On ‘Court Generated State Practice’: The Interpretation of Treaties as Dialogue between International Courts and States

Serena Forlati∗

I. International Courts and the Interpretation of Treaties

International case law is of particular relevance for the purposes of the interpretation of international legal rules, including international treaties, to the point that international courts and tribunals are sometimes qualified as exercising a ‘law making’ function. This qualification is usually not accepted by international courts themselves, as it would amount to overstepping the mandate which they were granted by the states that established them. The International Court of Justice (ICJ) Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons is particularly clear in stating that ‘the Court cannot legislate ... it states the existing law and does not legislate. This is so even if, in stating and applying the law, the Court necessarily has to

∗ Associate Professor of International Law, University of Ferrara.


2 The reference to ‘states’ is made for the sake of simplicity, as also other international legal entities (notably, international governmental organisations) can contribute to the setting up of international judicial systems and may have a role in developing subsequent practice similar to the one of states – as set forth also by Article 31(3)(b) of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, 21 March 1986 (not yet in force). Their role is, in this respect, radically different from the one of individuals, investors or NGOs, who may be subject to the jurisdiction of specific international tribunals but play no role in their establishment. However, specifically with reference to Article 31(3)(b) the peculiar position of international organizations’ practice is usually discussed in different terms, which rather concern the effects of their own practice for the purposes of interpretation of their constituent instrument (see para 1).
specify its scope and sometimes note its general trend.\textsuperscript{3} At the same time, the task of contributing to the elucidation and development of international law is more or less explicitly entrusted to at least some international courts: it is prominent for the ICJ but concerns also other permanent courts and institutional arbitration.\textsuperscript{4}

However, the boundaries between evolutive interpretation of treaties and modification of the obligations enshrined therein are at times difficult to draw; it is thus not easy to understand how the role of international courts and tribunals interpreting of international treaties fits into the framework of the rules on interpretation set forth by the VCLT. Some authors consider that, while the parties to a treaty share the competence to interpret it, the interpretation by an international tribunal may amount to an ‘authentic interpretation’ of the treaty;\textsuperscript{5} other scholars point to the existence, in this regard, of a ‘shared interpretive competence’ of the parties and international courts,\textsuperscript{6} and pronouncements of international tribunals are at times treated as ‘subsequent practice’ on the same basis as states’ behaviours for the purposes of interpretation,\textsuperscript{7} whereas this contention is expressly rejected in

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\item \textsuperscript{3} \textit{Legality of the Threat or Use of Nuclear Weapons} [1996] ICJ 226, 237, para 18 (Advisory Opinion of 8 July).
\item \textsuperscript{4} See also for further references Serena Forlati and Paula Wojcikiewicz Almeida, ‘Is Non-Compliance with Judgments a Failure of International Adjudication? A Case Study on the International Court of Justice’ in Hélène Ruiz Fabri and Lorenzo Gradoni (eds), Debacles. Illusions and Failures in the History of International Adjudication (forthcoming).
\item \textsuperscript{5} Serge Sur, \textit{L’interprétation en droit international public} (1974) 123: ‘La compétence concurrente d’interprétation entraîne donc des prétentions juridiques opposées mais égales, qui ne sont ni l’une ni l’autre une interprétation authentique ou quasi-authentique du droit. Sous certaines conditions, et notamment le consentement tacite ou non des autres Etats, ou l’intervention d’un organe juridictionnel, une telle interprétation pourra être reconnue comme interprétation authentique’. This approach echoes the idea that international courts are ‘common organs’ of the disputing parties, that is difficult to accept today (see further below, section III).
\item \textsuperscript{6} Anthea Roberts, ‘Subsequent Agreements and Practice: The Battle over Interpretive Power’ in Georg Nolte (ed), \textit{Treaties and Subsequent Practice} (2013) 95, at 101.
\item \textsuperscript{7} See \textit{Macoun v Commissioner of Taxation}, High Court of Australia (2015) 90 AUR 93, 12051 HCA 44, paras 79ff (referring to an ILOAT judgment); and Joined Cases C464/13 and C465/13, \textit{Europaeische Schule Muenchen v Oberto and O’Leary}, ECLI:EU:C:2015:163, para 65, as regards the case law of the Complaints Board of European Schools (see also para 72 on the qualification of the board as a ‘court or tribunal’). These cases are discussed in the responses