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SCHOOLS OF APPROACH TO THE INTERPRETATION OF TREATIES

by

OLIVER MORSE*

An old Austrian professor of mine once told me that upon his arrival to this country he had occasion to use the subway in New York City, and that at one point in his trip he had to get from the east side of town to the west side of town. In order to accomplish this he inquired of one of the platform attendants which train he should use. In response to this request he was informed to use the "shuttle". Not understanding what the attendant meant, and not wishing to appear ignorant of what he considered the "American" way, he went to one side and pulled out his pocket translation dictionary in order to make some sense out of the answer given him. The definition that he found was that "shuttle" was an instrument used for weaving. It was only some years later that he found out that the word "shuttle" had a connotative meaning indicating a train that made short trips back and forth between two points. This incident is indicative of how the differences in culture and background manifest themselves in the selection of words used to reveal an intention. It also shows how the use of "unhappy language" can result in misunderstandings. This is not a circumstance that is confined to local avenues of discourse; it is also present in the international scene of diplomatic intercourse.

Invariably when a State enters into an agreement with another or other States it is because it will serve that State's best interest. Inasmuch as each State's interest is rarely the same, a period of negotiations takes place with the desire on the part of each State that the final product of the agreement will conform to each State's interest. Often, a long and protracted discussion of the use and meaning of a single word, contemplated for use in the agreement, will ensue because of the different conceptions of its meaning. Here then is where the differences in culture, language, background and interest clash with the end product thereof said to be inclusive of the intention of the parties to that agreement. Throughout these negotiations, the interests of each State has been fore-

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INTERPRETATION OF TREATIES

most in its mind and, except in a treaty of peace wherein the will of the victor is imposed upon the vanquished, it is to be supposed that a State will assent to nothing inimical to its interests. What is finally assented to is then usually a formula, which is a combination of the unilateral intentions of each party, and couched in general terms for the pleasure of the parties and in the hopes of consummating the agreement.

Whatever the desires and demands of a State may be, diplomacy requires that they usually be expressed with moderation and courtesy, hence the language used is not *completely* indicative of these desires and demands, i. e. intentions. Sometimes provisions in a treaty are nominal in that the intention for any definite application of them is absent. They are merely high sounding phrases to afford diplomatic decorum to the instrument and the proceedings.¹

All of the discussion above is to suggest that, the circumstances under which a treaty is made necessarily admit of many ambiguities that portend interpretation and make the task thereof infinitely more than a mere pedestrian undertaking.²

Who May Interpret a Treaty

At the outset, the interpretation of a treaty is for the parties to the treaty themselves. This they can do by including definitions in the treaty.³ It may also be accomplished by agreements,⁴ or by the use of interpretive letters not found in the body of the treaty but included in the minutes of the negotiations that have been agreed upon by the parties. As will be indicated later, the practice of the parties can suffice to put an interpretation on a treaty provision. With respect to multilateral treaties, notes interpreting the text and formally accepted as reservations are to be considered as authentic interpretations.⁵

Domestic courts may and do interpret treaties but that interpretation is only effective within the court's jurisdiction and has no effect in inter-

¹ See YU, *THE INTERPRETATION OF TREATIES* 51 (1927).

² "Interpretation involves giving a meaning to the text; and since it is usually situations unforeseen by the parties, or situations foreseen *but as to which their divergent intentions caused them to adopt a 'formula' which render interpretation necessary*, the attempt to discover the intention of the parties in employing certain terms is only a part of the interpretative function." BRIGGS, *THE LAW OF NATIONS* 899 (1952, 2d ed.) (italics added).

³ See Art. 5 (b) and (c) of the Treaty of Brotherhood and Alliance Between the Kingdom of Iraq and the Hashemite Kingdom of Transjordan, Signed at London, on 22 March 1946, Vol. 23, UN TREATY SERIES, pp. 154, 157 (1948-49).

⁴ *The Law of Treaties*, Harvard Research in International Law, 29 AM. J. INT'L L. SUPP., pt. III, 968 (1935). See also *infra* note 8.

⁵ Wright, *The Interpretation of Multilateral Treaties*, 23 AM. J. INT'L L. 94, 104, 105 (1929).

national law. Interpretations by these tribunals deal with the rights of private individuals under the treaty and are not binding on the parties thereto.⁶ International organizations and their organs are generally given no express power to interpret its enabling instrument. However, in order to act, of necessity an organ must put some interpretation on the instrument under which it acts. That interpretation, in any event, is not binding upon the parties (Member States).⁷

International tribunals may interpret treaties depending upon the provisions thereof.⁸ The decisions thereof are binding only on the parties to the dispute and with respect to the particular point in dispute.⁹ And so it is that the parties may agree in the treaty as to the proper tribunal to interpret the treaty or if no such provision is residing therein, to agree to a tribunal to interpret the treaty after the dispute has arisen. The International Court of Justice has specific jurisdiction to interpret treaties, provided they otherwise have jurisdiction of the dispute.¹⁰ The discussion hereafter will deal with some recent decisions of the International Court of Justice with respect to disputes involving the interpretation of treaties, international agreements and declarations.

⁶ See *Perkins v. Elg*, 307 U. S. 325 (1938).

⁷ See ART. 10, U.N. CHARTER. Interpretations put on the U.N. Charter by the General Assembly although not considered juridical nor binding upon the Member States, are given some weight by the International Court of Justice. For an instance of such cognition see, the advisory opinion on the International Status of South-West Africa, I.C.J. Reports 1950, p. 137, and the advisory opinion on the Competence of the General Assembly for the Admission of a State to the United Nations, I.C.J. Reports 1950, p. 9.

⁸ ". . . it may be said that, in so far as treaties in their international aspect are concerned, they may be authoritatively interpreted by the parties themselves through mutual agreement, either directly and through the ordinary channels of international relations, or indirectly as the result of recourse to good offices, mediation, or conciliation. Or they may be interpreted by an international organ or agency, permanent or *ad hoc*, to whose decision and interpretation the parties to the dispute agree to submit. In other words, the parties to a treaty may agree to an interpretation of their own making or they may decide to accept that of some outside person, organ or authority mutually agreed upon. Under international law they are entirely free to choose either method, unless the treaty involved specifically binds them to have recourse to one or the other, or unless they are bound by some general treaty obliging them to have recourse to certain methods for the settlement of their international disputes." Harvard Research in International Law, *supra* note 4 at 975 and 976. See also Arts. 36, 37, and 38, STATUTE OF INT'L COURT OF JUSTICE.

⁹ See Art. 59, STATUTE OF INT'L COURT OF JUSTICE. However, the opinions of International Tribunals are usually given universal respect.

¹⁰ "1. The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force. 2. The states parties to the present Statute may at any time declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning: a. *the interpretation of a treaty . . .*" Art. 36, STATUTE OF INT'L COURT OF JUSTICE.

Approaches Used in the Interpretation of Treaties

The famous Harvard Research in International Law, *The Law of Treaties*, makes a broad and general statement relating to the factors to be considered in the interpretation of treaties.¹¹ This is indicative of the refusal to abide in the idea that there exist any maxims or clear-cut and mechanical rules to be applied in the interpretation of treaties.¹² This does not mean that canons of interpretation do not exist or are not used, but it is strongly suggested that the supposedly existing canons have been supplanted by an approach to the task of interpretation.¹³ There are, in essence, three schools of approach used in the interpretation of treaties: One, the intention of the parties school; two, the textual school; and three, the teleological school. These schools are not mutually exclusive and during the course of an opinion of the International Court of Justice any one or more of these approaches may be found to exist therein.¹⁴ It might be mentioned that there is in existence another school of thought being championed by Judge Alvarez, a former member of the Court of International Justice, which may appropriately be designated the sociological school.¹⁵ Very little, if any credence has been juridically afforded this school and only brief mention of it will be made below.

Intention of the Parties School

The intention of the parties school feels that all the related conduct with respect to the treaty and its making should be taken into consideration in trying to arrive at the intention of the parties when the Court is faced with a dispute involving the interpretation of that treaty. This conduct includes the use of cognate sources such as: the conduct of the parties, prior and subsequent to the treaty, the historical background, the aims and objectives of the parties sought to be effected in the treaty, the

¹¹ "A treaty is to be interpreted in the light of the general purpose which it is intended to serve. The historical background of the treaty, *travaux préparatoires*, the circumstances of the parties at the time the treaty was entered into, the change in these circumstances sought to be effected, the subsequent conduct of the parties in applying the provisions of the treaty, and the conditions prevailing at the time interpretation is being made, are to be considered in connection with the general purpose which the treaty is intended to serve." 29 AM. J. INT'L L. SUPP., pt. III, 937 (1935).

¹² "No canons of interpretation can be of absolute and universal utility in performing such a task, and it seems desirable that any idea that they can be should be dispelled." Harvard Research in International Law, *supra*, n. 4 at 946. See Stone, *Fictional Elements in Treaty Interpretation—A Study in the International Judicial Process*, 1 SYD. L. REV. 344 (1954).

¹³ See YU, *op. cit.*, p. 27.

¹⁴ For such a hybrid approach see the Case Concerning Rights of Nationals of the United States of America in Morocco, I.C.J. Reports 1952, pp. 176, 189, 195 and 196.

¹⁵ See Samore, *New International Law of Alejandro Alvarez*, 52 AM. J. INT'L L. 41 (1958).

other provisions of the treaty which compare or contrast with the provision in dispute, the practice of the parties in making like provisions and their conduct thereunder, other extrinsic circumstances prevailing at the time of the conclusion of the treaty and the "inclusive" *travaux préparatoires*.¹⁶ Doubting the existence of a text that is "clear", "natural" or "plain", the school adheres to the idea that words have any meaning the parties attach thereto and the function of the interpreter is to look at all the attending circumstances to determine what the parties intended in the use of a word or phrase.¹⁷ Accordingly, anything in a treaty in dispute is not to be thought of as self-contained. One of the chief characteristics of this school is the credence it allows to *travaux préparatoires*.¹⁸ From these manifestations of unilateral intentions, it is felt a "formula" can be gleaned. However, the use of *travaux préparatoires* is not without equivocation. In the case of multilateral treaties some confinement is put upon their use by adherents to the school. It is felt that the nature of a multilateral treaty and its negotiation does not admit of the free use of preparatory work, in that the negotiations are usually the work of a few important parties, and that the plenary sessions of the conference assume the character of a legislative debate which is not indicative of the intention of all the parties. This restriction is felt more justified in the case of a treaty open to accession since the acceding parties have had no participation in the preparatory work and are deemed to have accepted only the text of the treaty and the *formal* reservations thereto.¹⁹

¹⁶ Hyde, *The Interpretation of Treaties*, 24 AM. J. INT'L L. 1, 19 (1930). See also YU, *op. cit.*, p. 28. "*Travaux préparatoires* include such materials as preliminary drafts, the correspondence of the negotiators, the records of their remarks in committee of plenary sessions, committee reports, reports of rapporteurs, perhaps even public statements of negotiators or representative statesmen, etc. They are to be distinguished from formal reservations and from interpretations mutually agreed upon and formally recorded as 'authentic' interpretations." Harvard Research in International Law, *supra* note 4 at 956.

¹⁷ ". . . it may not be too late to endeavour to convince the court that the real significance of words as symbols of common design depends upon what the evidence reveals; *that that evidence may contradict what the bare form of a text purports to establish*, and that in case of a conflict, the evidence should be accepted as the key to a correct interpretation." Hyde, *Judge Anzilotti on the Interpretation of Treaties*, 27 AM. J. INT'L L. 502, 506 (1933). (italics added).

¹⁸ "In the case of treaties the preparatory work is as a rule recorded, formal, authoritative, explicit, and continuous. If thoroughly studied, it permits the tracing of the development of a clause, in an illuminating chain of continuity, from the first instruction to the delegate or from the first note initiating the correspondence to the final provision as adopted in the treaty. A party aiming to secure a forensic advantage may deliberately disturb this continuity, but a thorough investigation by the judge will restore the missing link without undue difficulty." Lauterpacht, *Some Observations on Preparatory Work in the Interpretation of Treaties*, 48 HARV. L. REV. 549, 575, 576 (1935).

¹⁹ See Wright, *supra*, n. 5.

Textual School

The textual school is characterized by its nomenclature. It confines itself to literal translations. If a word, clause or phrase of a treaty provision is in dispute and the meaning thereof is "clear", "natural" or "plain", then no resort will be had to the negotiations for its interpretation. This school bases its approach on the premise that the parties to a treaty ratified its text and not the preliminaries thereof; that the ratifying authorities were not present at the negotiations and were not in a position to properly evaluate all the implications of the negotiation; and that because of this their action on the treaty must be deemed to have taken into account the text alone.²⁰ However, if the text is unintelligible, then this school allows recourse to *travaux préparatoires*. Some qualification exists in this school of thought with respect to extrinsic evidence. At times, if the language of the text does not exclude it, the historical background of the treaty is considered.

Teleological School

The teleological school may be thought of as one of recent origin. It ascribes an aim and purpose to the treaty and from there is its point of departure. This school is given to attaching great importance to preambles and the statements of purposes in treaties. It is submitted that this school thinks in terms of the intention of the treaty rather than the intention of all the parties thereto and that this "formula" is independent of the intention of its constituents.²¹ By its nature this school of approach is almost invariably limited to conventions and multilateral treaties. A perusal of the cases evidencing this approach will attest to this. This type of approach, in order to give some effect to the aims and purposes of the treaty, as contrasted from the aims and objectives of the parties, has a tendency to legislate as will later be shown.

Sociological School

The sociological school is an extension of the teleological school. It assigns an intention to the treaty but that intention must further conform with what is considered the law of social interdependence. This approach will allow of no interpretation that will offend its notions of

²⁰ Fachiri, *Interpretation of Treaties*, 23 AM. J. INT'L L. 745, 746 (1929).

²¹ See Lauterpacht, *Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties*, 26 BRIT. YEARBOOK OF INT'L L. 48 (1949) for an interesting discussion of the manner and means (subterfuges) used in allowing interpretations that would give effect to international agreements.

social justice.²² Suffice it to say that it has found little juridical application save that of its originator, Judge Alvarez.

*Intention of the Parties School and Recent Decisions of
the International Court of Justice*

As has been previously mentioned, the schools of interpretation are not mutually exclusive, and the use of more than one school may be found in some decisions of the Court. There has been a tendency on the part of the Court to favor the textual approach and the use of the tenets of the intention school is sparse. In one of the cases to be discussed herein, the approach to interpretation is primarily textual but there is within that approach the use of the tenets of the intention school.

In the *Ambatielos* case, the Court of International Justice was asked to resolve a dispute between England and Greece involving the interpretation of the Treaty of Commerce and Navigation of 1926 between the two parties.²³ Accompanying the Treaty was a declaration.²⁴ In another part of the opinion, the Court had held that the declaration had the effect of keeping alive the provisions of an 1886 Treaty of Commerce and Navigation. Upon this, England claimed that the declaration was not a part of the 1926 treaty while Greece claimed that it was. In deciding this issue, the Court took into consideration three things: one, the subsequent conduct of the parties in ratifying the treaty; two, *travaux préparatoires*; and three, the conduct of the parties prior to the conclusion of the treaty. The evidence showed that England had included in a single document the declaration along with the treaty and customs schedule; that the declaration was included in a single document in

²² "The purposes of the new international law, based on social interdependence, differ from those of classical international law: they are to harmonize the rights of States, to promote co-operation between them and to give ample room to common interests; its purpose is also to favor cultural and social progress. In short, its purpose is to bring about what may be called *international social justice*."

Dissenting opinion of Judge Alvarez in the case of the International Status of South-West Africa, I.C.J. Reports, 1950, p. 176. See Samore, *New International Law of Alejandro Alvarez*, 52 AM. J. INT'L L. 41 (1958).

²³ I.C.J. Reports 1952, p. 28.

²⁴ The text of the Declaration is as follows: "It is well understood that the Treaty of Commerce and Navigation between Great Britain and Greece of today's date does not prejudice claims on behalf of private persons based on the provisions of the Anglo-Greek Commercial Treaty of 1886, and that any differences which may arise between our two Governments as to the validity of such claims shall, at the request of either Government, be referred to arbitration in accordance with the provisions of the Protocol of November 10th, 1886, annexed to the said Treaty." See *The Ambatielos Case*, I.C.J. Reports, 1952, p. 36. The Protocol referred to in the Declaration provided that, "Any controversies which may arise respecting the interpretation or the execution of the present Treaty, or the consequences of any violation thereof, shall be submitted, when the means of settling them directly by amicable agreement are exhausted, to the decision of Commissions of Arbitration, and the result of such arbitration shall be binding upon both Governments." *Id.* at p. 35.

England's *Treaty Series* a year afterwards; that it was registered in a single document in the League of Nations *Treaty Series* with all the instruments therein being given a single number; and that the formal ratification by England used language that included the declaration as part of the treaty. In all these acts, no distinction was made between the declaration and the treaty. The evidence further showed that Greece accepted, approved and ratified the treaty, the customs schedule and the declaration together. The *travaux préparatoires* revealed that England, in the negotiations, asked Greece for assurance that the 1926 treaty would not be considered as prejudicing the claims of English subjects founded upon the 1886 treaty.²⁵ Greece had renounced the 1886 treaty and England had kept it in force by a series of *modi vivendi*. The Court then reasoned that unless the declaration were a part of the 1926 treaty, that treaty would have terminated the 1886 treaty, and that England, by its prior conduct in keeping the renounced treaty of 1886 alive and asking assurances of Greece that its provisions would continue to operate after the 1926 treaty came into force, intended that the Declaration was to be a part of the 1926 treaty. It should be noted that the Court, with respect to this phase of the case, gave practically no consideration to the language of the declaration in determining that the parties intended that it be part of the treaty of 1926. What was considered was the prior and subsequent conduct of the parties and some statements made during the negotiation of the treaty. Only part of the *Ambatielos* case was discussed here. It is primarily a case where the approach to interpretation is a textual one. It was used here to show that whatever the approach to interpretation, it may include the use of other schools of interpretation.

The *Anglo-Iranian Oil Company* case dealt with the effect of an Iranian reservation to the compulsory jurisdiction of the International Court of Justice.²⁶ The dispute was one between England and Iran. The question to be decided was whether Iran had to submit to arbitration, pursuant to a convention accepted by Iran previous to its reservation to the jurisdiction of the Court, a dispute, the facts of which took place after that reservation. Iran had accepted the compulsory jurisdiction of the court in disputes arising after the ratification of the reservation "with regard to situations or facts relating directly or indirectly to the applica-

²⁵ It was felt by the Court that the "assurances" that England requested of Greece were for the purpose of keeping the 1886 Treaty in force, otherwise, had the Treaty terminated, the claims thereunder would have been without a remedy, if the Parties could not settle them amicably.

²⁶ I.C.J. Reports 1952, p. 93.

tion of treaties or conventions accepted" by it "and subsequent to the ratification" of the reservation.²⁷ It was Iran's claim that the jurisdiction of the Court was limited to treaties accepted by it after the reservation. On the other hand, England felt that the words "subsequent to the ratification" of the reservation referred to "with regard to situations or facts" and not to treaties accepted by Iran after the reservation; the contention of England being that the dispute had its remedy in a treaty accepted before the reservation but growing out of facts after the reservation. The Court denied the contention of Great Britain and refused to make a grammatical interpretation of the text. It considered the past conduct of Iran in renouncing all treaties containing capitulatory rights in Iran and stated that it was highly improbable that Iran would agree that disputes involving capitulatory rights would be cognizable by the Court. The Court also considered the conduct of Iran after signing the reservation but before ratifying it. Evidence showed that during this period Iran passed a law relating to the reservation and that law was worded in accordance with the contentions of Iran before the Court. The Court felt that if this were not the true understanding of Iran with respect to the reservation, Iran could have altered it before ratifying it. Here the Court considered the extrinsic circumstances in interpreting the reservation and concerned itself with the intention of Iran as manifested outside the text of the reservation. Since there were no negotiations involved here and only a unilateral intent was involved, it is easy to assume that in like situations the Court's approach, in interpreting reservations and unilateral declarations, will generally be that of the intention of the parties school.

*Textual School and Recent Decisions of the
International Court of Justice*

The textual school of interpretation finds the most support in the International Court of Justice. In the *Ambatielos* case, previously mentioned, Greece sought to have the Court decree that England was under a duty to submit to arbitration a dispute which had its basis in the Treaty of Commerce and Navigation of 1886. In the early part of the opinion, the Court had decided that Article 29 of the 1926 treaty had accorded it jurisdiction to interpret the 1926 treaty, and that the declaration in-

²⁷ The pertinent text of the reservation reads: "The Imperial Government of Persia (Iran) recognizes as compulsory ipso facto . . . the jurisdiction of the Permanent Court of International Justice . . . in any dispute arising after the ratification of the present declaration with regard to situations or facts relating directly or indirectly to the application of treaties or conventions accepted by Persia (Iran) and subsequent to the ratification of this declaration . . ." *supra* note 26 at 103.

cluded therewith referred to the 1886 treaty which made it a part of the 1926 treaty, therefore allowing it jurisdiction to interpret the 1886 treaty.²⁸ When the Court further held that the declaration was a part of the 1926 treaty, and that inasmuch as it sustained the provisions of the 1886 treaty and that disputes having their basis in the latter treaty were entitled to the remedy provided for in that treaty, to wit, arbitration, the Court was then faced with another textual problem posed by England. It was England's contention that the declaration, in reference to disputes based upon the 1886 treaty, limited those disputes formulated before the declaration was signed. At this point the Court invoked the purely textual approach. It stated that the phrase used in the declaration, "claims . . . based on the provisions of the Anglo-Greek Commercial Treaty of 1886", made no reference whatever to the date of their formulation and that the Declaration's only requirement was that they be based on the 1886 treaty. It held that the contention of England was contrary to the language of the declaration and it rejected the use of *travaux préparatoires* in making this interpretation. It is submitted that the contention of England, that the desire on the part of the parties to keep the 1886 treaty alive so as to allow claims *already accrued* thereunder a remedy, was a cogent one. However, the Court felt that the language of the declaration was "clear" and it would not consider extrinsic evidence to the contrary.

In the first phase of the Advisory Opinion of the case of *The Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, the Court of International Justice had decided that Bulgaria, Hungary and Romania were obligated, by the peace treaties, to appoint a representative to a Commission to hear disputes that had arisen between them and the allied and associated powers.²⁹ Bulgaria, Romania and Hungary failed to appoint a representative within the stipulated time. In the second phase of the Advisory Opinion on the case of *The Interpretation of Peace*

²⁸ The text of Article 29 reads as follows: "The two Contracting Parties agree in principle that any dispute that may arise between them as to the proper interpretation or application of any of the provisions of the present Treaty shall, at the request of either Party, be referred to arbitration. The court of arbitration to which disputes shall be referred shall be the Permanent Court of International Justice at the Hague, unless in any particular case the two Contracting Parties agree otherwise." *supra* note 23 at 36. See also Art. 37, STATUTE OF INT'L COURT OF JUSTICE.

²⁹ I.C.J. Reports 1950, p. 65. The pertinent text of the provision generic to all three treaties is as follows: "Any such disputes not resolved by them . . . shall . . . be referred at the request of either party to the dispute to a Commission composed of one representative of each party and a third member selected by mutual agreement of the two parties from nationals of a third country. Should the two parties fail to agree . . . upon the appointment of the third member, the Secretary-General of the United Nations may be requested by either party to make the appointment." *Id.* at p. 73.

Treaties with Bulgaria, Hungary and Romania, by Resolution of the General Assembly, the Court was asked whether, under the terms of the treaty, the Secretary-General could appoint a third member of the Commission at the request of one party when the other party refused to do so.³⁰ It was contended that the "third member" spoken of in the provision merely meant the neutral member of the Commission; that the provision did not imply that he could only be appointed when the two national Commissioners were appointed; and that the failure of the parties to the treaty to appoint a third member allowed the Secretary-General to do so. The Court refused to accept this contention and proceeded to make a literal interpretation of the provision. It followed the chronology of the language of the provision, to wit, "appointment of a national Commission by each party; selection of a third member by mutual agreement of the parties" and failing such agreement, "his appointment by the Secretary-General." It should be noted that the Court took into consideration the international practice of arbitration in arriving at its interpretation.³¹ Ordinarily, an agreement to submit to arbitration is nothing more than an agreement to agree to arbitrate. Appended to an agreement to arbitrate is the necessary condition that a further agreement must be negotiated (*a compromis*) to arrive at the points of issue to be submitted and the procedure to be used during the arbitration proceedings. If the means of selecting the members of the arbitral tribunal are not specified in the treaty, that too will have to be settled by a subsequent agreement. In the absence of an allowance to do so, which is highly improbable, no international tribunal is going to make the selection of an arbiter or select the procedure to be used by an arbitral tribunal or the issues to be placed before it, nor will it allow others to do so. The will of the sovereign cannot be supplanted thus. It is States who make such agreements, not the Court. So it is that in this case the interpretation of the agreement to arbitrate was founded upon the practice of nations. The literal and natural meaning of the words used in the provision derived such meaning from international practice. Even though the Court had held previously that under the provision Bulgaria, Hungary and Romania were obliged to submit the dispute to arbitration,

³⁰ I.C.J. Reports 1950, pp. 221 and 226.

³¹ "Moreover, this is the normal order followed in the practice of arbitration, and in the absence of any express provision to the contrary there is no reason to suppose that the parties wished to depart from it." *supra* note 30 at 227.

it would not interpret the language of the provision to be without international practice.³²

The Advisory Opinion on the *Conditions of Admission of a State to Membership in the United Nations* is a rigid textual approach.³³ By a Resolution of the General Assembly the Court was asked for an interpretation of Article 4 of the UN Charter.³⁴ In essence, what was asked was whether a member of the United Nations was legally entitled to make its consent for admittance to membership to the United Nations depend on "conditions" extraneous to Article 4, paragraph 1; and also whether a member, recognizing that an applicant for membership has fulfilled the conditions set forth in Article 4, can subject its vote to an additional "condition" that other States be admitted to membership with that State? The Court stated five "conditions" as requisite for admission to membership: One, the applicant must be a State; two, it must be "peace-loving"; three, it must accept the obligations of the Charter; four, it must be able to carry out these obligations and; five, it must be willing to do so. The Court felt that the text, because of the way the "conditions" were enumerated, was intended to be a legal rule. It also considered that these "conditions" as being requisite for membership, inversely formed the reasons for refusing admission, and that since no distinction existed in the text between the allowance of admission and the disallowance of admission, no interpretation that these "conditions" for membership were minimal, in that they were operative only to disallow membership, would obtain. In view of this, the Court held that, according to the natural meaning of the words of the text, the enumerated "conditions" were the sole "conditions" for membership. Feeling that the text was clear it rejected the use of *travaux préparatoires*. It was contended that although Article 4, paragraph 1 provided "conditions" requisite for membership, it did not place any restrictions on the General Assembly and the Security Council from taking into consideration political factors in recommending and deciding upon membership admission, under Article 4, paragraph 2. In looking to the words of Article 4, paragraph 2, the Court reasoned

³² See the Case Concerning Right of Passage Over Indian Territory, I.C.J. Reports 1957, p. 142, where the International Court of Justice in interpreting a condition in a Declaration accepting the compulsory jurisdiction of that court, the court avoided a strict textual interpretation of the condition and interpreted it "as producing and as intended to produce effects in accordance with existing law and not in violation of it."

³³ I.C.J. Reports 1948, p. 57.

³⁴ "1. Membership in the United Nations is open to all other peace-loving states which accept the obligations contained in the present Charter and, in the judgment of the Organization, are able and willing to carry out these obligations. 2. The admission of any such state to membership in the United Nations will be effected by a decision of the General Assembly upon the recommendation of the Security Council." U.N. CHARTER, Art. 4.

that the words "will be effected" were words of procedure and that action on admission to membership under Article 4, paragraph 2 was merely procedural, and Article 4 paragraph 1 was substantive and was to be the sole subject of the judgment of the General Assembly and the Security Council. In answering the second part of the request, the Court stated that such a condition was nowhere to be found in Article 4, paragraph 1 and that Article 4, by its language, implied that each applicant was to be examined and voted on individually so as to determine whether that applicant in *particular* fulfilled the "conditions" necessary for admission. It should be noted that nowhere in this opinion did the Court allude to extrinsic evidence as to the intention underwriting the provisions involved, in fact the Court did not go beyond the provision itself in interpreting it. Its whole scrutiny was within the confines of the provision. This is the *textual school* at its purest.

*Teleological School and Recent Decisions of the
International Court of Justice*

The teleological school, as previously mentioned, finds its application in multilateral treaties and conventions. The Court of International Justice seems to have a tendency toward this approach in interpreting the Charter of the United Nations in those instances when the prestige and eminence of the United Nations is in question. In underwriting this essence of importance, the Court has a tendency to legislate. It has attached a juridical aspect to the "spirit of the Charter" and seemingly supplanted the intention of the Parties with the intention of the Charter.

In the Advisory Opinion on *Reparations for Injuries Suffered in the Service of the United Nations*, the Court, among other questions, was asked, by Resolution of the General Assembly, whether or not the United Nations had the capacity to bring an international claim for damage caused to it.⁸⁵ At the outset, the Court admitted that the question was not to be resolved within the text of the Charter.⁸⁶ The Court considered the aspect of international personality with respect to the United Nations and decided that in order to achieve the ends and purposes of the Charter, an international personality was indispensable to the United Nations. It then outlined the duties and responsibilities of the United Nations.⁸⁷ It

⁸⁵ I.C.J. Reports 1949, p. 174.

⁸⁶ "To answer this question, which is not settled by the actual terms of the Charter, we must consider what characteristics it was intended thereby to give to the Organization . . ." *supra* note 35 at 178.

⁸⁷ ". . . the Organization is a political body, charged with political tasks of an important character, and covering a wide field namely, the maintenance of international peace and

stated the practice of the United Nations of concluding conventions and reasoned that this attested to its international personality. It also indicated the political means the UN employed in its activities with its members. From all this it was deduced that by its nature the United Nations had an international personality and was a subject of international law having the capacity to bring an international claim. It should be noted that the Court in perusing the Charter in search of an international juridical personality to afford the United Nations was at all times dealing with implications.³⁸ Whatever personality the United Nations had was to be gleaned from its enabling instrument. From the general provisions of the Charter, sufficient ends and purposes of the United Nations were derived and to them were ascribed an intention independent of each of those provisions and quite probably independent of the intentions of the parties to the Charter. This correlation between purposes and interpretation is the teleological school personified.

The Advisory Opinion on the *International Status of South West Africa* dealt with an interpretation of the obligations assumed by the mandatory under a mandate.³⁹ For the purposes of this discussion, one of the questions with which the Court was faced will be considered. That question was whether the mandate ceased to exist at the dissolution of the League of Nations. With respect to this question, the Court looked at the purposes and objectives of the mandate and that was its point of departure. It stated that the object of a mandate was the promotion of well-being and the development of the inhabitants thereunder. It further stated that a mandate was an international institution, as contrasted to the domestic contractual mandate, and that as such it was defined by international rules. Succeeding this, the Court declared that the language of the mandate imposed upon the mandator a "sacred trust" and although the League of Nations was dissolved, those obligations remained. In the language of the Court, "Their *raison d'être* and original object remain".⁴⁰ At this point the Court took notice of the conduct of the mandatory in making declarations which recognized the existence of the mandate obligations and stated that interpretations placed on legal instruments by

security, the development of friendly relations among nations, and the achievement of international co-operation in the solution of problems of an economic, social, cultural or humanitarian character (Article 1); and in dealing with its Members it employs political means." *supra* note 35 at 179.

³⁸ "Under international law, the Organization must be deemed to have these powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties." *supra* note 35 at 182.

³⁹ I.C.J. Reports 1950, p. 128.

⁴⁰ *Id.* p. 133.

the parties thereto have probative value especially in the instance of a party recognizing his own obligations. This case was used to indicate how a purpose or object can be the underlying basis of an interpretation. Before looking at the terms of the mandate, its purpose was controlling as far as its terms were concerned. It is submitted that some treaties may have purpose in the international scene that controls or defines their application and interpretation.⁴¹ An example of this could very well be the Genocide Convention. The Advisory Opinion on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* contained the following language: "In such a convention the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *"raison d'être* of the convention . . . The high ideals which inspired the Convention provide, by virtue of the common will of the parties, the foundation and measure of all its provisions."⁴² What is being suggested here is the approach of the *teleological school*.

One last case is important to this discussion because it is a hybrid type case in that it included the three schools of interpretation herein discussed. It is the *Case Concerning Rights of Nationals of the United States of America in Morocco*.⁴³ The case deals with rights of capitulation in Morocco. One of the disputes in this case involved the extent of consular jurisdiction that the United States held in Morocco under treaty provisions. Under the treaty of 1836, Article 20, between the United States and Morocco, the United States' Consul in Morocco had jurisdiction of "any dispute" that United States citizens had with each other.⁴⁴ The United States contended that the words "any dispute" included all disputes, civil or criminal, between United States' citizens. The Court found that the treaty of 1836 had replaced an earlier treaty between the same parties which was concluded in 1787 and that Article 20 was identical

⁴¹ See the Case of Certain Norwegian Loans, I.C.J. Reports 1957, p. 24, where upon a submission that as between France and Norway there existed a treaty making the payment of contractual debts a question of international law and hence not a matter of domestic jurisdiction beyond the cognizance of the International Court of Justice, the Court in one brief paragraph ruled out the treaty as controlling by simply stating that the *purpose* of the treaty was to be found in its title, "The Limitation of the Employment of Force for the Recovery of Contract Debts," which merely forestalled the use of force in the collection of contractual debts and did not afford an international character to these debts.

⁴² I.C.J. Reports 1951, p. 23.

⁴³ I.C.J. Reports 1952, p. 176.

⁴⁴ The text of Article 20 reads as follows: "If any of the citizens of the United States, or any persons under their protection, shall have any dispute with each other, the Consul shall decide between the parties; and whenever the Consul shall require any aid, or assistance from our government, to enforce his decision, it shall be immediately granted to him." *Id.* pp. 188 and 189.

in both. History showed that at the time of the conclusion of the two treaties no defined distinction between civil and criminal matters had yet developed in Morocco. It was also noticed that in treaties concluded by Morocco with other countries the word "dispute" was used to cover both civil and criminal disputes. The United States also claimed it had capitulatory rights under a most-favored-nation clause because such rights held by France and Spain were not entirely renounced in Declarations made by them in 1914. The words "renounce a claimer" (renounces claiming) were the words in dispute. The United States' contention was that the use of these words in the 1914 declarations was not a complete surrender of the capitulatory rights granted these countries in previous treaties, but merely temporary agreements *not to claim* such rights if the protectorate tribunals maintained judicial equality. The Court in examining the 1914 declarations found that in each declaration the words "renounces claiming" were preceded by the words "taking into consideration the guarantees of judicial equality offered to foreigners . . ." Upon this, it held that these words in their ordinary and natural meaning state the consideration for the relinquishment of the capitulatory rights contended by the United States to be reestablished by the Madrid Convention of 1880 and the Act of Algeciras of 1906. The Court held the preambles to these two instruments stated objects and purposes contrary to the United States contention. However, the Court also resorted to the use of *travaux préparatoires*, and took into consideration prior and subsequent conduct under the Act of Algeciras. As can be readily seen, an admixture of all three schools of interpretation was used in this opinion, the intentional, the textual and the teleological.

And so it is that the three schools of interpretation find expression in each other. If they are considered as approaches and not clear-cut and definitive rules, the inroads they make upon one another will not be confusing. Although the textual school seems to be the predominant, the others are not without merit or use. With the establishment of the United Nations and the many conventions of a social and humanitarian nature emanating therefrom, it is submitted that the textual school will not enjoy the eminence it currently does. An appreciation for all three schools is certainly not a wasted endeavour. In conclusion, I might add that when last I saw my former Austrian professor he had added a pocket dictionary of slang to his daily personal effects to make his task of interpretation less onerous.