

Exploring the Treaty Modifying Effect of Subsequent Practice and New Custom: The Implications of State Practice Going Beyond the Limits of Treaty Interpretation

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'Today's rule reflects in part yesterday's deviance and...the cloth of obligation is partly cut from the pattern of non-conformity.'

– Sir Elihu Lauterpacht

1 INTRODUCTION: THE EFFECTS OF SUBSEQUENT STATE PRACTICE

In the words of one legal scholar, *'la pratique crée, la pratique modifie, la pratique interprète, la pratique prouve, la pratique éteint la règle de droit.'* Subsequent practice is well established as a 'tool' for treaty interpretation. However, subsequent practice sometimes diverges from the provisions of a treaty to such an extent that it can no longer be said to constitute an act of treaty interpretation by application, but rather, in effect, one of *modification*. Such divergent practice can potentially also give rise to a supervening rule of international custom as a source of new legal obligation.

As norms and priorities of States change, international law must keep in pace in order to regulate inter-State relations effectively. Treaty provisions must undergo modernisation to reflect current policies, technological developments, changing economic and social interests, the proliferation of international institutions and actors, and evolving moral conceptions. At the same time, States may have multi-polar political and economic interests, which makes it more challenging to reach agreement on specific rules. This makes *formal* treaty amendment procedures, especially in the case of large multilateral treaty regimes, extremely cumbersome if not altogether unfeasible – which in turn makes it difficult for treaties to adapt and continue fulfilling their purpose over time. By contrast, the process of subsequent practice offers a large degree of flexibility, but a better methodology is required to evaluate how it operates in different contexts and account for its full range of effects.

One famous example of modification by subsequent practice arose in the *Namibia* case before the International Court of Justice. The Court here held that the UN Charter Article 27(3) requirement that Security Council decisions must be taken on the basis of the permanent member's 'concurring' votes, had been tacitly replaced by that of 'non-objection'. This enabled the Security Council to order intervention in the 1950 Korean War in the absence of the Soviet Union.

Clarifying the process of how modification by subsequent practice works – in other words, clarifying (a process of formation of) international law and the means of identifying it – would be of great importance to States, judges and other international legal actors alike. For States, subsequent practice can create new obligations stemming from pre-existing treaty provisions. It can also lead to the emergence of new institutional mechanisms, which impacts not only the direct obligations of States, but also those of the international organizations they constitute. An elucidation of this

process could help to more accurately define States' expectations under existing treaty regimes. Moreover, guidelines on how to analyse and identify subsequent practice would allow national and international courts and tribunals to more easily fulfil their judicial function. This would grant them an additional means of assessing the extent of a disputing party's obligations, as well as increasing transparency and consistency by harmonizing approaches to subsequent practice in the case law. Such insights into subsequent practice may help strike a more accurate balance between the *stability* of treaties on the one hand, and the organic *evolution* of treaty commitments on the other – an insufficiently explored issue of international significance.

First, the research examines the meaning of the term 'subsequent practice', and its role as a means of treaty interpretation, in light of Article 31(3)(b) of the 1969 Vienna Convention on the Law of Treaties. *Second*, the role of subsequent practice as a means of treaty *modification* is explored in detail. One important aspect here is the discussion in the International Law Commission regarding a draft provision on treaty modification by subsequent practice, which was ultimately excluded from the final version of the Vienna Convention. An analysis of the modifying effect of subsequent practice is then carried out by means of a non-exhaustive compilation of examples of tacit treaty modification (a 'repertoire of practice'), from which general criteria can be derived. *Third*, the potential modifying effect of subsequent customary law is considered and compared to the process of treaty modification by subsequent practice.

2 SUBSEQUENT PRACTICE AS A MEANS OF TREATY INTERPRETATION

The preliminary step is to understand the role of subsequent practice as a means of treaty *interpretation*. Terms such as 'practice', 'subsequent' and 'agreement of the parties' must be carefully defined. This provides a reference point from which to distinguish its more controversial application as a means of treaty *modification*. However, determining the point when the 'switch' from interpretation to modification occurs is not only an act of interpretation in itself, it is one that poses great difficulty to legal scholars and courts alike, and impacts the expectations of States in regard to their international treaty obligations. The silence of the Vienna Convention in this regard has triggered a long-standing debate: whilst it is sometimes argued that, in reality, interpretation and modification are indistinguishable, the majority view has advanced various criteria to aid in drawing this distinction in practice.

3 SUBSEQUENT PRACTICE AS A MEANS OF TACIT TREATY MODIFICATION

The international case law shows that subsequent practice in the application of a treaty is well capable of actually modifying it. The research explores the factors conducive to such modification: for instance, the *character* of the respective practice, the degree to which it is *common, concordant and consistent* (and thus capable of establishing the parties' implied agreement), as well as the *type of treaty regime*, the nature of the *provisions* affected, and the relevance of the *contributing parties*.

3.1 The Deleted ILC Article on Modification by Subsequent Practice

An examination of the *travaux* of the ILC in its codification of the law of treaties is crucial. The ILC ultimately excluded from the final Vienna Convention a draft provision on treaty modification by subsequent practice, although it *did* acknowledge

the lawfulness of this process. The draft article was deleted for ‘practical’ reasons, on account of its overlap with other draft provisions, and the fact that it triggered questions deemed too complex to tackle under the already heavy time constraints faced at the UN Conference. The article’s exclusion has thus not detracted from the importance of subsequent practice as a source of dynamic development of the law, lying just beyond the scope of the Vienna Convention.

3.2 Analysing the Modifying Effect of Subsequent Practice: The Repertoire of Practice

In recognition of the need to understand this elusive issue, the UN General Assembly’s Sixth Committee recently requested the International Law Commission to take up consideration of the effect of subsequent practice on treaty law in the context of a broader study on the evolution of treaties over time. It was noted that despite its crucial importance, the issue of how subsequent practice *actually* operates remains insufficiently explored, and examples have never been systematically collected or analysed. The modifying effect of subsequent practice is analyzed through a compilation of examples of tacit treaty modification – a ‘*repertory of practice*’ – spanning a wide range of legal fields, in particular major treaty regimes (especially in the law of the sea and human rights), and drawn from both in and outside the judicial context. The aim is to derive guidelines from the collected examples that provide a ‘common background of understanding’ on the effects of subsequent practice.

4 TACIT MODIFICATION BY MEANS OF NEW CUSTOMARY INTERNATIONAL LAW CONFLICTING WITH THE EARLIER TREATY RULE

The international case law indicates that a court can invoke subsequent customary law as a ground for the tacit modification of a conflicting treaty provision. However, what the case law and doctrine also suggest is that subsequent customary rules – with the exception of *jus cogens* norms – do not *automatically* have this effect (this would entail the existence of a hierarchy between customary and conventional law). Rather, new custom may constitute a *ground* for treaty modification, but additional evidence is required to show that the States parties have, at least tacitly, consented to such effect. This mirrors the discussion on treaty modification by subsequent practice: the practice must establish an intention to modify the treaty, i.e. an implied agreement. From this perspective, a newly emerged customary norm can be one of many possible outcomes of subsequent practice in the application of a treaty, rather than a phenomenon operating exclusively outside of it. Tacit modification through custom, extending ‘upon and beyond’ a treaty’s original scope, allows international law to naturally unfold and progress.