at the time of its conclusion'.⁸¹ The earlier formulation reflected the widely-held idea that a juridical fact should be appreciated in the light of the law contemporary with it and not of the law in force at the time when a dispute arose or was adjudicated upon. However, when this provision was discussed at its sixteenth session⁸² some members of the Commission argued that it failed to deal with the problem of the effect of an evolution of the law on the interpretation of the provisions of a treaty and was, therefore, inadequate. Upon re-examination, the Commission concluded that the 1964 text was unsatisfactory in that by only partially dealing with the question of inter-temporal law in its application to treaties it might lead to misunderstanding. On the other hand, the Commission balked at the idea of attempting to formulate a rule that would comprehensively cover the temporal element. It decided that the correct application of the temporal element would normally be indicated by the interpretation of the treaty in good faith. In the end result the Commission omitted altogether any mention of the temporal element and in its final formulation left the rule very flexible.

Article 31(4) of the Vienna Convention on the Law of Treaties contains the proviso that, notwithstanding the apparent meaning of a term in its context, where it is established that the parties intended it to have a

80. Fitzmaurice 1980, 618.

81. Text as added. This was Article 60(1)(b), reproduced in (1964) 2 Yearbook of the International Law Commission 199.

82. Report of the International Law Commission covering the work of its sixteenth session, 11 May - 24 July, 1964, (DOC A/5809) (1964) 2 Yearbook of the International Law Commission 173 at 202-3, paragraph 11.

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

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

The International Court of Justice has also recognized the existence of this rule and the strictness of the proof required to apply it.⁸⁶ The present Article 31(4) therefore accurately reflects the attitude of the Court in this regard and should not prove to be a matter for dispute.

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

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

- (a) leaves the meaning ambiguous or obscure; or
- (b) leads to a result which is manifestly absurd or unreasonable.

83. (1966) Yearbook of the International Law Commission 222, paragraph 17.

84. *Ibid.*

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

86. Conditions of Admission of a State to Membership in the United Nations case 1948 ICJ Reports 57 at 61.

The Commission relegated preparatory works to Article 32 as a mere 'supplementary means' of interpretation. It wisely refrained from defining travaux préparatoires since 'to do so might only lead to the possible exclusion of relevant evidence'.⁸⁷ The term designates those extrinsic materials which had a formative effect on the final draft of a treaty, and which, therefore, assist in the disclosure of the parties' aims and intentions.⁸⁸ In general terms it is the record of the drafting of a treaty and includes all the documents such as minutes, preliminary drafts, conference discussions, memoranda and draft amendments of the treaty in question. It also covers records of negotiations between the States that participated in the drafting of the treaty and in some cases records of the work of independent bodies of experts, such as the International Law Commission.⁸⁹ McNair⁹⁰ submits that unilateral statements such as those made by Government spokesmen prior to or concurrently with the negotiations but not as a part of them should not be admissible under the omnibus term of preparatory works as 'whatever value there may be in preparatory works is that it may afford evidence of the common intention of the parties'.⁹¹

Today there is little, if any, dispute on the permissibility of resort to travaux préparatoires as an aid to treaty interpretation but its significance has never been clearly explained in international jurisprudence. The essential problem is how to balance the final text of the treaty and the mass of documentation going under the label of preparatory works.⁹² Some authorities have adopted the view that recourse to preparatory works is only permissible where the text is not clear,⁹³ where the language employed is fundamentally obscure or ambiguous,⁹⁴ or to confirm a conclusion reached by 'normal' methods of construction.⁹⁵ O'Connell⁹⁶ recognises that from a policy point of view recourse to preparatory works by an international arbiter is desirable as its effect is to delimit the area of discretion of

87. (1966) 2 Yearbook of the International Law Commission 221, paragraph 20.

88. D.P. O'Connell op. cit. 262.

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

90. McNair op. cit. 421-2.

91. Italics added.

92. D.P. O'Connell loc. cit.

93. J.C. Starke An Introduction to International Law 5 ed. (1963) 361.

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

95. Starke loc. cit.

96. D.P. O'Connell loc. cit.

the judge, and in this way guaranteeing litigant States of his impartiality. By having preparatory works at his disposal the arbitrator has a means of discovering exactly what the parties meant by a particular provision in a treaty - it is not left solely to him to devise a construction of the treaty.

Apart from this, most treaties represent a compromise of vital political interests which cannot be fully understood without reference to the travaux préparatoires.⁹⁷ Despite this, O'Connell⁹⁸ is of the view that on certain occasions resort to preparatory works should be sparing, particularly when the text itself is substantially free from ambiguity. On some occasions, moreover, he believes, consultation of these works might even be 'dangerously unhelpful'.

McNair, after reviewing briefly the practice of international tribunals in this regard,⁹⁹ concludes that in most cases involving the interpretation of treaties one or both of the parties has sought to invoke preparatory works but the Courts, while reluctant to exclude resort to these works ex limine have, nevertheless, been slow in according to the practice any decisive role. The Court, he contends, has shown an ambiguous attitude towards preparatory works. In many cases it had announced that there was no need to have regard to preparatory works because the treaty in question was clear in itself; yet an examination of these cases shows that the Court had in fact considered the preparatory works before making that pronouncement.¹ McNair concludes from this² that any litigant before an international tribunal should not ignore travaux préparatoires but should not rely primarily on them. Furthermore, the Court would be wise to admit recourse to such works only as a subsidiary aid to interpretation in cases where it affords evidence of the common intention of the parties.

At the Vienna Conference on the Law of Treaties, the United States delegation argued forcefully but unsuccessfully for a rule permitting the use of preparatory works equally with the text as a means of determining the intentions of the parties. It contented inter alia³ that

97. See the comments of Hersch Lauterpacht in this regard in 'Some Observations on Preparatory Work in the Interpretation of Treaties' (1936-5) 48 Harvard Law Review 549 at 575.

98. D.P. O'Connell op. cit. 263-4.

99. McNair op. cit. 412 ff.

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

2. McNair op. cit. 422-3.

3. The American submissions may be seen in (1968) 62 American Journal of International Law 1021.

'the restrictions upon the use of preparatory works expressed in Article 28 [Article 32 of the Convention] do not, any more than the restrictions imposed on the use of other circumstances, represent established practice ... Even in the Lotus case⁴ [supra] which perhaps contains the most famous exposition of the alleged rule that "there is no occasion to have regard to preparatory works if the text of a convention is sufficiently clear in itself", the Court did in fact look at the travaux ... The habitual use of preparatory works by foreign offices needs no emphasis here.'

The International Law Commission, however, was heavily influenced by the numerous dicta of international tribunals stating that where the ordinary meaning of a provision is clear and makes sense in the context of the treaty, there is no need to have resort to other methods of interpretation including the travaux préparatoires.⁵ The Commission stressed the fact that its entire approach to the subject of treaty interpretation, made manifest in Article 27,⁶ was based on the idea that the text of the treaty is presumed to be the authentic expression of the intentions of the parties and that, therefore, the object of interpretation is the elucidation of the meaning of the text rather than an investigation ab initio of the supposed intentions of the parties which an examination of preparatory works would supply. Nevertheless, it was aware that in practice international tribunals, States and international organisations do have recourse to travaux préparatoires, more especially for the purpose of confirming their conclusions as to the 'ordinary' meaning of the text.⁷ The Commission added, however, that in its opinion international tribunals have relied on preparatory works with 'comparative rarity'.⁸ This suggested to them that the Courts regard this exception as limited to cases where the absurd or unreasonable character of the 'ordinary' meaning is manifest. These considerations led the Commission to include recourse to preparatory works as the supplementary method of interpretation described above. It was most anxious that while travaux préparatoires was to be accorded some status as an aid to interpreta-

4. *Supra*.

5. (1966) 2 Yearbook of the International Law Commission 222-3, paragraph 18.

6. Article 31 of the Convention.

7. The Commission cited in this regard the opinion of the Permanent Court in the Interpretation of the Convention of 1919 concerning Employment of Women during the Night 1932 PCIJ, Ser. A/B, No. 50, p. 380.

8. (1966) 2 Yearbook of the International Law Commission 223, paragraph 19.

tion, it was not to be allowed to 'weaken unduly the authority of the ordinary meaning of the terms'.⁹

This two-stage approach to treaty interpretation adopted by the Vienna Convention on the Law of Treaties does have a considerable amount of support in the jurisprudence of both the Permanent Court and the International Court of Justice, especially in the latter's earlier years.¹⁰ It must be conceded, however, that the practice of the Court has not been consistent¹¹ in this matter. So, while it is inaccurate to say that the approach of the International Law Commission can find no justification 'in the wisdom of past experience',¹² or that the rule as formulated by the Commission introduces 'an entirely new element of uncertainty into the stability of treaties',¹³ the true position seems to be, as one critic has noted,¹⁴ that the Special Rapporteur might well have gone beyond the evidence in presenting the Commission's view as the general rule. As with so much of the law of treaties, there was no settled rule and consequently this codification contains a strong element of 'progressive development'.

A final caveat should be mentioned. Articles 31 and 32 of the Vienna Convention on the Law of Treaties were not intended by the Commission to be an exclusive or exhaustive enumeration of the factors which might be taken into account in the interpretation of treaties. It acknowledged¹⁵ that statements can be found in the decisions of international tribunals to support the use of virtually every maxim of interpretation that undoubtedly exists, many of which are made use of in municipal legal systems in the interpretation of statutes and contracts, as well as in the interpretation of treaties. These would include such rules as ut res magis valeat quam pereat, contra proferentum, eiusdem generis, expressio unius est exclusio alterius, and generalia specialibus non derogant. McNair¹⁶ warns that the rules of interpretation of treaties are so many and so conflicting that

'today for many of the so-called rules of interpretation that one party may invoke before a tribunal the adverse party can often, by the exercise of a little ingenuity, find another rule to serve as an equally attractive antidote ... The many

9. Ibid.

10. H. Lauterpacht The Development of International Law by the International Court (1958) 116-124.

11. Ibid. 124-7.

12. As did McDougal in his statement to the ILC: (1968) 62 American Journal of International Law 1021 at 1023.

13. Ibid. 1027.

14. Merrills op. cit. 57-8.

15. (1964) 2 Yearbook of the International Law Commission 54; paragraph 6.

16. McNair op. cit. 365.

maxims and phrases ... are merely prima facie guides to the intention of the parties and must always give way to contrary evidence of the intention of the parties in a particular case. If they are allowed to become our masters instead of our servants, these guides can be very misleading.'

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

(c) The South African Approach to Treaty Interpretation

(i) The Approach of the South African Government

Through the unique legal situation arising out of its somewhat unusual 'reign' as Mandatory for the territory of South-West Africa and the subsequent widely publicized actions in respect of the territory before the International Court of Justice, the South African Government has been forced to clarify for the international community its approach to the problem of treaty interpretation. It is in this governmental arena that treaty interpretation has assumed its prime importance, as the South African courts have not to date been confronted with the necessity to develop their views on the matter. Because of this lacuna, when the domestic courts are eventually called upon to interpret treaties, it is inevitable that they will be heavily influenced by the approach of the South African Government as made manifest before the International Court. South African courts are not alone in this situation. In many countries the day to day interpretation and application of treaties and conventions is primarily the concern of those governmental departments whose responsibility it is to administer the treaty, more especially the Department of Foreign Affairs. In this way, the vast majority of treaties and conventions are interpreted and given effect by the

17. (1964) 2 Yearbook of the International Law Commission 54, paragraph 6.

executive branch of government and only in rare instances will the matter reach the domestic courts. For these reasons it is necessary to analyse the arguments put forward by representatives of the South African Government and to decide whether they accord with the current attitudes of the world community as regards treaty interpretation as evidenced, in particular, by the Vienna Convention on the Law of Treaties.

The approach of the South African Government towards the interpretation of treaties was explained in the oral submissions made on its behalf by Mr. D.P. de Villiers, S.C., to the International Court in 1962¹⁸ as well as in South Africa's written submissions to the International Court in 1971.¹⁹ The timing of both these submissions was fortuitous because of the conclusion of the Vienna Convention on the Law of Treaties in the interim in 1969. Although South Africa has not become a party to the Convention, the South African Government has shown great interest in its provisions; and in the written submissions of 1971 it is clear that the Government attempted to justify its approach in terms of Articles 31 and 32 of the Convention. It is interesting to note, though, that the provisions of the Convention have not operated to alter in any significant manner the approach of the South African Government to the interpretation of treaties. They have instead served as confirmation of its basic preconceived ideas.

On both occasions,²⁰ the South African Government realized fully that the philosophy adopted by the Court towards the problem of treaty interpretation would have an important, if not decisive, bearing on the ultimate outcome of the cases. As a result it took great pains to clarify and emphasize for the Court certain aspects of the principles of treaty interpretation in the hope that the Court would thereby arrive at a more sympathetic appreciation of South Africa's position as Mandatory for the territory of South-West Africa. It suggested that the Court uphold the South African approach to the interpretation of treaties, conventions or other similar instruments embodying international obligations.

The foundation upon which the South African Government constructed its

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

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

20. That is, in 1962 and 1971.

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

The oral submissions of Mr. D.P. de Villiers²³ went on to cite at some length a number of authorities for these propositions, including judgements of the Permanent Court of Justice, the International Court of Justice and opinions of numerous jurists. The written submissions²⁴ were primarily concerned with justifying the South African approach in terms of the 1969 Vienna Convention on the Law of Treaties.²⁵ They noted that the formulation in the Vienna Convention was largely in accordance with the recommendations of the International Law Commission contained in its 1966 Report²⁶ in which the Commission had theorized that jurists differ to some extent in their basic approach to the interpretation of treaties according to the relative weight which they give to the text of the treaty as the authentic expression of the intentions of the parties; the intentions of the parties as a subjective element distinct from the text; and the declared or apparent objects and purposes of the treaty. The main difference between jurists who emphasized the text of the treaty and those who concentrated subjectively on the intentions of the parties related to the extent to which recourse might be had to preparatory works and other such evidence of the intentions of contracting States as *extraneous* to the text of a treaty.²⁷ Both schools, however, accept that the true aim of treaty interpretation is to ascertain the common intent of the parties. This was contrasted with jurists who emphasized the importance of the objects and purposes of the treaty and who do not necessarily accept this basic assumption. By giving

21. Many South African jurists would agree with this. See, for example, J.T. van Wyk 'The International Court of Justice at the Crossroads' 1967 *Acta Juridica* 201 at 204 ff.

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

23. Oral submission op. cit. 27-28.

24. Written submissions op. cit. 1-6.

25. Articles 31 and 32.

26. (1966) *Yearbook of the International Law Commission* 217-8.

27. Ibid. 218.

greater weight to the objects and purposes, these jurists were more ready, especially in the case of general multilateral convention, to admit teleological interpretations of the text which might go beyond or even diverge from the original intentions of the parties as expressed in the text.²⁸

The South African submissions noted with satisfaction²⁹ that the amendment introduced by Professor Myres S. McDougal on behalf of the American delegation to the Conference, which advocated a teleological approach, was rejected in the Committee of the Whole by sixty-six votes to eight, with ten abstentions, and that the draft articles as they stood were unanimously approved - draft article 27³⁰ by ninety-seven votes to none and draft article 28³¹ by 101 votes to none.³² While the South African Government refrained from analysing the draft articles in any detail, it did emphasize³³ two points which had been made repeatedly during the discussions surrounding America's proposed amendment, namely, that the actual text of the treaty was the safest and most reliable indication of the intentions of the parties, and that it would, in the words of the U.S.S.R. delegate, be 'politically dangerous ... [to] permit an arbitrary interpretation divorced from the text and capable of altering its meaning'.³⁴ This led South Africa to the conclusion that the textual approach was not only in accordance with logic as being based upon the fundamental principle of the consent of the contracting parties, but that it had received, in addition, the imprimatur of the International Law Commission (a body composed of some of the world's most highly qualified jurists), of the Court,³⁵ and of States themselves, as evidenced by the ultimate endorsement of the draft articles. It submitted that the teleological approach long advocated by various jurists and certain judges of the Court had been decisively rejected as being out of step with the practice of States, and that the textual approach had been overwhelmingly confirmed. It concluded that, in the end result, the

29. Written submissions op. cit. 4.

30. Article 31 in the final Convention.

31. Article 32 in the final Convention.

32. United Nations Conference on the Law of Treaties, OR, Second Session, Vienna, 9 April to 22 May, 1969, pp. 57 and 59.

33. Written submissions loc. cit.

34. United Nations Conference on the Law of Treaties, OR, First Session, Vienna, pp. 174-5.

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

fundamental principle which emerged from the Vienna Convention is that the aim and purpose of treaty interpretation is to ascertain and give effect to the common intention of the parties as evidenced by the text.³⁶

Having established the underlying objective of treaty interpretation in this way, the South African Government turned its attention to the principles of actuality, ordinary meaning and contemporaneity.³⁷ The principle of actuality is premised on the general rule that the parties to a treaty intend to set out their agreement in writing in such a way that it will be clearly understandable to themselves or to others that might have an interest in its terms. Consequently the text of a treaty as it stands should be regarded as fully and accurately expressing the common intent of the parties. Similar to this is the ordinary meaning principle according to which the language of the text is to be given its ordinary, natural and unrestrained meaning in its context. These principles are not to be regarded as absolute rules but as strong prima facie guides to intention. While the principle of ordinary meaning has been highlighted in Article 31(1) of the Vienna Convention which provides, inter alia, that a treaty shall be interpreted 'in accordance with the ordinary meaning to be given to the term', the Convention goes considerably further afield than the narrow principle of actuality relied upon by the South African Government. First, it concentrates on the 'context' rather than simply on the text, which is to be regarded as one aspect of the context only. The context is stated to comprise, in addition to the text, 'any instrument ... made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to this treaty'³⁸ as well as any agreement relating to the treaty made by the parties in connection with the conclusion of the treaty.³⁹ It should be noted that although the South African representative before the Court in 1962 (Mr. D.P. de Villiers) had stressed that the principles of actuality and natural meaning were very strong prima facie guides to the intention of the parties, he nevertheless conceded that they were not absolute rules and that 'special reasons' might exist to displace the results which an application of these principles would indicate in a particular case.⁴⁰

36. Written submissions op. cit. 5-6.

37. Oral submissions op. cit. 40 ff; Written submissions op. cit. 7 ff.

38. Article 31(2)(b), discussed at 309 above.

39. Article 31(2)(a), discussed at 309 above.

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

If, for instance, the text did not set out the full agreement of the parties, or if there was something which had not been expressed in writing but which was, nevertheless, part of the common intent of the parties, such as something oral, tacit or unexpressed, these would be taken into account although they would require 'special and convincing demonstration'.⁴¹

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

The third principle which the South African Government has regarded of prime importance, and virtually as a corollary to the principles of actuality and natural meaning, is that of contemporaneity.⁴⁴ This enjoins appraisal of the treaty in the light of concepts and linguistic usage current at the time of execution of the treaty rather than at the time the dispute arose or was litigated upon.⁴⁵ Although this principle has been acknowledged

41. Ibid.

42. Article 31(3).

43. (1966) *Yearbook of the International Law Commission* 219-20, paragraph 8.

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

45. Many prominent South African academics hold similar views. A.C. Gilliers, in a critique of the 1966 Advisory Opinion on South-West Africa, argues that the practice of apartheid, if acceptable to the international community in 1921, could not suddenly be regarded as illegal in 1966, simply because a standard of non-discrimination was in the process of evolving. Although South Africa as Mandatary, had an obligation to keep up with developing constitutional, technological and sociological trends this in itself did not justify a novel interpretation of the Mandate agreement: A.C. Gilliers 'Die Suidwes-Afrika-Saak en die Volkereg' (1971) 12 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 25 at 33-4. Advocates D.P. de Villiers, S.C. and E.M. Grosskopf, S.C., are also sceptical of the idea that any recent standard of non-discrimination could govern the interpretation of the Mandate. They argue that '(1) it is difficult to see how events transpiring more than a quarter of a century after drafting of the Mandate could be of decisive importance (or even of any assistance) in its interpretation': D.P. de Villiers and E.M. Grosskopf 'The South-West Africa Case - A Reply from South Africa' (1967) 1 *International Lawyer* 457 at 469.

by many leading authorities in international law⁴⁶ and has on a number of occasions been applied by international tribunals,⁴⁷ the International Law Commission did not regard the principle of contemporaneity as settled enough to include in the Vienna Convention. As a result, all reference to it was purposefully omitted. It is arguable, however, that this principle is covered by Article 31(3)(c) of the Convention, as a 'relevant rule of international law applicable in the relations between the parties'. In any event, Articles 31 and 32 were never intended by the Commission to be an exhaustive exposé of the law on treaty interpretation. The Commission, realizing that such a task would have been impossible as the applicability of any one of a number of principles of treaty interpretation depends on factors which were too numerous and too variable to state in writing with any degree of accuracy.

The principle of actuality means that the parties must prima facie be considered to have expressed their full agreement in the written text. Exceptionally, however, the conclusion may be warranted that the parties did, in fact, tacitly agree upon something not expressly stated in the text. This question of the implication of terms was particularly important in the various South-West Africa cases, and this led the South African Government to expound its views on the subject at some length.⁴⁸ Mr. De Villiers maintained that the process of ascertaining whether an implication does or does not apply in a particular case is not really a matter of interpretation in the narrower sense of assigning a meaning to the text; it is, instead, a process of attempting to establish a proposition by circumstantial evidence from which a logical inference becomes necessary. This circumstantial evidence would begin with the indications afforded by the text itself, but extraneous considerations, including travaux préparatoires and subsequent conduct of the parties, would also play a part in building up an overall picture in order to see finally whether that logical inference may be drawn. The inference would be one of a tacit mutual assent which actually existed on the part of the parties in regard to a certain point.

The Government postulated further that courts of law in all legal systems guard themselves against assenting too readily to a proposition that a certain

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

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

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

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

Because of the above two factors, viz., that this is a process of reasoning by inference with a heavy reliance on circumstantial evidence, and the danger of making new contracts for the parties, the courts have stressed that, in order to be justified, any implication of consensus must arise necessarily or inevitably from the relevant facts, in the sense that all other reasonable inferences are logically excluded.⁴⁹ This cautious approach has been advocated by some international lawyers⁵⁰ and by the International Court⁵¹ as well as by South African courts when faced with the task of the interpretation of contracts. South African courts have accepted the test formulated by Lord Justice Scrutton in Reigate v. Union Manufacturing Co. (Ramsbottom) Ltd.⁵² to the effect that

"(a) term can only be implied if it is necessary in the business sense to give efficacy to the contract; that is, if it is such a term that it can confidently be said that if at the time the contract was being negotiated someone had said to the parties "What will happen in such a case?" They would both have replied "Of course, so and so will happen; we did not trouble to say that; it is too clear."⁵³

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

49. Vide J.T. van Wyk 'The United Nations, South-West Africa and the Law' (1969) 2 Comparative and International Law Quarterly of South Africa 48 at 52.

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

51. Reparations for Injuries Suffered in the Service of the United Nations 1949 ICJ Reports 174 at 179, 182, 184; the Colombian-Peruvian Asylum case 1950 ICJ Reports 266 at 275; Case Concerning Rights of Nationals of the United States of America in Morocco 1952 ICJ Reports 176 at 198-9; Certain Expenses of the United Nations (Article 17(2) of the Charter) 1962 ICJ Reports 13.

52. [1918] 1 K.B. 592 (CA) at 605.

53. See, for example, Barnabas Flein and Company v. Sol Jacobson and Son 1929 A.D. 25 at 31; West End Diamonds Ltd. v. Johannesburg Stock Exchange 1946 A.D. 910 at 921.

then the court cannot conclude that the parties tacitly agreed upon anything at all. Secondly, it follows that where the written document makes express provision for a particular eventuality, it will be even more difficult to find that there is an implied term covering substantially the same ground as the express provision.⁵⁴ These are principles applied by South African courts as regards the implication of terms in contracts⁵⁵ and the South African Government contended (by implication) that they would adopt a similar view when interpreting the provisions of a treaty.⁵⁶ The Government contended, in addition,⁵⁷ that one factor which would militate very strongly against any contention that an implied agreement had been reached, was the availability of means to conclude a similar agreement in express terms, together with the failure to make use of such availability. This omission was accorded decisive weight in the North Sea Continental Shelf case⁵⁸ in which it had been contended that the Federal Republic of Germany had become bound under the 1958 Geneva Convention on the Continental Shelf, despite the fact that it had never ratified the Convention. The Court said:

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

54. Oral submissions op. cit. 51, written submissions op. cit. 10.
55. See, for instance, Rapp and Maister v. Aronovsky 1943 WLD 68 at 74-5.
56. Written and Oral submissions loc. cit.
57. Written submissions op. cit. 11-12.
58. 1969 ICJ Reports 3.

under the convention, on the basis of a declared willingness to be bound by it, or of conduct evincing acceptance of the conventional regime, it would simply be told that, not having become a party to the convention it could not claim any rights under it until the professed willingness and acceptance had been manifested in the prescribed form.⁵⁹

In the opinion of the South African Government, the principles mentioned in the North Sea Continental Shelf case would, a fortiori, apply if the State sought to be bound by a suggested tacit agreement had not only failed to take advantage of an opportunity to conclude an express agreement, but had clearly rejected suggestions that such an agreement be concluded at all.⁶⁰

Becoming the applicants in both the 1962 and 1971 Advisory Opinions on South-West Africa and invoked the principle of effectiveness (ut res magis valeat quam pereat) in support of their applications, the South African Government felt it necessary to state its views on the matter.⁶¹ The principle of effectiveness takes account of the objects and purposes of a treaty. It presumes that all parties intended the provisions of the treaty to have their maximum effect in the light of the underlying objects and purposes of the treaty. The South African view acknowledges the existence of this principle of treaty interpretation but would not allow its use without due circumspection. It is primarily to be used as an aid in choosing between alternative possible meanings of an ambiguous or obscure text, but it might also be a factor in deciding whether an inference of tacit agreement might be drawn in a particular treaty. While different considerations arise to some extent depending on its use, certain basic propositions are regarded by the Government as common to both.⁶² First of all, this maxim is to be regarded simply as an aid to the intention of the parties. It cannot operate to give a higher degree of efficacy to the instrument than the parties intended nor can it operate as a substitute for a non-existent common intention. Furthermore, the objects and purposes to which effect is sought to be given, must themselves be ascertained by interpretation. The principle of effectiveness cannot be used to ascribe to the parties a different purpose

59. At 25-6

60. Written submissions op. cit. 12-13.

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

62. Written submissions op. cit. 14-16.

from the one they actually had in mind. The Government emphasized that even in its primary use as an aid to textual interpretation, the principle of effectiveness cannot override the clear meaning of the text. At most it can assist the court in deciding which of two or more possible inferences is to be preferred in cases of doubt.

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

In the oral submissions⁶³ the caveat was added that an implied term can never override or supplant the real intention of the parties or the absence of intention on a particular point.⁶⁴ In the later written submissions⁶⁵ this caveat was altered to state that an implied term cannot override the express terms of the instrument or operate to regulate some aspect for which express provision is made in the instrument.⁶⁶ This difference in language indicates a shift in attitude in 1971 away from a too heavy reliance on the intentions of the contracting parties, which was discredited by the International Law Commission, towards a greater recognition of the role of the text. It is probably safe to assume, though, that this shift is more apparent than real, and made largely for pragmatic reasons, viz., to make the South African approach more acceptable to the International Court. The fact that the numerous authorities cited by Governmental spokesmen on both occasions are identical tends to bear this out.⁶⁷

The South African Government conceded⁶⁸ that the role assigned by itself to the principle of effectiveness was a necessary corollary to the

63. Oral submissions op. cit. 60.

64. Italics added.

65. Written submissions op. cit. 17.

66. Italics added.

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

68. Written submissions op. cit. 17.

basic textual approach to treaty interpretation permeating all its arguments. It stated that

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

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

'(I)t is through this principle of effectiveness that the Court has given its legitimate place to the teleological element in interpretation (objects and purposes). But ... precisely because of its teleological tendencies, and the danger of falling into judicial legislation that the teleological principle may involve, the Court has subordinated the principle of effectiveness to that of the textual and natural meaning, in the sense that it is never legitimate, even with the object of giving maximum effect to a text, to interpret it in a manner actually contrary to, or not consistent with, its plain meaning.'

Nevertheless, it is arguable that the principle of ut res magis valeat quam pereat ought not to be dismissed so lightly by the South African Government, especially in view of the fact that it has expressly been incorporated into Article 31(1) of the Vienna Convention on the Law of Treaties. This provides that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and that this interpretation must take place 'in the light of its objects and purposes'. By including the principle of effectiveness in

69. Ibid.

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

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

72. G.C. Fitzmaurice 'The Law and Procedure of the International Court of Justice: Treaty Interpretation and Other Treaty Points' (1957) 33 British Yearbook of International Law 203 at 211.

Article 31, the general rule of interpretation, the International Law Commission made it quite clear that this principle was not to be regarded merely as a supplementary means of interpretation, but is a major factor to be taken into account whenever treaties are interpreted. It has been given equal status with the rule that treaties are to be interpreted in accordance with their 'ordinary meaning' and constitutes an acknowledgement that teleological elements are valid tools of treaty interpretation. Unfortunately, while Article 31(1) results from an attempt to balance the textual and teleological approaches to treaty interpretation, its wording is vague enough to allow for many different interpretations and applications. The South African Government has freely admitted that its view of the principle of effectiveness has been coloured by its overall approach to treaty interpretation, and while it is regrettable that its stance in this regard is too rigidly textual, it is nevertheless justifiable in the light of the ambiguous phraseology of Article 31.

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

In regarding travaux préparatoires as a supplementary means of interpretation, the attitude of the South African Government is basically in harmony with that subsequently adopted by the International Law Commission. Article 32 of the Vienna Convention on the Law of Treaties adopts a somewhat broader

73. Oral submissions op. cit. 52-5.

approach in that it would allow the use of preparatory works not only where an interpretation according to the methods prescribed in Article 31 has left the meaning of the treaty ambiguous or obscure, but also in order to confirm the meaning resulting from the application of Article 31. On the other hand, no mention is made in the Convention of the possibility of utilising preparatory works to imply a term of a treaty. The process of implication of terms is not, strictly speaking, one of interpretation proper, but rather one of quasi-interpretation in the sense of adding a provision to the treaty. Seen in this light this omission is, perhaps, acceptable. However, there is no doubt that, in practice, preparatory works will continue to be a factor in the implication of terms where the treaty itself is silent on a matter.⁷⁴

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

A much more detailed explanation of the South African attitude was advanced in the 1971 proceedings.⁷⁶ From the outset it was stressed⁷⁷ that if subsequent conduct of the parties was to play any role in treaty interpretation, it could be relevant only to ascertain the common intention of the parties as it existed when the treaty was concluded. It therefore followed that the subsequent conduct of the parties could never be used to give to a treaty a meaning different from that which it bore at its inception. South Africa chose to gloss over the fact that this principle had been incorporated by the Commission as part of the general rule of treaty interpretation and had, therefore, been treated by the Commission as a

74. In the Reservations to the Convention on Genocide Advisory Opinion, 1951 ICJ Reports 17 at 22, the travaux préparatoires were used in this way. The Court said: 'The Character of a multilateral convention, its purpose, provisions, mode of preparation and adoption, are factors which must be considered in determining, in the absence of any express provision on the subject, the possibility of making reservations, as well as their validity and effect'.

75. Oral submissions op. cit. 55-7.

76. Written submissions op. cit. 20-40.

77. Ibid. 20-22.

primary method of interpretation.⁷⁸ Instead, the Government submitted that, although it was permissible to resort to the principle of subsequent conduct as an aid to interpretation, its value was very limited.⁷⁹ It could, in fact, be of assistance only where the text of the treaty was ambiguous or unclear, and it could never justify any departure from the clear wording of the text. This idea appears to be a necessary corollary of the overall approach to treaty interpretation adopted by South Africa, viz., the textual approach.

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

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

'These declarations constitute recognition by the Union Government of the continuance of its obligations under the Mandate and not a mere indication of the future conduct of that Government. Interpretations placed upon legal instruments by the parties to them, although not conclusive as to their meaning, have considerable probative value when they contain recognition by a party of its own obligations under an instrument.'⁸³

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

79. Written submissions op. cit. 22-3.

80. Ibid., 23-25.

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

82. 1950 ICJ Reports at 135.

83. Italics added.

Even in bilateral treaties, the subsequent conduct of one party only will be regarded as an important factor in the interpretation of the terms of the treaty if it could be said to constitute a recognition by that party of its own obligations arising out of the instrument. Furthermore, as submitted by Lord McNair,⁸⁴ evidence that both parties have adopted the same meaning of a treaty provision will, for obvious reasons, be of higher probative value than evidence as to the view of one party only. 'But when one party in some public document such as a statute adopts a particular meaning, circumstances can arise, particularly after the lapse of time without any protest from the other party, in which that evidence will influence a tribunal.'⁸⁵ Much would seem to depend on the form that the subsequent conduct assumes as to how much evidential weight it will ultimately carry with a tribunal.

As for multilateral conventions, the South African Government argued that where one or some, but not all, of the parties have acted in a particular way, their subsequent conduct could not of itself have any probative value or provide a criterion for judicial interpretation. In addition, special consideration has to be given to multilateral conventions where the original parties may or have already been added to in accordance with the terms of the convention itself. Is the subsequent conduct of the original members only to be taken into account or that of all the members, new and old? The textualists would advocate the former course of action if forced to choose but would prefer not to rely on subsequent conduct at all. As Sir Percy Spender⁸⁶ said when applying this principle to the Charter of the United Nations, which is a prime example of such a treaty:

'The original Members of the Charter number less than half the total number of Member States. If the intention of the original Members of the United Nations, at the time they entered into the Charter, is that which provides a criterion of interpretation, then it is the subsequent conduct of those Members which may be equated with the subsequent conduct of the parties to a bilateral or multilateral treaty where the parties are fixed and constant. This, it seems to me, could add a new and indeterminate dimension to the rights and obligations of States that were not original Members and so were not privy to the intentions of the original Members.'⁸⁷

84. McNair op. cit. 427.

85. Ibid.

86. Himself a textualist.

87. Certain Expenses of the United Nations 1962 ICJ Reports 151 at 191.

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

One other aspect of the principle of subsequent conduct was examined by South Africa in 1971,⁸⁸ namely, the provision that a treaty might be revised or modified by the subsequent conduct of the parties. The International Law Commission had proposed that this proposition be included in the Vienna Convention.⁸⁹ But, although this specific proposal drew little comment from Governments,⁹⁰ amendments deleting it were ultimately adopted by fifty-three votes to fifteen, with twenty-six abstentions, by the Conference's Committee of the Whole.

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

88. Written submissions op. cit. 34-39.

89. In draft article 38: (1966) 2 Yearbook of the International Law Commission 236. This draft article provided: 'A treaty may be modified by subsequent practice in the application of the treaty establishing the agreement of the parties to modify its provisions'.

90. (1966) 2 Yearbook of the International Law Commission 279 ff.

91. United Nations Conference on the Law of Treaties OR, First Session, vide the objections of the representatives of Spain (paragraph 59, p. 209); Chile (paragraph 75, p. 210); U.S.S.R. (paragraph 3, p. 210); Syria (paragraph 30, p. 212); Uruguay (paragraph 34, p. 212); Cuba (paragraph 40, p. 213); Portugal (paragraph 42, p. 213); and Netherlands (paragraph 47, p. 213).

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

93. Such limitations had previously been suggested by Professor G.L. Tunkin: (1966) 1 Yearbook of the International Law Commission, Part II, p. 4, paragraph 18.

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

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

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

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

(ii) The Approach of the South African Courts

In 1971 C.H. Schreuer⁹⁸ drew attention to the fact that international

94. United Nations Conference on the Law of Treaties, OR, First Session. Vide objections of representatives of France (paragraph 63, p. 208); Spain (paragraph 68, p. 209); U.S.S.R. (paragraph 4, p. 210); Poland (paragraph 16, p. 211); Turkey (paragraph 27, p. 211); Uruguay (paragraph 36, p. 212); and Philippines (paragraph 43, p. 213); see, too, the reply of the Expert Consultant (paragraph 57, p. 214).

95. Written submissions op. cit. 26-30.

96. Ibid. 29-30.

97. Ibid. 30-33.

98. C.H. Schreuer 'The Interpretation of Treaties by Domestic Courts' (1971) 45 British Yearbook of International Law 233.

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

It is a fundamental principle of South African constitutional law that the courts will not regard a treaty by itself as being a source of South African law in the sense that it imposes duties or confers rights on private individuals. As discussed above⁹⁹ South African courts, following the practices which originated in the United Kingdom, insist that a treaty be incorporated into the law of the land by legislation. Strictly speaking, therefore, in South African courts as in English courts the question is primarily one of statutory interpretation. Consciously or unconsciously it is inevitable that South African courts will tend to follow their own precedents and doctrines even in cases where they have to interpret and apply law which does not originate in their own legal system. Furthermore, common lawyers instinctively tend to lean towards the view that a statute adopting a treaty is on the same level as other ordinary statutes because any treaty which purports to alter the law requires an Act of Parliament before it becomes operative.

The rules of interpretation of a South African statute are well-

99. At pp. 230 ff.

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

2. Schreuer op. cit. 257.

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

4. Mann op. cit. 279.

established⁵ and routinely applied by municipal courts. The overriding concern of the courts here is to ascertain and give effect to the intention of the legislature⁶ as it appears from the text. The words of the statute must generally be interpreted in their ordinary grammatical sense.⁷ If they prove to be ambiguous, the legislature's intention is to be sought through the application of accepted mechanical rules. Similarly, in the numerous occasions upon which South African courts have been called on to interpret contracts and wills, their avowed aim has been to determine and give effect to the intentions of the contracting parties or the testator. The courts have stressed that on no account will they themselves contract on behalf of the parties.

J.E.S. Fawcett in his book The British Commonwealth in International Law⁸ contends that the practice of courts in the United Kingdom, from which the courts in other Commonwealth countries do not markedly diverge,⁹ in the interpretation and application of treaties, rests on two complimentary principles. 'The first is the constitutional principle of the primacy of the laws enacted by Parliament; the second is the recognition that international agreements have their own special structure and field of operation and must, subject to the first principle, be construed and applied accordingly.'

The primacy of statute law manifests itself in several ways. Even where the treaty has been incorporated into municipal law by legislation, if there is a conflict between the statute and the treaty the statute will prevail.¹⁰ Fawcett contends further¹¹ that the enactment of legislation in a particular sphere might be regarded as evidence of the intention of parties to a convention, the United Kingdom¹² being one of them. Despite this a statute cannot be interpreted any differently simply because at the

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

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

7. Hahlo and Kahn op. cit. 183.

8. J.E.S. Fawcett The British Commonwealth in International Law (1963) 66 ff.

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

10. Discussed above at pp. 322 ff.

11. Fawcett loc. cit.

12. Or South Africa.

date of its passing a convention dealing with the same subject-matter was in force to which the United Kingdom¹³ did in fact accede¹⁴ after the passing of the Statute.

Yet another result of the primacy of legislation lies in the fact that the determination of the meaning of the language used in a statute giving effect to an international agreement also follows rules resting on the primacy of the statute. Where, for example, a treaty provision directing that, in the case of divergence of language, the French text is to prevail, has not been incorporated into English¹⁵ law, the other provisions of the treaty must be construed according to the English¹⁶ text.¹⁷ The French text will be regarded only as an aid to the solution of ambiguities but not as conclusive.¹⁸

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

The second principle mentioned by Fawcett is complementary to the first and has the effect of moderating its severity. It recognizes that an international agreement has its own special status and function as an instrument of international law.¹⁹ Therefore, to the extent that the first principle of the primacy of a statute does not operate in any given situation, the treaty should be construed by canons of interpretation designed to make it as effective as possible in its field of operation.²⁰ The insistence of many international lawyers that international standards of interpretation should be applied by municipal courts has at its

13. Or South Africa.

14. Or which it later ratified.

15. Or South Africa.

16. Or South Africa.

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

18. Pyrene Co. Ltd. v. Scindia Navigation Co. [1953] 2 Q.B. 402.

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

20. Fawcett op. cit. 67-8.

objective the achievement of international uniformity.²¹ Some even go as far as holding that there is an obligation under international law to secure this uniformity.²² Despite such considerations, other lawyers insist that treaty law, as soon as it has become part of the domestic legal system, should be treated like any other domestic law.²³ A South African court ought not to be urged to either extreme point of view. On the one hand, while the courts should be encouraged to regard international law, be it customary or conventional, as part of the law of the land, they should, at the same time, be aware that the manner in which they apply a particular rule or treaty provision may ultimately have ramifications beyond the narrow borders of the country. In order to ensure the continued existence of an international norm it ought, as far as it reasonably possible, be uniformly interpreted and applied by municipal courts of every state. In interpreting an international convention, a domestic court should, therefore, bear in mind that 'an enactment, as far as its language permits, is to be construed as consistent with the established principles of public international law'.²⁴ The interpretation of an international convention must, as Lord Sumner said in *The Blonde*,²⁵ take note of the fact that 'it is expressed in what is by tradition the common language of international intercourse'.²⁶ He warned further that there existed 'many rules ... as to the formation, the interpretation and the discharge of contracts which cannot be transferred indiscriminately from municipal law to the law of nations'.²⁷ As Lord Macmillan declared in *Stag Line Ltd. v. Fosco, Mango and Co.*²⁸ in respect of the Carriage of Goods by Sea Act 1924, which incorporates the Hague Rules into English Law:

'It is important to remember that the Act of 1924 was the outcome of an international conference and that the rules in the Schedule have an international currency. As these rules must come under consideration of foreign courts, it is desirable in the interests of uniformity that their

21. Schreuer op. cit. 264.

22. Ibid.

23. Ibid.

24. Hahlo and Kahn op. cit. 211.

25. [1922] 1 A.C. 313 (PC).

26. At 320.

27. At 331.

28. [1932] A.C. 328 (HL).

interpretation should not be rigidly controlled by domestic precedents of antecedent date, but rather that the language of the rules should be construed as broad principles of general acceptance.²⁹

A South African court in Dave Zick Timbers (Pty.) Ltd. v. Progress Steamship Co. Ltd.³⁰ was recently called upon to interpret the phrase 'brought on board' in Article 3(b) of the Hague Rules contained in the International Convention for the Unification of certain Rules relating to Bills of lading, which had been incorporated into South African law by the Merchant Shipping Act of 1951.³¹ The court held that, although South Africa was a party to the Convention in question, Article 3(b) was to be interpreted in accordance with the principles of South African law because the action had been instituted in a South African court and the question could only be determined by reference to South African law.³² As John Dugard commented,³³ South African law was applicable in this case not only for the reasons advanced by the court but also because Article 3(6) of the Hague Rules had been enacted into domestic law by s.308(c) of the Merchant Shipping Act and on that basis alone fell to be interpreted in accordance with South African principles. It is unfortunate that the court did not discuss the problem in any greater depth or consult the jurisprudence of the English courts, especially in view of the dearth of South African judgements on the subject of treaty interpretation.

In Pyrene Co. Ltd. v. Scindia Navigation Co.³⁴ the Queen's Bench Division remarked that

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

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

29. At 250.

30. 1974 (4) S.A. 381 (D).

31. Act 57 of 1951.

32. At 283.

33. John Dugard 'Foreign Affairs and Public International Law' (1974) Annual Survey of South African Law 52 at 58.

34. [1954] 2 Q.B. 402 at 416.

or where they have a meaning already judicially assigned to them in English law, Parliament must be taken to have intended that they should bear their English meaning.³⁵ Such arguments would apply with equal validity to similar South African situations.

One final point should be noted in regard to the interpretation of treaties by municipal courts. If a term of the statute incorporating a treaty provision is itself ambiguous or unclear, resort may be had by a South African court to the language of the treaty itself to assist in the interpretation of the statute.³⁶

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

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

The most striking and recurring feature of the South African Governmental approach lies in its unswerving adherence to the textual school of thought. This approach has not only remained aloof from the widespread trend towards an acceptance of certain teleological or sociological elements, but has, furthermore, manifested a complete lack of understanding of this current jurisprudential philosophy. The teleological approach of the International Court of Justice in its latest (1971) pronouncement on the status of South-West Africa, in which it declared South Africa's continued presence in the territory to be illegal, was described by the Prime Minister, Mr. B.J. Vorster, himself a lawyer, as 'entirely untenable' and 'clearly and demonstrably the result of political manoeuvring instead of objective jurisprudence'.³⁷ Mr. Justice J.T. van Wyk, South African *ad hoc* judge in the 1962-6 contentious proceedings over South-West Africa, accused the

35. Fawcett *op. cit.* 69.

36. Per Scrutton L.J. in *Ellerman Lines Ltd. v. Murray* [1930] A.C. 177, not disputed on appeal although the House of Lords did not find resort to the Convention necessary in this particular case. [1931] A.C. 126.

37. *Rand Daily Mail* 22 June, 1971.

Court of 'substituting mere mumbo-jumbo for sound legal reasoning'.³⁸ This accusation echoes his earlier statements on the reasons behind the effects of the 1962 Advisory Opinion of the court.³⁹ He has concluded that the efforts of international lawyers and international tribunals to promote confidence in an international regime had suffered a 'severe set-back' as a result of the 1962 Opinion. This set-back had been caused 'by those judges who refuse to apply the traditional methods of interpretation of treaties ... and who base their conclusions on assertions, assumptions and inferences not supported by the facts'.⁴⁰ In his opinion the 'erroneous' majority judgement in the 1962 proceedings had been based on 'inadequate grounds'.⁴¹ He was convinced that 'to a great extent these errors [were] due to an excessive zeal to reach a predetermined result'.⁴² Justice Van Wyk strongly condemned any attempt at judicial lawmaking⁴³ and quoted extensive authority in support of his view that the 'so-called conceptional and formalistic methods [of interpretation] are the accepted methods'.⁴⁴

38. Address to students of the University of Cape Town on 17th August, 1971 (unpublished). Such outbursts are in sharp contrast to the praise lavished on the Court's integrity and courage by South African jurists after the 1966 judicial proceedings over South-West Africa: D.P. de Villiers 'The South-West Africa Cases: The Moment of Truth Ethiopia and Liberia v. South Africa: The South West Africa Cases Symposium. Los Angeles, African Studies Centre, University of California, Occasional Paper No. 5, 1968, p. 13 at 18. See further, Marinus Wiersma 'South West Africa: The Decision of 16 July 1966 and its Aftermath (1968) 1 Comparative and International Law Journal of Southern Africa 408.

39. J.T. van Wyk 'The International Court of Justice at the Crossroads' 1967 Acta Juridica 201.

40. Ibid. 202.

41. Ibid. 203.

42. Ibid.

43. Ibid. 206.

44. Ibid. 206-7. See too, his remarks to the effect that the teleological or sociological method of interpretation as defined by Judge Tanaka in his dissenting opinion in the South West Africa Cases, Second Phase, 1966 ICJ Reports at 278 would 'undoubtedly lead to a greater reluctance on the part of States to enter into treaties or to submit interpretation disputes to arbitration': J.T. van Wyk 'The United Nations, South-West Africa and the Law' (1969) 2 Comparative and International Law Journal of Southern Africa 48 at 50.

A similar lack of understanding of the teleological approach to law was demonstrated by Advocate E.M. Grosskopf, S.C., who was a member of the South African legal team during the proceedings before the International Court in regard to South-West Africa, 1960-6; and who later became co-leader of the legal team in the proceedings leading to the Court's Advisory Opinion of 1971.⁴⁵ Grosskopf described the teleological method of interpretation as a 'vague and undefined' concept⁴⁶ and condemned the 1971 Advisory Opinion as 'a propaganda piece dressed up as a legal opinion'.⁴⁷ He appears convinced that the International Court had set out to condemn the South African Government for practising apartheid in the territory of South-West Africa, even if by so doing they found themselves unable to deliver a well reasoned, sound legal opinion.⁴⁸

Indeed, the arguments contained in South Africa's written submissions to the Court in 1971 are an attempt to prove that the 1969 Vienna Convention on the Law of Treaties has entirely discredited the legitimacy of teleological methods of interpretation. This attempt was shortsighted. Although the International Law Commission expressed itself strongly against extreme methods of teleological interpretation,⁴⁹ its endorsement of various purpose orientated elements of treaty interpretation is proof that this body was not opposed to more moderate forms of teleological interpretation.⁵⁰ In any event, as Professor John Dugard has noted,⁵¹ even assuming its interpretation of the Vienna Convention was correct, South Africa overlooked the fact that it is doubtful whether the Vienna Convention was designed to cover constitutive and humanitarian treaties such as the Mandate for South-West Africa. Here special rules of interpretation apply designed to adapt the letter of the treaty to circumstances of the time and contemporary

45. E.M. Grosskopf 'The 1971 Advisory Opinion' published in a booklet entitled South West Africa and the International Court: Two Viewpoints on the 1971 Advisory Opinion by the South Africa Institute of International Affairs, Johannesburg, 1974, p. 10.

46. Ibid.

47. Ibid. 15.

48. Ibid.

49. See the commentary of the Commission on articles 27 and 28 of the Draft Articles on the Law of Treaties in (1967) 61 American Journal of International Law 350.

50. Ibid. 351-2.

51. John Dugard 'The Opinion on South-West Africa (Namibia): The Teleologist's Triumph' (1971) 88 South African Law Journal 460 at 476.

expectations.⁵² Be that as it may, it is arguable that even where the terms of an 'ordinary' treaty are in dispute the approach of the South African Government would be too rigidly textual to be entirely acceptable.

Are, then, teleological principles rejected by South African lawyers? The answer lies in an examination of the underlying South African judicial philosophy. The South African approach on the international level to treaty interpretation stems from this judicial philosophy and simply mirrors the general approach of municipal courts towards the interpretative function. When interpreting a statute the court basically adopts the view that its sole task is to discover the intention of the legislature through the application of accepted mechanical rules.⁵³ A similar attitude towards the intention of the parties is adopted when the courts consider the interpretation of contracts or wills.

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

An insight into the legal philosophy underlying the approach of municipal courts as well as many South African-trained academics, lawyers and members of the executive entrusted with the task of interpreting and applying treaties to which South Africa is a party will help not only in understanding the position taken by the South African Government and courts in the past, but also in assessing their probable future course of conduct. Such an insight has already been provided by Professor Dugard in a number of publications which dwell precisely on this topic, with which the present writer wishes to associate herself. The answer to the myth of judicial sterility, which is preserved in the case of interpretation of statutes and contracts, suggests Dugard⁵⁴ lies in the acceptance of positivism as a

52. See the comments of Judge De Castro in 1971 ICJ Reports 184. Sir Gerald Fitzmaurice, who could not by any stretch of the imagination be labelled a teleologist, also recognizes the need for a different approach to constitutive treaties: 'Judicial innovation - Its Uses and Its Perils' (1956) *Cambridge Essays in International Law* 24.

53. The view permeates L.C. Steyn's *Die Oorsake van Wet, 3 ed.* (1963). This book describes in considerable detail the technical rules of interpretation but, as noted by John Dugard in 'The Judicial Process, Positivism and Civil Liberty' (1971) 88 *South African Law Journal* 181 at 182 n. 5, the commentary contains no reference to the nature of the judicial process itself in this field, nor significantly, does the bibliography refer to any of the numerous modern studies on the judicial process and the interpretation of statutes.

54. John Dugard 'The Judicial Process, Positivism and Civil Liberty' op. cit. 183.

jurisprudential guide. This legal philosophy, developed by John Austin in the nineteenth century, is based on two cardinal beliefs. The first is that law is a command from a political superior to a political inferior; the second is that law and morality (including legal values) must be firmly separated.⁵⁵ A strict division must therefore be maintained between law as it is and law as it ought to be.⁵⁶ Positivism was the dominant legal philosophy of nineteenth-century England⁵⁷ and when the British annexed the Cape Colony in 1806 they brought this legal philosophy with them. Here it soon replaced the Roman-Dutch natural law heritage of Grotius and Voet.⁵⁸

Attempts were made to revive natural-law philosophy in the Orange Free State and South African Republic, where it was incorporated in the provisions of rigid Constitutions with which the laws of the respective Volksraads were obliged to conform. However, after the 'laws' of the Transvaal Volksraad were struck down by Chief Justice Kotze for non-conformity with the Constitution,⁵⁹ President Kruger declared the testing right (and hence a higher ideal law to which man-made law should aspire) to be a 'principle of the Devil'⁶⁰ and proclaimed the supremacy of the Volksraad. This notion of Parliamentary sovereignty accords fully with the Austinian command theory. By 1908 Sir John Wessels⁶¹ was able to declare that

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

The decline of the natural-law doctrine in Europe⁶² and the pervasiveness of English legal influence were the two major reasons for the growth of

55. H.L.A. Hart 'Positivism and the Separation of Law and Morals' (1958) 71 *Harvard Law Review* 593 at 601-2; Lon L. Fuller 'Positivism and Fidelity to Law - A Reply to Professor Hart' (1958) 71 *Harvard Law Review* 630 at 640, 656; W. Friedmann *Legal Theory* 5 ed. (1967) 256-91.

56. Hart *op. cit.* 596-7.

57. Gustav Radbruch 'Anglo-American Jurisprudence through Continental Eyes' (1936) 32 *Law Quarterly Review* 530 provides a study of the effect of Austin on nineteenth-century English legal philosophy.

58. Sir John Wessels *History of the Roman-Dutch Law* (1908) 291-3 describes this process.

59. In *Brown v. Leyds* NO (1897) 4 Off. Rep. 17.

60. *Natalen Eersteren Volksraad, 1898, 152-4*. Cited in Sir John Kotze's *Memoria and Reminiscences II* (1949) xli-xlii.

61. Wessels *op. cit.* 291.

62. See Friedmann *op. cit.* 128, 132.

positivism in South Africa. Advocates of the Cape Colony were obliged to be members of a United Kingdom Bar or doctors of law of Oxford, Cambridge or Dublin.⁶³ As a result they were trained in the mould of positivists and were taught to concern themselves with rules of law alone and their mechanical application and to avoid any speculation about the morality of any given law.

The flaws and dangers inherent in this type of legal thinking, which insisted upon servile obedience to the will of the sovereign and the strict distinction between law and morality, were made manifest in the exploitation of the law and lawyers by the corrupt Nazi regime and the consequent debasement of the German legal system. The horrors exposed during the Nuremberg Trials did much to contribute to a general post-war revival of natural-law doctrines. In the United States, in particular, new sociological and realist theories of law had begun to take effect even prior to the Second World War.⁶⁴ The United Kingdom still adheres to the positivist creed⁶⁵ but the full rigours of the Austinian theory have been modified by such modern positivists as H.L.A. Hart⁶⁶ and Dennis Lloyd.⁶⁷ South Africa, however, has remained untouched by the new jurisprudential trends. As stated by Lord:⁶⁸

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

In the field of statutory interpretation, the twin principles of positivism - command and distinction between law and morality - have manifested

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

64. Jerome Hall 'The Present Position of Jurisprudence in the United States' (1958) 44 *Virginia Law Review* 321.

65. *Ibid*; see, too, H.L.A. Hart 'Philosophy of Law and Jurisprudence in Britain (1943-1952)' (1953) 2 *American Journal of Comparative Law* 355.

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

67. Dennis Lloyd *The Idea of Law* (1968) chapter 5.

68. Dugard *op. cit.* 186.

themselves in the acceptance of the course of the rigid distinction between the legislative function and the judicial function inherent in the command theory. The courts regard it as their duty to analyse and interpret the will of Parliament but not to question its underlying motivation.⁶⁹ From this there is a natural progression to seeking the will of the parties to contracts, wills and treaties. In addition, the rigid distinction between law and morals has led to a repudiation of the judicial process of considerations of policy: the courts have often indicated that they 'will not sit in judgement on matters of policy'.⁷⁰

This domestic approach contends Dugard⁷¹ is reflected in the South African attitude towards international law and the international judicial process, where an extreme positivist stance has been adopted. The South African Government sees international law as a body of rules between States to which they have consented.⁷² It regards the principle of non-intervention in the domestic affairs of States as the cornerstone of the international legal order, a principle overriding the whole Charter.⁷³ No State has a legal right to enquire into or pronounce upon the morality of laws applied by any other State. The positivist approach shows itself in a variety of ways. South Africa totally rejects the notion that customary rules of international behaviour may be created in the political organs of the United Nations.⁷⁴ It refuses to accept human rights and self-determination

69. Ibid. 186-7.

70. Per Steyn C.J. in *S. v. Tuhakeleni* 1969 (1) S.A. 153 A.D. at 172.

71. John Dugard 'Namibia (South-West Africa): The Court's Opinion, South Africa's Response and Prospects for the Future' (1972) 11 *Columbia Journal of Transnational Law* 14 at 35; John Dugard 'The Opinion on South-West Africa (Namibia): The Teleologist's Triumph' (1971) 88 *South African Law Journal* 460 at 474.

72. This approach is evident in South Africa's arguments before the Court in 1966: 1966 ICJ Pleadings, South-West Africa, vol. 9, 629-36, 653-4.

73. See the statement to this effect by Mr. D. Fourie in the Security Council: 15 U.N. SCOR, 851 st meeting 8 (1960).

74. See 1966 ICJ Pleadings, South-West Africa, vol. 9, 653-4. Also vol. 10, 40, and the separate opinion of Mr. Justice van Wyk in the 1966 *South-West Africa Cases* 1966 ICJ Reports 169-70. Similar sentiments have been expressed by various South African academics. For example see Marinus Wiechers 'South-West Africa: The Decision of 16 July 1966 and its Aftermath' (1968) 1 *Comparative and International Law Journal of Southern Africa* 408 at 427.

on legal rights or legal values worthy of consideration by international tribunals.⁷⁵ It requires the International Court of Justice to adopt the same narrow view of the judicial function as that taken by South African and British courts.⁷⁶

Many South African academics would not agree with Professor Dugard's explanation of the differences between the South African approach to treaty interpretation and that adopted by the ICJ in 1962 and 1971. E.M. Grosskopf has labelled his theories 'demonstrably unsound'.⁷⁷ He accuses Dugard of not defining his legal philosophy with any precision. To his mind Dugard seems to be saying more than that 'in international law the ends may justify the means - the ends being the political, social and moral causes sought to be advanced and the means being the legal reasoning employed in advancing those causes'.⁷⁸ He characteristically dismisses the talk about natural law, teleological theories and sociological philosophies as a gloss placed upon the Court's Opinion by well-disposed (but misguided) academics like Professor Dugard⁷⁹ and adopts the view that the only true philosophy underlying the Court's opinions was that of handing down decisions which were adverse to South Africa in order to condemn judicially the practice of apartheid.⁸⁰

Such is the extreme view of Mr. Grosskopf for what it is worth. However, other South African lawyers also manifest a deep distrust of any judicial deviation from positivist principles. Advocate D.P. de Villiers was leader of the South African Government's legal team at the Hague during the South West African cases before the International Court, 1960-6, and during the proceedings before the Court in connection with the 1971 Advisory Opinion. In an article praising the courage and integrity of the Court in

75. Note the doubts expressed to this effect by South Africa's legal representative in the 1966 ICJ Pleadings, *South-West Africa*, vol. 10, 60-6.

76. See 1966 ICJ Pleadings, *South-West Africa*, vol. 9, 543-5. Numerous statements to this effect have been made by South African lawyers. See, for example, J.T. van Wyk 'The International Court of Justice at the Crossroads' 1967 *Acta Juridica* 201 at 204. Also Wiechers loc. cit. and D.P. de Villiers 'The South-West Africa Cases: The Moment of Truth' *Ethiopia and Liberia v. South Africa: The South West Africa Cases*. Symposium, Los Angeles: African Studies Centre, University of California, Occasional Paper No. 5 (1968), 13 at 17. For a discussion of the British approach see Higgins 'Policy Considerations and the International Judicial Process' (1958) 17 *International and Comparative Law Quarterly* 58.

77. E.M. Grosskopf 'The 1971 Advisory Opinion Addendum' *South West Africa and the International Court: Two Viewpoints on the 1971 Advisory Opinion* op. cit. 30.

78. Ibid.

79. Ibid.

80. Ibid 11.

1966, he stressed the need for caution to be applied to any suggestion for 'dynamic' law-making.⁸¹ Judges should not overstep the bounds of their judicial function. This was especially true, he felt, of international adjudications which are entirely dependent on the willingness of States to submit to the jurisdiction of the Court.

Similar exhortations have been advanced by Mr. Justice J.T. van Wyk. He disapproved of lawyers who supported teleological or sociological methods of interpretation despite their admissions that such methods could not be justified on the basis of conventional jurisprudence.⁸² He realized that their support for this unconventional approach stemmed from their belief in what the law ought to be. However laudable such an objective was, it did not constitute sound jurisprudence.⁸³ The tenor of his article reveals a pre-occupation with ascertaining the intentions of the parties as they were at the time that the Mandate agreement was concluded. The humanitarian argument that the Court's function was to uphold and protect the 'sacred trust of civilization' even if this meant implying certain terms into the Mandate agreement, left him unmoved. The Court's function, he insists, is limited to interpreting and applying only those intentions of the parties which appeared in the agreement. The Court has no right to fill in lacunas by theoretical interpretation.⁸⁴ The moral issues involved in upholding the underlying objects and purposes of the Mandate agreement are plainly of no concern to him. The Court's function is to interpret the intention of the parties in accordance with predetermined rules of interpretation - it is no less and no more.

Professor Marinus Wiechers similarly queries the Court's authority to fill in lacunas in the mandate agreement on the basis that the Court would then be undertaking a legislative function, the soundness of which was highly doubtful.⁸⁵ Although his writings reveal his positivist leanings, he is more sensitive than many South African academics to the important role that legal philosophy plays in judicial decisions. Thus he admits that '(t)he legal foundation of the South-West Africa dispute cannot be

81. D.P. de Villiers 'The South-West Africa Cases: The Moment of Truth' op. cit. 18-19.

82. J.T. van Wyk 'The United Nations, South-West Africa and the Law' op. cit. 49.

83. Ibid.

84. Ibid. 62-3.

85. Marinus Wiechers 'The Judgement of 18 July 1966: The Legal Implications' *Codicillus*, Special Edition, October 1966, 6 at 7.

ignored or denied. What can create differences of opinion, however, is the role and characteristics of the law which has to be applied in order to solve that dispute'.⁸⁶ However, in an analysis of the 1966 South West Africa decision he arrives at the unhappy conclusion that there is an 'unbridgable gap' between the ideas and philosophies of the majority and the dissenting judges.⁸⁸

In the light of this approach to international law it is not surprising that South Africa expects the Court to interpret all treaties restrictively in the interests of State sovereignty,⁸⁹ to refrain from applying teleological methods of interpretation to any treaties including those of a constitutive and humanitarian nature such as the Mandate; and to adopt instead a narrow, textual attitude; to apply the principle of contemporaneity by examining the text of a treaty in the light of concepts and linguistic usages current at the time of its conclusion, and to invoke the subsequent conduct of parties to a treaty as a guide to the original common intention of the parties only.⁹⁰

86. Marinus Wiechers South West Africa and the International Court: Two Viewpoints on the 1971 Advisory Opinion (1974) Introduction, p. 9.

87. 'n onoorbrugbare kloof.

88. M. Wiechers 'Die Suidwes-Afrika-Saak: Enkele Aspekte van die Uitspraak van die Internasionale Geregshof van 18 Julie 1966' (1966) 29 Tydskrif vir Hedendaagse Romeins-Hollandse Reg 297 at 310.

89. Dugard loc. cit.

90. Ibid.

ANNEXURE A

THE COLONIAL LAWS VALIDITY ACT, 1865
(22 & 29 Vict., c.63) [June 29, 1865]

An Act to remove Doubts as to the Validity of Colonial Laws.

Whereas Doubts have been entertained respecting the Validity of divers Laws enacted or purporting to have been enacted by the Legislatures of certain of Her Majesty's Colonies, and respecting the Powers of such Legislatures, and it is expedient that such Doubts should be removed:

Be it hereby enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows:

1. The Term 'Colony' shall in this Act include all of Her Majesty's Possessions abroad in which there shall exist a Legislature, as herein-after defined, except the Channel Islands, the Isle of Man, and such Territories as may for the Time being be vested in Her Majesty under or by virtue of any Act of Parliament for the Government of India:

The Terms 'Legislature' and 'Colonial Legislature' shall severally signify the Authority, other than the Imperial Parliament or Her Majesty in Council, competent to make Laws for any Colony:

The Term 'Representative Legislature' shall signify any Colonial Legislature which shall comprise a Legislative Body of which One Half are elected by Inhabitants of the Colony:

The Term 'Colonial Law' shall include Laws made for any Colony either by such Legislature as aforesaid or by Her Majesty in Council:

An Act of Parliament, or any Provision thereof, shall, in construing this Act, be said to extend to any Colony when it is made applicable to such Colony by the express Words or necessary Intendment of any Act of Parliament.

The Term 'Governor' shall mean the Officer lawfully administering the Government of any Colony:

The Term 'Letters Patent' shall mean Letters Patent under the Great Seal of the United Kingdom of Great Britain and Ireland.

2. Any Colonial Law which is or shall be in any respect repugnant to the Provisions of any Act of Parliament extending to the Colony to which such Law may relate, or repugnant to any Order or Regulation made under Authority of such Act of Parliament, or having in the Colony the Force and Effect of such Act, shall be read subject to such Act, Order or Regulation, and shall, to the Extent of such Repugnancy, but not otherwise, be and remain absolutely void and inoperative.

3. No Colonial Law shall be or be deemed to have been void or inoperative on the Ground of Repugnancy to the Law of England, unless the same shall be repugnant to the Provisions of some such Act of Parliament, Order or Regulation as aforesaid.

4. No Colonial Law, passed with the Concurrence of or assented to by the Governor of any Colony, or to be hereafter so passed or assented to, shall be or be deemed to have been void or inoperative by reason only of any Instructions with reference to such Law or the Subject thereof which may have been given to such Governor by or on behalf of Her Majesty, by any Instrument other than the Letters Patent or Instrument authorising such Governor to concur in passing or to assent to Laws for the Peace, Order, and good Government of such Colony, even though such Instructions may be referred to in such Letters Patent or last-mentioned Instrument.

5. Every Colonial Legislature shall have, and be deemed at all Times to have had, full power within its jurisdiction to establish Courts of Judicature, and to abolish and reconstitute the same, and to alter the Constitution thereof; and to make Provision for the Administration of Justice therein; and every Representative Legislature shall, in respect to the Colony under its Jurisdiction, have, and be deemed at all Times to have had, full power to make Laws respecting the Constitution, Powers, and Procedure of such Legislature; provided that such Laws shall have been passed in such Manner and Form as may from Time to Time be required by any Act of Parliament, Letters Patent, Order in Council, or Colonial Law for the Time being in force in the said Colony.

6. The Certificate of the Clerk or other proper Officer of a Legislative Body in any Colony to the Effect that the Document to which it is attached is a true Copy of any Colonial Law assented to by the Governor of such Colony, or of any Bill reserved for the Signification of Her Majesty's pleasure by the said Governor, shall be prima facie Evidence that the Document so certified is a true Copy of such Law or Bill, and, as the Case may be, that such Law has been duly and properly passed and assented to, or that such Bill has been duly and properly passed and presented to the Governor; and any Proclamation purporting to be published by Authority of the Governor in any Newspaper in the Colony to which such Law or Bill shall relate, and signifying Her Majesty's Disallowance of any such Colonial Law, or Her Majesty's Assent to any such reserved Bill as aforesaid, shall be prima facie Evidence of such Disallowance or Assent.

And whereas doubts are entertained respecting the Validity of certain Acts enacted or reputed to be enacted by the Legislature of South Australia Be it further enacted as follows.

7. All Laws or reputed Laws enacted or purporting to have been enacted by the said Legislature, or by Persons or Bodies of Persons for the Time being acting as such Legislature, which have received the Assent of Her Majesty in Council, or which have received the Assent of the Governor of the said Colony in the Name and on behalf of Her Majesty, shall be and be deemed to have been valid and effectual from the Date of such Assent for all Purposes whatever; provided that nothing herein contained shall be deemed to give Effect to any Law or reputed Law which has been disallowed by Her Majesty, or has expired, or has been lawfully repealed, or to prevent the lawful Disallowance or Repeal of any Law.

It may be worth mentioning that in 1937 section 1 of this Act was amended by the substitution of the words 'British India and British colonies' for 'and South Australia, India'. The object of this amendment was to bring the Act into line with the provisions of

the Government of India Act, 1935, which inter alia separated Burma from India. The Amendment was made by statutory order issued under the authority of the Government of India Act, 1937, s. 31(5). See Government of India (Adaptation of Acts of Parliament) Order, 1937. S.R. and C. No. 220 of 1937, art. 2, Sched. Part II, p.966.]

ANNEXURE B

House of Assembly Debates vol. 8, cols. 509-10 (21 February 1927)

Cape Town Agreement, 1927

(Announcement made simultaneously, in India and South Africa on 21st February 1927, of the terms of the Cape Town Agreement, 1927.)

1. It was announced in April, 1926, that the Government of India and the Government of the Union of South Africa had agreed to hold a Round Table Conference to explore all possible methods of settling the Indian question in the Union in a manner which would safeguard the maintenance of western standards of life in South Africa by just and legitimate means. The Conference assembled at Cape Town on December 17th and its session finished on January 12th. There was, in these meetings, a full and frank exchange of views which has resulted in a truer appreciation of mutual difficulties and a united understanding to co-operate in the solution of a common problem in a spirit of friendliness and good-will.

Both Governments re-affirm their recognition of the right of South Africa to use all just and legitimate means for the maintenance of western standards of life.

2. The Union Government recognises that Indians domiciled in the Union who are prepared to conform to western standards of life, should be enabled to do so.
3. For those Indians in the Union who may desire to avail themselves of it, the Union Government will organise a scheme of assisted emigration to India or other countries where western standards are not required. Union domicile will be lost after 3 years' continuous absence from the Union, in agreement with the proposed revision of the law relating to domicile which will be of general application. Emigrants under the assisted emigration scheme who desire to return to the Union within the 3 years will only be allowed to do so on refund to the Union Government of the cost of the assistance received by them.
4. The Government of India recognise their obligation to look after such emigrants on their arrival in India.
5. The admission into the Union of the wives and minor children of Indians permanently domiciled in the Union will be regulated by paragraph 3 of Resolution XXI of the Imperial Conference of 1918.
6. In the expectation that the difficulties with which the Union has been confronted will be materially lessened by the agreement now happily reached between the two Governments, and in order that the agreement may come into operation under the most favourable auspices and have a fair trial, the Government of the Union of South Africa have decided not to proceed further with the Areas Reservation and Immigration and Registration (Further Provision) Bill.
7. The two Governments have agreed to watch the working of the agreement now reached and to exchange views from time to time as to any changes that experience may suggest.
8. The Government of the Union of South Africa have requested the Government of India to appoint an agent in order to secure continuous and effective co-operation between the two Governments."

Annexure containing summary of the conclusions reached by the Round Table Conference on the Indian question in South Africa, 1927.

1. Scheme of assisted emigration.

1. Any Indian of 16 years or over may avail himself of the scheme. In case of a family, the decision of the father will bind the wife and minor children under 16 years.
2. Each person of 16 years of age or over will receive a bonus of £20 and each child under that age a sum of £10. No maximum shall be fixed for a family. A decrepit adult who is unable to earn his living by reason of a physical disability may, at the discretion of the Union authorities, receive a pension in lieu of or in addition to the bonus. The pension will be paid through some convenient official agency in India out of a fund provided by the Union Government to such amount as they may determine. It is expected that the amount required will not exceed £500 per annum in all.

In every case the bonus will be payable in India on arrival at destination or afterwards, through some banking institution of repute.
3. Free passage, including railway fares to port of embarkation in South Africa and from port of landing in India to destination inland, will also be provided.
4. Emigrants will travel to India via Bombay as well as via Madras. Emigrants landing at Bombay will be sent direct from the ship to their destination at the expense of the Union Government.

Survey and certification of ships will be strictly supervised and conditions on the voyage, especially in respect of sanitary arrangements, feeding and medical attendance, improved.
5. Before a batch of emigrants leaves the Union, information will be sent to some designated authority in India at least one month in advance giving (a) a list of intending emigrants and their families, (b) their occupation in South Africa and the occupation or employment which they would require in India, and (c) the amount of cash and other resources which each possesses. On arrival in India emigrants will be (i) advised, and so far as possible, protected against squandering their cash or losing it to adventurers, and (ii) helped, as far as possible, to settle in occupations for which they are best suited by their aptitude or their resources. Any emigrant wishing to participate in emigration schemes authorised by the Government of India will be given the same facilities in India as Indian nationals.
6. An assisted emigrant wishing to return to the Union will be allowed to do so within three years from the date of departure from South Africa. As condition precedent to re-entry, an emigrant shall refund in full to some recognized authority in India the bonus and cost of passage including railway fares received on his own behalf and if he has a family, on behalf of his family. A pro rate reduction will, however, be made (i) in respect of a member of the family who dies in the interim or a daughter who marries in India and does not return, and (ii) in other cases of unforeseen hardship, at the discretion of the Minister.
7. After expiry of three years Union domicile will be lost in agreement with the proposed revision of the law relating to domicile which

will be of general application. The period of three years will run from the date of departure from a port in the Union and expire on the last day of the third year. But to prevent the abuse of the bonus and free passage by persons who wish to pay temporary visits to India or elsewhere no person availing himself of the benefits of the scheme will be allowed to come back to the Union within less than one year from the date of his departure. For purposes of re-entry within the time limit of three years, the unity of the family group shall be recognised though in cases of unforeseen hardship the Minister of the Interior may allow one or more members of the family to stay behind. A son who goes with the family as a minor, attains majority outside the Union, marries there and has issue will be allowed to return to South Africa, but only if he comes with the rest of his father's family. In such cases he will be allowed to bring his wife and child or children with him. But a daughter who marries outside the Union will acquire the domicile of her husband and will not be admitted into the Union unless her husband is himself domiciled in the Union.

II. Entry of wives and minor children.

To give effect to paragraph 3 of the Reciprocity Resolution of the Imperial Conference of 1917 which intended that an Indian should be enabled to live a happy family life in the country in which he is domiciled, the entry of wives and children shall be governed by the following principles:

- (a) The Government of India should certify that each individual for whom a right of entry is claimed, is the lawful wife or child, as the case may be, of the person who makes the claim.
- (b) Minor children should not be permitted to enter the Union unless accompanied by the mother, if alive, provided that
 - (i) the mother is not already resident in the Union, and
 - (ii) the Minister may, in special cases, permit the entry of such children unaccompanied by their mother.
- (c) In the event of divorce no other wife should be permitted to enter the Union unless proof of such divorce to the satisfaction of the Minister has been submitted.
- (d) The definition of wife and child as given in the Indian Relief Act (No. 22 of 1914) shall remain in force.

III. Upliftment of Indian community.

1. The Union Government firmly believe in and adhere to the principle that it is the duty of every civilised Government to devise ways and means to take all possible steps for the uplifting of every section of their permanent population to the full extent of their capacity and opportunities, and accept the view that in the provision of educational and other facilities the considerable number of Indians who remain part of the permanent population should not be allowed to lag behind other sections of the people.
2. It is difficult for the Union Government to take action, which is considerably in advance of public opinion, or to ignore difficulties arising out of the constitutional system of the Union under which the functions of Government are distributed between the Central Executive and the Provincial and minor local authorities. But the

Union Government are willing:

- (a) in view of the admittedly grave situation in respect of Indian education in Natal, to advise the provincial administration to appoint a provincial commission of inquiry and to obtain the assistance of an educational expert from the Government of India for the purpose of such inquiry;
- (b) to consider sympathetically the question of improving facilities for higher education by providing suitable hostel accommodation at the South African Native College at Fort Hare and otherwise improving the attractiveness of the institution for Indians;
- (c) to take special steps under the Public Health Act for an investigation into sanitary and housing conditions in and around Durban which will include the question of -
 - (i) the appointment of advisory committees of representative Indians; and
 - (ii) the limitation of the sale of municipal land subject to restrictive conditions.'

ANNEXURE C

J.E. Corbett A Study of the Cape Town Agreement (1947) Dissertation
for the degree of Master of Arts, University of Cape Town 88.

INDIANS REPATRIATED FROM THE UNION

1927	1,655
1928	3,477
1929	1,314
1930	1,012
1931	1,961
1932	2,881
1933	1,493
1934	880
1935	492
1936	430
1937	232
1938	205
1939	121
1940	48

ANNEXURE II

House of Assembly Debates vol.19 col.2725 (5 April 1932)

Joint Communiqué 1932

Statement made in the Legislative Assembly and
the Council of State, on Tuesday, 5th April, 1932.

'In accordance with paragraph 7 of the Cape Town Agreement of 1927 delegates of the Government of the Union of South Africa and of the Government of India met at Cape Town from January 22th to February 4th, 1932 to consider the working of the Agreement and to exchange views as to any modifications that experience might suggest. The delegates had a full and frank discussion in the Conference which was throughout marked by a spirit of cordiality and mutual goodwill.

Both Governments consider that the Cape Town Agreement has been a powerful influence in fostering friendly relations between them and that they should continue to co-operate in the common object of harmonising their respective interests in regard to Indians resident in the Union.

It was recognised that the possibilities of the Union's scheme of assisted emigration to India are now practically exhausted owing to the economic and climate conditions of India as well as to the fact that 80 per cent of the Indian population of the Union are now South-African born. As a consequence the possibilities of land settlement outside India, as already contemplated in paragraph 3 of the agreement, have been further considered. The Government of India will co-operate with the Government of the Union in exploring the possibilities of a colonization scheme for settling Indians, both from India and from South Africa, in other countries. In this investigation, which should take place during the course of the present year, a representative of the Indian community in South Africa will, if they so desire, be associated. As soon as the investigation has been completed the two Governments will consider the results of the enquiry.

No other modification of the agreement is for the present considered necessary.'

Annexure E

Table of Good Hope & South African Treaties, Conventions, Agreements and
State Papers Subsisting on the 1st day of September, 1898
(1898) Cape Town

Chronological List

1852	Jan. 17	Orange River Convention. Great Britain-Transvaal settlers.
1852	April 15	Proclamation. High Commissioner's approval of foregoing.
1852	June 24	Despatch. Secretary of State's approval of foregoing.
1854	Jan. 30	Order in Council. Constituting the Orange River Territory a distinct Government.
1854	Jan. 30	Letters Patent Do.
1854	Feb. 23	Bloemfontein Convention. Great Britain-Orange River Territory.
1856	July 29	Act (British). Evidence in matters pending before Foreign Tribunals.
1858	Feb. 3	Order in Council. Defining boundaries of Natal.
1863	Dec. 9	Letters Patent. Annexing part of Nomansland to Natal.
1869	Feb. 12	Convention of Aliwal North. Basutoland-Orange Free State.
1869	July 29	Treaty. Portugal-Transvaal Republic.
1870	Aug. 9	Act (British). Extradition.
1871	Aug. 11	Act (Cape of Good Hope). Annexation of Basutoland. (Extract)
1873	Aug. 5	Act (British). Extradition. Amending Act of 1870.
1874	July 9	Proclamation (British). Annexation of Ichaboe and Penguin Islands.
1874	Dec. 5-24	Convention. Great Britain-Orange Free State. Orange River Bridges.
1875	Dec. 11	Treaty. Portugal-Transvaal Republic.
1876	March 10	Treaty. Portugal-Orange Free State.
1876	July 13	Memorandum of Agreement. Great Britain-Orange Free State.
1876	July 13	Further Memorandum. Do.
1877	Aug. 8	Act (Cape of Good Hope). Administration of Imperial Extradition Acts of 1870 and 1873.
1878	Mar. 12	Proclamation (British). Annexation of Walfish Bay.
1881	Aug. 3	Convention. Great Britain-Transvaal Republic.
1881	Aug. 27	Act (British). Fugitive Offenders.
1882	June 22	Act (Cape of Good Hope). To amend Extradition Acts.
1882	Oct. 7	Protocol. Portugal-Transvaal Republic. Exchange of Ratifications of Treaty of 1875.
1882	No. 1	Ordinance (Orange Free State). Extradition to Cape of Good Hope.
1882	-	Law (South African Republic). Extradition to Cape of Good Hope.
1884	Feb. 27	Convention. Great Britain-South African Republic.
1884	May 17	Supplementary Agreement (Railways). Portugal-South African Republic.

1885	Jan. 22	Treaty. Germany-South African Republic.
1885	June 16	Agreement. Great Britain-Germany. Spheres of Action.
1885	Aug. 5	Award (Orange Free State). South-Western Boundary of South African Republic.
1885	Sept. 30	Proclamation (British). Bechuanaland Protectorate.
1886	July 15	Protocol. Great Britain-Germany. Claims in South-West African Protectorate.
1886	Oct. 22	Agreement. Great Britain-New Republic.
1886	Sept.-Nov.	Telegraph Convention. Cape Colony-Natal-Orange Free State.
1886	Dec. 30	Declaration. Germany-Portugal. Limits of Possessions.
1887	Aug. 13	Protest (British) against the German Portuguese Declaration of December 30, 1886.
1887	Sept. 1	Telegraph Convention. Cape Colony-Natal-Orange Free State. Additional Articles.
1887	Sept. 1-7	Basutoland-Orange Free State. Extradition.
1888	June 11-20	Convention. Great Britain-South African Republic. Union with New Republic.
1888	June 30	Convention. Cape Colony-Natal. Amaxesibi Boundary.
1888	Dec. 9	Notification (British). Inclusion in Zululand of Territories of certain Chiefs.
1888	March 8	Treaty (Railways). South African Republic-Orange Free State.
1889	March 9	Treaty (Friendship and Commerce). South African Republic-Orange Free State.
1889	March 9	Protocol to foregoing.
1889	March 9	Treaty (Political). South African Republic-Orange Free State.
1889	Mar.-Apr.	Convention (Customs Union). Cape Colony-Orange Free State.
1889	Mar.-Apr.	Protocol to above.
1889	Mar.-Apr.	Do.
1889	June 4-19	Do. Admission of British Bechuanaland.
1889	Oct. 29	Charter. British South Africa Company.
1889	Oct. 29	Memorandum of Agreement. Cape Colony-British South Africa Company. Railway Extension to Fourteen Streams.
1889	Dec. 13	Order in Council. Colonial Prisoners Removal.
1890	Jan. 23	Agreement. High Commissioner-British South Africa Company. Railway Extension through British Bechuanaland.
1890	Jan. 23	Agreement. Cape Colony-British South Africa Company. Do.
1890	June 12-19	Convention (Railways). Natal-Orange Free State.
1890	June 26	Concession. South African Republic-Netherlands South African Railway Company.
1890	July 1	Order in Council. British South Africa Company.
1890	Sept. 11-17	Supplement to Protocol (Customs Union Convention). Cape Colony-Orange Free State-British Bechuanaland.
1890	Nov. 21-26	Protocol (Customs Union Convention). Cape Colony-Orange Free State-British Bechuanaland.
1891	Jan.-Feb.	Protocol (Customs Union Convention). Admission of Basutoland.
1891	March 20	Order in Council. Great Britain-Orange Free State. Extradition.
1891	May 5	Proclamation (British). Bechuanaland Protectorate.
1891	May 9	Order in Council. British South Africa Company.
1891	May 14	Notification (British). Bechuanaland Protectorate.

1891	May 2	Treaty. Portugal-Congo. (Extract).
1891	June 11	Treaty. Great Britain-Portugal.
1891	July 4	Universal Postal Union.
1891	July 30	Order in Council. British South Africa Company.
1891	July 30	Decree (Portuguese). Granting Charter to Mozambique Company. (As amended by Decree of July 30, 1891).
1892	Feb. 1	Protocol (Customs Union Convention). Admission of Bechuanaland Protectorate.
1892	Sept. 20	Memorandum of Conference (Railways). Cape Colony-Orange Free State.
1893	June 5-8	Supplement to Protocol (Customs Union Convention) of 1892.
1894	Feb. 3	Agreement (Railways). Natal-South African Republic.
1894	Feb. 12	Do.
1894	March 3	Order in Council. Great Britain-Portugal. Extradition.
1894	March 24	Declaration. Portugal-Congo. Boundary.
1894	April 25	Agreement. Natal-South African Republic.
1894	May 12	Agreement. Great Britain-Congo.
1894	July 18	Order in Council. British South Africa Company. Matabeleland.
1894	Aug. 3	Contract. Construction of Railway from Vryburg to Palapye.
1894	Nov. 7	Agreement (Railway). Cape Colony-South African Republic.
1894	Dec. 10	Convention (Swaziland). Great Britain-South African Republic.
1895	Feb. 2	Order in Council. Great Britain-Germany. Extradition.
1895	April 2	Award (Orange Free State). Article XIV of London Convention of 1884.
1895	April 23	Proclamation (British). British Sovereignty, Amatongaland.
1895	April 23	Proclamation (British). Inclusion in Zululand of Territories of certain Chiefs.
1895	June 11	Notification (British). Protectorate over part of Amatongaland.
1895	June 25	Act (Cape of Good Hope). Transit under Warrant of Extradited Offenders.
1895	Aug. 26	Protocol to Convention (Extradition). Basutland-Orange Free State.
1895	Aug. 9	Convention. Orange Free State-Rhodesia. Extradition.
1895	Oct. 10	Provisional Supplementary Agreement (Railway). High Commissioner British South Africa Company-Bechuanaland Railway Company.
1895	Oct. 20	Proclamation (British Bechuanaland). Extension of Railway.
1895	Sept.-Oct.	Exchange of Notes. Great Britain-Portugal. Boundary.
1895	—	Act (Cape of Good Hope). Annexation of British Bechuanaland. (Extract).
1896	Oct. 12-16	Convention. Cape Colony-Orange Free State. Railways.
1896	Sept.-Oct.	Money Order Convention. Cape Colony-British South Africa Company.
1896	Nov. 23	Proclamation (Bechuanaland Protectorate). Extension of Railway.
1897	Dec.-Jan.	Postal Union Convention (South Africa). Cape Colony-Natal-Orange Free State-South African Republic.
1897	May 28	Agreement (Railway). Cape Colony-Bechuanaland Railway Company.
1897	July 27	Award. Great Britain-Portugal. Mainca Boundary.
1897	June-Aug.	Money Order Arrangement. Cape Colony-Zanzibar.

1895	May. 22	Proclamation (British). Annexation of Amatongaland.
1897	Dec. 2	Letters Patent. Annexation of Zululand to Natal.
1897	Dec. 1	Proclamation (Natal). Annexation of Zululand.
1898	May	Convention (Customs Union). Cape Colony-Natal-Orange Free State.
1908	Oct. 5	Protocol to Convention (Swaziland) of 1894. Great Britain-South African Republic.

BIBLIOGRAPHY

BOOKS

- Akehurst, M. A Modern Introduction to International Law; 2 ed. London: George Allen & Unwin Ltd., 1974.
- Anson, W. The Law and Custom of the Constitution; 2 ed. Oxford: Clarendon Press, 1896. 2v.
- Blackstone, W. Commentaries on the Laws of England; 13 vol. London: A. Strahan, 1802.
- Brierly, J.L. The Law of Nations; 6 ed. Oxford: Clarendon Press, 1963.
- Cockram, G.H. Constitutional Law in the Republic of South Africa; Capetown: Juta, 1975.
- Cross, R. Precedent in English Law; Oxford: Clarendon Press, 1961.
- De Smith, S.A. Constitutional and Administrative Law; Harmondsworth: Penguin, 1971.
- De Visscher, C. Theory and Reality in Public International Law; Revised edition (Princeton, N.J.: Princeton University Press, 1968).
- Dicey, A.V. An Introduction to the Study of the Law of the Constitution; 8 ed. London: Macmillan, 1915.
- _____. An Introduction to the Study of the Law of the Constitution; 10 ed. London: Macmillan, 1967.
- Doekker, G. The Treaty-Making Power in the Commonwealth of Australia; The Hague: Nijhoff, 1966.
- Dupard, J. The South-West Africa/Namibia Dispute; Berkeley: University of California Press, 1973.
- Evatt, H.V. The King and His Dominion Governors: A Study of the Reserve Powers of the Crown in Great Britain and the Dominions; London: Oxford University Press, 1936.
- Fawcett, J.E.S. The British Commonwealth in International Law; London: Stevens, 1963.
- Fincham, C.B.H. Domestic Jurisdiction; Leiden: Sijthoff, 1948.
- Friedmann, W.G. Legal Theory; 5 ed. London: Stevens, 1967.
- Greif, D.W. International Law; London: Butterworths, 1970.
- _____. International Law; 2 ed. London: Butterworths, 1976.

- Grotius, H. De Jure Belli Ac Pacis; English Translation, Oxford: Clarendon Press, 1913-27.
- Hahlo, H.R. and Kahn, L. The South African Legal System and its Background; Cape Town: Juta, 1968.
- _____. The Union of South Africa: The Development of its Laws and Constitution; London: Stevens, 1960.
- Hall, W.E. A Treatise on International Law; 8 ed. Oxford: Clarendon Press, 1924.
- Halbury, Laws of England; 3 ed. London: Butterworth, 1953, 43v.
- Harris, D.H. Cases and Materials on International Law; London: Sweet and Maxwell, 1973.
- Hart, H.L.A. The Concept of Law; Oxford: Clarendon Press, 1961.
- Harvey, H.J. Consultation and Co-operation in the Commonwealth; a Handbook on Methods and Practice; London: Oxford, 1952.
- Headlam, C. 'The Race for the Interior' 8 The Cambridge History of the British Empire; 2 ed. (ed. J.H. Rose, A.P. Newton, E.A. Benians); Cambridge: Cambridge University Press, 1962, 9v.
- Higgins, R. The Development of International Law Through the Political Organs of the United Nations; London: Oxford University Press, 1963.
- Holloway, K. Modern Trends in Treaty Law; Dobbs Ferry, N.Y.: Oceana, 1967.
- Holmes, O.W. The Common Law; Boston: Little and Brown, 1881.
- Hood Phillips, O. Constitutional and Administrative Law; 5 ed. London: Sweet and Maxwell, 1973.
- International Law Association Committee on State Succession to Treaties and Other Governmental Obligations. The Effect of Independence on Treaties; South Hackensack, N.J.: Rothman, 1965.
- Jellinek. Allgemeine Staatslehre; 5 ed. Berlin, 1968.
- Jennings, I. Cabinet Government; 3 ed. London: Cambridge University Press, 1959.
- Keith, A.B. The Dominions as Sovereign States; London: Macmillan, 1938.
- _____. Theory of State Succession; London: Waterlow and Sons, 1907.
- Kennedy, W.P.M. and Schlosberg, J.J. The Law and Custom of the South African Constitution; London: Oxford University Press, 1935.

Knaplund, P. Britain, Commonwealth and Empire (1901-1955);
London: H. Hamilton, 1956.

Kotzé, Sir J. Memoirs and Reminiscences; Cape Town: Maskew Miller, 1949, 2v.

Lauterpacht, H. International Law Collected Papers; Cambridge: Cambridge University Press, 1970, 2v.

The Development of International Law by the International Court; revised ed. London: Stevens, 1954.

Lloyd, D. The Idea of Law; Harmondsworth: Penguin, 1964.

Mansergh, N. Documents and Speeches on British Commonwealth Affairs 1931-1952; London: Oxford University Press, 1953, 2v.

Marck, K. Identity and Continuity of States in Public International Law; 2 ed. Geneva: Droz, 1968.

McDougal, M.S., Lasswell, H.D. and Miller, J.C. The Interpretation of Agreements and World Public Order: Principles of Content and Procedure; New Haven: Yale University Press, 1967.

McNair, A.D. The Law of Treaties; Oxford: Clarendon Press, 1961.

Mitchell, J.D.B. Constitutional Law; 2 ed. Edinburgh: W. Green, 1968.

O'Connell, D.P. International Law; 2 ed. London: Stevens, 1970, 2v.

The Law of State Succession; London: Cambridge University Press, 1956.

'The Present State of the Law on State Succession'
The Present State of International Law and other Essays;
(ed. Dr. M. Bos) The Netherlands: Kluwer, 1973, 331.

State Succession in Municipal Law and International Law; New York, N.Y.: Cambridge University Press, 1967, 2v.

Oppenheim, L. International Law - A Treatise; 8 ed. London: Longmans, Green, 1955, 4v.

Pachai, B. International Aspects of The South African Indian Question: 1860-1971; Cape Town: Struik, 1971.

Rajan, M.S. United Nations and Domestic Jurisdiction; New York, N.Y.: Asia Publishing House, 1958.

Ridges, E.W. Constitutional Law; 8 ed. London: Stevens, 1950.

Robertson-Wray, K. Commonwealth and Colonial Law; London: Stevens, 1966.

- Schwartzberger, G. Manual of International Law; 5 ed. London: Sweet and Maxwell, 1967.
- Shearer, I. Extradition in International Law; Dobbs Ferry, N.Y.: Oceana, 1971.
- Starke, J.G. An Introduction to International Law; 5 ed. London: Butterworth, 1963.
- _____. An Introduction to International Law; 7 ed. London: Butterworth, 1972.
- Stewart, R.B. Treaty Relations of the British Commonwealth of Nations; London: Macmillan, 1939.
- Steyn, L.C. Die Uitleg van Wette; 3 ed. Cape Town: Juta, 1963.
- Ukokang, G. Succession of New States to International Treaties; Dobbs Ferry, N.Y.: Oceana, 1972.
- Van Reenen, T.H. Land: Its Occupation and Ownership in South Africa; Cape Town: Juta, 1962.
- Verloren van Themaat, P.J.G. Staatsreg; 2 ed. Durban: Butterworth, 1967.
- Von Gierke. Die Genossenschaftstheorie und die Deutsche Rechtsprechung; Berlin: Weidmann, 1887.
- Wade, E.C.S. and Phillips, G. Constitutional Law; 8 ed. London: Longmans, 1970.
- Wessels, F.J. Die Republikeinse Grondwet; Cape Town: Nasionale Boekhandel, 1962.
- Wessels, Sir J. History of the Roman-Dutch Law; Grahamstown, Cape Colony: African Book Co., 1908.
- Wheare, K.C. The Statute of Westminster and Dominion Status; 5 ed. London: Oxford University Press, 1953.

ARTICLES

- Blix, H. 'The Requirement of Ratification' (1953) 30 B.Y.I.L. 352-380.
- Blom-Cooper, L.J. 'Republic and Mandate' (1961) 24 Modern Law Review 256-260.
- Booyesen, H. 'Is Gewoonte Regtelike Volkereg Deel van ons Reg?' (1975) 38 T.H.R.-H.R. 315-322.
- Bridge, J.W. 'The Relationship between International Law and the Law of South Africa' (1971) 20 I.C.L.Q. 746-749.
- Brierly, J.L. 'International Law in England' (1935) 51 Law Quarterly Review 24-35.
- Cavaglieri, A. 'Regles Generales du Droit de la Paix' (1929) 1 Recueil 315-581.
- Celliers, A.C. 'Die Suidw.-Afrika-Saak en die Volkereg' (1971) 34 T.H.R.-H.R. 25-44.
- Claxton, B. 'The Commonwealth and South Africa' (1935) 42 Queen's Quarterly 110-120.
- Cohen, R. 'Legal Problems arising from the Dissolution of the Mali Federation' (1960) 36 B.Y.I.L. 375-384.
- De Villiers, D.P. 'The South-West Africa Cases: The Moment of Truth' Ethiopia and Liberia v. South Africa: The South-West Africa Cases Symposium. Los Angeles: African Studies Centre, University of California, Occasional Paper No. 5, 1968, 13-19.
- De Villiers, D.P. and Grosskopf, E.M. 'The South-West Africa Case: A Reply from South Africa' (1967) 1 International Lawyer 457-474.
- Devine, D.J. 'Does South Africa Recognize Rhodesian Independence?' (1969) 86 S.A.L.J. 438-443.
- _____ 'Qualifications in the Incorporation of International Customary Law into South African Municipal Law' (1973) 1 Natal University Law Review 58-63.
- Dugard, J. 'Foreign Affairs and Public International Law' 1974 Annual Survey 52-59.
- _____ 'International Law is Part of Our Law' (1971) 88 S.A.L.J. 13-15.
- _____ 'Namibia (South-West Africa): The Court's Opinion, South Africa's Response and Prospects for the Future' (1972) 11 Columbia Journal of Transnational Law 14-49.

Dugard, J. 'Rhodesia: Does South Africa Recognize it as an Independent State?' (1977) 4 S.A.L.J. 127-130.

_____'South-West Africa and the Supremacy of the South Africa. - 'Comment' (1969) 86 S.A.L.J. 194-204.

_____'Succession to Federal Treaties on the Dissolution of a Federation' (1965) 82 S.A.L.J. 430-437.

_____'Succession to Federal Treaties Revisited' (1967) 84 S.A.L.J. 250-254.

_____'The Judicial Process, Positivism and Civil Liberty' (1971) 88 S.A.L.J. 181-200.

_____'The Opinion on South-West Africa (Namibia): The Teleologist's Triumph' (1971) 88 S.A.L.J. 460-477.

_____'The Simonstown Agreement: South Africa, Britain and the United Nations' (1968) 85 S.A.L.J. 142-156.

_____'The Treaty-Making Process' (1968) 85 S.A.L.J. 1-4.

_____'The 1971 Opinion and the Future' South-West Africa and the International Court: Two Viewpoints on the 1971 Advisory Opinion. South African Institute of International Affairs 16-29.

Fairmann, C. 'The Interpretation of Treaties' (1935) 20 Grotius Society 122-139.

Fitzmaurice, G.G. 'Do Treaties Need Ratification?' (1934) 15 B.Y.I.L. 113-137.

_____'Judicial Innovation - Its Uses and Its Perils' 1956 Cambridge Essays in International Law 24.

_____'The General Principles of International Law Considered from the Standpoint of the Rule of Law' (1957) 7 Recueil 1-227.

_____'The Law and Procedure of the International Court of Justice: Treaty Interpretation and Certain Other Treaty Points' (1951) 28 B.Y.I.L. 1-28.

_____'The Law and Procedure of the International Court of Justice: Treaty Interpretation and Other Treaty Points' (1957) 32 B.Y.I.L. 203-293.

Franck, T.M. 'World Made Law - The Decision of the I.C.J. in the Nuclear Test Cases' (1975) 69 A.J.I.L. 612-620.

Fuller, L.L. 'Positivism and Fidelity to Law - A Reply to Professor Hart' (1958) 71 Harvard L.R. 630-672.

- Grosskopf, E.M. 'The 1971 Advisory Opinion' South-West Africa and the International Court: Two Viewpoints on the 1971 Advisory Opinion. South African Institute of International Affairs 10-15 and 30-31.
- Hall, J. 'The Present Position of Jurisprudence in the United States' (1958) 44 Virginia Law Review 321-330.
- Hall, H.C.A. 'Philosophy of Law and Jurisprudence in Britain (1945-1952)' (1953) 2 American Journal of Comparative Law 355-364.
- _____. 'Positivism and the Separation of Law and Morals' (1958) 71 Harvard L.R. 593-629.
- Higgins, R. 'Policy Considerations and the International Judicial Process' (1968) 17 I.C.L.Q. 58-84.
- Holdsworth, W.S. 'The Treaty-Making Power of the Crown' (1942) 58 L.Q.R. 175-183.
- Jacobs, T.C. 'Varieties of Approach to Treaty Interpretation: With Special Reference to the 1978 Convention on the Law of Treaties Before the Vienna '_____' Conference' (1969) 18 I.C.L.Q. 318-346.
- Jenks, C.W. 'State Succession in respect of Law-Making Treaties' (1952) 29 B.Y.I.L. 105-144.
- Jennings, R.Y. 'The Commonwealth and International Law' (1953) 30 B.Y.I.L. 320-331.
- Jones, J.M. 'State Succession in the Matter of Treaties' (1947) 24 B.Y.I.L. 360-375.
- Kahn, E. 'Constitutional and Administrative Law' 1960 Annual Survey 1-60.
- _____. 'Constitutional and Administrative Law' 1961 Annual Survey 1-67.
- Keith, K.J. 'State Succession to Treaties in the Commonwealth: Two Replies' (1964) 13 I.C.L.Q. 1441-1450.
- _____. 'Succession to Bilateral Treaties by Seceding States' (1967) 61 A.J.I.L. 521-546.
- _____. 'Treaties and Legislation' (1970) 19 I.C.L.Q. 127-134.
- Kelsen, H. 'Théorie Générale du Droit International Public: Problemes Choisis' (1932) 4 Reuèil 121-349.
- Kidwai, M.B.M. 'International Personality and the British Dominions: Evolution and Accomplishment' (1975) 9 University of Queensland Law Journal 16-117.

Lauterpacht, E. 'The Contemporary Practice of the United Kingdom in the Field of International Law - Survey and Comment, vi' (1958) 7 I.C.L.Q. 514-576.

Lauterpacht, H. 'Is International Law a part of the Law of England?' (1939) 25 Grotius Society 51-88.

_____. 'Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties' (1949) 26 B.Y.I.L. 48-85.

_____. 'Some Observations on Preparatory Work in the Interpretation of Treaties' (1931-3) 38 Harvard L.R. 349-391.

Lawrie, G.G. 'The Simonstown Agreement: South Africa, Britain and the Commonwealth' (1968) 85 S.A.L.J. 157-177.

Leider, J.P. 'State Succession to Treaties in the Commonwealth' (1963) 12 I.C.L.Q. 415-507.

Lewis, V.H. 'The Canadian-American Halibut Fisheries Treaty' (1923-4) 4 B.Y.I.L. 168-169.

_____. 'The International Status of the British Self-Governing Dominions' (1922-3) 3 B.Y.I.L. 21-41.

MacKenzie, N. 'Two Recent Canadian Treaties' (1925) 6 B.Y.I.L. 191-192.

Mandelbrots, H.J. 'The Royal Prerogative in the Union' (1936) 53 S.A.L.J. 426-440.

Mann, F.A. 'The Interpretation of Uniform Statutes' (1946) 62 L.Q.R. 278-291.

McDougal, M.S. 'The International Law Commission's Draft Articles Upon Interpretation: Textuality Redivivus' (1967) 61 A.J.I.L. 992-1000.

McNair, A.D. 'When Do British Treaties Involve Legislation?' (1928) 9 B.Y.I.L. 59-68.

Merrills, J.C. 'Two Approaches to Treaty Interpretation' (1968-9) Australian Yearbook of International Law 55-82.

Morgenthau, E. 'Judicial Practice and the Supremacy of International Law' (1950) 27 A.T.L. 42-92.

O'Connell, D.P. 'Independence and Succession to Treaties' (1962) 38 B.Y.I.L. 84-180

_____. 'State Succession and the Effect upon Treaties of Entry into a Composite Relationship' (1963) 69 B.Y.I.L. 117-137.

- O'Connell, D.P. 'State Succession to Treaties in the Commonwealth: Two Replies' (1964) 13 I.C.L.Q. 1450-1453.
- _____. 'The Crown in the British Commonwealth' (1957) 6 I.C.L.Q. 103-125.
- Tolak, E.L. 'The South African Indian Problem - A Constitutional Point' (1922) 23 Indian Review 579-584.
- Tollak, W. 'The Legislative Competence of the Union Parliament' (1931) 48 S.A.L.J. 269-287.
- Radtke, G. 'Anglo-American Jurisprudence Through Continental Eyes' (1936) 52 L.Q.R. 530-545.
- Rosonne, S. 'Interpretation of Treaties in the Restatement and the International Law Commission's Draft Articles: A Comparison' (1966) 5 Columbia Journal of Transnational Law 205-230.
- Sanders, A.J.G.M. 'Our State Cannot Speak with Two Voices' (1971) 88 S.A.L.J. 413-416.
- Schreuer, C.H. 'The Interpretation of Treaties by Domestic Courts' (1971) 45 B.Y.I.L. 255-301.
- Sinclair, I.M. 'The Principles of Treaty Interpretation and their Application by the English Courts' (1963) 12 I.C.L.Q. 508-550.
- _____. 'Vienna Conference on the Law of Treaties' (1970) 19 I.C.L.Q. 47-69.
- Starke, J.G. 'Monism and Dualism in the Theory of International Law' (1936) 17 B.Y.I.L. 66-81.
- Stewart, R.B. 'Treaty-Making Procedure in the British Dominions' (1938) 32 A.J.I.L. 467-487.
- Vallat, F.A. 'Some Aspects of the Law of State Succession' (1955) 41 Grotius Society 123-135.
- Vane, M. 'The South African Indians and U.N.O.' (1948) 28 Quarterly Review 162-177.
- Van Wyk, J.T. 'The International Court of Justice at the Cross-roads' 1967 Acta Juridica 201-213.
- _____. 'The United Nations, South-West Africa and the Law' (1969) 2 C.I.L.S.A. 48-72.
- Wade, E.C.S. 'Acts of State in English Law' (1934) 15 B.Y.I.L. 98-113.

Wiescher, M. 'Die Suidwes - Afrika - Saak: Erkele Aspekte van die Uitspraak van die Internasionale Geregshof van 18 Julie 1966' (1966), 29 T.H.R.-H.R. 297-319.

_____. 'South-West Africa. The Decision of 18 July 1966 and its Aftermath' (1968) 1 C.J.O.M.A. 408-446.

_____. 'The Judgement of 18 July 1966: The Legal Implications' Codicillus, Special Edition, October 1966, 6-11.

DISSERTATIONS AND NEWSPAPER REPORTS

Bekker, M.J. 'Historica - Empiriese Studie van die Suid-Afrikaanse Diplomatieke en Konsulêre Diens en Staatskakel-Organisasie' M.A. Diss. Univ. Potchefstroom, 1973.

Booyesen, Hercules. 'Die Toepassing Van Volkereg in die Suid-Afrikaanse Reg - 'n Staatse Regtelike Ondersoek' L.L.D. Diss. Univ. Port Elizabeth, 1974.

Cape Times 9 September 1919: General Smuts on South Africa and The League of Nations.

5 September 1939: Letter from the Governor-General Sir Patrick Duncan to the Hon. J.M.B. Hertzog refusing his request to dissolve Parliament.

Corbett, J.E. 'A Study of the Cape Town Agreement' M.A. Diss. Univ. Cape Town, 1947.

Daily Chronicle 14 August 1914: Declaration of War by the German Foreign Office.

Touche, J.J. 'Die Bevoegdhede van die Staatspresident van die Republiek van Suid-Afrika' L.L.D. Diss. Univ. Stellenbosch, 1964.

Rand Daily Mail 22 June 1971: Statement by the Prime Minister, Mr. B.J. Vorster, on the 1971 I.C.J. Advisory Opinion on South-West Africa.

Steyn, C.S.J. 'Prerogatief en Diskresie by die Uitvoerende Gesag in die Republiek van Suid-Afrika' Doctor of Administration Diss. Univ. Orange Free State, 1970.

STATUTES

- Apprenticeship Act 26 of 1922.
- Asiatic Land Tenure and Indian Representation Act 28 of 1940.
- Aviation Act 74 of 1962.
- 'Black Act' 36 of 1908.
- Carriage by Air Act 22 and 23 Geo. 5 c. 36.
- Children's Act 33 of 1960.
- Civil Aviation Offences Act 10 of 1972.
- Colonial Laws Validity Act 28 and 29 Vict., c. 63.
- Coronation Oath Act 7 of 1937.
- Criminal Procedure Act 56 of 1955.
- Customs and Excise Act 91 of 1964.
- Defence Act 44 of 1957.
- Defence Amendment Act 1 of 1976.
- De Grondwet der Zuid-Afrikaansche Republiek, Wet No. 2 of 1896.
- Diplomatic Privileges Act 71 of 1951.
- Estate Duty Act 45 of 1955.
- [Exclusion of Indians from Acquisition of Citizenship and Ownership of Land in the Transvaal Republic] Law No. 3 of 1885.
- [Exclusion of Indians in Natal from Parliamentary Franchise] Act 8 of 1896.
- Extradition Act 67 of 1962.
- General Law Amendment Act 62 of 1966.
- [Grant of Responsible Government to Natal] Law No. 14 of 1893.
- His Majesty King Edward the Eighth's Abdication Act 2 of 1937.
- Immigrants Regulation Act 22 of 1913.
- Income Tax Act 58 of 1962.
- Indemnity and Peace Preservation Ordinance 38 of 1902.

Indian Relief Act 22 of 1914.
 Industrial Conciliation Act 11 of 1924.
 Interpretation Act 33 of 1957.
 Interpretation of Statutes Act 45 of 1961.
 Liquor Act 30 of 1928.
 Merchant Shipping Act 57 of 1951.
 Mines and Works Amendment Act 25 of 1926.
 Post Office Act 44 of 1953.
 Prince Edward Island Act 43 of 1948.
 Prisons Act 8 of 1959.
 Privy Council Appeals Act 16 of 1950.
 Public Health Act 30 of 1919.
 Referendum Act 52 of 1960.
 Republic of South Africa Constitution Act 32 of 1961.
 Retreats and Rehabilitation Centres Act 86 of 1963.
 Royal Executive Functions and Seals Act 70 of 1934.
 Royal Styles and Titles Act 17 of 1948.
 South Africa Act 9 Edw. VII; ch. 9, 1909.
 South West Africa Constitution Act 42 of 1925.
 Status of the Transkei Act 100 of 1976.
 Status of the Union Act 69 of 1934.
 Statute of Westminster 22 and 23 Geo. 5, c. 4.
 Supreme Court Act 59 of 1959.
 Territorial Waters Act 87 of 1963.
 Terrorism Act 83 of 1967.
 Trading and Occupation of Land (Transvaal and Natal) Restriction
 Act 35 of 1943.
 Transkei Constitution Act 48 of 1963.
 Transvaal Immigrants Regulation Act 22 of 1913.
 Treaties of Peace Act 32 of 1921.

Treaties of Peace Act 20 of 1948.

Treaty of Peace and South-West Africa Mandate Act 49 of 1919.

Union and Rhodesian Customs Agreement Act 17 of 1930.

Wage Act 27 of 1925.

Note on Citation of Cases

For reasons of space, convenience and easy reference, cases in the text and footnotes have been given their short titles. This is especially true of P.C.I.J. and I.C.J. judgements. In this bibliography however, the full names of cases as they appear in the relevant law reports have been cited.

CASES

(a) Commonwealth

Attorney-General v. De Keyser's Royal Hotel Ltd. [1920] A.C. 508.

Attorney-General v. Nissan [1969] 1 All E.R. 629 (H.L.).

Attorney-General for Canada v. Attorney-General for Ontario [1937] A.C. 326.

Bank of Ethiopia v. National Bank of Egypt and Liguori [1937] Ch 513.

Barbuit's Case (1737) Cas. t. Talb. 281; 25 E.R. 777.

Bitter v. Secretary of State for Canada [1944] 3 D.L.R. 482.

Buron v. Denman (1848) 2 Exch. 167.

Carl Zeiss Stiftung v. Rayner and Keeler [1967] 1 A.C. 853.

Chung Chi Cheung v. The King [1939] A.C. 160 (P.C.).

Commercial and Estates Company of Egypt v. The Board of Trade [1925] 1 K.B. 271.

Compañía Naviera Vascongada v. Steamship Christina [1938] A.C. 485.

Cook v. Sprigg [1899] A.C. 572.

Corocraft Ltd. v. Pan American Airways Inc. [1969] 1 All E.R. 82 (C.A.).

Damodar Gordhan v. Deoram Kanji (1876) 1 App. Cas. 332 (P.C.).

Duff Development Corporation Ltd. v. Kelantan Government [1924] A.C. 797.

Ellerman Lines Ltd. v. Murray [1930] A.C. 197.

Ellerman Lines Ltd. v. Murray [1931] A.C. 126 (H.L.)

- Engelke v. Musmann [1928] A.C. 433 (H.L.).
- Ffrost v. Stevenson (1937) 58 C.L.R. 528.
- Foster v. Globe Ventore Syndicate Ltd. [1900] 1 Ch. D. 811.
- Government of the Republic of Spain v. S.S. Arantzazu Mendi [1939] A.C. 256.
- Heathfield v. Chilton (1767) 4 Burr. 2016.
- Janson v. Driefontein Consolidated Mines Ltd. [1902] A.C. 484 (H.L.).
- Johnstone v. Pedlar [1921] A.C. 262.
- Kawasaki Kisen Kaisha Ltd. v. Bantam S.S. Co. Ltd. [1938] 2 K.B. 790.
- Le Louis (1917) 2 Dods. 210.
- Luther v. Sagor [1921] 1 K.B. 456.
- McLeod v. Attorney-General for New South Wales [1891] A.C. 455 (P.C.).
- Mighell v. Sultan of Johore [1894] 1 Q.B. 149.
- Mortensen v. Peters [1906] 8 F. (Ct. of Sess.) 93; (1906) 14 S.L.T. 227.
- Naylor, Benzon and Co. Ltd. v. Krainische Industrie Gesellschaft [1918] 1 K.B. 331.
- Naylor, Benzon and Co. Ltd. v. Krainische Industrie Gesellschaft [1918] 2 K.B. 486 (C.A.).
- Netz v. Ede [1946] 1 All E.R. 628.
- Nissan v. Attorney-General [1969] 1 All E.R. 629 (H.L.).
- Nordenfellt v. The Maxim Nordenfellt Guns and Ammunition Company Ltd. [1894] A.C. 35.
- North Chatterland Exploration Company (1910) Ltd. v. The King [1931] 1 Ch. 169.
- Owners of the Ship Philippine Admiral v. Wallem Shipping (Hong Kong) Ltd. [1976] 1 All E.R. 78 (P.C.).
- Photo Agencies (Pty.) Ltd. v. The Commissioner of Swaziland Royal Police Civ. T. 158/75.
- Polites v. Commonwealth (1945) 70 C.L.R. 60.
- Porter v. Freudenberg [1915] 1 K.B. 857 (C.A.).
- Pyrene Co. Ltd. v. Scindia Steam Navigation Co. [1954] 2 Q.B. 402.

- R. v. Bottrill, Ex Parte Kuechenmeister [1947] K.B. 41.
- R. v. Dudley (1884) 14 Q.B.D. 273.
- R. v. Keyn (The Franconia) (1876) 2 Ex. D. 63.
- Re Arrow River and Tributaries Slide and Boom Co. [1932] 2 D.L.R. 250.
- Re Drummond Wren (1943-5) Annual Digest and Reports of Public International Law Cases 178.
- Reigate v. Union Manufacturing Co. (Ramsbottom) Ltd. [1918] 1 K.B. 592 (C.A.).
- Re Noble and Wolf 1948 O.C. 579.
- Re Noble and Wolf 1949 O.R. 504.
- Re Piracy Jure Gentium [1934] A.C. 586.
- Republic of Italy v. Hambros Bank [1950] 1 All E.R. 430.
- Rothschild v. Administrator of Austrian Property [1923] 2 Ch. 542.
- Salaman v. Secretary of State for India [1906] 1 K.B. 613.
- Secretary of State in Council of India v. Kamachee Boye Sahaba (1859) 7 Moo. Ind. App. 476 (P.C.).
- Stag Line Ltd. v. Foscolo, Mango and Company [1932] A.C. 328 (H.L.).
- Tagaloa v. Inspector of Police [1927] N.Z.L.R. 883.
- Taylor v. Barclay (1828) 2 Sim. 213; 57 E.R. 769.
- Thai Europe Tapioca Service Ltd. v. Government of Pakistan, Minister of Food and Agriculture, Directorate of Agricultural Supplies (Imports and Shipping Wing). [1975] 3 All E.R. 961 (C.A.).
- The Blonde [1922] 1 A.C. 313 (P.C.).
- The Hoop (1799) 1 C. Rob. 196.
- The Odessa 1 B. & C.P.D. 174.
- Theophile v. Solicitor-General [1950] A.C. 186 (P.C.).
- The Parlement Belge (1879) 4 P.D. 129.
- The Parlement Belge (1880) 5 P.D. 197 (C.A.).

The Zamora [1916] 2 A.C. 77.

Trendex Trading Corporation v. Central Bank of Nigeria (1977)
2 W.L.R. 356 (C.A.).

Triquet v. Bath (1764) 3 Burr. 1478.

Union of India v. Jain 1954 I.L.R. 256.

Walker v. Baird [1892] A.C. 491.

West Rand Central Goldmining Co. v. R. [1905] 2 K.B. 391. (C.A.)

(b) South African

Achterborg v. Glinister 1903 T.S. 326.

Alexander v. Pfau 1902 T.S. 155.

Barnabas Flatau and Company v. Sol Jacobson and Son 1928 A.D. 25.

Brown v. Leyds (1897) 4 Off. Rep. 17.

Crooks and Company v. Agricultural Co-operative Union Ltd. 1922
A.D. 473.

Dave Zick Timbers v. Progress Steamship Co. Ltd. 1974 (4) S.A.
381 (AD).

De Howarth v. The S.S. India 1921 C.P.D. 451.

Du Toit v. Kruger (1905) 22 S.C. 234.

Ex parte Belli 1914 C.P.D. 742.

Ex parte Lowen 1938 T.P.D. 504.

Ex parte Savage 1914 C.P.D. 827.

Ex parte Schumann 1940 W.L.D. 251.

Ex parte Sulz 1942 C.P.D. 407.

In re 'Mashona' (1900) 17 S.C. 135.

Kethel v. Kethel's Estate 1949 (3) S.A. 598 (A.D.)

Leibowitz v. Schwartz 1974 (2) S.A. 661 (T.)

Lemkuhl v. Kock 1903 T.S. 450.

- Lendlease Finance Co. (Pty.) Ltd. v. Corporacion de Mercaderes Agricola 1975 (4) S.A. 197 (C)
1976 (4) S.A. 464 (A.D.).
- Mahomed and Minor Son v. Immigrants Appeal Board (1918) 39 N.L.R. 7.
- Marburger v. The Minister of Finance 1918 C.P.D. 183.
- Maree v. Conradie 1903 O.R.C. 23.
- Mashia Ebrahim v. Mahomed Essop 1905 T.S. 59.
- Minister of the Interior v. Beebler; Beier v. Minister of the Interior 1948 (3) S.A. 409 (A.D.).
- Moluele v. Deschazelets N.O. 1950(2) S.A. 670 (T.).
- Mshwakezele v. Guduza (1901) 18 S.C. 167.
- Ncumata v. Matwa (1881-2) 2 E.D.C. 272.
- Nduli and Another v. Minister of Justice and Others (1978) 1 S.A. 893 (A.D.).
- Olivier v. Wessels 1904 T.S. 235.
- Pan American World Airways Inc. v. S.A. Insurance Co. Ltd. 1965 (3) S.A. 150 (A.D.).
- Parkin v. Government of the Republique Democratique du Congo 1971 (1) S.A. 259 (W.).
- L. and H. Policansky v. Minister of Agriculture 1946 C.P.D. 860.
- Rapp and Maister v. Aronovsky 1943 W.I.D. 68.
- S. v. Bull 1967 (2) S.A. 636 (T.).
- S. v. Devoy 1971 (1) S.A. 359 (N.).
- S. v. Devoy 1971 (3) S.A. 999 (A.D.).
- S. v. Eliasov 1965 (2) S.A. 770 (T.).
- S. v. Eliasov 1967 (4) S.A. 583 (A.D.).
- S. v. Oosthuizen 1977 (1) S.A. 821 (A.D.).
- S. v. Penrose 1966 (1) S.A. 5 (N.).
- S. v. Ramotse Unreported case of the Transvaal Provincial Division of 14 September 1970.
- S. v. Tuhadeleni 1969 (1) S.A. 153 (A.D.).

- Sachs v. Dongen P.O. 1950 (2) S.A. 265 (A.D.).
- Seedat's Executors v. The Master (Natal) 1917 A.D. 302.
- Smit v. Bester 1904 O.R.C. 30.
- South Atlantic Islands Development Corporation Ltd. v. Buchan
1971 (1) S.A. 234 (C).
- R. v. Ain Hong 1913 T.P.D. 708.
- R. v. Christian 1924 A.D. 101.
- R. v. Holm, R. v. Pienaar 1948 (1) S.A. 925 (A.D.).
- R. v. Lionda 1944 A.D. 348.
- R. v. Newmann 1949 (3) S.A. 1238 (T.).
- R. v. Offen 1934 S.W.A. 73.
- S. v. Penrose 1966 (1) S.A. 5 (N.).
- Union Government (Minister of Lands) Estate Whittaker 1916 A.D. 194.
- Union Government v. Tonkin 1918 A.D. 533.
- Van Deventer v. Hancke and Mossop 1903 T.S. 401.
- West End Diamonds Ltd. v. Johannesburg Stock Exchange 1946 A.D. 910.

(c) P.C.I.J. and I.C.J.

- Ambatielos Case 1952 I.C.J. Reports 28.
- Anglo-Iranian Oil Co. Case 1952 I.C.J. Reports 93.
- Asylum Case (Colombia/Peru) 1950 I.C.J. Reports 266.
- Case Concerning Certain German Interests in Polish Upper Silesia
1926 P.C.I.J., Series A, No. 7.
- Case Concerning Rights of Nationals of the United States of America
in Morocco 1952 I.C.J. Reports 176.
- Case Concerning the Application of the Convention of 1902 Governing
the Guardianship of Infants 1958 I.C.J. Reports 55.

- Case Concerning the Payment in Gold of the Brazilian Federal Loans Issued in France 1929 P.C.I.J., Series A, No. 15, p. 90.
- Case Concerning the Temple of Fresh Vihar 1961 I.C.J. Reports 17.
- Case of Certain Norwegian Loans 1957 I.C.J. Reports 9.
- Case Relating to the Territorial Jurisdiction of the International Commission of the River Oder 1929 P.C.I.J., Series A, No. 23.
- Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter) Advisory Opinion 1962 I.C.J. Reports 151.
- Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter) 1948 I.C.J. Reports 57.
- Competence of the General Assembly for the Admission of a State to the United Nations 1950 I.C.J. Reports 4.
- Competence of the International Labour Organisation to Regulate Agricultural Labour Advisory Opinion 1922 P.C.I.J., Series B, No. 2.
- Corfu Channel case (merits) 1949 I.C.J. Reports 4.
- International Status of South-West Africa 1950 I.C.J. Reports 128.
- Interpretation of Article 3, paragraph 2, of The Treaty of Lausanne Advisory Opinion 1925 P.C.I.J., Series B, No. 12.
- Interpretation of Peace Treaties with Bulgaria, Hungary and Rumania 1950 I.C.J. Reports 65.
- Interpretation of the Convention of 1919 Concerning Employment of Women During the Night 1932 P.C.I.J., Series A/B, No. 50 p. 365.
- Jurisdiction of the Courts of Danzig 1928 P.C.I.J., Series B, No. 15.
- Legal Status of Eastern Greenland 1933 P.C.I.J., Series A/B, No. 53, p. 22.
- Nationality Decrees in Tunisia and Morocco Advisory Opinion 1923 P.C.I.J., Series B, No. 4.
- North Sea Continental Shelf Cases 1969 I.C.J. Reports 3.
- Nuclear Tests Case 1974 I.C.J. Reports 253.
- Reparations for Injuries Suffered in the Service of the United Nations 1949 I.C.J. Reports 174.

Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide 1951 I.C.J. Reports 15.

South-West Africa Cases Preliminary Objections 1962 I.C.J. Reports 319.

South-West Africa Cases Oral Submissions of Mr. D.P. De Villiers, representative of the South African Government to the I.C.J.: 1962 I.C.J. Pleadings, South-West Africa, vol. 7, pp. 37-64.

South-West Africa Cases Second Phase 1966 I.C.J. Reports 6.

South-West Africa Cases 1966 I.C.J. Pleadings, South-West Africa vols. 9 and 10.

South-West Africa Cases Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) notwithstanding Security Council Resolution 276 (1970) 1971 I.C.J. Reports 11.

South-West Africa Cases 1970 I.C.J. Request for Advisory Opinion: Statement Submitted by the Government of the Republic of South Africa. 1971 I.C.J. Pleadings, South-West Africa, vol. 1, chapter 2, pp. 10-43.

Status of Eastern Greenland Case 1933 P.C.I.J., Series A/B, No. 53.

The Case of the S.S. Lotus 1927 P.C.I.J., Series A, No. 10.

The Greco-Bulgarian Communities Advisory Opinion 1930 P.C.I.J., Series B, No. 17.

The Mayrommatis Jerusalem Concessions 1925 P.C.I.J., Series A, No. 5.

Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory 1932 P.C.I.J., Series A/B, No. 44.

TREATIES

(a) Bilateral

(1) South African

- 1852 Sand River Convention between Great Britain and the Transvaal Boers: Clive Parry, The Consolidated Treaty Series, vol. 107 p. 300.
- 1854 Bloemfontein Convention between Great Britain and the Orange River Territory: Clive Parry, The Consolidated Treaty Series vol. 111 p. 314.
- 1875 Treaty of Friendship and Commerce between the South African Republic and Portugal: 1875-6 B.F.S.P. vol. 67 p. 1256.
- 1881 Pretoria Convention between Great Britain and the South African Republic: 1881 B.F.S.P. vol. 72 p. 900.
- 1884 London Convention between the South African Republic and Great Britain: 1883-4 B.F.S.P. vol. 75 p. 5.
- 1884 Supplementary Agreement between the South African Republic and Portugal regarding the Lorenzo Marques railway: 1883-4 B.F.S.P. vol. 75 p. 636.
- 1902 Treaty of Vereeniging between Great Britain, the South African Republic and the Orange Free State: 1902 B.F.S.P. vol. 95 p. 160.
- U.K.T.S. 30 of 1926: Agreement with Portugal to regulate the use of the waters of the Kunene River.
- U.G.T.S. 2 of 1932: Agreement with Swaziland to exempt farmers carrying on business both in the Union and Swaziland from the payment of double taxation.
- U.G.T.S. 3 of 1932: Agreement with Southern Rhodesia for the avoidance of double death duties.
- U.G.T.S. 9 of 1932: Agreement to suspend inter-governmental debts payable by the German Reich.
- U.G.T.S. 12 of 1932: Trade agreement with Canada.
- U.G.T.S. 3 of 1933: Air Navigation Arrangement with the United States of America.
- U.G.T.S. 10 of 1933: Agreement to suspend inter-governmental debts payable by Czechoslovakia.

1946 Unpublished agreement with the United States of America for the avoidance of double taxation.

1947 U.N.T.S. vol. 66, p. 233: Bilateral air transport agreement with the United States of America.

U.G.T.S. 12 of 1948: Termination of war with Hungary.

U.G.T.S. 13 of 1948: Termination of war with Bulgaria.

U.G.T.S. 14 of 1948: Termination of war with Finland.

U.G.T.S. 15 of 1948: Termination of war with Italy.

U.G.T.S. 16 of 1948: Agreement with the United Kingdom to transfer the right, title and interest in Marion Island and Prince Edward Island.

U.G.T.S. 12 of 1952: Visa agreement with the Netherlands.

U.G.T.S. 17 of 1952: Termination of war with Japan.

1955 U.N.T.S. vol. 248, p. 192: Simonstown Defence Agreement with the United Kingdom.

U.G.T.S. 13 of 1958: Agreement with Ireland for the avoidance of double taxation.

R.S.A.T.S. 3 of 1962: Cultural agreement with Federal Republic of Germany.

R.S.A.T.S. 8 of 1962: Visa agreement with Belgium.

R.S.A.T.S. 1 of 1963: Most Favoured Nations Trade Agreement with Spain.

R.S.A.T.S. 1 of 1964: Protocol with France governing the installation of a scientific space tracking station in South Africa.

R.S.A.T.S. 7 of 1964: Treaty with Portugal regarding the waters of the Kunene River.

R.S.A.T.S. 5 of 1965: Agreement with Netherlands for the establishment and registration of dentists.

R.S.A.T.S. 1 of 1967: Trade agreement with Malawi.

R.S.A.T.S. 4 of 1967: Protocol amending Double Taxation Agreement with the Governments of the United Kingdom and Northern Ireland.

R.S.A.T.S. 5 of 1967: Agreement with Switzerland for the avoidance of double taxation.

- R.S.A.T.S. 2 of 1968: Exchange of Notes with France in respect of reciprocal recognition of airworthiness certificates.
- R.S.A.T.S. 3 of 1968: Agreement amending an Air Transport Agreement with the United States of America.
- R.S.A.T.S. 4 of 1968: Extradition treaty with Swaziland.
- R.S.A.T.S. 1 of 1969: Treaty with Portugal regarding the waters of the Kunene River.
- R.S.A.T.S. 2 of 1969: Extradition Treaty with Botswana.
- R.S.A.T.S. 3 of 1969: Air transport agreement with Austria.
- R.S.A.T.S. 6 of 1969: Extension of extradition treaty with Swaziland to the territory of South-West Africa.
- R.S.A.T.S. 8 of 1969: Memorandum of Understanding subsidiary to a Customs Union Agreement with Botswana, Lesotho and Swaziland.
- R.S.A.T.S. 1 of 1972: Extradition Treaty with Malawi.

(ii) Commonwealth

- 1825 Anglo-Russian boundary and commercial treaty: Clive Parry, the Consolidated Treaty Series, vol. 75 p. 96.
- 1901 Agreement between Great Britain and Portugal regarding railway traffic and the recruitment of black labour: 1901-2 B.F.S.T. vol. 95, p. 931.
- 1922 Treaty of Alliance between Great Britain and Iraq: L.N.T.S. vol. 35, p. 14.
- 1923 Pacific Halibut Fisheries Treaty (U.S.A. and Canada): L.N.T.S. vol. 32, p. 94.
- 1926 Treaty of Alliance between Great Britain and Iraq: L.N.T.S. vol. 47, p. 419.
- 1931 Devolution Agreement between the United Kingdom and Iraq: U.K.T.S. 15 of 1931.
- 1933 Ottawa Agreement between Canada and Norway to exchange insured parcels by parcel post: L.N.T.S. vol. 141, p. 211.
- 1946 Treaty of Alliance between the United Kingdom and Jordan: U.N.T.S. vol. 6, p. 144.
- 1957 Devolution Agreement between the United Kingdom and Malaya: U.N.T.S. vol. 279, p. 287.
- 1957 Devolution Agreement between the United Kingdom and Ghana: U.N.T.S. vol. 287, p. 233.

(b) Multilateral

- 1912 International Radio-telegraphic Convention: L.N.T.S. vol. 1, p. 136.
- 1919 Treaty of Versailles: U.K.T.S. 4 of 1919; B.F.S.P. vol. 112, p. 1.
- 1919 Covenant of the League of Nations: U.K.T.S. 4 of 1919; B.F.S.P. vol. 112, p. 113.
- 1920 Treaty of Sèvres between the Principal Allied and Associated Powers and Greece: L.N.T.S. vol. 28, p. 244.
- 1920 Mandate for South-West Africa: B.F.S.P. vol. 113, p. 1109.
- 1923 Treaty of Lausanne: L.N.T.S. vol. 28, p. 12.
- 1921 Barcelona Convention on Freedom of Transit: L.N.T.S. vol. 7, p. 11.
- 1925 Treaty of Locarno: U.K.T.S. No. 28 of 1926; cmd 2764.
- 1929 International Convention and Protocol for the Suppression of Counterfeiting Currency: L.N.T.S. vol. 112, p. 371.
- 1929 International Convention for the Unification of certain rules relating to international carriage by air, signed at Warsaw: L.N.T.S. vol. 137, p. 11.
- 1931 British Commonwealth Merchant Shipping Agreement: L.N.T.S. vol. 129, p. 177.
- 1931 Convention for the Regulation of Whaling: U.C.T.S. No. 11 of 1931.
- 1936 London Naval Treaty: L.N.T.S. vol. 184, p. 115.
- 1939 Universal Postal Convention: L.N.T.S. vol. 202, p. 159.
- 1944 Convention on International Civil Aviation: U.N.T.S. vol. 15, p. 295.
- 1944 International Sanitary Convention for Aerial Navigation: U.N.T.S. vol. 17, p. 305.
- 1944 International Air Services Transit Agreement: U.N.T.S. vol. 84, p. 389.
- 1945 Charter of the United Nations: text and commentary in Woodrich, I., Hambro, E. and Simons, A.P. Charter of the United Nations: Commentary and Documents 3 ed. New York: Columbia University Press, 1969.

- 1945 Articles of Agreement of the International Monetary Fund:
U.N.T.S. vol. 2, p. 39.
- 1945 Constitution of the United Nations Educational, Scientific
and Cultural Organisation: U.N.T.S. vol. 4, p. 275.
- 1946 Convention on Privileges and Immunities of the United Nations:
U.N.T.S. vol. 1, p. 15.
- 1946 Constitution of the World Health Organisation: U.N.T.S.
vol. 14, p. 165.
- 1947 Convention on Privileges and Immunities of the Specialized
Agencies: U.N.T.S. vol. 33, p. 261.
- 1948 General Agreement on Tariffs and Trade: U.N.T.S. vol. 377,
p. 396.
- 1949 Protocol amending the Agreement for the Suppression of
Obscene Publications of 1910: U.N.T.S. vol. 30, p. 3.
- 1949 Geneva Convention on Treatment of Prisoners of War: U.N.T.S.
vol. 75, p. 135.
- 1950 Convention on Nomenclature for the Classification of Goods in
Customs Tariffs: U.N.T.S. vol. 347, p. 127.
- 1957 Universal Postal Convention: U.N.T.S. vol. 364, p. 3.
- 1957 European Agreement concerning the International Carriage of
Dangerous Goods by Road, registered in 1968: U.N.T.S.
vol. 619, p. 77.
- 1963 Convention on Offences and Certain Other Acts Committed on
board Aircraft: (1963) 2 I.L.M. 1042.
- 1969 Vienna Convention on The Law of Treaties: (1969) 8 I.L.M.
679.
- 1970 Hague Convention for the Suppression of Unlawful Seizure of
Aircraft: (1971) 10 I.L.M. 133.
- 1971 Convention for the Suppression of Unlawful Acts against the
Safety of Civil Aviation: (1971) 10 I.L.M. 1151.

DOCUMENTARY MATERIAL

(a) Commonwealth

Orange River sovereignty proclaimed: Great Britain, House of Lords, Sessional Papers, vol. 7, July 1848, p. 63.

Abandonment of sovereignty over Orange River Territory: Great Britain, House of Lords, Sessional Papers, vol. 13, April 1854, p. 93.

1867 Opinion of British Law Officers in Anglo-Russian Commercial and Boundary Convention of 1825: F.O. 83/2225; Appendix No. 33.

South African Republic proclaimed as British territory (1877): B.F.S.P. vol. 68, p. 40; c. 1776, p. 152.

C. 7824 (July 1895): Dispatch from the Secretary of State for the Colonies to the Governor-General of Canada, the governors of the Australasian Colonies (except Western Australia) and the Governor of the Cape of Good Hope.

Annexation of South African Republic (1900): B.F.S.P. vol. 92, p. 547; Cd. 426, p. 16.

1901 Opinion of Law Officers on lapse of S.A. treaties: F.O. Confidential Paper (7763), No. 30, Appendix No. 73.

Cd. 5745: 1911 Imperial Conference.

Cd. 9005: 1918 Parl. Papers, War Cabinet Report.

Canada, Sessional Papers 1919, Special Session No. 41:
Correspondence and Documents Relative to the Representation of Canada at the Peace Conference and to the Ratification of the Treaty of Peace with Germany.

Cmd. 1987: Summary of Proceedings, 1923 Imperial Conference.

Cmd. 1988: Appendices to the Summary of Proceedings of the 1923 Imperial Conference.

Cmd. 2768: Summary of Proceedings, 1926 Imperial Conference.

Cmd. 3479: Report of 1929 Conference on the Operation of Dominion Legislation.

Cmd. 3717: Summary of Proceedings, 1930 Imperial Conference.

I.B.C.M.C. (1933) 28: The Development of the Machinery and Methods of Separate Action in Foreign Affairs.

2 B.C.R.C. (1937) 77: The Practice and Procedure for the Negotiation and Ratification of the Treaty of Peace with Germany.

The Commonwealth Declaration of April 1969: (1948-9) Halsbury's Statutes of England, 2 ed. 454.

(b) South African

Cape of Good Hope: South African Treaties, Conventions, Agreements and State Papers Subsisting on the 1st day of September 1898. Cape Town (1898).

Proclamation 197 G.G. Extraordinary 2676 of 6 September 1939
declaration of war with Germany.

J.C. Smuts Statement in Reply on the Legal Aspects of the Case: Principal Documents Relating to Consideration by the United Nations General Assembly of the Representations of the Government of India on the Treatment of Indians in the Union of South Africa (1947).

Proclamation 116 G.G. Extraordinary 2774 of 12 June 1940:
Declaration of war with Italy.

Proclamation 230 G.G. Extraordinary 2971 of 8 December 1941:
Declaration of war with Japan.

Proclamation R. 151 G.G. Extraordinary 1156 of 25 June 1965
Reg. Gaz. 507: Extradition treaty with Rhodesia.

Proclamation 229 G.G. Extraordinary 2971 of 8 December 1941:
Declaration of war with Finland, Hungary and Rumania.

Proclamation 3 G.G. Extraordinary 2979 of 2 January 1942:
Declaration of war with Bulgaria.

Proclamation 213 of 15 October 1976 G.G. 5314: Brought Status of the Transkei Act into operation.

G.N. 1976 R.G. 5120 of 27 October 1976 Reg. Gaz. 2388: Publication of treaties with Transkei.

House of Assembly Debates (Chronological List).

Note that the following Parliamentary Debates of 1919 were reported not in Hansard but in the Cape Times:

Cape Times	12 February 1919
	6 September 1919
	9 September 1919
	10 September 1919
	11 September 1919

Later Debates are cited thus:

House of Assembly Debates

Vol. 1, cols 1292-9, 1303	(3 April 1924)
Vol. 5, cols 6502-3	(23 July 1925)
Vol. 6, cols 671, 676	(17 February 1926)
Vol. 7, col. 2722	(23 April 1926)
Vol. 8, cols 508-11	(21 February 1927)
Vol. 8, cols 1506-7	(16 March 1927)
Vol. 10, col. 1523	(29 February 1928)
Vol. 10, cols 1846, 1858	(8 March 1928)
Vol. 11, cols 10-11	(28 January 1929)
Vol. 19, col. 2725	(5 April 1932)
Vol. 24, cols 1779, 1790	(19 February 1935)
Vol. 32, cols 1677-9	(25 August 1938)
Vol. 34, cols 2724-5	(12 April 1939)
Vol. 36, cols 23, 30-5, 53-5	(4 September 1939)
Vol. 40, cols 100-101	(29 August 1940)
Vol. 43, col. 536	(17 January 1942)
Vol. 46, cols 5410-6, 5430	(14 April 1943)
Vol. 55, cols 1215-7, 1265-6	(7 February 1946)
Vol. 56, cols 4162, 4167, 4170-2	(25 March 1946)
Vol. 65, cols 3041-4	(22 September 1946)

(c) League of Nations and United Nations

Draft Articles on Succession of States in respect of Treaties,
First Draft: U.N. Document A/CN. 4/202.

Draft Articles on Succession of States in respect of Treaties,
Second and Third Drafts: U.N. Document A/CN. 4/224.

Definition of Signature in Report of the Committee for the
Progressive Codification of International Law of the League
of Nations: Publications of the League of Nations V. Legal,
1927, v. 16, Doc. c. 211.

G.A.O.R. 1st Sess.. Pt II, Jt. Cttee, 3.

G.A.C.R. 4th Sess., Ad Hoc Pol. Cttee, 13th mtg, 1 para. 20.

G.A.O.R. 5th Sess., plen., 303rd mtg, para. 126.

G.A.O.R. 7th Sess., 1st Cttee, 545th mtg, para. 29.

G.A.O.R. 8th Sess., 1st Cttee, 630th mtg, para. 40.

G.A.O.R. 8th Sess., Ad Hoc Pol. Cttee, 104.

G.A.O.R. 8th Sess., Ad Hoc Pol. Cttee, 90-91.

G.A.O.R. 8th Sess., Ad Hoc Pol. Comm., 99-100; 104.

G.A.O.R. 23rd Sess., Suppl. No. 9 (A/7209/Rev. 1) p. 25; (1969)
8 I.L.R. 172.

International Law Commission Reports on the Law of Treaty

Bratley, I.L., Second Report, U.N. Doc. A/CN. 4/43 in (1951) 2
Y.B.I.L.C.

Lauterpacht, H., First Report, U.N. Doc. (A/CN. 4/63) in (1953) 2
Y.B.I.L.C.

Lauterpacht, H., Second Report, U.N. Doc. A/CN. 4/67 in (1954) 2
Y.B.I.L.C.

Fitzmaurice, G.G., First Report, U.N. Doc. A/CN. 4/101 in (1956) 2
Y.B.I.L.C.

Statement of Professor Myres S. McDougal, United States Delegation,
to Committee of the whole, April 19, 1968: (1968) 62
A.J.I.L. 1021.

Waldock, H., Third Report: U.N. Doc. A/CN. 4/167 in (1964) 2
Y.B.I.L.C. 54.

Waldock, H. Sixth Report: U.N. Doc. A/CN. 4/186 in (1966) 2
Y.B.I.L.C. 94.

Report of the I.L.C. covering the work of its eleventh session
U.N. Doc. (A/4169) Suppl. No. 9.

Report of the I.L.C. covering the work of its sixteenth session,
11 May-24 July 1964 (Doc. A/5809) in (1964) 2 Y.B.I.L.C.
173.

United States proposed amendment to the draft articles on inter-
pretation of treaties: U.N. Doc. A/Conf. 39/C 1/L 15.

Procedure concerning the cabling ahead of Full Powers: U.N.
Document L.E.G. 103/01 (1) A.L. of 11 July 1949.

Registration and Publication of Treaties and International Agree-
ments, Regulations to give effect to Article 102 of the
Charter of the United Nations: G.A. Resolution 97 (I) of 14
December, 1946, as subsequently modified by G.A. Resolution
364 (IV) of 1 December, 1949 and G.A. Resolution 482 (V) of
12 December, 1950.

Report of the Committee for the Progressive Codification of
International Law of the League of Nations on signature of a
treaty: U.N. Document A/5209

Resolutions of the General Assembly on South Africa's continued occupation of Namibia:

- 2145 (xxi) of 27 October 1966;
- 3295 (xxix) of 13 December 1974;
- 3399 (xxx) of 26 November 1975;
- 3111 (xxviii) of 12 December 1973;
- 3324E (xxix) of 16 December 1974.

1956 Resolution of the Institute of International Law on the Interpretation of Treaties: 1956 Annuaire de l'Institut de Droit International 364.

Resolutions of the Security Council on South Africa's continued occupation of Namibia:

- 245 (1968);
- 246 (1968);
- 264 (1969);
- 269 (1969);
- 276 (1970);
- 283 (1970);
- 300 (1971);
- 301 (1972).

Summary of the Practice of the Secretary-General as Depositary of Multilateral Agreements: U.N. Document ST/LEG/7 paragraph 133, 7 August 1959.

United Nations Chronicle 1975 vol. 12.

United Nations Chronicle 1977 vol. 14.

United Nations Conference on the Law of Treaties, First and Second Sessions, 1968 and 1969, Official Records: U.N. Documents A/Conf. 39/11 and Add. 1.

United Nations Handbook of Final Clauses Part II: U.N. Document ST/LEG/1 of 28 August 1951.

United Nations Legislative Series Laws and Practices concerning the Conclusion of Treaties: ST/LEG/Ser. B/3 1952.

United Nations Legislative Series Materials on Succession of States: ST/LEG/Ser. B/14 1967.

United Nations Yearbook, 1946-7.

United Nations Yearbook, 1948-9.

Yearbook of the International Law Commission

- 1951 (2)
- 1954 (2)
- 1956 (2)
- 1964 (2)
- 1966 (2)
- 1968 (2)
- 1969 (2)
- 1974 (2)

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