

The International Law Commission and role of subsequent practice as a means of interpretation under Articles 31 and 32 VCLT

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1. Introduction

Subsequent agreement and subsequent practice, as well as the method of evolutive interpretation, are vehicles of change in international law. Theoretically speaking, they can contribute to integrating a transformative process into the treaty when, as it continuously is, the international order is moving. Many of the treaties which constituted the international legal order after the second world war have been in force for six or seven decades. Also with respect to younger treaties, the question of adaptation to new circumstances arises, the more so if the value orientation of the international order itself is changing. However, did the parties to the treaty intend such transformation? Does it matter? How can constitutional concerns be addressed if treaty interpretation is at risk to move beyond the parliamentary assent once given in the process of ratification? Since recently, a new concern may be added: As long as ‘humanization’ of international law and commitment to protect the environment were moving forward, not all internationally minded lawyers would object to interpretive change. But what if the development goes backwards?

Seen against this background the four reports of Special Rapporteur of the International Law Commission (ILC), Georg Nolte, on subsequent agreements and subsequent practice in relation to treaty interpretation (hereinafter referred to as ‘the Reports’) are almost inevitably bound to be spotted in a spectrum not only of approaches to legal methodology, but also of international politics.¹ The *leitmotiv* of the Reports is a distinction between subsequent agreement and subsequent practice in the

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sense of Article 31(3) of the Vienna Convention on the Law of Treaties (VCLT) on the one hand and other subsequent practice which is subsumed under Article 32 VCLT on the other hand.² The degree of obligation to make use of such material differs: whereas Article 31(3) VCLT requires that subsequent agreement ‘regarding the interpretation of the treaty or the application of its provisions’ as well as ‘practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation’ *shall* be taken into account, other subsequent practice only qualifies as supplementary means of interpretation to which ‘recourse *may* be had’ (emphasis added) in order to ‘confirm the meaning resulting from the application of Article 31, or to determine the meaning’ when the result of such interpretation is either (a) ‘ambiguous or obscure’ or (b) ‘manifestly absurd or unreasonable’.

This distinction between subsequent agreement and practice in a narrow sense and subsequent practice in a broad sense has a bearing on three major issues of any treaty interpretation informed by practice.

The first facet of the problem (hereafter section 2) is its impact on the tension between static and dynamic, of restrictive and effective interpretation.³ Here the question of interest is how the Reports cope with a trend in the jurisprudence of the International Court of Justice (ICJ) which has departed over time from a ‘subjective’ approach, attributing great weight to the will of the parties at the time of the conclusion of a treaty, to a more ‘objective’ view that takes the perspective of the time of interpretation.⁴

¹ ILC, ‘First report on subsequent agreements and subsequent practice in relation to treaty interpretation’ UN Doc A/CN.4/660 (9 March 2013) (hereinafter cited as First Report); ‘Second report on subsequent agreements and subsequent practice in relation to treaty interpretation’ UN Doc A/CN.4/671 (26 March 2014) (hereinafter cited as Second Report); ‘Third report on subsequent agreements and subsequent practice in relation to treaty interpretation’ UN Doc A/CN.4/683 (7 April 2015) (hereinafter cited as Third Report); Fourth report on subsequent agreements and subsequent practice in relation to treaty interpretation, A/CN.4/694 (7 March 2017) (hereinafter cited as Fourth Report) all by Georg Nolte, Special Rapporteur.

² Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 1 January 1980) 1155 UNTS 331.

³ On this dichotomy see M Waibel, ‘Demystifying the Art of Interpretation’ (2011) 22 *Eur J Intl L* 571, 581-3; cf First Report (n 1) paras 17, 60-1.

⁴ Compare *Interpretation of Peace Treaties* (Advisory Opinion) [1950] ICJ Rep 221, 229 and *Rights of Nationals of the US in Morocco (France v United States)* [1952] Rep 173, 196 with *Kasikili/Sedudu Islands (Botswana v Namibia)* [1999] ICJ Rep 1045 para 49, and *Navigational and Related Rights (Costa Rica v Nicaragua)* [2009] ICJ Rep 213 para 64. A



The second point (*infra* section 3) where the distinction between the two types of subsequent practice has consequences is the categorization of the practice of international organizations. While the ICJ remains silent on its precise normative value,⁵ the Reports group it ‘at least as a supplementary element’ of the law of an international organization, which gains the more weight the more clearly it is carried by the member states.⁶ A similar weight is given to the practice of bodies of experts which fulfil a defined role in applying a treaty, like the UN Human Rights Committee; as such, their output is considered as a subsidiary means of interpretation which may give rise to subsequent practice of the parties under Article 31(3) VCLT.⁷

The third – and perhaps the overarching – issue is the distinction between modification and application of a treaty (below section 4): ‘It is presumed that the parties to a treaty, by subsequent agreement or subsequent practice, intend to interpret the treaty, not to modify it’.⁸ Ideally, modification is subject to formal agreement of the parties, whereas interpretation is an act preceding application or a judicial exercise. The desire to rule out treaty modification by interpretation also shows, for instance, in the distinction between subsequent agreement which amounts to a new treaty and agreement which does not.⁹ The distinction intersects with a constitutional debate as to when new parliamentary approval for engaging international obligations is needed.

In the following sections, the stance taken by the Reports will be contrasted with international jurisprudence and legal writings in order to make an assessment easier where they can be located in the spectrum between traditionalist and evolutive approaches.

more subtle way to put it is that the ILC tends to deduce a presumed intention from objective factors ‘which are substantially the same factors on which one should rely when interpreting a treaty according to the general criterion stated in the Vienna Convention’, see P Palchetti, ‘Interpreting “Generic Terms”: Between Respect for the Parties’ Original Intention and the Identification of the Ordinary Meaning’ in N Boschiero et al (eds) *International Courts and the Development of International Law: Essays in Honour of Tullio Treves* (Brill 2013) 91 at 103-4; E Borge, *The Evolutionary Interpretation of Treaties* (OUP 2014) 83.

⁵ Cf. *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* (Advisory Opinion) [1996] ICJ Rep 66 para 19.

⁶ Third Report (n 1) para 82.

⁷ Draft conclusion 12, Fourth Report (n 1) para 94.

⁸ Draft conclusion 11, Second Report (n 1) para 166.

⁹ First Report (n 1) paras 67-70.

2. *Restrictive or effective? Agreed subsequent practice and other subsequent practice*

The ILC derives the two concepts of agreed subsequent practice and subsequent practice in a broad sense from jurisprudence of courts and tribunals.¹⁰ And indeed, the wording of Article 31(3) VCLT seems to suggest a narrow reading of its scope: subsequent agreement must be ‘regarding the interpretation’ and the application of the treaty, and practice is only relevant if it develops ‘in the application of the treaty’ and establishes agreement among the parties about its interpretation. The Reports therefore conclude that the most important distinguishing factor is whether an agreement is made ‘regarding the interpretation’ of a treaty¹¹ and demand that ‘careful consideration’ is in place with respect to this criterion of ‘specificity’ of practice and agreement.¹²

As examples for agreed subsequent practice the Reports mention cases in which later agreement is already inbuilt, as it were, by referring to treaty clauses which are meant to be developed by interpretation in practice¹³ or likely to do so,¹⁴ dynamic in character,¹⁵ require further implementation,¹⁶ or establish a body with the task to interpret treaties or to develop further interpretive practice.¹⁷ In contrast to these categories, other subsequent practice encompasses mere ‘positions’ and ‘views’,¹⁸ as well as unilateral or parallel subsequent practice, as present in national laws.¹⁹ Also practice within a limited number and not all of the parties is ascribed to this category.²⁰

¹⁰ First Report (n 1) paras 94 and 110.

¹¹ First Report (n 1) para 115.

¹² Second Report (n 1) paras 19 and 39.

¹³ First Report (n 1) para 34, and Second Report (n 2) para 113 (with an example taken from WTO law).

¹⁴ As, famously, the term ‘comercio’ in the *Navigational Use* case (n 4) paras 66-68, see First Report (n 1) para 59.

¹⁵ See references to terms like ‘best environmental practice’ or ‘feasible precautions’ in Second Report (n 1) paras 26 and 32, respectively.

¹⁶ First Report (n 1) para. 80 (with the Chicago Convention on Civil Aviation as an example).

¹⁷ Second Report (n 1) paras 12 (Whaling Commission) and 77-111 (Conferences of the Parties, with examples).

¹⁸ First Report (n 1) paras 71 and 107.

¹⁹ First Report (n 1) para 95.

²⁰ First Report (n 1) para 83.



As if projecting the distinction between agreed and other subsequent practice against the background of the restrictive/effective dichotomy, the Reports state that subsequent practice may have both supportive and restrictive effects, that it may narrow or widen the range of possible interpretive outcomes.²¹ This seems to imply that the ILC would not claim to take part in a principled debate on restrictive or expansive interpretation. In the centre is the intention to come as close as possible to the ‘authentic’ meaning of a treaty.²² However, also the ‘authentic’ can be approached in different ways, i.e. from the perspective of state sovereignty, which would trigger connotations to the *in dubio mitius* rule, or by following a notion that aims at attributing a treaty the most expansive scope reconcilable with the other methods of treaty interpretation, for which the *effet utile* rule is used.²³ Thus, to claim to be in search of the authentic meaning is not necessarily the same as to remain neutral between those two positions.

That the Reports, notwithstanding the balanced and thorough way in which the matter is analysed, are rather hesitant to place on subsequent practice greater weight becomes apparent if it comes to methodological implications. Accordingly, subsequent practice is ‘any measure taken on the basis of the interpreted treaty’.²⁴ It follows that such practice is consulted at a later stage than the application of the general rule of Article 31(1) VCLT, i.e. wording, context, and object and purpose.²⁵ It is supposed to be used with an already taken view at ordinary language, context or object and purpose.²⁶ This approach seems to disappoint the expectation in a way that the work of the ILC would serve as a ‘necessary antidote to the occasional misunderstanding which suggests that the first part of

²¹ First Report (n 1) para 60, Second Report (n 1) paras 31-8.

²² Cf. First Report (n 1) paras 30, 54, 70, 95.

²³ C Schreuer, ‘Comments: International Investment Law and General International Law – From Clinical Isolation to Systemic Integration?’ in R Hofmann, C Tams (eds) *International Investment Law and General International Law* (Nomos 2011) 71, 71-2; Waibel (n 3) 581-2; cf. also A Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (OUP 2008), 36-43; A von Oettingen, *Effet utile und individuelle Rechte im Recht der Europäischen Union* (Nomos 2010) 39-43.

²⁴ Second Report (n 1) para 4.

²⁵ Second Report (n 1) para 21.

²⁶ Second Report (n 1) paras 21-29.

the general rule [ie Article 31(1) VCLT] is the main rule to which the rest is somehow subsidiary'.²⁷

Hence it appears that the stance taken in the Reports vis-à-vis subsequent practice is generally a reluctant one, so that the distinction between practice in a narrow and a broader sense may be part of an inherently restrictive concept.

3. *Subsequent practice of international institutions*

A closely related issue is the relevance given to the subsequent practice of international organizations. The ICJ has made use of such practice in its jurisprudence in prominent decisions, but left the exact impact of it open. It included not only practice by the international institutions more or less explicitly endorsed by the member states of the respective regimes, but also the institutions' 'own practice'.²⁸ The Reports, in contrast, show the attempt to distinguish between practice of the institutions as such and practice by the member states within these institutions (see section 3.1). A special case is the role of bodies of experts established by treaty, which is generally characterized as practice in a broader sense (section 3.2).

3.1. *International institutions in general*

The Third Report covers constitutive instruments of international organizations to which the Vienna Convention applies (Article 5 VCLT). It discerns subsequent practice (*i*) by the parties to these treaties, (*ii*) by the institutions of the international organizations and (*iii*) a combination of categories (*i*) and (*ii*).²⁹ For each of these categories, ICJ decisions are cited.

As to the type of practice which falls most clearly in the purview of Article 32 VCLT, category (*i*), the Report refers to the ICJ's *Nuclear Weapons* opinion and the *Cameroon v Nigeria* case.³⁰ However, it is not

²⁷ RK Gardiner, *Treaty Interpretation* (2nd edn, OUP 2015) 227.

²⁸ See above (n 3).

²⁹ Third Report (n 1) para 31.

³⁰ *ibid* paras 33-7.



cogent that these decisions merit this observation. Whereas, in the former, it is only said that a resolution by the WHO, which was not adopted unanimously, would not suffice in itself, the latter states that the institution in question did not have the function of a regional security organization so that its acts could not be regarded as pertinent in that respect.³¹

Concerning class (ii), besides the already mentioned reference in the *Nuclear Weapons* opinion to the organization's 'own practice', the ICJ cases cited comprise other advisory opinions in which the ICJ did not make a statement on the precise interpretive value of institutional practice.³² The Reports find that such practice is conceived 'at a minimum' as 'other subsequent practice' to be placed under Article 32 VCLT.³³

Category (iii) seems to be the most common and widely accepted. The Reports again refer to advisory opinions by the ICJ dealing with instances in which either both the institutions themselves and the conduct of their members have contributed to the acts used for interpretation or the member states at least accepted these acts.³⁴ The *Whaling in the Antarctic Case* cited in the same context, however, only affirms what is said in opinions referred to as being representative for category (i), that instruments which are not supported by all member states do not per se qualify as subsequent agreement or practice.³⁵

It deserves to be noted that some observers evaluate the jurisprudence analysed by the Reports differently. In particular, some of the more recent ICJ advisory opinions are seen as recognizing practice by the UN

³¹ *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* (Advisory Opinion) [1996] ICJ Rep 66 para 27; *Land and Maritime Boundary between Cameroon and Nigeria (Preliminary Objections)* [1998] ICJ Rep 275 para 65.

³² Third Report (n 1) paras 43-51; see *Competence of the General Assembly regarding Admission to the United Nations* (Advisory Opinion) [1950] 5, 9; *Constitution of the Maritime Safety Committee of IMCO* (Advisory Opinion) [1960] 150, 169; *Certain Expenses of the United Nations (Article 17, paragraph 2 of the Charter)* (Advisory Opinion) [1963] 151, 160, 168; *Applicability of Article VI, Section 22 of the Convention on the Privileges and Immunities of the United Nations* (Advisory Opinion) [1989] 177 para 48.

³³ Third Report (n 1) para 49.

³⁴ *ibid* paras 52-6, 80; cases analysed are *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Resolution 267 (1970)* (Advisory Opinion) [1971] 16, 22; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136 para 28.

³⁵ Third Report (n 1) para 54; cf. *Whaling in the Antarctic (Australia v Japan, New Zealand Intervening)* [2014] ICJ Rep 226 para 83.



organs as subsequent practice in itself, mentioning and using it either in the same vein as elements of the single method of Article 31(1) VCLT, as in the *Nuclear Weapons* opinion, or without having recourse to member states conduct, as in the evaluation of practice with respect to the parallel seizing of Security Council and General Assembly in security matters (Article 12 of the UN Charter) in the *Palestine Wall* opinion.³⁶ In the scholarly debate, which the Reports take up scrupulously, whether institutional practice should in itself be conceived as subsequent practice in the scope of Article 31 VCLT, as supplementary material in the sense of Article 32 VCLT or as something else, the ILC does not take a very precise position, but states that it ought to be considered ‘at least as a supplementary element’ of the law of international organizations.³⁷ The draft conclusion adopts a differentiated, if hesitant approach, stating that practice of organs ‘may give rise or articulate’ subsequent agreement or practice of the parties and ‘may itself’ constitute a relevant practice for the interpretation. The ‘established practice’ of an international organization ‘shall’ be taken into account in the interpretation of the constituent instrument.³⁸ The Reports here seem to refrain from sharp conclusions. Seen in itself, this appears appropriate and leaves space for further development. On the other hand, it shows no attempt to strengthen the role of the organs of international organizations in interpreting their own constitutive treaty. It leaves the impression that the state parties to the treaty are the decisive authors of interpretation, whereas the role of other institutional actors remains unclear.

3.2. *The practice of treaty bodies*

Particular attention is paid in the Reports to the role of expert bodies established by treaty. Such commissions and committees can fulfil various functions, among which the elaboration of technical and health standards figure prominently. So far, they have tasks comparable to national rounds of experts which provide for input into, or the specification of, legislation. How far these activities are even suitable to amount to

³⁶ Gardiner (n 27) 281-5.

³⁷ Third Report, paras. 68-71, quote in para. 82.

³⁸ Cf C Peters ‘Subsequent Practice and Established Practice of International Organizations: Two Sides of the Same Coin?’ (2011) 3 *Goettingen J Intl L* 617-42.



subsequent practice depends on the respective regime. However, there is one field where bodies of experts are necessarily involved in interpretive acts, and that is human rights, where the committees established by the respective UN conventions have the competency to review reports submitted by the member states or to take individual, state or group complaints. They are expert bodies with members who act in their individual capacity and proceed in a quasi-judicial way. The most prominent example is the Human Rights Committee established under the UN Covenant on Civil and Political Rights (HRC). As is well known, their communications to state parties concerning specific complaints, which are referred to as ‘views’ under the Covenant (cf Article 5(4) of the First Optional Protocol),³⁹ are not considered legally binding. The Reports refer to their output as ‘pronouncements’.⁴⁰

The Reports hold that the VCLT rules apply to the practice of expert bodies in principle, which does not go without saying, given the debate on the matter.⁴¹ The output of these committees, whose members are supposed to be independent, is not as such attributable to the ‘parties’ in the sense of Article 31(3) VCLT.⁴² To affirm that result, the Reports mention the drafting history of general comment 33 on the duties of member states in implementing the Covenant and the views by the HRC,⁴³ in the course of which the HRC withdrew its opinion expressed in an earlier draft, where it claimed to produce subsequent practice.⁴⁴

On the other hand, it was welcomed with some enthusiasm in human rights literature that the ICJ had referred to HRC practice in *Diallo* and in other cases as ‘jurisprudence’ to which the interpretation ‘should ascribe great weight’.⁴⁵ The question therefore arises, if the findings of these

³⁹ Optional Protocol to the International Covenant on Civil and Political Rights (adopted 19 Dec 1966, entered into force 23 March 1976) 999 UNTS 302.

⁴⁰ Fourth Report (n 1) para 14.

⁴¹ *ibid* para. 41, with reference.

⁴² *ibid* para 42.

⁴³ General Comment No 33, ‘The Obligation of States Parties under the Optional Protocol to the International Covenant on Civil and Political Rights’ UN Doc CCPR/GC/33 (5 November) 2008.

⁴⁴ Fourth Report (n 1) paras 18-21.

⁴⁵ *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)* [2010] ICJ Rep 639 para 66; see, for instance, International Law Association – Human Rights Law Committee, *International Human Rights Law and the International Court of Justice (ICJ)* (2014) Report Part I, finalized by Eva Rieter paras 30-46.

committees are no subsequent practice, what else they could be. The ILC holds that they ‘may [...] reflect or give rise to a subsequent agreement or subsequent practice *by the parties themselves*’ (emphasis added) and mentions the interpretation of Articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights by the responsible ICESCR Committee and the recognition of the right to water as an example.⁴⁶ Absent such a reception process, however, to take ‘pronouncements’ of human rights bodies into account would result from a good faith obligation and would be a means of interpretation in a ‘supplementary fashion’.⁴⁷ As a result, the ILC calls it ‘other subsequent practice’, groups it under Article 32 VCLT⁴⁸ and connects this finding with Article 38(1)(d) ICJ Statute, which mentions jurisprudence by courts and legal writings as auxiliary sources of international law.⁴⁹ It is in line with that perspective when the Reports consider the jurisprudence of domestic courts as possible evidence for subsequent practice in the sense of Article 31(3) VCLT.⁵⁰ In a similar vein, the Reports by Special Rapporteur Michael Wood on the identification of customary international law treat domestic court decisions as evidence for customary law.⁵¹

At this stage, the study leaves the impression that it joins two issues, one about the legally binding character of decisions of judicial and quasi-judicial bodies, and the other on their classification as subsequent practice. This alone does not explain, but it fits with, the use of the jurisprudence of the European Court of Human Rights as a source to detect subsequent practice in instances in which the Court undertakes comparative studies with respect to individual guarantees of the European Convention.⁵²

⁴⁶ Fourth Report (n 1) paras 43 and 45.

⁴⁷ *ibid* para 53.

⁴⁸ *ibid* paras 58-62.

⁴⁹ *ibid* paras 63-5.

⁵⁰ *ibid* paras 98-100 and 112, with draft conclusion 13.

⁵¹ ILC, ‘Third report on identification of customary international law by Michael Wood, Special Rapporteur’ UN Doc A/CN.4/682 (27 March 2015) para 58.

⁵² See First Report (n 1) paras 37, 97-8. The ECtHR rarely makes it explicit if it considers compilations of domestic law as subsequent practice to the ECHR, see also Second Report (n 1) paras 14, 40, 53, 69. This is not to say that the ILC contradicts itself on this point; it also mentions comparative analysis by the HRC in that context, see First Report (n 1) para 99.



4. *Interpretation and modification*

One of the crucial tenets of the studies undertaken by the Special Rapporteur is to uphold the distinction between interpretation and modification of a treaty: Modification ought to be avoided and not presumed.⁵³ Accordingly, the more interpretation departs from original intent, the closer it comes to a creation of new obligations, which entails the risk that formal amendment procedures are circumvented.⁵⁴ The distinction is presupposed in the VCLT, where interpretation (Articles 31, 32) and revision (Articles 39-41) are dealt with separately. On the level of domestic constitutional law, the modification by subsequent practice triggers concerns that the consent to the treaty expressed, which is in many important cases given by parliament, would be left so that obligations may arise without democratic legitimacy.⁵⁵ Indeed, formal modification and interpretation are linked with different actors, since, ideally, the creation of obligations is within the power of states, whereas interpretation is a function of courts and tribunals.

To call for a clear separation between legitimate adaptation to historic change and unconsented imposition of new obligations thus appears deeply rooted in international treaties and in constitutional law. It touches the question how far the informal transformation of constituent instruments of international organizations may go, taking into account how difficult it is to reach consensus on the routes of formal amendment procedures.⁵⁶ However, the impression is wide-spread that it is impossible to identify reliable criteria which allow for such a distinction.⁵⁷ The methodological implications become visible when the Reports describe the ICJ as being (apparently: too) generous with respect to informal

⁵³ Second Report (n 1) paras 115, 140, 142, 147.

⁵⁴ Second Report (n 1) para 119.

⁵⁵ Second Report (n 1) paras 119, 141; cf also S Kadelbach, 'Domestic Constitutional Concerns with Respect to the Use of Subsequent Agreements and Practice' in G Nolte (ed) *Treaties and Subsequent Practice* (OUP 2013) 145 at 150-1.

⁵⁶ J Arato, 'Treaty Interpretation and Transformation: Informal Change in International Organizations' (2013) 38 *Yale J Intl L* 289.

⁵⁷ As famously stated by H Lauterpacht, *The Function of Law in the International Community* (Clarendon Press 1933) 21; see also W Karl, *Vertrag und spätere Praxis im Völkerrecht* (Springer 1983), 21-45; ME Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Nijhoff 2009) 432.

change.⁵⁸ It appears that the ILC has embarked on an approach that is stricter than the trend in the jurisprudence it cites. On the other hand, a similar observation could have been made with respect to the jurisprudence of the ECtHR, which the Reports leave uncommented. The ECtHR concluded, for instance, that the abolition of, or at least a moratorium on, the death penalty by the state parties indicated that the exception made in the provision on the right to life (Article 2(1) ECHR) was abrogated and its imposition constituted inhuman and degrading treatment in the sense of Article 3 ECHR, in spite of the fact that not all states of the Council of Europe had ratified the additional protocol on the abolition of capital punishment.⁵⁹

5. Conclusions

There are good reasons for a project of the ILC to evaluate subsequent agreement and practice. Many important treaties have not simply grown old, they have also been substantially developed within the various institutions created by their member states. Parallel to this process of intensifying the normative framework of international cooperation, the methods of interpretation have changed. The move the ICJ has made from a preference of the original will of the parties towards a more generalized and objective approach was influenced by Article 31 VCLT which has set out a single rule of interpretation composed of various elements of equal weight. Therefore, the old doctrine described by McNair that ‘the relevant conduct of the parties after the conclusion of a treaty [...] has a high probative value as to the intention of the parties at the time of their conclusion’, if it was ever plausible,⁶⁰ does not hold true

⁵⁸ Second Report (n 1) paras 124-9, 144-7. Examples include the *Case concerning the Temple of Preah Vihear (Cambodia v Thailand)* [1962] ICJ Rep 6 at 30; the *Namibia Advisory Opinion* (n 34) para 22; the *Boundary Dispute between Cameroon and Nigeria* (n 31) para 68; and *Pulp Mills on the River Uruguay (Argentina v Uruguay)* [2010] ICJ Rep 14 paras 128-42.

⁵⁹ Second Report (n 1) paras 133-135; to the same point cf. Gardiner (n 27) 276-80.

⁶⁰ As for the logical problem involved see D Alland, ‘L’interprétation du droit international public’ (2012) 362 *Recueil des Cours* 216-22.



anymore.⁶¹ Practice as a manifestation of the parties' common understanding has its own value, which may depart from their intentions at the time the treaty was made.

In the attempt at indicating as precisely as possible how far such practice may go, the Reports make a painstaking effort to evaluate the material found and to balance out different possible approaches underlying such an exercise. Seen as a whole, however, the final outcome appears to follow a comparatively narrow understanding: the wording of Article 31 VCLT ('parties', 'in the application of the treaty') is construed restrictively, subsequent practice as an element of interpretation is related to one of the three elements of (the first part of) the single rule in Article 31(1) VCLT, and the international institutions' 'own practice' as such only qualifies as a supplementary means of interpretation. The states as the interpreters of their acts are the relevant players of subsequent development. This approach, which one may call 'positivist' or 'realist', would be in keeping with 'the presumption in favour of the state in the process of interpretation' which is said to characterize the general concept of Article 31 VCLT.⁶² However, such an understanding does not *per se* have to exclude institutional practice.⁶³ In subscribing to a comparatively strict state-centred notion the Reports implicitly distance themselves from the idea of an 'interpretative community' composed of actors in states, international organizations, courts, quasi-judicial bodies and academia.⁶⁴

The exhortation that a broader idea of subsequent development may conflict with domestic constitutional concerns is justified. However, the risk that a treaty detaches from the legitimating assent by the competent

⁶¹ AD McNair, *The Law of Treaties* (Clarendon Press 1961) 424.

⁶² J-M Sorel, V Boré Eveno, 'Article 31 – General Rule of Interpretation' in O Corten, P Klein (eds), *The Vienna Convention on the Law of Treaties – A Commentary* (OUP 2011) 804, at 830.

⁶³ See, for instance, R Kolb, *Interprétation et création du droit international – Esquisse d'une herméneutique juridique moderne pour le droit international public* (Bruylant 2006) 481-8; O Dörr, 'Article 31 – General Rule of Interpretation' in O Dörr, K Schmalenbach (eds), *Vienna Convention on the Law of Treaties – A Commentary* (Springer 2012), 521, at 558; C Djéffal, *Static and Evolutive Treaty Interpretation – A Functional Reconstruction* (CUP 2016), 165-6.

⁶⁴ D Vagts, 'Treaty Interpretation and the New American Ways of Law Reading' (1993) 4 *Eur J Intl L* 472, 479-81; M Waibel, 'Interpretive Communities in International Law' in A Bianchi, D Peat, M Windsor (eds), *Interpretation in International Law* (OUP 2015) 147-65.

constitutional institutions is not necessarily lower if interpretation depends primarily on a narrower set of actors. Following such a concept of state practice makes the notion more difficult to defend that deficits in democratic legitimacy might be compensated by other features of an international regime like independent institutions of dispute settlement and their adherence to the rule of law. The space for ‘normative constitutionalization’ of international regimes has become smaller.⁶⁵

⁶⁵ A Peters, ‘Membership in the Global Constitutional Community’ in J Klabbers, A Peters, G Ulfstein, *The Constitutionalization of International Law* (OUP 2009) 152, 157.

