PART I

Definitions, assumptions and method

1

Two paths to interpretative method

At the outset of this study lies the observation that there is an increase in evolutive interpretations in international law[1] as well as a rising scholarly awareness of that phenomenon. My ambition is to inquire into how an interpreter of international treaties ought to deal with the choice between static and dynamic interpretation. This is a question of *interpretative method*, i.e. the rules guiding interpreters in the process of interpretation.[2]

1.1. What we are talking about: interpretative method and methodology

In international law, the general rule of treaty interpretation is laid out in a treaty, the Vienna Convention on the Law of Treaties.[3] This treaty on treaties,[4] which has been described as 'constitutional',[5] contains a general rule on interpretation in its Arts. 31 and 32. The treaty does not only show a very high participation among member states,[6] it is almost universally recognised by international courts as determining interpretative method in international law.[7] To find out whether and how the content of treaties

[1] Nolte, 'Between Contemporaneous and Evolutive Interpretation' 1679; Nolte, 'Treaties over Time: Introductory Report'.
[2] This is based on Hart's distinction of primary and secondary norms. Hart, *The Concept of Law* 81. Certain of those norms are extended to norms about interpretation.
[3] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT).
[4] Kearney and Dalton, 'The Treaty on Treaties' 495.
[5] As reported by Verosta, 'Die Vertragsrechts-Konferenz der Vereinten Nationen 1968/69 und die Wiener Konvention über das Recht der Verträge' 687.
[6] Currently, it is ratified by 114 states: see http://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXIII~1&chapter=23&Temp=mtdsg3&lang=en (accessed 31 December 2014).
[7] For an overview, see Gardiner, *Treaty Interpretation* 114–26. With regard to its customary status, see Villiger, 'Articles 31 and 32 of the Vienna Convention on the Law of Treaties in

can be changed, we will have to travel into the deeper layers of interpretative method. This will lead us in two directions: That of doctrinal reflection or methodology, and that of interpretative practice. And this for a good reason: These two perspectives have been the poles whose interaction created the concepts we denote as interpretative method.[8] It is their mutual influence, which creates and alters interpretative method. *Interpretative practice* is the use of method in real life. Practice is a source but at the same time an application of method. Courts for example interpret treaties. Courts use interpretative method, but the way they do it also has a bearing upon the rules. We could say that interpretative method materialises in interpretative practice. The reflection of international legal method by legal scholars is called *methodology*.[9] Methodology influences method in two ways. On the one hand, it restates the practice as method, but it restates it in a defined way, giving it a certain structure and form. It, therefore, changes it slightly. It is mirrored interpretative method. Methodology and practice, material and mirror are magical: They aim to reproduce interpretative method but they also create it. This is a kind of magic we can observe in many areas of life: Conceptual historians like Quentin Skinner or Reinhard Koselleck tell us that some concepts like sovereignty not only describe but make history.[10] The philosophical current of pragmatism has highlighted that the utterance of words has more

the Case Law of the European Court of Human Rights' 118. For a detailed account of the acceptance of the rules by the ICJ, see Torres Bernárdez, 'Interpretation of Treaties by the International Court of Justice Following the Adoption of the 1969 Vienna Convention on the Law of Treaties', see also Gardiner *ibid.* 13.

[8] This runs parallel to the criteria Koskenniemi uses to describe international legal method: normativity and concreteness. Koskenniemi, 'Methodology of International Law'. Yet, the distinction of methodology and practice is more focused on the institutional perspective than on criteria for the admissibility of legal argument.

[9] For this distinction, see Schröder, 'Juristische Methode' 1449. Looking not only on interpretative method but on method and methodology in a broader sense, some authors have been able to avoid the rather refined and possibly a bit pedantic distinction I assume: Focarelli, *International Law as a Social Construct* 92. He sees the function of method as well as methodology in the ascertainment of law and attributes a broader scope of means to methodology. A similar notion is assumed by Bos, *A Methodology of International Law* 1–2. Bleckmann defined methodology by enumerating different areas of the methodology, Bleckmann, *Grundprobleme und Methoden des Völkerrechts* 33. For our purposes, the term *logos* enshrined in methodology suggests that it is a reflective practice. If we define method as rules regulating legal activity, methodology cannot be the same but must be the reflection of that activity. For an example in which both terms are exclusively used in relation to legal scholarship, see Bankowski and others, 'On Method and Methodology'.

[10] Skinner, 'Retrospect: Studying Rhetoric and Conceptual Change'; Koselleck, 'Die Geschichte der Begriffe und Begriffe der Geschichte'.

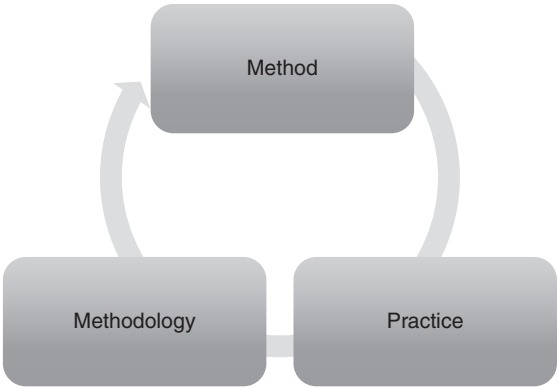

Figure 1 Method in context

consequences than solely to restate their lexical meaning.[11] Those insights might not seem spectacular to a lawyer from a practical point of view.[12] Legal concepts and their use alter reality every day: couples are married, houses are sold, and criminals are imprisoned. Whenever there is an argument about what the text ought to mean, lawyers resort to certain rules guiding their conduct even though lawyers are often not actively aware of how these rules operate. In the case of interpretation, we call the rules guiding the practice interpretative method. Figure 1 summarises the way in which interpretative method is related to interpretative practice as well as to methodology. To find out whether and how the meaning of treaties can be changed through interpretation, we have to consider legal practice as well as legal methodology. In the latter case, the present inquiry will plod through legal doctrine over time. The research on interpretative practice is limited to the practice of international courts. The scope of the study ought to be explained before defining what evolutive treaty interpretation actually is.

1.2. Who we are talking about: international courts

Disputes before international courts lie at the heart of this study.[13] We are awaiting the next wave of rising judicial practice that could

[11] See the classical account of Austin, *How to Do Things with Words*.
[12] Yet, there is much to be gained through the theoretical insights as shown by Ingo Venzke, *How Interpretation Makes International Law*.
[13] For accounts focusing on judicial practice, see Gerald Fitzmaurice, 'The Law and Procedure of the International Court of Justice: Treaty Interpretation' 1; Gerald Fitzmaurice,

substantiate a trend towards evolutive interpretation:[14] while there has been a '[l]onging for international adjudication' in the past,[15] international adjudication is definitively an achieved reality today.[16] Moreover, an 'explosion'[17] of judicial mechanisms leading to their 'multiplication' and 'proliferation' can be observed.[18] This means that there is a great increase in new judicial institutions, the number of which comes close to 125,[19] 24 of which can be classified as international courts.[20] They produce an increasing amount of decisions. Therefore, one might say that the structure of international law has not only moved from co-existence to cooperation, as Wolfgang Friedmann has termed it,[21] but also from diplomacy to adjudication.[22] International courts complement states as actors on the international stage. This move towards more adjudication on the international plane might entail good and bad consequences:[23] More mechanisms promise more effectiveness since disputes are decided in a final, binding and objective manner.[24] But more mechanisms might also lead to competing claims about jurisdiction.[25] This might tempt

'The Law and Procedure of the International Court of Justice 1951–4' 203; Yambrusic, *Treaty Interpretation*; Nolte, 'Second Report for the ILC Study Group on Treaties over Time'.

[14] For that trend, see Nolte, 'Between Contemporaneous and Evolutive Interpretation' 1679; Nolte, 'Treaties over Time'. See also Binder, *Die Grenzen der Vertragstreue im Völkerrecht* 83.

[15] Venzke, *How Interpretation Makes International Law* 140.

[16] Nolte, 'Introduction' 1; Alter, *The New Terrain of International Law* 68–69.

[17] Alford, 'The Proliferation of International Courts and Tribunals' 160.

[18] Buergenthal, 'Proliferation of International Courts and Tribunals' 267; Dupuy, 'The Danger of Fragmentation or Unification of the International Legal System and the International Court of Justice' 795; Paulus, 'International Adjudication' 218.

[19] Venzke, *How Interpretation Makes International Law* 135, referring to 'Project on International Courts and Tribunals', www.pict.pcti.org (accessed 15 May 2013).

[20] Alter, *The New Terrain of International Law* 70–6.

[21] Friedmann, 'The Changing Dimensions of International Law' 1147.

[22] Cohen, 'International Law's Erie Moment' 257. At the centre of his attention is the nature of the law which he describes as shifting from diplomatic to judicial. Yet, one could very well argue that this shift has even more implications.

[23] Dupuy, 'The Danger of Fragmentation or Unification of the International Legal System and the International Court of Justice' 795; Alford, 'The Proliferation of International Courts and Tribunals'; Buergenthal, 'Proliferation of International Courts and Tribunals'.

[24] Dupuy, 'The Danger of Fragmentation or Unification of the International Legal System and the International Court of Justice' 796; Nolte, 'Introduction' 1.

[25] Oellers-Frahm, 'Multiplication of International Courts and Tribunals and Conflicting Jurisdiction – Problems and Possible Solutions' 78ff; Dupuy, 'The Danger of Fragmentation or Unification of the International Legal System and the International Court of Justice' 796; Buergenthal, 'Proliferation of International Courts and Tribunals' 272.

courts to overstretch their competence, ability, legitimacy and expertise. One of the most pressing questions in this context will be how to rebalance theoretically as well as practically the relationship between states, judicial mechanisms and other actors. If there is an increasing body of judicial decisions, the likelihood increases that judicial decisions are overturned. In other words, if there is a tendency towards more decision-making there will be more instances to re-evaluate previous decisions. This could explain or substantiate the 'trend towards evolutive interpretation':[26] if courts like the ECtHR have to deal with an increasing amount of cases, they will have to revisit and adapt their jurisprudence: The fact that transsexuals had no right to have their birth certificate be corrected in 1986[27] does not mean that the same has to apply in 2003.[28] If there is an increasing number of courts dealing with similar issues, this might result in competing interpretations of the very same issue or even case.[29] Another explanation for the 'trend towards evolutive interpretation' is that aging treaties, many of which stem from the last century or, more precisely, the last millennium, might also increase the need for reinterpretation.

The changing structure of international law comes about as it is viewed and practised from a completely different perspective: if international legal argument is made not only in diplomatic lounges but also in the courtroom, this shapes the conduct of actors but also the content of law.[30] At high-level diplomatic discussions, the law is sometimes left in a fuzzy state for the sake of achieving agreement. Not all deliberations are accessible for the general public. Textbook authors can then only guess whether and how the agreed conduct could be explained legally. Before a court, on the other hand, decisions must be reached. What is even more significant for this study is that arguments before a court are transparent, and there is a real discussion between the parties and a response by the

[26] For that phrase and the general trend, see Nolte, 'Between Contemporaneous and Evolutive Interpretation' 1679.

[27] *Rees* v. *the United Kingdom* (Plenary) (1986) Series A no. 106 App. no. 9532/81 [38–47].

[28] *Christine Goodwin* v. *the United Kingdom* (GC) ECHR 2002-VI App. no. 28957/95 [71–93].

[29] Interesting examples are mentioned by Rheinisch, 'The Proliferation of International Dispute Settlement Mechanisms' 114.

[30] Cohen, 'International Law's Erie Moment' 271; for a more cautious approach on judicialisation, see Kingsburry, 'International Courts: Uneven Judicialisation in Global Order'. For an assessment of the judicialisation of international law on national law, see Alter, *The New Terrain of International Law*.

court. The pattern of argumentation before and of courts is more stable as compared to arbitral tribunals. Quantitatively, court decisions might constitute only a small part of all interpretations.[31] But qualitatively, there is no better context to study the 'art of interpretation'.[32] So there is a real need to examine court practice in the wake of its 'explosion'; at the same time, such practice also provides better material for the study of changing interpretations. Before ruminating the intricate problems of interpretative method, we have to know what evolutive interpretation actually means.

1.3. Interpretation

1.3.1 What interpretation is

To define interpretation is very easy and very difficult at the same time. It is the aim of this section to give a workable definition of interpretation representing what lawyers do when they interpret and at the same time to provide a basic model of interpretation that is open to incorporate different insights from different theoretical currents and disciplines. It is first important to understand that the topic of interpretation is relevant in many contexts. Texts, pictures, gestures, actions, films, objects are interpreted.[33] We can potentially interpret everything we sense in one way or another. In some academic disciplines, interpretation has a special importance:[34] a pianist as well as a musicologist might interpret Beethoven's 'Für Elise',[35] a priest and a scholar of theology a text from the Bible. Or, as Hans Kelsen has termed it, '[o]ne interprets the Bible as well as Shakespeare, primitive paintings as well as Goya'.[36] This study focuses on lawyers and legal texts. The interpretation of texts is a great part of what lawyers do in their professional life. Lawyers are familiar with what legal interpretation is. Unsurprisingly, legal academia often

[31] Rosenne, 'Conceptualism as a Guide to Treaty Interpretation' 417; Gardiner, *Treaty Interpretation* 110.
[32] Waibel, 'Demystifying the Art of Interpretation' 572.
[33] For a similar introduction, see Klabbers, 'Virtuous Interpretation' 17.
[34] For an account comparing legal interpretation with interpretation in other disciplines, see Greenwalt, *Legal Interpretation*.
[35] Bagatelle No. 25 in A minor (WoO 59 and Bia 515).
[36] Kelsen, *Legal Technique in International Law: A Textual Critique of the League Covenant* 12.

conveys a clear picture of what interpretation really is. Interpretation relates to the Latin expression *pretium*, which translates as meaning, price or value.[37] Therefore, interpretation could be explained as the activity of assessing, pricing or evaluating. In the legal context, it is mostly defined as the attribution of meaning to a set of signs.[38]

Since it is not the aim to give an all-encompassing and full account of all the problems of interpretation, it will suffice to focus on the context we are actually dealing with, that is, proceedings before and decisions of international courts. When international courts interpret a provision, they do it in the context of deciding a dispute and dealing with rival claims. The parties to a case disagree about the meaning of a provision or individual words in it. In such situations, those claims are based on texts, and the court in question has to choose between different readings of those texts. In the justification of their decision, courts frame their argument by basically replicating the Aristotelian deductive logic: They look at the text, rephrase the decisive words to define them more precisely and compare their elaboration of the text to the facts of the case.[39] Whether the deductive logic can[40] or cannot[41] be upheld in the light of today's theoretical insights is not of central importance. The process of handing down a decision is not envisaged to replicate the epistemological process.[42] It is rather a restatement of the result the interpreter arrived at, it is an activity or a social practice of courts. They communicate how they think a text of a treaty determines real world problems. In conclusion, when lawyers interpret, they circumscribe a legal text in different words to make it more comprehensible and to prepare the application of the text and they present arguments for their reading of the text.

While it is easy to make this observation, it is much harder to say what actually happens when a human being reads a legal text and to understand and communicate whether and how the text aims to shape

[37] Tammelo, *Treaty Interpretation and Practical Reason* 5. Kolb, *Interprétation et création du droit international* 27–8.

[38] Wróblewski, 'Legal Language and Legal Interpretation' 243; Herdegen, 'Interpretation in International Law' [1]; Remy, 'Techniques interpretatives et systemes de droit' 329; Villiger, 'The Rules on Interpretation: Misgivings, Misunderstandings, Miscarriage? The "Crucible" Intended by the International Law Commission' 106.

[39] An accessible explanation and defence of deductive reasoning is offered by MacCormick, *Rhetoric and the Rule of Law* 32ff.

[40] Von Bogdandy and Venzke, 'Beyond Dispute' 986. They stress the justificatory function of deductive reasoning.

[41] For a general critique of syllogistic logic and an alternative account, see Toulmin, *The Uses of Argument* 100–5.

[42] Von Bogdandy and Venzke, 'Beyond Dispute' 986.

the conduct of human beings. The question what meaning actually is, is disputed in many academic disciplines such as the philosophy of language, theology, linguistics, literary studies or cognitive sciences. Most of the disagreements circle around the question of the nature of meaning and its relation to the process of using language. In literary science, a manifest dispute over the right aim of interpretation can be witnessed, in which some favour the intention of the author as the aim of interpretation while others proclaim the 'death of the author'[43] and that the meaning is dependent upon the reader or the interpretative community[44] he or she belongs to. An important stream of the philosophy of language aimed at representing language in an abstract way with logical signs, while another influential current thinks of utterances as actions and tries to derive consequences from this.[45] Linguists have built upon those theories to develop several practical models of the use of language in general and meaning in particular.

All disciplines and areas have made significant progress and gained important insights, particularly in the twentieth century. Some groundbreaking theories in the philosophy of languages starting from the early twentieth century have been very productive and led to the rethinking of many problems. Yet, one should be mindful that the topic of language and communication is so complex that Alland might be right in his scepticism about whether any theory can really explain the whole process sufficiently.[46] Until very recently, it was also hard to test those theories apart from their internal consistency and their appropriateness in relation to the obvious features of language. Even though there are many promising advances in cognitive sciences, the theoretical riddles have not been solved either, so that any researcher writing about interpretation has to be mindful of the remaining riddles. One way of avoiding this uncertainty is to ignore the insights from other disciplines. Another is to take sides and to assume that one voice in the discourse is right and to spell out what would be true if the assumption was right. The present study tries to find a middle ground in many respects. This consists of focusing on a legal problem and the way lawyers deal with it but still being open for the insights from other disciplines. These insights are to be included in a way appreciating the explanatory potential of

[43] Barthes, 'Death of the Author'. [44] Fish, 'Is There a Text in This Class'.
[45] For a good overview, see Lycan, *Philosophy of Language*; Martinich and Sosa (eds.), *The Philosophy of Language*.
[46] Alland, 'L'Interprétation de droit international public' 54.