PRACTICE AS A GUIDE TO TREATY INTERPRETATION

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When interpreting international agreements, courts have often sought guidance in subsequent practice of the parties to the agreements. The types of practice which may be examined, and the probative weight the practice deserves, however, have been matters of some dispute. The author explores the approaches taken by the International Court of Justice, examines the juridical basis of practice as an interpretive guide, and concludes that the proper role of practice is as evidence of a treaty's common sense meaning.

The purpose of this article is to examine the practice of the International Court of Justice and its precursor the Permanent Court of International Justice[1] of utilizing subsequent practice of parties as a tool for interpreting international agreements. Although important, this method has received little attention either from the court itself[2] or from scholarly writings.[3] Moreover, the relevant provisions of the Vienna Convention on the Law of Treaties[4] have done little either to clarify the method or

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1. In this article both the International Court and the Permanent Court will be referred to generally as "the court."
2. Judge Spender is the only judge on the court to consider the subject in any detail. See his separate opinion in the Certain Expenses of the United Nations, 1962 I.C.J. 151, 187-97.
3. For discussion of the subject see LORD MCNAIR, THE LAW OF TREATIES 424-31 (1961); Fitzmaurice, *The Law and Procedure of the International Court of Justice: Treaty Interpretation and Certain Other Treaty Points*, 28 BRIT. Y.B. INT'L L. 1, 20-22 (1951); Fitzmaurice, *The Law and Procedure of the International Court of Justice 1951-4: Treaty Interpretation and Other Treaty Points*, 33 BRIT. Y.B. INT'L L. 203, 223-25 (1957).
4. *Opened for signature* May 23, 1969, U.N. Doc. A/CONF. 39/27 (1969) (entered into force Jan. 27, 1980). As of November, 1983, 44 states were parties to the convention. The U.S. is not a party. The relevant articles are 31 and 32, which read:

> *Article 31*
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> *General rule of interpretation*
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> 1. A treaty shall 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.
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> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
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> (a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;

to resolve the problems connected with its application. Four aspects of the use of subsequent practice are here examined: problem areas in the types of practice used by the court; the judicial scope of the method; its juridical basis; and its utility.

I. WHAT CONSTITUTES RELEVANT PRACTICE

A. *Introduction*

The court has been prepared to accept a wide variety of activities as interpretive conduct. With states, for example, it has referred to domestic legislation,[5] diplomatic correspondence,[6] and the silence or inactivity of one state in the face of the conduct of another.[7] With international

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(b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32
Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work 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.

5. *See* Anglo-Iranian Oil Co. Case (U.K. v. Iran), 1952 I.C.J. 93, 106-07 (Iranian law used in interpreting the Iranian declaration acceding to the jurisdiction of the court).

6. *See* South West Africa Cases (Ethiopia v. S. Afr.; Liberia v. S. Afr.), 1966 I.C.J. 6, 134; Legal Consequences for States of the Continued Presence of South Africa in Namibia, 1971 I.C.J. 16, 39, where, in both cases, statements by South African diplomats were used in interpreting the League of Nations Mandates. *See also* Case Concerning Rights of Nationals of the United States of America in Morocco (Fr. v. U.S.), 1952 I.C.J. 176, 211, where letters and minutes of meetings of customs officials were used in interpreting the treaty in question.

7. In the Corfu Channel Case (U.K. v. Alb.), 1949 I.C.J. 4, 25, Albanian failure, in its counter-memorial, to challenge the court's power to fix the amount of compensation was used in interpreting the Special Agreement as not precluding the court from fixing the amount of damages. In the Asylum Case (Colom. v. Peru), 1950 I.C.J. 266, 286, Colombian failure to raise the Havana Convention in diplomatic correspondence was used to show that Colombia did not construe the convention as applicable. Judge Read, on the other hand, considered that Peru's failure to argue that the facts did not fall within the relevant provisions indicated that it considered the convention to apply. *Id.* at 324. In the Serbian Loans Case, 1929 P.C.I.J. *ser.*

organizations it has similarly utilized the silence or inactivity of an organization or its members.[8] It has also looked to resolutions, regulations, debates, and actions of organs.[9] It has utilized the practices, statements, and rulings of organization officials.[10]

Indeed the availability of evidence on practice in any given dispute presents problems in itself. On the one hand, not all of the practice of the parties to a treaty may be available to the court;[11] on the other hand,

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A, No. 20, the court was not prepared to consider the acceptance by bondholders of payment in French francs as indicating that the agreement permitted payment other than in gold. The court apparently thought that there was insufficient time for a protest to be organized. Judge Pessôa, on the other hand, took the silence as indicating the contrary view — that the agreement contemplated payment in French francs. *Id.* at 67.

8. In the Case Concerning the Competence of the Int'l Labour Org. to Regulate the Conditions of Agricultural Labourers, 1922 P.C.I.J. ser. B, No. 2, the court, looking to the practice of the ILO from June, 1914 to October, 1921, noted that it had discussed and dealt with agriculture in one form or another without the question of its competence to do so having been raised. *Id.* at 39-41. In the *Namibia* opinion, the court considered the abstention of the Permanent Members of the Security Council as indicating approval of what was being proposed, and implicitly, the lack of protest as evidencing general approval for the adoption of the procedure involved. 1971 I.C.J. at 22. On the other hand the court was not, in the same case, prepared to accede to South Africa's contention that the failure of the League of Nations to adopt proposals to transfer the Mandates over to the United Nations indicated that no such transfer was intended. *Id.* at 36.

9. In the *Expenses* case, the court made extensive use of resolutions in its opinion. 1962 I.C.J. at 159-60. See also, for the use of resolutions, South West Africa Cases, 1966 I.C.J. at 134, and the *Namibia* opinion, 1971 I.C.J. at 40. In the *Expenses* case, the court also supported its opinion with references to financial rules and regulations of the United Nations. 1962 I.C.J. at 168. Similarly, in Competence of the General Assembly for the Admission of a State to the United Nations, 1950 I.C.J. 4, the court utilized rules of procedure to indicate its interpretation of the U.N. Charter. Judge Azevedo pointed out in this case that it is somewhat superfluous to use regulation to vindicate the validity of the laws from which they emanate. *Id.* at 21. *See also* Jurisdiction of the European Commission of the Danube, 1925 P.C.I.J. ser. B, No. 14, at 57-58, for the use of draft regulations to support an interpretation.

   On occasion the court has simply referred to the fact of the organization engaging in the disputed conduct as evidence of its ability to do so. Thus in Reparations for Injuries Suffered in the Service of the United Nations, 1949 I.C.J. 174, the court sustained in part its finding of the international capacity and personality of the United Nations from the fact that there were conventions to which it had become a party. *Id.* 179. Similarly, in Competence of the Int'l Labour Org. to Regulate, Incidentally, the Personal Work of the Employer 1926 P.C.I.J. ser B, No. 13, the court supported its interpretation, in part, by referring to the fact that the ILO had already on occasion regulated the work of employers. *Id.* at 18-19. For the court's similar use of conduct of the international entity, see Jurisdiction of the European Commission of the Danube, 1925 P.C.I.J. at 24-28.

10. In the *Namibia* decision the court made use of presidential rulings in the Security Council indicating its position regarding the lack of affirmative votes by the Permanent Members. 1971 I.C.J. at 22. In the *Expenses* case, several judges noted with some dissatisfaction that the budgetary practices originated in the Secretariat and were merely followed by the General Assembly. See in particular the dissenting opinion of Judge Koretsky, 1962 I.C.J. at 255. See also the Dissenting opinion of Judge Moreno Quintano, *id.* at 245-47. The court relied heavily on practices of U.N. officials regarding employee contracts in its Opinion Concerning the Administrative Tribunals of the Int'l Labour Org., 1956 I.C.J. 77, 91.

11. For example, the practice of other parties to the Havana Convention on Asylum of 1928 was not made available to the court in the Asylum Case, 1950 I.C.J. at 324 (separate opinion of Judge Read).

that which is made available may be so voluminous as to be indigestible by the members of the court.[12] The amount of practice available permits a great deal of subjective selection by parties and judges, as indicated by the inevitable use of contradictory practice in dissenting opinions.[13] No attempt was made in the Vienna Convention to define what is relevant practice for the purposes of the Convention.

B. Agreement of the Parties to the Practice in Question

The following practices used by the court give rise to practical and juridical problems.

1. Bilateral Treaties

Insofar as bilateral treaties are concerned, there is implicit recognition in the cases of an evidentiary requirement that both parties to the treaty have accepted the interpretive practice.[14] Article 31(3)(b) of the Vienna Convention refers to practice which "establishes the agreement of the parties regarding its interpretation." This requirement, however, has been considerably vitiated by the court's willingness to infer acceptance through silence or inactivity be it advertent or inadvertent;[15] or through some other conduct not intended to indicate acceptance.[16] The court,

12. See the comment by Judge Kovetsky in the *Expenses* case, 1962 I.C.J. at 267, and the comment by Judge Read in the Asylum Case, 1950 I.C.J. at 325.
13. In the *Expenses* case, most of the dissenting judges used practice of the organization to support their own views. See for example the opinion of Judge Koretsky, 1962 I.C.J. at 256-79; Bustamante, *id.* at 289-96; Winiarski, *id.* at 228-31; and Moreno Quintano, *id.* at 242-47. See also Judge McNair's dissenting opinion in the South West Africa Cases, 1966 I.C.J. at 161-71; Judge Fitzmaurice in the *Namibia* decision, 1971 I.C.J. at 248, 254; Judge Read's dissent in the Asylum case, 1950 I.C.J. at 324-25.
14. Although the court does not appear to have explicitly stated that agreement to an interpretive practice is required, it generally has attempted to find agreement, or at least lack of disagreement, in the conduct of the other state. Thus, for example, in the Corfu Channel Case, 1949 I.C.J. at 25, the court relied on the failure of Albania to contest the United Kingdom's claim for fixed damages as indicating Albania's acceptance of the court's jurisdiction in this matter. *See also* cases cited *infra* note 15.
15. The court has used silence or inactivity to indicate agreement in the Corfu Channel Case, 1949 I.C.J. at 25, the Asylum Case, 1950 I.C.J. at 283, and the Anglo-Iranian Oil Co. Case, 1952 I.C.J. at 106-07. In this last case the court was prepared to use the Iranian laws in question as an interpretive guide to Iran's conception of the treaty obligations despite the fact that the law in question was not communicated to other states.
16. In both the *South West Africa* and the *Namibia* opinions the court relied on statements and communiqués of South African officials purporting to recognize the continuing validity and legal force of the Mandate in question; in both cases there were strong dissents questioning the validity of the implication drawn from these communiqués and statements. For *Namibia,* see 1971 I.C.J. at 24, 40 (for the court's evidence); *see id.* at 254 (for Judge Fitzmaurice's dissent). For *South West Africa,* see 1966 I.C.J. at 135 (for the court); *see id.* at 161 (for the dissent of Judge McNair). See also Judge Krylov's comment on the value of the evidence used by the court in the Corfu Channel Case, 1949 I.C.J. at 73.

therefore, has placed a heavy burden on states to scrutinize the conduct of other parties and to vocalize their disapproval lest they be saddled with interpretive practices with which they disagree. Silence in particular and conduct generally is often subject to varied interpretations and can be made to support diametrically different views.[17]

2. *Constitutive Treaties*

The Vienna Convention applies to the interpretation of constitutive instruments[18] but not to agreements concluded between a state and an organization.[19] In an early report to the International Law Commission, Sir Humphrey Waldock, the Special Rapporteur, pointed out that the use of practice with regard to international organizations raised special problems. He felt, however, that this was a matter more properly dealt with in a convention dealing specifically with organizations.[20] The 1981 Report on the Convention on Treaties Concluded between States and International Organizations merely proposes to adopt the present Article 31 of the Vienna Convention.[21]

Insofar as the court is concerned it has, in general, been prepared to consider the resolutions of international bodies as a major, if not primary, source of interpretive practice by those organizations.[22] It has given little weight to the existence of dissenting minorities,[23] abstentions, or qual-

17. In the Serbian Loans Case, for example, the court and Judge Pessôa were able to draw diametrically different interpretations from the silence of the bondholders. 1929 I.C.J. at 38, 67. See also the different interpretations placed on the League's failure to accept the Chinese resolution transferring the League Mandates to the United Nations in the *Namibia* opinion, 1971 I.C.J. at 36, 248; and the different interpretations placed on practice in the Asylum Case by the court, 1950 I.C.J. at 286, and Judge Read, *id.* at 234-35.
18. Art. 5.
19. Art. 3.
20. *Third Report on the Law of Treaties,* [1964] 2 Y.B. INT'L L. COMM'N 59, para. 23, U.N. Doc. A/CN.4/167.
21. *Tenth Report on the Question of Treaties Concluded between States and International Organiations or between Two or More International Organizations,* [1981] 2 Y.B. INT'L L. COMM'N 65.
22. In the *Expenses* case, the court would not comment on the extent to which it was necessary to take into account proceedings antecedent to the adoption of a resolution in interpreting the resolution, and did in a number of instances refer to the effect of the debate on the wording of the resolution. 1962 I.C.J. at 156-57. In general, however, it was the resolution itself that was given primary effect in the decision. *Id.* at 169-72. See also comments by Judges Winiarski, *id.* at 228, and Koretsky, *id.* at 225, 260.
23. See *Personal Work of the Employer,* 1926 P.C.I.J. ser. B, No. 13, at 18-19, where employers' representatives took strong exception to provisions in question applying to employers themselves. See also the *Expenses* case, 1962 I.C.J. at 174, for use of majority votes to support the conclusion that the UNEF and ONUC expenses were apportionable under art. 17(2). See, e.g., the following resolutions concerning apportionment: G.A. Res. 1441, 14 GAOR Annex (Agenda Item 28) at 33, U.N. Doc.A/4336 (1959) (UNEF; vote: 49 for, 9 against, 21 abstentions. 14 GAOR (846th plen. mtg.) at 641, U.N. Doc. A/PV.846 (1959)); G.A. Res. 1337, 13 GAOR Annex (Agenda Item 65) at 40, U.N. Doc. A/4072 (1958) (UNEF; vote:

ified assents,[24] as invalidating the interpretive value of the resolution itself. Similarly it has ignored significant actual practice contrary to resolutions.[25] The Court's practice, therefore, is to look to the formal result of the political process as indicating the organization's understanding of the meaning of a provision. The use of resolutions seems a logical approach in determining the institution's understanding of a provision. As Judge Spender pointed out in the *Expenses* case, "It would be anarchic of any interpretation of the Charter were each Member State its own interpreter."[26]

3. Multilateral Treaties not of a Constitutive Kind

In the case *Concerning the Application of the Convention of 1902 Governing the Guardianship of Infants*[27] Judge Cordova, dissenting, was prepared to interpret the Convention as applying even though contrary to the views of both parties to the dispute.[28] The implication was that the interpretive practices of the majority of the parties to the treaty would govern particular disputes rather than *inter se* interpretive practices. Similarly, in the *Asylum Case*,[29] Judge Read indicated that the practices of all the parties to the convention in question should be considered, but that because of lack of time, space, and information, he had looked only to the practices of the two disputants, Colombia and Peru, for his interpretation of the treaty.[30] Apart from these two statements the court does not appear to have concerned itself with the question.

Article 31(3)(b) of the Vienna Convention merely states that account shall be taken of the subsequent practice of the "parties." At one point during the drafting an attempt was made to require the express consent of all of the parties.[31] This was ultimately rejected by some members

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42-9-27. 13 GAOR (790th plen. mtg.) at 598, U.N. Doc. A/PV.790 (1958)); G.A. Res. 1089, 11 GAOR Annex (Agenda Item 66) at 74, U.N. Doc. A/Res/448 (1956) (ONUC; vote: 62-8-7. 11 GAOR (632nd plen. mtg.) at 818, U.N. Doc. A/PV.632 (1956)).

24. In the *Namibia* decision the court did not consider abstentions of the Permanent Members as invalidating Security Council decisions. 1971 I.C.J. at 20. *See also id.* at 332-33 (doubts of Judge Gros on the use of unanimous resolutions in the light of qualifying statements); *Certain Expenses*, 1962 I.C.J. at 255, 260 (similar doubts of Judge Koretsky about the practice of ignoring interpretive statements).
25. Judge Koretsky, in his dissent in the *Expenses* case, pointed out that a significant number of states (including those who had voted for the budgets in question) had in fact failed to make payments. *Id.* at 263, 266. *See also id.* at 231 (Winiarski, J., dissenting).
26. 1962 I.C.J. at 183.
27. Case Concerning the Application of the Convention of 1902 Governing the Guardianship of Infants (Netherlands v. Sweden), 1958 I.C.J. 55.
28. *See id.* at 143.
29. (Colom. v. Peru), 1950 I.C.J. 266.
30. *Id.* at 324.
31. *Report of the International Law Commission to the General Assembly* DOC A/6309/Revl, *reprinted in* [1966] 11 Y.B. INT'L. COMM'N 222.

because it seemed to imply a requirement of affirmative (as opposed to passive) conduct of all parties to the treaty before practice could be used; and by others as superfluous as the term "parties" when used in the Convention was understood to mean all the parties to the treaty interpreted.[32] Similarly, Sir Humphrey Waldock believed that a treaty should have only one correct interpretation.[33] Thus the preparatory work seems to indicate that bilateral interpretive practices will not govern even the practice of that interpretation in the case of multilateral treaties.[34]

There are certain problems with this approach. First, it places an arduous, if not impossible, task on parties to a dispute to establish what the practices of all parties to a multinational treaty may be.[35] Second, if states are permitted to make reservations regarding certain aspects of a treaty[36] and subsequently might amend a multilateral treaty,[37] there appears to be no reason why they should not be able to bind themselves by their conduct to a specific interpretation of a provision in their relations with another state. Finally, because the distinction between interpreting and amending a text is not always easily drawn, some uniformity of approach is desirable.

There appears to be good reason, therefore, for permitting parties to a convention to agree, by their conduct, to interpret a provision of a convention in a particular way. Other states would not be bound by such practices specifically, but only insofar as they go towards generating a general interpretation of the treaty. The position ultimately would be that states who as between themselves had generated an interpretive practice would be bound by such practice; and states who had no practice or who had inconsistent practice would be governed by the plain meaning of the text supported or clarified by majority practice insofar as it is available.

C. *Consistency of Practice*

While the court seems to require consistency of practice, it has often accepted very limited evidence of practice to support its decision.[38] The

32. *See id.*
33. *See* Waldock, *supra* note 18, at 90 para. 9.
34. As to the defunct art. 38, which permitted alteration by subsequent practice, there was no uniform view whether amendment required the practice of all the parties. *See, e.g.*, 1 U.N. GAOR (38th mtg.) para. 3, U.N. Doc. A/CONF.39/11 (1968) (comments of Mr. Grishin); *id.* (37th mtg.) para. 73 (comments of Mr. Martinez Caro).
35. *See* cases cited *supra* note 12.
36. *See* Vienna Convention on the Law of Treaties arts. 19-21.
37. *See id.* art. 41.
38. In the following cases the practice referred to only occurred once. *European Commission of the Danube*, 1927 P.C.I.J. ser. B, No. 14; Conditions of Admission 1948 I.C.J. 57, Constitution of the Maritime Safety Committee Case 1960 I.C.J. 150.

court has also been prepared to ignore factors such as minority dissents, qualified assents, and abstentions in seeking to find a uniform practice.[39] These latter factors are highlighted in dissenting opinions by judges who, instead of seeing consistent practice, see an ongoing dispute with majorities attempting to impose their views on a minority.[40] Inconsistent practice, on the other hand, has been used affirmatively by the court to support the view that a provision was intended by the parties to be applied flexibly.[41]

D. Motive as an Element of Practice

Occasionally the court has suggested that practice as interpretative conduct must have been motivated by a sense of legal obligation.[42] This requirement is the same as that found for the development of a customary norm through the practice of states.[43] In view of the difficulties of establishing motive, it should play only a negative role insofar as interpretive practice is concerned: only obvious acts of political expediency should be disregarded. Furthermore, the strength of evidence of practice will often lie in its inadvertent nature: the agent acts on a nonpolitically motivated interpretation of the provision in question rather than consciously attempting to establish a practice. Conduct may emphasize *opinio juris* but may also be highly self-serving.[44]

E. The Relationship of the Practice Used to the Dispute in Issue.

Ordinarily, practice as an interpretive guide consists of prior conduct, unrelated to the immediate dispute, that is used to indicate the parties'

39. *See supra* notes 14-37 and accompanying text. In particular see the court's use of practice in the *South West Africa* decision, 1966 I.C.J. at 134, and in the *Expenses* case, 1962 I.C.J. at *161.*
40. See the joint dissent by Judges Hackworth, Badawi, Levi Carneiro and Benegal Ran in the *United States Nationals in Morocco* case, 1952 I.C.J. at 232; the comments by Judge McNair in the South West Africa Case, 1966 I.C.J. at 161; and Judge Moreno Quintana's view of the relevance of the practice referred to by the majority in the *Expenses* case. *Id.* at 245.
41. *See United States Nationals in Morocco,* 1952 I.C.J. at 211, where the court held that the failure of officials to adopt a particular method of valuing merchandise indicated that the provision in question laid down no strict rule, but rather required a more flexible approach than that contended for by either party.
42. In the Asylum Case the court thought that the granting of asylum in the cases referred to it may have been the product of political expediency rather than an indication of the existence of a legal obligation. 1950 I.C.J. at 286. See also the opinions of Judge Read, South West Africa Case, 1966 I.C.J. at 170; Judge Fitzmaurice, *Namibia,* 1971 I.C.J. at 254; and Judge Winiarski in the *Expenses* case, 1962 I.C.J. at 231.
43. *See* S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J., ser. A., no. 10, at 28; the North Sea Continental Shelf Cases 1969 I.C.J. 3, at 44-45.
44. See, e.g., the highly self-serving resolutions of the General Assembly stating that South Africa recognized the United Nations interest in Namibia by presenting or raising the matter before it. *Namibia,* 1971 I.C.J. at 40.

previous understanding of the treaty provision in question. It seems, however, that the court is also prepared to utilize practice directly relating to the dispute in issue. Thus in the *Expenses* case the court referred to practices, that were in themselves being questioned to support interpretations that would in turn validate the practices so used.[45] The circularity of the process is obvious (particularly if the practice was generated with the dispute in mind), but may be inevitable in the absence other practice on point.

F. Administrative Practice

Many practices will originate in the activities of administrative officers.[46] States can have only a general supervisory function over these activities, particularly in the case of international organizations. Some judges have questioned the legitimacy and value of referring to administrative acts as interpretive guides.[47] The court, however, has tended to ignore the problem and has utilized administrative acts as interpretive practice of bilateral and constitutive treaties.[48]

G. Conclusion

The problems with the use of practice as an interpretive guide are similar to those found with the use of *travaux preparatoires*. The practice may be so vast as to make it virtually unavailable to the court or the parties. Or, much may be unrecorded or otherwise unavailable. It may be generated at will by the parties and be highly self-serving. Moreover, because practice is amenable to subjective interpretation, it may be readily bent to particular points of view. Finally, judicial selectivity is often a problem: acts ignored by one judge may be given special significance by another. Despite the problems of its use, however, it is clear that practice

45. See the comment of Judge Fitzmaurice in his separate opinion in the *Expenses* case that arguments drawn from practice can be question-begging, and that it was the validity of some part of the practice which had been put in issue by the request for opinion. *1962 I.C.J.* at 201.

46. *See supra* note 11 and cases cited therein. In the *United States Nationals in Morocco* case the Permanent Court looked at the correspondence of the Moroccan Controller of Customs, and minutes of meetings of a committee on customs valuations. 1952 I.C.J. at 211.

47. Judge Koretsky in the *Expenses* case was concerned that recommendations regarding UNEF were made by the Secretary General and not by member states, and that the formula of referring the expenses of UN forces to art. 17(2) of the Charter originated in the Secretariat. 1962 I.C.J. at 255. Judges Winiarski and Moreno Quintana referred to the budgetary practices as being only of "technical" importance. *Id.* at 230, 247. Judge Azevedo, in the *Competence of the General Assembly* case, pointed out that it is superfluous to quote texts of rules of procedure, because they can only complement a rule or provision which may itself be in question. 1927 P.C.I.J. at 21. A similar argument might be made regarding practices of officials used to support a questioned rule.

48. *See supra* notes 10 & 38 and cases cited therein.

is gaining in significance as an interpretive guide.[49] The next part of the article examines the extent to which the method is used.

II. JUDICIAL SCOPE OF THE USE OF PRACTICE

A. Probative Value of Practice

Practice is just one of many interpretive guides to a treaty's meaning. The issue, therefore, is how much weight practice is to be given. Is practice to be given the weight of confirmation, primary interpretation, or supplementary interpretation? In the *Status of South West Africa Case* the court stated that practice is of primary value in interpreting treaties.

> The interpretations placed on 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.[50]

In the *Expenses* case Sir Gerald Fitzmaurice went somewhat further:

> [P]ractice must be a very relevant factor . . . . The interpretation in fact given to an international instrument by the parties to it, as a matter of settled practice, is good presumptive (and may in certain cases be virtually conclusive) evidence of what the correct legal interpretation is.[51]

In general, the court has tended to use practice to confirm a conclusion reached by other means.[52] Thus it has been used generally to reinforce a textual reading by reference to the authority of the parties' own conduct confirming that reading.[53]

The Vienna Convention allocates practice a more fundamental role. Article 31 accords practice equal status with subsequent agreements of the parties and applicable rules of international law. All three are to be taken into account within the context of the treaty. In turn, context is to be utilized in giving the words their ordinary meaning in light of the treaty's objects and purposes. Under Article 31, then, practice plays an

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49. The Vienna Convention, for example, gives practice a greater significance than preparatory work. *See* arts. 31-32.
50. 1966 I.C.J. at 135-36.
51. 1962 I.C.J. at 201.
52. Practice was used for the purpose of confirming a conclusion already reached in the *IMCO* decision, the *Expenses* case, the *Namibia* opinion, and the *Admissions* case.
53. *See supra* note 47 and cases cited therein. In these cases the court reached its initial conclusion on a textual reading of the provisions in issue and supplemented this reading with evidence of party practice.

integral part in the initial interpretation of the agreement. Preparatory work is now given the supplementary role, originally played by practice, of confirming a conclusion already reached.[54]

Apart from its primary role, however, practice may also be used supplementarily. Although Article 31 provides that only practice which establishes agreement of the parties may be used, evidence of other relevant practice may be available. An example might be the practice of only one party that is unknown to others. If an Article 31 reading produces ambiguous or unreasonable results, supplemental means under Article 32 may be employed. This could include practice otherwise unavailable under Article 31, which may now come in under Article 32 to clarify the meaning of the text.[55]

B. Practice as Evidence of the Interpretation of the Original Signatories to the Treaty

In its Advisory Opinion in the *Treaty of Lausanne* case[56] the Permanent Court would look to practice only insofar as it threw light on the intent of the parties at the time they concluded the treaty. Judge Spender reiterated this position in the *Expenses* case.[57] In that case Judge Spender was not prepared to consider the practices of an international organization in the interpretation of a constitutive treaty. He argued that the difference in membership produced by the influx of new member states meant that the later practices of the organization could not indicate the intentions of the original signatories.[58]

This approach seems artificial and unduly restrictive. It is artificial because, even with bilateral treaties, those who administer and interpret them are not necessarily those responsible for their creation. These individuals, are not necessarily going to reflect the drafters' intentions better than are persons representing new states joining an organization. This is particularly so when changes of government and personnel occur within a state. Moreover, it seems unreasonable to confine the interpretation process to seeking the supposed views of those who drafted the instrument. Equal emphasis should be given to the interpretations of those who have actually operated a treaty as opposed to those for whom it was merely an abstract concept.

It is clear from the frequent use that the court has made of the practice

54. *See* art. 32.
55. For support for this reading of art. 32, see Waldock, *supra* note 20, at 98-99 para. 18.
56. 1925 P.C.I.J. ser. B, No, 13. at 24.
57. 1962 I.C.J. at 189.
58. *Id.* at 195.

of international organizations that it does not share Judge Spender's view that practice may only be used if it reflects the interpretations of the original parties. The Vienna Convention has adopted a similar approach: it has given preparatory work a secondary role,[59] and has not distinguished between constitutive and other instruments insofar as the relevance of subsequent practice is concerned.

C. *Ambiguity as a Prerequisite to the Use of Practice*

In the *Serbian Loans Case*[60] and the *Right of the International Labour Organization to Regulate Agricultural Labourers*,[61] the Permanent Court refused to use subsequent practice to interpret a treaty's clear and unambiguous language. Similarly, in the *Expenses* case,[62] Judge Spender would only look to practice when the text was obscure or when a "plain meaning" reading would produce unreasonable results. He argued that in the face of a clear meaning subsequent reaction would go only to the issue of whether a new agreement had been entered into, or whether an estoppel had arisen.

Logically, it is possible to distinguish between interpreting a provision and amending it. In practice, however, the distinction is not readily maintained. In the *Expenses* case, the issue was whether the expenditures authorized by the General Assembly to cover its Congo and Middle East peace-keeping operations were "expenses of the Organization" under Article 17(2) of the Charter. In part this raised the question as to whether the General Assembly was empowered by the Charter to set up such forces. The majority was able to find clear support in the Charter for both of these propositions.[63] They then went on to use resolutions connected with these operations to support this finding. Dissenting judges, however, who read the Charter as only authorizing the Security Council to engage in such peace-keeping activities, saw the resolutions as being used to alter the Charter over the opposition of some member states.[64]

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59. *See* art. 32.
60. 1929 P.C.I.J. at 38.
61. 1922 P.C.I.J. at 39.
62. 1962 I.C.J. at 189.
63. 1962 I.C.J. at 159-60.
64. Judge Winiarski thus gave primary emphasis in his judgment to the nonbinding nature of General Assembly resolutions. *Id.* at 227-34. Judge Koretsky considered the resolutions authorizing the expenses to be invalid and that the issue was basically a political rather than juridical one. *Id.* at 253-87. With regard to the latter point during discussion in the General Assembly of the proposal to get an advisory opinion from the court, the Soviet representative said:

> The proposal to ask the International Court of Justice to issue an advisory opinion is merely an attempt in this case to find the means for exerting pressure on those States which on very good grounds — on political and juridical grounds — do not

As practice has been used to support a found plain meaning of the text, the ambiguity issue has been avoided. In the *Namibia* decision, however, the court was prepared to interpret Article 27(3) of the United Nations Charter in the light of the Security Council's subsequent practice to mean that a Permanent Member's negative vote was required to invalidate a resolution, rather than the absence of an affirmative vote, as the provision itself seems to indicate.[65] The majority did not deal with the ambiguity issue. In a separate opinion, however, Judge Dillard did deal with the point. He found an ambiguity in the provision, or at least the absence of a precise prescription invalidating resolutions unless all five Permanent Members were present and voting.[66] But he then stated in a footnote that ambiguity was not a necessary precondition for recourse to practice:

> Much depends on the nature of the subject matter to be interpreted, i.e., constitutional documents, multilateral treaty, bilateral treaty, type of contract, etc. Much depends also on the character of the applicable norm, i.e., whether a vaguely worded standard or a precise rule, and much depends on the expectations aroused in the light of the entire context and social interest involved.[67]

This appears to be saying that if the court is able to find from the nature of the treaty, its language, or the interest it creates, an intention that the text was *not* to be read strictly then the court need not find an ambiguity in order to resort to subsequent practice.

The approach of seeking an intent to permit a flexible reading of an otherwise unambiguous provision, however, sidesteps the two central questions that underlie the ambiguity issue: whether practice can be used informally to amend the text of a treaty and whether it can do so contrary to the wishes of some of the parties.

Although the court has been able to avoid dealing directly with these issues, its practice seems to permit both results. The court has been prepared to interpret instruments, particularly constitutive ones, in the light of subsequent practices that are themselves produced by new de-

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feel that it is possible for them to participate in the financing of operations such as the maintenance of the Emergency Force in the Middle East or the United Congo Operation.

16 U.N. GAOR (1086th plen. mtg.) at 61, U.N. Doc. A/PV.1086 (1961).

65. 1971 I.C.J. at 22-23.

66. *Id.* at 153-54.

67. *Id.* at 154 n.1.

velopments in the international order.[68] In the *Reparations for Injuries Case* the court stated:

> The rights and duties of an entity such as the organization must depend upon its purpose and functions as specified or implied in its constituent documents and developed in practice.[69]

Similarly Judge Lauterpacht in the *Voting Procedures Case*[70] argued:

> A proper interpretation of a constitutive instrument must take into account not only the formal letter of the original instrument but also its operation in actual practice and in the light of the revealed tendencies in the life of the organization.[71]

Perhaps the strongest stand was that taken by Judge Alvarez in the *Conditions of Admission Case*:[72]

> It must be recognized that even the clear provisions of a treaty must not be given effect or must receive appropriate interpretation when as a result of modifications in international life their application would lead to manifest injustice or results contrary to the aims of the institutions.[73]

The *Namibia* case similarly indicates that, in practice as well as theory, the court is prepared to accept an informal amendment to an instrument by virtue of the subsequent conduct of the parties.[74]

Insofar as the second question is concerned, whether an informal amendment can take effect without consent of all the parties, Judge Spender says no:

> [A treaty] cannot be altered by the will of the majority of the member states, no matter how often that will is expressed or asserted against a protesting minority and no matter how large be the majority — or how small be the minority.[75]

Other judges have expressed similar views.[76] We have seen, however,

68. The East-West conflict led indirectly to the budgetary practices in the *Expenses* case, and the voting practices questioned in the *Namibia* opinion.
69. 1949 I.C.J. at 180.
70. *South West Africa* (Voting Procedures) 1955 I.C.J. 67.
71. *Id.* at 106 (Separate Opinion).
72. Conditions of Admission of a State to Membership of the United Nations, 1948 I.C.J. 57.
73. *Id.* at 68.
74. 1971 I.C.J. at 31.
75. *Certain Expenses*, 1962 I.C.J. at 196. See also the acknowledgment of this amendment by Judge Bustamante, *id.* at 291.
76. *See id.* at 234 (Winiarski, J., dissenting).

that while the court has not been prepared to state that a treaty may be amended against the will of a party, it has been remarkably willing to find consent in both the activities or inactivities of states when interpreting bilateral treaties[77] and in the majority voice when interpreting constitutive instruments.[78] The result of both these approaches is that interpretive practice will have the ultimate result of informally changing a treaty even though contrary to the wishes of one or some of its signatories.[79]

Article 31(3)(b) of the Vienna Convention requires that the practice establish the agreement of the parties. As indicated above, this was understood by the Commission to mean the agreement of all the parties, although this agreement need not take an active form.[80] As the instrument is to be interpreted in the light of its objects and purposes, the court is still given substantial leeway in establishing a progressive meaning by virtue of an "interpretation" of the text. Moreover, it can continue to find acquiescence in interpretive practice in silence or other conduct of states.[81] If, however, there is active opposition to a particular practice then the court will have to rely primarily on the textual reading.[82] There is still a need for judicial creativity in finding a textual reading that supports current practices or needs of the parties.

The need for the somewhat devious method of altering a treaty via interpretation would have been eliminated had the Convention recognized that a treaty might be amended by practice of the parties. Initially the Convention contained such a provision,[83] but it was removed as being contrary to the principle of *pacta sunt servanda*[84] despite the fact that the

77. *See supra* note 15 and cases cited therein.

78. *See supra* notes 18-21 and cases cited therein.

79. Yet it is difficult to deny that the meaning of a treaty, or some part of it . . . may undergo a process of change or development in the course of time. When this occurs, it is the practice of the parties, in relation to the treaty that affects and indeed is, that change or development. In that sense there is no doubt about the standing of an independent principle, which, in a proper case, it may be not only legitimate but necessary to make use of; for what is here in question is not so much the meaning of an existing text, as a revision of it, but a revision brought about by practice, rather than effected by and received in writing.

Fitzmaurice, *supra* note 3, at 225.

80. *See supra* note 28 and accompanying text.

81. *See id.*

82. *See supra* note 50 and accompanying text.

83. *Article 38*

Modification of treaties by subsequent practice

A treaty may be modified by subsequent practice in the application of the treaty establishing the agreement of the parties to modify its provisions.

1966 Draft text in [1966] 2 Y.B. INT'L L. COMM'N 236.

84. *See* 1 U.N. GAOR (37th mtg.) para. 70, U.N. Doc. A/CONF.39/11 (1968) (comments of Mr. Martinez Caro); *id.* (38th mtg.) para. 3 (comments of Mr. Grishin); *id.* paras. 30-32 (comments of Mr. Thiam); *id.* para. 33 (comments of Mr. Verosta).

practice required the agreement of all parties.[85] It was also thought to be contrary to the internal law of those states requiring domestic legislative action to enter into or amend treaty obligations.[86] Finally it was thought inappropriate that relatively minor officials be able to bind their states to new obligations by their conduct.[87]

III. THE JURIDICAL BASIS OF PRACTICE AS AN INTERPRETIVE GUIDE TO INTERNATIONAL INSTRUMENTS

Neither the court as a whole nor the International Law Commission has apparently considered the legal rationale of the use of practice as an interpretive guide. Judge Spender in the *Expenses* case, however, did raise the issue:

> In essence [the use of practice] *is a question of evidence,* its admissibility and value: its roots are deeply embedded in the experience of mankind.
>
> A man enters into a compact usually between himself and another. The meaning of that compact when entered into, whether oral or in writing, may well be effected, even determined by the manner in which both parties in practice have carried it out . . . . Then joint conduct expresses their common understanding of what the terms of their compact, at the time they entered into it, were intended to mean, and thus provides direct evidence of what they did mean.[88]

Sir Gerald Fitzmaurice explained use of practice in similar terms:

> [A]lthough it is convenient to classify the matter as a principle of interpretation it is not really that so much as *a rule of evidence.* It is a question of the probative value of the practice of the parties as indicative of what the treaty means.
>
> [C]onduct usually forms a more reliable guide to intention and purpose than anything to be found in the preparatory work . . . .[89]

Both jurists, therefore, consider practice as an evidentiary guide to what the parties intended. But as pointed out above, the conduct of those functionaries who produce the practice relied on by the court may not necessarily reflect the views of those who drafted the treaty; nor will

85. *See id.* (38th mtg.) paras. 55-56 (comments of Sir Humphrey Waldock).
86. *See id.* para. 27 (comments of Mr. Miras); *id.* para. 58 (comments of Mr. Fujisaki).
87. *See id.* (37th mtg) para. 67 (comments of Mr. Martinez Caro); *id.* (38th mtg.) para. 6 (comments of Mr. Kearney).
88. 1962 I.C.J. at 190 (emphasis added).
89. *Supra* note 3, 28 BRIT. Y.B. INT'L L., at 20. (emphasis added).

their conduct necessarily reflect the current views of those senior officials representing the states involved at the time of the dispute.[90] This latter fact explains the apparent inconsistency of referring the parties to their own practice to explain the meaning of a text when the mere fact of the dispute or request for an advisory opinion would seem to indicate that they have no common understanding of the provisions involved.[91]

Practice, then, does not necessarily reflect the *intentions* of the drafters or the opinions of the states presently in conflict, but represents the ongoing pragmatic *understanding* of those individuals who have functioned under and within the treaty's terms. If this is so, one might ask, wherein lies the evidentiary value of such practice? The answer seems to be that those actually engaged in working under the treaty are likely to have more knowledge and experience about the realities of the functioning of the treaty than either those who prepared it or those who have dealt with it from a distance or for a limited period of time. As Judge Hudson wrote in 1948,

> meaning needs to be given to [a treaty's] provisions, not so much by the rulings of judges on the bench, as by those who have the experience of making the treaty work.[92]

Similarly Fitzmaurice saw the value of practice in the fact that it "has taken concrete and active, and not merely verbal or paper form."[93]

The evidentiary value of practice, therefore, lies not as a manifestation of intent, but rather as an indicator of the soundness of the interpretation. This is because practice represents the common-sense practical interpretation of the treaty under the varied contingencies of its ongoing operation.

Under these circumstances if there is serious disagreement among the various actors involved as to how a particular provision should be interpreted, then the evidentiary value of any one point of view is diminished. The same can be said for practice that is only of limited duration. This is particularly so when the practice relates directly to the dispute in issue. The initial interpretation of a provision may produce a situation which is essentially unworkable under the treaty and which must subsequently be abandoned.[94] Limited or inconsistent practice must therefore

90. *See supra* text accompanying notes 58-59.

91. Judge Bustamante raises this point in the *Expenses* case, 1962 I.C.J. at 305. See also the comment of the court in the Asylum Case, 1950 I.C.J. at 278.

92. Hudson, *The Twenty-Sixth Year of the World Court* 42 AM.J. INT'L L. 16 (1948).

93. *Supra* note 3, 33 BRIT. Y.B. INT'L L., at 223.

94. This occurred in the aftermath of the *Expenses* case, where the continued refusal of France and the Soviet Union to pay led the General Assembly to fund these operations on a voluntary basis. *See* D.W. GREIG, INTERNATIONAL LAW 852 (2d ed. 1976).

be carefully evaluated. If the inconsistencies are minor, or if the practice, though limited, appears to be carefully considered, then evidentiary weight should be given to it because it still represents a working approach to the treaty rather than an abstract, theoretical one.

Much the same thing can be said with regard to interpretive conduct by one party to the treaty alone: Judge Spender considered that such conduct "could not of itself have any probative value or provide a criterion for judicial interpretation."[95] This view appears to assume that interpretive conduct of the officials of one state will necessarily be partisan or represent evidence manufactured for some possible future dispute. But this assumption may be unwarranted: on its face the practice may be judicious and unmotivated by partisan considerations. If this is so, such practice should have evidentiary value as to the soundness of the interpretation that it is used to support.

The practice of officials of international organizations should be given particular weight. These individuals, presumably, give their primary loyalty to their organization and are expected to carry out their functions in a strictly non-partisan fashion.[96] They often develop a particular expertise in the operations of the organization which cannot be shared by its more transient political participants. Therefore, their views are more likely to be motivated by principle than politics.

The question remains as to the weight to be given to the interpretive practice of organs of international bodies that are produced by majority vote. In the *Expenses* case Judge Spender adopted the same position regarding this issue as he did for practice of one state alone. He said:

> [I]t is not evident on what ground a practice consistently followed by a majority of member states not in fact accepted by others could provide any criterion of interpretation which the court could properly take into consideration in the discharge of its judicial function. The conduct of the majority . . . may be evidence against them and against those who in fact accept the practice as correctly interpreting a charter provision but could not, it seems to me, afford any evidence in their favour to support an interpretation which by majority vote they have been able to assert.[97]

The majority view, however, must have probative value if simply on the

95. *Certain Expenses*, 1962 I.C.J. at 191.
96. *See, e.g.*, U.N. CHARTER art. 100.
97. 1962 I.C.J. at 192.

basis that it is the view of the majority of members.[98] It is true that the resolutions of assemblies may be politically motivated rather than principled; but this is not always the case. Indeed we must assume, as the court itself has pointed out, that the organs of an organization interpret their powers in good rather than bad faith.[99] It may be that resolutions that are obviously politically motivated should be given little value as indicators of the soundness of the interpretations they express.[100] Even so this should be rather the exception than the norm.

IV. CONCLUSION — THE UTILITY OF THE PRINCIPLE

The use of practice could be vindicated by reference to the concept of state responsibility for the acts of its agents appointed directly or individually;[101] to the rights of parties to interpret a treaty themselves;[102] to the concepts of estoppel and acquiescence where one party has remained mute in the face of interpretive conduct of others;[103] and to the understanding that parties who join a democratic organization agree to abide by majority interpretations of the constitutive instrument when such instrument contains no provision for unilateral appeal against such interpretations to a judicial tribunal.[104] Such theories, however, are somewhat artificial in this context. A better view is that resort to practice is justified on the basis that treaties are to be interpreted in a common sense manner.[105] Practice represents evidence of a practical interpretation of the treaty. As such it can be used to gain insights into the operation of the treaty and to test the soundness of a particular interpretation. On

98. Sole Arbitrator Dupuy, in Texaco Overseas Petroleum Co. v. Libya, 53 Int'l L. Rep. 389 (1979), considered General Assembly resolutions reflecting the views of the majority of states belonging to the various representative groups as evidence of international law. *Id.* ¶ 73.

99. *See Certain Expenses*, 1962 I.C.J. *See also id.* at 204 (opinion of Fitzmaurice, J.).

100. Thus Dupuy, in the *Texaco* case, would not give legal effect to politically motivated resolutions which did not have the support of the various representative groups of the United Nations. 53 Int'l L. Rep. 389 ¶ 88.

101. *See* The Wanderer, 6 U.N.R.I.A.A. 57. *See also First Report on State Responsibility*, [1971] 1 Y.B. INT'L L. COMM'N 249 (acts of the organization officials could be imputed to the states that were responsible for their election).

102. See the *Expenses* case, 1962 I.C.J. at 168; *id.* at 197 (opinion of Spender, J.); South West Africa Case, 1966 I.C.J. at 135-36. Article 31 of the Vienna Convention is presumably directed at state parties who must initially interpret the treaty themselves.

103. See the separate opinion of Judge Spender in the *Expenses* case, where he accepted that conduct of the majority may be evidence against those who accepted the practice as correct. 1962 I.C.J. at 192.

104. See the separate opinion of Judge Fitzmaurice in the *Expenses* case, *id.* at 211-12. *Cf. id.* at 227-34 (Winarski, J., dissenting).

105. See the comment by Waldock that the principle of integration is one of "both common sense and good faith; the natural and ordinary meaning of terms is not to be determined in the abstract but by reference to the context in which they occur." *Supra* note 20 para. 23.

the other hand practice has its limitations. It may be the work of expediency rather than principle; it may focus on immediate problems to the detriment of larger purposes. Because of this, great care must be taken to ensure that a particular practice is not crystallized into rule of law to the detriment of the larger principles and purposes of the instrument. Such a use of the practice would stultify a treaty as readily as would a rigid adherence to text without regard to the practical realities of the treaty's operations. As Judge Azevedo pointed out in his dissenting opinion on the *Competence of the General Assembly* "even long practice, usually a good guide in interpretation, cannot frustrate a pressing teleological requirement."[106]

106. 1950 I.C.J. at 24.