The Effect of Subsequent Practice on the European Convention on Human Rights: Considerations from a General International Law Perspective

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1. Introduction

Almost 200 years ago – in 1816 – Thomas Jefferson wrote: 'laws and institutions must go hand in hand with the progress of the human mind'.[1] According to him requiring society to remain ever under the same rules would be tantamount to asking a man to wear the same coat which fitted him when a boy. Though the European Convention on Human Rights ('ECHR')[2] only claims a 67 year-old history, the question to what extent the Convention is able – in Jefferson's terms – *to go hand in hand with progress of human mind* has been subject to debate for quite some time now.[3] On what basis can the meaning of a treaty legitimately be advanced? What role do Contracting States play in this endeavour? Can they advance or even modify the treaty after its conclusion by way of State practice?

To answer these questions two competing considerations come to mind: On the one hand, the obligations under the Convention are undertaken by States. Their consent provides the source of these obligations. As the authors of the Convention, they remain competent to modify it, arguably even by means of practice. On the other hand, the specific nature of the Convention as a human rights instrument solicits a cautious approach.[4] Seen from this perspective it is debatable whether and to what extent State practice can be a legitimate source of treaty interpretation.[5] Since it is the very object of human rights protection to restrain State conduct, States cannot overrule the guarantees set out in the Convention simply by way of practice.

The European Court of Human Rights ('ECtHR') takes a pragmatic approach to this dilemma when it considers State practice. It acknowledges the relevance of State practice when it engages in 'dynamic interpretation' of substantive rights.[6] In this context, State practice is used to advance the protection of rights so that it does not compete but rather accords with the object of the Convention. However, this approach has not gone unchallenged. Some authors

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[1] Letter from Thomas Jefferson to Samuel Kercheval (12 July 1816).

[2] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (1953).

[3] See eg Rudolf Bernhardt, 'Rechtsfortbildung durch den Europäischen Gerichtshof für Menschenrechte' in S Breitenmoser, B Ehrenzeller, M Sassòli, W Stoffel and B Wagner Pfeifer (eds), *Human Rights, Democracy and the Rule of Law: Liber amicorum Luzius Wildhaber* (Nomos 2007), 91-101; George Letsas, 'The ECHR as a living instrument: its meaning and legitimacy' in Andreas Føllesdal, Birgit Peters and Geir Ulfstein (eds), *Constituting Europe – The European Court of Human Rights in a National, European and Global Context* (CUP 2013) 106; Daniel Moeckli and Nigel D White (n 3).

[4] For a value-based approach to the interpretation of the ECHR see George Letsas, 'Strasbourg's Interpretive Ethic: Lessons for the International Lawyer' (2010) 21 EJIL 509-541.

[5] For the limited role of state consent and the special value of "non-uniform practice" und "non-binding rules" as supplementary means of interpretation for the ECHR in accordance with Art. 31 VCLT see Daniel Moeckli and Nigel D White (n 3).

[6] *Tyrer v. the United Kingdom*, 25 April 1978, para 31, Series A no. 26. The Court refused to apply the living instrument approach in *Banković and Others v. Belgium and Others* (dec.) [GC], no. 52207/99, paras 64-65, ECHR 2001-XII. For a critique of this narrow application of the living instrument approach see Eirik Bjorge, 'What Is Living and What Is Dead in the European Convention on Human Rights? A Comment on Hassan v. United Kingdom' (2015) 15 QIL 23, 29.

have criticized the Court's dynamic interpretation for the lack of methodological consistency and for not being subject to democratic accountability in the member States if it cannot be traced back to sufficient relevant state practice.[7] The issue becomes even more controversial in cases where reference to State practice leads to a lower level of protection. For example, in *Hassan v UK*[8] State practice became relevant when the Court had to determine whether States are relieved from a formal derogation in extraterritorial military missions.[9] The Court relied on State practice in order to hold that Contracting States who detain persons on the basis of the Third or Fourth Geneva Convention during an international armed conflict do not need to formally derogate from article 5 for such detention.[10] However, this holding did not go unchallenged. In a partial dissent, Judges Spano, Bianku, Nicolaou and Kalaydjeieva questioned whether State practice was sufficiently consolidated ('common to all Parties') to warrant this potentially modifying reading of the Covenant.[11]

The discussion among the judges shows that this is an area of international law, which continues to engage the Court. While State practice has traditionally played some role in the interpretation of the Convention, such as in the well-known Tyrer case[12], the methodology applied by the Court to determine under what circumstance and to what extent State practice is able to affect the scope and meaning of the Convention remains uncertain. How much State practice is needed in order to sustain an evolving interpretation of the Convention? Is it only relevant if it is common and agreed by all Contracting States? Can State practice lead to a lowering of the Convention standards? Do the same standards apply irrespective of whether practice relates to substantive or procedural matters?

Most attention by literature has been devoted so far to the Court's dynamic interpretation of substantive rights whereas the role of state practice for formal issues has attracted less interest by academia.[13] The following contribution considers state practice more comprehensively and seeks to explain its normative relevance for different means of interpretation. At the same time, it concentrates exclusively on the relevance of state practice for the interpretation of the

[7] Daniel Moeckli and Nigel White argue that the legitimacy of the ECtHR's evolutive interpretation cannot draw from the availability of a democratic corrective as in the case of constitutional interpretation by domestic constitutional courts but only from the consent of as many States parties as possible: Daniel Moeckli and Nigel D White (n 3). Therefore the authors demand at least a detailed explanation of the 'living instrument' approach backed up by evidence rather than mere reference to the *Tyrer* judgment.

[8] *Hassan v. the United Kingdom* [GC], no. 29750/09, ECHR 2014.

[9] For a critical assessment of the Court's approach in this case, see e.g. Luigi Crema, 'Subsequent Practice in Hassan v. United Kingdom: When Things Seem to Go Wrong in the Life of a Living Instrument' (2015) 15 QIL 3, 10; Eirik Bjorge (n 6), 23, 25. See also Matthias Lippold, 'Between Humanization and Humanitarization? Detention in Armed Conflicts and the European Convention on Human Rights' (2016) ZaöRV 2016 53.

[10] *Ibid.*, para 101.

[11] Partly Dissenting Opinion of Judge Spano joined by Judges Nicolaou, Bianku and Kalaydjieva, *Hassan v. the United Kingdom* (n 8), para 13.

[12] ECHR, *Tyrer v. the United Kingdom* (n 6) para 31. See also e.g. *Marckx v. Belgium*, 13 June 1979, para 41, Series A no. 31; *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, para 85, ECHR 2002-VI; *Öcalan v. Turkey* [GC], no. 46221/99, para 163, ECHR 2005-IV; *Demir and Baykara v. Turkey* [GC], no. 34503/97, paras 65 – 86, ECHR 2008. For further details see Geir Ulfstein, 'Evolutive Interpretation in the Light of Other International Instruments: Law and Legitimacy' in this volume.

[13] Eirik Bjorge, *The Evolutionary Interpretation of Treaties* (OUP 2014); David McGrogan, 'On the Interpretation of Human Rights Treaties and Subsequent Practice' (2014) 32 NQHR 347-378; George Letsas, 'The ECHR as a living instrument: its meaning and legitimacy' in Andreas Føllesdal, Birgit Peters and Geir Ulfstein (eds), *Constituting Europe – The European Court of Human Rights in a National, European and Global Context* (CUP 2013) 106; Daniel Moeckli and Nigel D White (n 3).

European Convention rather than on the general issue of dynamic interpretation which also involves elements other than state practice.[14]

In an effort to clarify the area of treaty interpretation, which is informed by State, practice the contribution turns to the recent work of the International Law Commission ('ILC') on 'Subsequent agreements and subsequent practice in relation to interpretation of treaties'. [15] Based on a comprehensive study of international jurisprudence and in an effort to delineate a general methodology the Commission is adopting draft conclusions on the role of subsequent agreements and practice in treaty interpretation.[16] The study offers a frame under which the European human rights jurisprudence can be systematically analysed.

The contribution outlines the work of the International Law Commission and compares it to the jurisprudence of the European Court of Human Rights. After setting out the normative framework for the interpretation of the European Convention, the second part distinguishes between the different means of interpretation and describes to what extent subsequent practice may become relevant respectively. In a third step, the question whether the European Convention can be modified is considered.

Since the ultimate goal of this contribution is to specify the preconditions under which subsequent State practice can be legitimately considered in human rights treaty interpretation, the fourth part develops a general theoretical framework, which rationalizes the normative value of subsequent practice in accordance with its respective function and sets out the relevant standards for the consideration of State practice. It draws from the previous analysis and places the requirements for subsequent practice on a normative scale. The final part of the contribution turns to the broader question of whether human rights jurisprudence follows its own rules of interpretation or can be accommodated within the realms of general international law.[17] It describes international law as a matrix, which draws the outer limits for treaty interpretation and at the same time, allows for sufficient flexibility to accommodate the specific nature of human rights law within this perimeter. From this perspective, subsequent practice can serve as a catalyst for the advancement of human rights without compromising the legitimate value of treaty interpretation.

2. State Practice and Treaty Interpretation:

a) Normative Framework for Interpretation

In order to determine the normative value of State practice for the interpretation of the European Convention of Human Rights we need to consider the relevant rules of general international law. The ILC study illustrates that as a common point of reference all

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[14] See Bianchi who considers subsequent practice as one tool amongst others that may lead to changes in the law over time. Andrea Bianchi, 'Law, Time, and Change: The Self-Regulatory Function of Subsequent Practice' in Georg Nolte (ed.), *Treaties and Subsequent Practice* (OUP 2013) 140. For the relevance of international instruments for dynamic interpretation see Geir Ulfstein (n 12).

[15] Georg Nolte, 'Subsequent Treaty Practice: The Work of the International Law Commission' in A Reinisch, M E Footer and C Binder (eds), *International Law and… Select Proceedings of the European Society of International Law* (Volume 5, Hart Publishing 2016) 219-225; Georg Nolte, 'Third report on subsequent agreements and subsequent practice in relation to the interpretation of treaties' UN Doc A/CN.4/683 A/CN.4/683; Georg Nolte, 'Fourth report on subsequent agreements and subsequent practice in relation to the interpretation of treaties' UN Doc A/CN.4/694 A/CN.4/694.

[16] See on the latest work ILC, 'Report of the International Law Commission on the Work of its 68th Session' (2 May – 10 June and 4 July – 12 August 2016) UN Doc A/71/10, 118-240.

[17] For the issue of constitutional interpretation, see Ineta Ziemele, 'Custom and European Consensus', in this volume.

international courts including those interpreting international human rights instruments consider article 31 of the Vienna Convention on the Law of Treaties ('VCLT') as the basis for treaty interpretation.[18] The European Court of Human Rights recognized the relevance of the VCLT already in 1975 in *Golder v UK* where it held with respect to treaty interpretation:

> The Court (…) should be guided by Articles 31 to 33 of the Vienna Convention of 23 May 1969 on the Law of Treaties. That Convention has not yet entered into force and it specifies, at Article 4, that it will not be retroactive, but its Articles 31 to 33 enunciate in essence generally accepted principles of international law to which the Court has already referred on occasion.[19]

The UN Human Rights Committee ('HRC') shares this approach.[20] In reviewing the International Covenant on Civil and Political Rights it considers that 'as required by the Vienna Convention on the Law of Treaties, a treaty should be interpreted in good faith and 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'.[21]

Despite this common ground for treaty interpretation, the ILC study reveals that there are considerable differences in the application of articles 31 to 33 VCLT.[22] The comparison of the

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[18] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331; **ICJ**: *Arbitral Award of July 1989 (Guinea-Bissau v Senegal)* (Judgment) [1991] ICJ Rep 53, para 48; *Land, Island and Maritime Frontier Dispute (El Salvador v Honduras, Nicaragua intervening)* (Judgment) [1992] ICJ Rep 351, paras 373, 376; *Application of the Interim Accord of 13 September 1995 (Macedonia v Greece)* [2011] ICJ Rep 644, para 91; **ECtHR**: *Golder v. the United Kingdom*, 21 February 1975, para 30, Series A no 18; *Mamatkulov and Askarov v. Turkey* [GC], nos. 46827/99 and 46951/99, paras 111, 123, ECHR 2005-I; *Hassan v. the United Kingdom* (n 8), para 100; **HRC**: *Alberta Union v Canada* (1986) 2 Selected Decisions of the Human Rights Committee ('HRC SD') 34, para 6.3; *Setelich v Uruguay* (1981) 1 HRC SD 101, para 6.3; **ITLOS**: *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area* (Advisory Opinion of 1 February 2011) 2011 ITLOS Reports 10, paras 57-58; **ICC**: *Prosecutor v Lubanga Dyilo* (Decision on the Final System of Disclosure and the Establishment of a Timetable) ICC-01/04-01/06-102 (15 May 2006) Annex I, para 1; *Situation in the Democratic Republic of the Congo* (Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal) ICC-01/04-168 (13 July 2006), paras 6, 33; **WTO DSB**: WTO, *Japan: Alcoholic Beverages II - Report of the Appellate Body* (4 October 1996) WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, section D; **ECJ**: Case C-386/08 *Brita GmbH v Hauptzollamt Hamburg-Hafen* [2010] ECR I-01289, paras 40-43. On the jurisprudence of international courts and tribunals regarding art 31 VCLT see eg ILC, 'First Report on Subsequent Agreements and Subsequent Practice in Relation to Treaty Interpretation' (13 March 2013) UN Doc A/CN.4/660, paras 8ff; For evolutive interpretation see also eg Pierre-Marie Dupuy, 'Evolutionary Interpretation of Treaties' in Enzo Cannizzaro (ed), *The Law of Treaties Beyond the Vienna Convention* (OUP 2011) 123; Osamu Inagaki, 'Evolutionary Interpretation of Treaties Re-examined: The Two-Stage Reasoning' (2015) 22 [2-3] Journal of International Cooperation Studies 127; Julien Arato, 'Subsequent Practice and Evolutive Interpretation: Techniques of Treaty Interpretation over Time and Their Diverse Consequences' (2010) 9 J.Int'l L.& Prac. 443.

[19] *Golder v. the United Kingdom* (n 18), para 29. See also Geir Ulfstein (n 12); Sorel and Boré Eveno, Art. 31 (3), in *Corten and Klein, VCLT - A Commentary* 827-829; Sean D Murphy, 'The Relevance of Subsequent Agreement and Subsequent Practice for the Interpretation of Treaties' in Nolte (ed), *Treaties and Subsequent Practice* (OUP 2013) 82, 87 f.; Alexander Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (OUP 2008) 362.

[20] See Daniel Moeckli and Nigel D White (n 3). Arguing that the Human Rights Committee favors teleological effectiveness over original intent: Başak Çali, 'Specialized Rules of Treaty Interpretation: Human Rights', in Duncan B Hollis (ed), *The Oxford Guide to Treaties* (OUP 2012) 539 f.

[21] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171; *Judge v Canada* (2003) 8 HRC SD 85, para 10.4. See also Kerstin Mechlem, 'Treaty Bodies and the Interpretation of Human Rights' (2009) 42 Vanderbilt Journal of Transnational Law905.

[22] This does not surprise given the differences between textualist, intentionalist and telological approaches, which informed the debate in the drafting of artficle 31 in Vienna. See Mark E Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhoff 2009) 421-23.

European Court of Human Rights with the WTO Appellate Body shows that, while both affirm article 31 VCLT as a general rule, the former emphasizes the object and purpose in its interpretation whereas the latter has been described as more text-oriented.[23] For example, the WTO Appellate Body engages in a detailed analysis of the ordinary meaning of treaty terms referring to dictionaries, such as the Concise Oxford English Dictionary and Black's Law Dictionary, in order to determine the meaning of a treaty provision.[24] The European Court of Human Right, on the other hand, gives considerable weight to the purpose, as evidenced, for example, in *Soering v UK* when the Court had to determine whether the extradition of Jens Soering to Virginia where he faced the risk of exposure to the 'death row phenomenon' amounted to inhuman or degrading treatment in violation of Art. 3 ECHR. The Court held that:

> [I]n interpreting the Convention regard must be had to its special character as a treaty for the collective enforcement of human rights and fundamental freedoms (…). Thus, the object and purpose of the Convention as an instrument for the protection of individual human beings require that its provisions be interpreted and applied so as to make its safeguards practical and effective.[25]

The ILC does not give preference to either method of interpretation.[26] Instead, it is the combination of textual, teleological, contextual and other modes of interpretation, which makes it a single combined operation.[27] This operation places appropriate emphasis on the various means of interpretation outlined in articles 31 and 32. The term 'appropriate' indicates that the application of these means of interpretation depends on each treaty and case.[28] Therefore, the weight of a particular means may vary from treaty to treaty.[29] Nevertheless, despite these variances the International Law Commission after some debate and in an effort to preserve the unity of international law decided not to refer to the nature of a treaty.[30] Its approach is based on the understanding that articles 31 and 32 VCLT provide for the general framework, which can be applied with some flexibility to various treaties. Different approaches to treaty interpretation can be accommodated within this framework.[31] This reading of the Vienna Convention also has implications for the European Court of Human

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[23] ILC, 'Report of the International Law Commission on the Work of its 63th Session' (26 April – 12 August 2011) UN Doc A/66/10, para 344.

[24] See eg WTO, *Brazil: Export Financing Programme for Aircraft, Recourse by Canada to Article 21.5 of the DSU - Report of the Appellate Body* (21 July 2000) WT/DS46/AB/RW, para 45.

[25] *Soering v. the United Kingdom*, (1989) Series A no 161, para 87. For the particular nature of the European Convention see also *Mamatkulov and Askarov v. Turkey* (n 18), para 111.

[26] According to the ILC there is no priority of one over other means of interpretation,; ILC, 'Report of the International Law Commission on the Work of its 68th Session' (2 May – 10 June and 4 July – 12 August 2016) UN Doc A/71/10, Draft Commentary Conclusion no 2, para 13.

[27] ILC, 'Report of the International Law Commission on the Work of its 68th Session' (2 May – 10 June and 4 July – 12 August 2016) UN Doc A/71/10, Draft Commentary Conclusion no 2, para 5. See also *Golder v. the United Kingdom* (n 18), para 30: unity, combined operation, same footing of the various elements of interpretation; *Banković and Others v. Belgium and Others* (n 6), para 56, ECHR 2001-XII; *Loizidou v Turkey* (preliminary objections), 23 March 1995, para 89, Series A no. 310.

[28] Çali argues that the European Convention requires a flexible application of Art. 31 VCLT and solicits an interpretation guided by the principle of effectivity. Başak Çali (n 20) 525-548.

[29] ILC, 'Report of the ILC on the Work of its 68th Session'(2 May – 10 June and 4 July – 12 August 2016) UN Doc A/71/10; Draft Commentary Conclusion no 2, para 15; ILC, 'First Report on Subsequent Agreements and Subsequent Practice' (n 18) Draft Conclusion no 1(2).

[30] ILC, 'Report of the International Law Commission on the Work of its 68th Session' (2 May – 10 June and 4 July – 12 August 2016) UN Doc A/71/10, Draft Commentary Conclusion no 1, para 16. For the discussion see ILC, 'Report of the ILC on the Work of its 65th Session' Draft Commentary Conclusion no 1, para 16.

[31] See Başak Çali (n 20) 525.

Rights.[32] It gives the Court enough room to pursue its teleological approach provided that it does not loose sight of the equal value of textual and contextual analysis.

b) Dynamics of Treaty Interpretation

As a common point of reference article 31 VCLT is relevant for the question whether the meaning of a treaty can evolve over time under general international law.[33] The ILC does not take a position on the appropriateness of an evolutive approach to treaty interpretation in general.[34] The draft conclusions neither refer to terms such as 'dynamic interpretation' nor do they describe treaties as 'living instruments'. Instead, the Commission states a need for caution.[35] Any evolutive interpretation of the meaning of a term must, according to the ILC, result from the ordinary process of treaty interpretation.[36] It requires a presumed intention of the States parties.[37] Whether a treaty was intended to be capable of evolving must be established through the various means of interpretation recognized in articles 31 and 32.[38] Subsequent agreements and practice may be relevant for this analysis according to the draft conclusions.[39]

While this approach may serve as a theoretical ground for evolutive interpretation, in practice, the European Court of Human Rights has never engaged in a detailed examination of the intention of the Contracting States in order to establish a genuine agreement with respect to evolutive interpretation.[40] In *Tyrer v UK,* the Court simply held that 'the Convention is a living instrument which (…) must be interpreted in the light of present-day conditions'.[41] This

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[32] For the jurisprudence of the ECtHR see eg Mark E Villiger, 'Articles 31 and 32 of the Vienna Convention on the Law of Treaties in the Case-Law of the European Court of Human Rights' in Jürgen Bröhmer and others (eds), *Internationale Gemeinschaft und Menschenrechte - Festschrift für Georg Ress zum 70. Geburtstag* (Carl Heymanns 2005) 317.

[33] Taslim Olawale Elias, 'The Doctrine of Intertemporal Law' (1980) 45 AJIL 285; Ruth Higgins, 'Some Observations on the Inter-Temporal Rule in International Law' in Jerzy Makarczyk (ed), *Theory of International Law at the Threshold of the 21st Century* (Kluwer Law International 1996) 173, 174ff; Malgosia Fitzmaurice, 'Dynamic (Evolutive) Interpretation of Treaties, Part I' (2008) 21 Hague Y.B.Int'l L. 101; Giovanni Distefano, 'L' interprétation évolutive de la norme internationale' (2011) 115 [2] R.G.D.I.P. 373, 384, 389ff; Dupuy (n 18), para 123, 125ff; Ulf Linderfalk, *On the Interpretation of Treaties: The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties* (Springer 2007) 179-89; Richard Gardiner, *Treaty Interpretation* (OUP 2008) 252-56. See also eg *Island of Palmas Case (Netherlands v USA)* (Award by Arbitrator Huber) (1928) 2 UNRIAA 829, 845; *Arbitration regarding the Iron Rhine ("Ijzeren Rijn") Railway (Belgium v Netherlands)* (Award) (2005) 17 UNRIAA 35, para 81; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* (Advisory Opinion) [1971] ICJ Rep 16, para 53; ILC, 'Reports of the International Law Commission on the Second Part of its Seventeenth Session and its Eighteenth Session (3 January - 19 July 1966)' (1966) [2] U.N.Y.B.I.L.C. 220–21, para 11; ILC, Report of the Study Group on the Fragmentation of International Law, Finalized by Martti Koskenniemi' (13 April 2006) UN Doc A/CN.4/L.682, para 478; ILC, 'Reports of the International Law Commission on the Second Part of its Seventeenth Session and its Eighteenth Session (3 January - 19 July 1966)' (1966) [2] U.N.Y.B.I.L.C. 220–21, para 11.

[34] ILC, 'Report of the International Law Commission on the Work of its 68th Session' (2 May – 10 June and 4 July – 12 August 2016) UN Doc A/71/10, Draft Commentary Conclusion no 8, para 4.

[35] *Ibid.*, para 10.

[36] *Ibid.*, para 8.

[37] See also Eirik Bjorge, 'The Vienna Rules, Evolutionary Interpretation, and the Intentions of the Parties' in Andrea Bianchi, Daniel Peat and Matthew Windsor (eds), *Interpretation in International Law* (OUP 2015) 189, 203-04.

[38] ILC, 'Report of the ILC on the Work of its 68th Session' (2 May – 10 June and 4 July – 12 August 2016) UN Doc A/71/10 Draft Commentary Conclusion no 3, para 9.

[39] *Ibid.*, Draft Commentary Conclusion no 3.

[40] Inagaki (n 18) 139.

[41] Its interpretation of the term 'degrading punishment' was therefore influenced by 'the developments and commonly accepted standards in the penal policy of the member States of the Council of Europe'. See *Tyrer v.*

approach resembles the one applied by the UN Human Rights Committee, which also applies evolutive interpretation.[42] In *Judge v Canada,* the Committee recognized 'that the protection of human rights evolves' and considered that 'the Covenant should be interpreted as a living instrument and the rights protected under it should be applied in context and in the light of present–day conditions'.[43] It recognized that a 'review of the scope of application of the rights protected in the Covenant' may be required 'if there have been notable factual and legal developments and changes in international opinion in respect of the issue raised.'[44]

Both treaty bodies presume that human rights treaties are *intended* to be capable of evolving. A prominent example of evolutive interpretation is the recognition of the right to conscientious objection, which the Committee and the European Court of Human Rights initially denied and later recognized as the result of an evolutionary development. [45] In *Yoon and Choi v Republic of Korea,* the Human Rights Committee held that the understanding of article 18 of the Covenant, which guarantees the right to freedom of thought, conscience and religion 'evolves as that of any other guarantee of the Covenant over time in view of its text and purpose'. In this case, *Yeo-bum Yoon* and more than a hundred other authors, all citizens of the Republic of Korea, had been convicted for refusing to perform military service because of their beliefs as Jehovah's Witnesses. The Constitutional Court of Korea had held that the freedom of conscience as guaranteed in Article 19 of the Korean Constitution did not grant individuals a right to refuse military service. Hence, more than 700 conscientious objectors had been imprisoned for one and a half years. The authors brought their case to the Human Rights Committee claiming a violation of the right to freedom of conscience and religion under Art. 18 ICCPR. The Committee reversed its earlier jurisprudence holding that Article 8 ICCPR does not preclude a right of conscientious objection. Taking into account the evolving understanding of Art. 18 ICCPR it recognized that the provision provides protection against being forced to act against genuinely held religious belief.

The ECtHR followed this approach in *Bayatyan v Armenia*.[46] The author of this case had also refused to perform military service because of his beliefs as a Jehovah's Witness. His offer to to do alternative civil service was rejected by state authorities on the basis that there was no law providing for such service and Mr. *Bayatyan* was convicted for draft evasion and sentenced to imprisonment. When the case was brought to Strasbourg, the Court, different from the earlier jurisprudence of the European Commission of Human Rights, recognized a right to conscientious objection to military service as falling under Art. 9 ECHR, which guarantees the freedom of thought, conscience and religion. It explained its deviation from the earlier jurisprudence of the Commission *inter alia* with domestic legal changes of the Council of Europe member States. The Court did so out of the fear that 'a failure by the Court to maintain a dynamic and evolutive approach would risk rendering it a bar to reform or improvement'.[47] It is noteworthy that neither the European Court of Human Rights nor the

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the United Kingdom (n 6), para 31. See also Daniel Moeckli and Nigel D White (n 3); ILC, 'Report of the ILC on the Work of its 68th Session' (2 May – 10 June and 4 July – 12 August 2016) UN Doc A/71/10, Draft Commentary Conclusion no 8, para 14.

[42] *Kindler v Canada* (2003) 5 HRC SD 113, para 14.2; *Judge v Canada* (n 21), para 10.3; *Barrett and Sutcliffe v Jamaica* (1992) 4 HRC SD 71, para 8.4; *Simms v Jamaica* (1995) 5 HRC SD 18, para 6.5; *Kim Jong-Cheol v Republic of Korea* (2005) UN Doc CCPR/C/84/D/968/2001, para 8.3 (Committee member Wedgwood attached a dissenting opinion, criticizing the perspective of the majority as selective (at p 10)).

[43] *Judge v Canada* (n 21), paras 10.3, 10.7.

[44] *Ibid.*, para 10.3.

[45] *Yoon and Choi v Republic of Korea* (2007) 9 HRC SD 218, para 8.2.

[46] *Bayatyan v. Armenia* [GC], no. 23459/03, para 105, ECHR 2011.

[47] *Ibid*., para 98 with reference to *Vilho Eskelinen and others v Finland* [GC], no. 63235/00, para 98, ECHR 2007-II.

Human Rights Committee explained this evolutive interpretation on the basis of an agreement between the States parties to reinterpret the Convention or the Covenant but only on the basis of changing *domestic* perceptions.

Whereas this progress has not been linked directly to an explicit international state consent, evolutive interpretation can nevertheless be rationalized on the basis of article 31 VCLT.[48] It can be explained based on the object and purpose (aa), the text (bb) and context (cc) of the Convention. These rationales overlap to a certain extent as evidenced by the following overview.

aa) State practice in teleological interpretation

Progress follows in particular from the Convention's object and purpose as a living instrument.[49] The European Court in the conscientious objection case of Bayatyan v Armenia implicitly recognized this when it found that it had to have regard to the changing conditions in Contracting States in order to determine the scope of Art. 9 ECHR and respond to any emerging consensus as to the standards to be achieved because the Convention created a system for the protection of Human Rights.[50] In other words, the intention of the Contracting States to envisage the Convention as capable of evolving can be derived from its nature as a human rights instrument, which requires its ability to adapt to changing circumstances in order to keep human rights protection effective.[51] Arguably, by creating a supervisory organ like the European Court of Human Rights, Member States accepted this evolving judicial interpretation.[52] Accordingly, it is in the determination of the evolving meaning of a provision (not with respect to the intention of the Contracting States to render the treaty dynamic) that the Court considers subsequent practice. The Court has explained this approach with the nature of the Convention as 'a living instrument which (...) must be interpreted in the light of present-day conditions' and that 'the Court cannot but be influenced by the developments and commonly accepted standards in the penal policy of the member States of the Council of Europe in this field'.[53] Hence, when State practice, such as national legislation, becomes relevant for the determination of the current interpretation of the Convention it informs the *modality* of adjustment rather than its terms and conditions. The consent to the widening scope of the respective provisions derives already from the original consent to the Convention as a human rights instrument. In the case of *Bayatyan v Armenia* it was the adoption of a provision on the freedom of thought, conscience and religion followed by the increasing

[48] Bjorge argues that evolutionary interpretation is evolution intended by the parties. Eirik Bjorge, *The Evolutionary Interpretation of Treaties* (OUP 2014). According to Matscher, subsequent acceptance by States justifies evolutive interpretation under art. 31(3)(b) VCLT: Franz Matscher, 'Wie sich die 1950 in der EMRK festgeschriebenen Menschenrechte weiterentwickelt haben' in S Breitenmoser, B Ehrenzeller, M Sassòli, W Stoffel and B Wagner Pfeifer (eds), *Human Rights, Democracy and the Rule of Law: Liber amicorum Luzius Wildhaber* (Nomos 2007) 440-441. See also Irina Buga, 'A Critical Look at the Law of Treaties: Giving Recognition to Informal Means of Treaty Adaption' in C Ryngaert, E J Molenaar and S M H Nouwen (eds), *What's Wrong with International Law? Liber Amicorum A.H.A. Soons* (Brill Nijhoff 2015) 232, 240-242. Other authors have argued that evolutive interpretation can be explaned on the basis of 'ordinary meaning' and 'object and purpose' (article 31(1) VCLT) as well as 'relevant rules of international law' (article 31(3)(c) VCLT). Daniel Moeckli and Nigel D White (n 3).

[49] See eg *Christine Goodwin v. the United Kingdom* (n 12), para 74. The Grand Chamber held in *Demir and Baykara v. Turkey* that in the consideration of the object and purpose of the Convention provisions it also takes into account common domestic law standards of European States. See *Demir and Baykara v. Turkey* (n 12), para 76. See also Inagaki (n 18) 138-39. See also Geir Ulfstein (n 12).

[50] *Bayatyan v. Armenia* (n 46), para 102.

[51] See also Daniel Moeckli and Nigel D White (n 3).

[52] *Ibid.*

[53] See ECHR in *Tyrer v. the United Kingdom* (n 6), para 31.

acceptance of conscientious objection in CoE States which laid the basis for the relevant state consent.

bb) State practice in textual interpretation

Apart from the Convention's object and purpose, the Court can also rely on its text to justify an evolving interpretation. The adoption of generic terms[54], such as 'inhuman or degrading' in the text of Convention suggests that the Contracting States intended them to be receptive to evolving interpretation and to accommodate changes in the understanding of these terms.[55] As a result, State practice becomes relevant when the Court determines how a term needs to be interpreted nowadays. For example, in *Tyrer v UK* the Court had to evaluate whether corporal punishment is degrading. *Anthony M. Tyrer* had been convicted at the age of 15 by a local juvenile court on the Isle of Man for of an assault, which he had committed together with three others against an older pupil at his school. In accordance with the relevant legislation, he had been sentenced to three strokes of the birch. The ECtHR found that this corporal punishment constitutes degrading punishment in violation of Art. 3 ECHR. In its evaluation the Court considered the changing perception of what is degrading as manifested '(…) by the developments and commonly accepted standards in the penal policy of the member States of the Council of Europe in this field'[56] and therefore found judicial corporal punishment in violation of article 3.[57] A similar approach was taken in *Herrmann v Germany* where the evolving convergence of the domestic standards with regard to mandatory hunting had an impact on the Court's interpretation of article 1 of Protocol no 1.[58] In these cases, the Court could rely on the general wording of the treaty, the meaning of which was informed by subsequent state practice.

The jurisprudence of the Court thus demonstrates that State practice becomes relevant for the textual and teleological interpretation of the Convention. Against this backdrop, the question whether treaty interpretation by the European Court of Human Rights can be reconciled with general international law can be answered in the affirmative – provided, however, that evolutive interpretation is not framed as a separate means of interpretation, but as the result of a textual and teleological interpretation in accordance with article 31(1) VCLT.

cc) State practice in contextual interpretation

State practice may also become relevant under article 31(3) VCLT which provides that any subsequent practice in the application of a treaty shall be taken into account in treaty interpretation together with its context provided that this practice establishes the agreement of

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[54] See also the rationale applied by the ICJ with respect to 'generic' terms as warranting an evolutive interpretation in *Dispute regarding Navigational and Related Rights (Costa Rica v Nicaragua)* (Judgment) [2009] ICJ Rep 213, paras 64-71 concerning the term 'commerce'. See also *Legal Consequences for States of the Continued Presence of South Africa in Namibia* (n 33), para 53.

[55] For this approach in other fields of international law see *Gabčíkovo-Nagymaros Project (Hungary v Slovakia*) (Judgment) [1997] ICJ Rep 7, para 104 'formulation (…) designed to accommodate change'; *Navigational and Related Rights* (n 54), para 66. See also Dupuy (n 18), para 129-31.

[56] *Tyrer v. the United Kingdom* (n 6), para 31. See also *Marckx v. Belgium* (n 12), para 41; *Mazurek v. France* no. 34406/97, para 52, ECHR 2000-II, with reference to changed 'factual and temporal circumstances'.

[57] Arguably this is a matter of evolutive application rather than evolutive interpretation. See Marko Milanovic, 'The ICJ and Evolutionary Treaty Interpretation' (*EJIL: Talk!* 14 July 2009) <http://www.ejiltalk.org/the-icj-and-evolutionary-treaty-interpretation> accessed 4 August 2017. See also the Court in *Marckx v. Belgium* (n 12), para 41 where the Court stressed that the Convention must be interpreted in the light of present day conditions.

[58] *Herrmann v Germany* [GC], no. 9300/07, para 78, 26 June 2012 with reference to *Chapman v. the United Kingdom*[GC], no. 27238/95, para 70, ECHR 2001-I; *Bayatyan v. Armenia* (n 46), para 98. See also *Marckx v. Belgium* (n 12), para 41. In *VO v. France* [GC], no. 53924/00, para 84, ECHR 2004-VIII, however, the Court found no consensus on the nature and status of the embryo which could lead to an evolutive interpretation.

the parties regarding interpretation.[59] This requires a two-prong test: First there needs to be practice under a treaty, second, an agreement with respect to interpretation must be established. However, the Vienna Convention on the Law of Treaties does not specify how much practice is needed to establish an agreement.[60] It is therefore unclear how many States parties need to engage in this practice, how agreement can be established and whether State practice needs to be uniform.

The ILC Study, which is based on a detailed analysis of international jurisprudence by its Special Rapporteur Georg Nolte, reveals that exigencies vary.[61] For example, the WTO Appellate Body rigidly asks for a 'concordant, common and consistent' practice in order to satisfy article 31(3)(b) of the VCLT.[62] It does so in order to establish a pattern, which implies the agreement of the parties regarding the interpretation. Arguably, this rigid approach corresponds to the nature of trade agreements. They provide for reciprocal rights and obligations of States parties so that any changes require state consent.[63] However, the wording of article 31 does not suggest that agreement can be established only by way of a common practice.[64] Accordingly, the ILC clarifies in its draft conclusions that the number of parties actively engaging in subsequent practice may vary, if there is a common understanding regarding the interpretation of the treaty, which the parties are aware of and accept.[65] Silence can constitute acceptance when the circumstances call for a reaction.[66] There is no mention of concordant, common and consistent practice – as stipulated by the Appellate Body in *Japan: Alcoholic Beverages II* – in any of the ILC draft conclusions.

The European Court of Human Rights which typically refers to article 31(3)(b) VCLT when it determines its relationship to member States or deals with questions of general international law requires State practice to be *consistent*.[67] The Court has declined to adjust its interpretation of the Convention if State practice is insufficiently consolidated. An emerging consensus alone is not enough. An example is the judgment in *SH and others v Austria* where the court was asked to determine whether the prohibition to use donate sperm or ova for *in vitro* fertilization constitutes a discrimination in regard of the right to respect for private and

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[59] See David McGrogan (n 13) 347-378; Oliver Dörr, 'Article 31' in O Dörr and K Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (Springer 2012) 552-568; Jean-Marc Sorel and Valerie Bore-Eveno, 'Article 31' in O Corten and P Klein (eds), *Vienna Convention on the Law of Treaties: A Commentary* (OUP 2011) 825-829.

[60] For this issue see Gardiner (n 33), 239.

[61] Georg Nolte, 'Jurisprudence of the International Court of Justice and Arbitral Tribunals of Ad Hoc Jurisdiction Relating to Subsequent Agreements and Subsequent Practice - Introductory Report for the ILC Study Group on Treaties over Time' reprinted in Georg Nolte (ed), *Treaties and Subsequent Practice* (OUP 2013) 169, 190ff; ILC, 'First Report on Subsequent Agreements and Subsequent Practice' (n 18), para 92ff; ILC, 'Second Report on Subsequent Agreements and Subsequent Practice' (26 March 2014) UN Doc A/CN.4/671, para 42ff; Georg Nolte, 'Jurisprudence Under Special Regimes Relating to Subsequent Agreements and Subsequent Practice - Second Report for the ILC Study Group on Treaties over Time' reprinted in Nolte (ed), *op cit.*, 210, 247, 255ff, 266f, 278ff, 284f, 295, 305.

[62] WTO, *Japan: Alcoholic Beverages II* (n 18), section E.

[63] For the difference between contractual and law-making treaties see Daniel Moeckli and Nigel D White (n 3).

[64] For the practice of the ICJ see ILC, 'Report of the International Law Commission on the Work of its 68th Session' (2 May – 10 June and 4 July – 12 August 2016) UN Doc A/71/10, Draft Commentary Conclusion no 9, para 9 with reference to *Kasikili/Sedudu Island (Botswana v Namibia)* (Judgment) [1999] ICJ Rep 1045.

[65] ILC, 'Report of the International Law Commission on the Work of its 68th Session' (2 May – 10 June and 4 July – 12 August 2016) UN Doc A/71/10, Draft Commentary Conclusion no 10.

[66] *Ibid.*

[67] *Cruz Varas and others v. Sweden* 20 March 1991, para 100, Series A no 201; *Loizidou v. Turkey* (n 27), para 73; *Banković v. Belgium* (n 6), para 56. See also ILC, 'First Report on Subsequent Agreements and Subsequent Practice' (n 18), para 37. See *Al-Saadoon and Mufdhi v. the United Kingdom,* no. 61498/08, para 120, ECHR 2010; *Hassan v. the United Kingdom* (n 8), para 101 on the term 'consistent'.

family life. Though the Grand Chamber acknowledged 'a clear trend in the legislation of the Contracting States towards allowing gamete donation for the purpose of in vitro fertilisation, which reflects an emerging European consensus', this emerging consensus was not based on 'settled and long-standing principles established in the law of the member States but rather reflects a stage of development within a particularly dynamic field of law and does not decisively narrow the margin of appreciation of the State [under article 8 of the Convention]'.[68] Mere trends are thus insufficient to serve as a basis for contextual interpretation.

Nevertheless, the Court does not require that the practice is common to all Contracting States. For example, in *Loizidou v Turkey* the Court relied on the fact that 'almost all' of the parties to the Convention had accepted the competence of the Court to examine complaints without restrictions *ratione loci*.[69] The Applicant, a Cypriot national, complained that Turkish forces had prevented her since the occupation in 1974 from returning to Kyrenia, a city in northern Cyprus where she owned property.[70] The Turkish Government filed preliminary objections challenging the Court's jurisdiction. The Government relied on two earlier declarations placing territorial limitations upon the Court's jurisdiction and argued that it had not accepted the Court's competence to examine acts outside its metropolitan territory.[71] At the time, articles 25 and 46 ECHR required recognition of the Commission's and the Court's jurisdiction by the Respondent State. However, the Court found 'practically universal agreement' amongst the Contracting Parties that articles 25 and 46 ECHR did not permit any territorial or substantive restrictions.[72] This 'uniform and consistent State practice' led the Court to rebut the respondent Government's argument that the drafters had envisaged a different interpretation.[73] In other cases, the exigencies for State practice have been even less demanding and the Court in practice only required a number of Contracting States to be directly engaged in it.[74]

Since practice as an objective element is only one aspect of article 31(3)(b) VCLT, it is necessary to show also the agreement of those States parties who do not participate in the practice (voluntary element).[75] The ILC asks for a common understanding regarding the interpretation of the treaty, which *the parties are aware of and accept*.[76] According to the ILC, State parties must have taken a position regarding the interpretation of the treaty.[77]

The European Court of Human Rights, however, does not engage in a lengthy analysis to establish the agreement of all Contracting States.[78] Neither does it examine to what extent

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[68] *S.H. and others v. Austria* [GC], no. 57813/00, para 96, ECHR 2011.
[69] *Loizidou v. Turkey* (n 27), para 79.
[70] *Ibid.*, para 11.
[71] *Ibid.*, para 55.
[72] *Ibid.*, para 80.
[73] *Ibid.*, para 82.
[74] *Hassan v. the United Kingdom* (n 8), para 101.
[75] Gardiner (n 33) 236.
[76] ILC, 'Report of the ILC on the Work of its 68th Session' (2 May – 10 June and 4 July – 12 August 2016) UN Doc A/71/10, Draft Commentary Conclusion no 10, para 1.
According to the ILC States parties must have taken a position regarding the interpretation of the treaty. *Ibid* Draft Commentary Conclusion no 6, para 1.
[77] *Ibid.*, Draft Commentary Conclusion no 6, para 1.
[78] See eg *Soering v. the United Kingdom* (n 25), para 103. See also ILC, 'Report of the ILC on the Work of its 68th Session' (2 May – 10 June and 4 July – 12 August 2016) UN Doc A/71/10, Draft Commentary Conclusion no 6, para 14. In *Cruz Varas v. Sweden* the Court found that the practice of complying with the Court's interim measures was a matter of good faith-cooperation and not based on a 'belief that these indications gave rise to a binding obligation', *Cruz Varas v. Sweden* (n 67), para 100. See also Luigi Crema (n 9) 3, 10.

State practice is in the application of the Convention.[79] When it relies on article 31(3) it usually only refers to State practice without identifying a corresponding agreement between the parties.[80] Such agreement is usually presumed from practice.[81] For example in *Soering v UK,* the Court explained that subsequent practice in national penal policy could be taken as establishing State party agreement with respect to the death penalty.[82] In other words, if there is sufficient State practice, agreement is presumed even though the practice may not be specifically related to the Convention as an international legal instrument. Another example is the judgment in *Öcalan v Turkey* where the Court referred to the almost complete abolition of the death penalty in Europe without, however, considering whether this change in domestic penal policy was in fact motivated by the Convention.[83]

Though this analysis may appear to be at odds with the exigencies of article 31(3)(b) VCLT, there are valid reasons for this approach. In a system of multi-level human rights protection which is first and foremost directed at domestic implementation, it would be artificial to distinguish between domestic legislation on the one hand and the implementation of the Convention on the other hand or to maintain that a measure of protection is purely domestic and not in application of the Convention. There is a valid expectation that Council of Europe Members States are mindful of their obligations under the Convention when they legislate. Their domestic practice therefore can be presumed *bona fide* to reflect how they understand their multi-level human rights commitments.[84] Measures undertaken to protect human rights in domestic law are presumably also in application of the Convention unless there are indications to the contrary. In other words, agreement can generally be derived from practice in such cases.[85] This results from the Convention's particular character as a human rights instrument.

The ILC accepts this practice by pointing out that a position regarding the interpretation of a treaty may be inferred from the character of a treaty.[86] However, in order to presume the necessary agreement by the Contracting States it is necessary to show that State practice is sufficiently consistent and common in these instances. The above analysis of the European Court's jurisprudence shows that it requires more than an emerging consensus. Practice needs to be shared by a plurality of the States parties; it must be consistent in content and consolidated over time. If this is the case, State party agreement can be presumed.

dd) State practice as subsidiary means of interpretation

If State practice lacks the necessary agreement by all States or is insufficiently consistent and thus does not meet the threshold of article 31(3)(b) VCLT, it can still be relevant as a

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[79] ILC, 'First Report on Subsequent Agreements and Subsequent Practice' (n 18), para 97.
[80] *Ibid.*
[81] An exception is *Cruz Varas v. Sweden* in which the Court explained that the practice of complying with interim measures could not be explained as being based on a 'belief that these indications gave rise to a binding obligation' but where rather a matter of good faith co-operation with the Commission. *Cruz Varas v. Sweden* (n 67), para 100. Later in *Mamatkulov and Askarov v. Turkey* the Court referred instead to general principles of international law, the object and purpose of the Convention ('living instrument') and contextual arguments in order to find interim measures to be binding. see *Mamatkulov and Askarov v. Turkey* (n 18), paras 110-27.
[82] *Soering v. the United Kingdom* (n 25), para 103.
[83] *Öcalan v. Turkey* (n 12), para 163 with reference to para 195 of the Chamber judgment.
[84] See also ILC, 'Report of the ILC on the Work of its 68th Session' (2 May – 10 June and 4 July – 12 August 2016) UN Doc A/71/10 Draft Commentary Conclusion no 6, para 14.
[85] The case is different if practice relates to procedural issues, such as derogation, and leads to a lower level of protection. See Luigi Crema (n 9) 3, 10.
[86] See *ibid*.

subsidiary means of interpretation. As such, subsequent practice can contribute to the clarification of the meaning of a treaty if it remains within the limits of treaty interpretation.[87] This is why the European Court of Human Rights frequently refers to subsequent practice in order to confirm an interpretation.[88] One example is the reference by the Grand Chamber to the 'vast majority' of European States recognizing in principle the right of public servants to bargain collectively in *Demir and Baykara v Turkey*.[89] The Applicants were the president and a member of a Turkish trade union formed by civil servants.[90] This trade union entered into a collective agreement with a municipal council regulating all working conditions in 1993.[91] After the council failed to fulfil certain obligations, particularly financial ones, the trade union initiated civil proceedings.[92] Though the District Court acknowledged a lack of express statutory provisions in Turkish law recognizing a right for trade unions formed by civil servants to enter into collective agreements it held that this right could be derived from international agreements, in particular the ILO conventions, which were directly applicable in domestic law according to the Turkish constitution.[93] The Court of Cassation, however, overruled the lower court holding that the trade union had never gained legal personality because Turkish legislation did not permit civil servants to form trade unions.[94]

The European Court of Human Rights found a violation of the Convention. It recognized a right of civil servants to organise and form trade unions[95] and found support of its position 'in the practice of European States'.[96] At the same time, the Court maintained that the remaining exceptions in State practice from public official's right to bargain collectively in certain areas or categories of civil servants could be justified by particular circumstances.[97] It explained its final holding also by reference to international instruments.[98] This is in line with its usual jurisprudence in which the Court often relies on subsequent State practice not alone but also on international agreements in order to confirm a progressive reading of the Convention.

3. State Practice and Treaty Modification

When we consider the question to what extent State practice may have an impact on international treaties, interpretation in light of subsequent practice is only one aspect.[99] An additional and even more controversial issue is the question whether treaties may be modified by way of State practice.[100] It was controversially discussed already at the Vienna Conference

[87] ILC, 'First Report on Subsequent Agreements and Subsequent Practice' (n 18), para 107. See also ILC, 'Report of the International Law Commission on the Work of its 68th Session' (2 May – 10 June and 4 July – 12 August 2016) UN Doc A/71/10, Draft Commentary Conclusion no 2 para 4and no 7, para 2.
[88] See eg *Loizidou v. Turkey* (n 27), para 79.
[89] *Demir and Baykara v. Turkey* (n 12), para 52.
[90] *Ibid.*, para 14.
[91] *Ibid.*, para 16.
[92] *Ibid.*, para 17.
[93] *Ibid.*, para 21.
[94] *Ibid.*, para 29.
[95] *Ibid.*, para 97.
[96] *Ibid.*, para 98.
[97] *Ibid.*, para 52.
[98] *Ibid.*, paras 101ff. For this issue see Geir Ulfstein (n 12).
[99] See also Sean D Murphy (n 19) 82, 83ff.
[100] According to Mark Villiger, State Parties as the masters of a treaty are entitled to amend, extend or delete a text by means of State practice pursuant to art 31(3)(b) VCLT. See Villiger, *VCLT Commentary* (n 22) 429. But see Marcelo G Kohen, 'Keeping Subsequent Agreements and Practice in Their Right Limits' in Nolte (ed), *Treaties and Subsequent Practice* (n 19) 34, 36, 44. On this issue see also eg. Irina Buga, 'Subsequent Practice and Treaty Modification' in Dino Kritsiotis and Michael J Bowman (eds), *Conceptual and Contextual Perspectives on the Modern Law of Treaties* (CUP 2015) 13, and Irina Buga (n 48) 242-246. For the

where the originally proposed draft article 38 on the modification of treaties by subsequent practice was later withdrawn from the Convention.[101] The provision provided that a treaty 'may be modified by subsequent practice in the application of the treaty establishing the agreement of the parties to modify its provisions.'[102] In favour of the proposed article, the ILC cited an arbitration between France and the United States regarding a bilateral air transport services agreement.[103] The tribunal had recognized that the parties' subsequent practice was not merely a means of interpretation but a possible source of modification.[104] This holding was taken as indicating that the required agreement to any modification could in fact be established by subsequent practice.[105] Delegates at the Vienna Conference argued that sovereign States were in principle free to act as they wished and that agreement to modification did not need to be declared formally.[106] Other delegates, however, found it inappropriate to deal with the complex relationship of customary and treaty law in a convention on the law of treaties.[107] Since subsequent practice could be considered as a means of interpretation, the proposed draft article 38 was deemed unnecessary.[108] The main argument against the proposed rule was that any practice incompatible with a treaty generally constituted a violation rather than a new rule.[109] Practice itself seemed to be insufficient to legalize a new situation. Rather, the conclusion of a new agreement was required in order to comply with the principle of *pacta sunt servanda*.[110] In addition, several constitutional issues were raised because in some States the principle of formal parallelism required that treaty modifications followed the same procedure as the original text.[111] Modification by practice would give rise to unconstitutional modifications without parliamentary approval.[112] Low-level officials might even interpret treaties erroneously.[113] Delegates also argued that the draft article would deprive specific provisions for revision contained in many treaties of their meaning.[114] Finally, modification by subsequent practice raised issues of legal certainty and security.[115]

Given this controversy, it does not surprise that the ILC's approach remains cautious even today. There is not a single sentence in its draft conclusions, which would allow States to modify a treaty by way of State practice. Instead, draft conclusion no. 7(3) stipulates that the possibility of modifying a treaty by subsequent State practice has not been generally

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jurisprudence of the ICJ see ILC, 'Second Report on Subsequent Agreements and Subsequent Practice' (n 61), para 125 ff. *Nota bene*, modification is not always easy to distinguish from interpretation. For the distinction see Gerhard Hafner, 'Subsequent Agreements and Practice: Between Interpretation, Informal Modification, and Formal Amendment' in Nolte (ed), *Treaties and Subsequent Practice* (n 19) 105, 114.

[101] See ILC, Report of the of the International Law Commission on the Work of its 18th Session (4 May - 19 July 1966) UN Doc A/CN.4/191, 236; 'Summary Records of the Plenary Meetings and of the Meetings of the Committee of the Whole' UN Conference on the Law of Treaties (Vienna 26 March - 24 May 1968) (1969) UN Doc A/CONF.39/11, 207, 215. For the drafting history see Alexander Orakhelashvili (n 19) 356.

[102] Yearbook of the International Law Commission, 1966, Vol. II, 182.

[103] ILC, Report of the of the International Law Commission on the Work of its 18th Session (4 May - 19 July 1966) UN Doc A/CN.4/191, 236.

[104] *Ibid.*, 236.

[105] *Ibid.*, 236.

[106] 'Summary Records of the Plenary Meetings and of the Meetings of the Committee of the Whole' UN Conference on the Law of Treaties (Vienna 26 March - 24 May 1968) (1969) UN Doc A/CONF.39/11, 211.

[107] *Ibid.*, 207, 209 f.

[108] *Ibid.*, 207 f., 213.

[109] *Ibid.*, 208.

[110] *Ibid.*, 208, 210, 212 f.

[111] *Ibid.*, 208.

[112] *Ibid.*, 209.

[113] *Ibid.*, 211.

[114] *Ibid.*, 208 f.

[115] *Ibid.*, 208.

recognized and that the parties to a treaty, by a practice in the application of the treaty, presumably intend to interpret the treaty, not to amend or to modify it. According to the Special Rapporteur international jurisprudence suggests, however, that absent indications in the treaty to the contrary, agreed subsequent practice of the parties 'may lead' to limited treaty modification. Nevertheless, courts should try to consider State practice rather as an effort to interpret a treaty than to modify it.[116] Whether there is additional room for modification depends on the treaty and the provisions concerned.[117]

The European Court of Human Rights has not entirely ruled out the possibility of modification.[118] This issue became relevant when the Court considered the admissibility of the death penalty under the European Convention. In *Soering v UK* it indicated in a dictum that subsequent practice in national penal law could have the effect of abrogating the exception for the death penalty under article 2:

> Subsequent practice in national penal policy, in the form of a generalised abolition of capital punishment, could be taken as establishing the agreement of the Contracting States to abrogate the exception provided for under Article 2 § 1 (…) and hence to remove a textual limit on the scope for evolutive interpretation of Article 3 (…). However, Protocol No. 6 (…), as a subsequent written agreement, shows that the intention of the Contracting Parties as recently as 1983 was to adopt the normal method of amendment of the text in order to introduce a new obligation to abolish capital punishment in time of peace and, what is more, to do so by an optional instrument allowing each State to choose the moment when to undertake such an engagement. In these conditions, notwithstanding the special character of the Convention (…), Article 3 (…) cannot be interpreted as generally prohibiting the death penalty.[119]

Though the Court ultimately followed a cautious approach because of the Protocols amending the Convention, it indicated that in other cases textual limits could be overcome by means of subsequent State practice. This approach was later confirmed in *Al-Saadoon and Mufdhi v. the United Kingdom* despite the fact that the text usually provides a limit for evolutive interpretation.[120]

It was again confirmed in *Hassan v UK* with respect to a procedural issue when the Grand Chamber held in respect of article 31(3)(b) that consistent subsequent State practice 'could be taken as establishing agreement not only to interpret but even to modify the text of the Convention'.[121] The case was brought to the Court on behalf of an Iraqi national who had been arrested by British troops in Iraq and taken to a camp that was jointly operated by British and US-troops. The respondent State requested the Court to disapply its obligations under Article 5 or to interpret them in the light of powers of detention available to it under

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[116] ILC, 'Second Report on Subsequent Agreements and Subsequent Practice' (n 61), para 142.
[117] See also ILC, 'Report of the ILC on the Work of its 68th Session' (2 May – 10 June and 4 July – 12 August 2016) UN Doc A/71/10, Draft Commentary Conclusion no 7, para 35.
[118] In *Cruz Varas v. Sweden* (n 67), para 100, the Court indicated however: 'Subsequent practice could be taken as establishing the agreement of Contracting States regarding the interpretation of a Convention provision (see, mutatis mutandis, the above-mentioned *Soering* judgment, (…) and Article 31 § 3 (b) of the Vienna Convention of 23 May 1969 on the Law of Treaties) but not to create new rights and obligations which were not included in the Convention at the outset'. See also *Johnston and others v. Ireland*, 18 December 1986, para 53, Series A no. 112. See also Rudolf Bernhardt (n 3) 91-101.
[119] *Soering v. the United Kingdom* (n 25), para 103.
[120] *Al-Saadoon and Mufdhi v. the United Kingdom* (n 67), para 120.
[121] *Hassan v. the United Kingdom* (n 8), para 101.

international humanitarian law. The applicant disagreed, arguing that there had been no derogation in this case and that there could be no implied displacement of Convention rights.

The Court did not consider it harmful that the United Kingdom had not made a derogation. It noted that the practice of the High Contracting Parties was not to derogate from their obligations under Article 5 in order to detain persons on the basis of the Third and Fourth Geneva Conventions during international armed conflicts. No State had ever made a derogation in order to detain persons based on the Geneva Conventions during an international armed conflict abroad.[122] Consequently, the lack of a formal derogation did not prevent the Court from interpreting article 5 of the Convention in line with international humanitarian law.

While I do not take issue with the outcome in this case (for somewhat different substantive reasons), the question remains whether this holding can be based on article 31(3)(b).[123] Is it enough to consider practice by States or is it necessary to evaluate also, whether other Contracting States agree? Arguably, for the modification of a treaty, agreement amongst all Contracting States cannot simply be presumed from the practice of some States. Accordingly, the partly dissenting judges criticized the holding and questioned whether the State practice was sufficient to fulfil the criteria of concordant, common and consistent in order to modify the text of the Convention.[124]

I agree and would argue that while it is not necessary to find concordant, common and consistent practice in the context of textual, teleological or contextual interpretation the threshold for modification is higher if it leaves the realm of textual limits. Exigencies are particularly high in those cases in which State practice limits the substantive reach of the Convention.[125] If neither the text nor the purpose of the Convention provides a basis for a particular reading it becomes even more essential to back it up by way of agreement. In other words, for the modification of a treaty, it is insufficient to consider subsequent practice alone; it is also necessary to establish a corresponding *opinio juris*, comparable to customary international law. Accordingly, Judges Caflisch, Türmen and Kovler in their Joint Partly Dissenting Opinion in *Mamatkulov and Askarov v. Turkey* maintained: 'while the Court is entitled to interpret the provisions of the Convention it may not – by way of interpretation (…) – write new rules into the Convention, not even if there is a fairly widespread practice in the desired sense, as long as that practice is not uniform accompanied by a corresponding *opinio juris*'.[126]

4. Scaling Subsequent Practice

The analysis of the European Court of Human Rights' jurisprudence shows that subsequent practice is relevant for different aspects of treaty interpretation: as supplementary means of

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[122] *Ibid.*

[123] See also Bjorge who finds it unclear whether the requisite practice was actually obtained. Eirik Bjorge (n 6), 23, 25 Lippold argues criticizes that it is not self-evident that the lack of derogarions implied an interpretative statement. Matthias Lippold (n 9) 53, 83. According to Crema the crucial issue was whether the lack of a declaration was in the application of the treaty. Luigi Crema (n 9) 3, 9-10.

[124] Partly Dissenting Opinion of Judges Spano, Nicolaou, Bianku, and Kalaydjieva, *Hassan v. the United Kingdom* (n 8), para 13. For a critique of the 'concordant, common and consisten' approach see Luigi Crema (n 9) 3, 12-13; Matthias Lippold (n 9) 53, 82-83.

[125] See *ibid*.

[126] Joint Party Dissenting Opinion by Judges Caflisch, Türmen and Kovler, *Mamatkulov and Askarov v. Turkey* (n 18), para 146.

interpretation, as means of textual and teleological interpretation and as a matter of context; potentially, even as a means to modify the Convention. In its interaction with different means of interpretation, State practice contributes to the clarification of the meaning of a treaty.[127] For this matter, it needs to be considered in view of the object and purpose of a human rights treaty. State practice is one element for the interpretation of the treaty but not an exclusive or necessarily decisive one.[128]

The general rules of treaty interpretation, which have been codified in Articles 31 and 32 VCLT, provide the starting point for the consideration of State practice with respect to human rights treaties. While Article 31 (3) (b) VCLT explicitly refers to subsequent practice, it is not the only relevant provision for the consideration of state practice in human rights treaty interpretation. If it comes to the interpretation of substantive rights the Court can usually rely on the wording and purpose of the European Convention in accordance with article 31 (1) VCLT. Since the Convention is intended to provide for effective human rights protection, a certain dynamic is already built into it. The Court can refer to subsequent practice in the context of its living instrument jurisprudence in order to sustain its interpretation of the evolving meaning of its terms and the changing perceptions of its scope. Thus in the context of textual and teleological interpretation, state practice can support a particular interpretation when an evolving practice renders the protection of a particular right more effective or when it demonstrates an evolving meaning. In these cases, evolutive interpretation is the result of a textual and teleological interpretation of the Convention while state practice informs the way in which the meaning of a right is adjusted to present day conditions.

The normative value of State practice varies according to its respective role for treaty interpretation. For this matter, we need to distinguish between modification, ordinary and supplementary means of interpretation. If State practice is resorted to only as a supplementary means it represents just one element to sustain a particular interpretation and thus is less significant than in those cases in which State practice is resorted to for purpose of treaty modification. This has an impact on the prerequisites for the density of State practice. The higher the normative value attributed to State practice, the higher are the exigencies. Its requirements can be scaled according to the following increments:
If State practice is only referred to in a supplementary manner (Art. 32 VCLT) in order to confirm a meaning, which is based on textual, contextual and teleological interpretation, State practice is only complemental and does not need to be uniform because the treaty itself backs it up. If it is considered in the context of a textual or teleological interpretation (Art. 31 (1) VCLT) State practice needs to be sufficiently broad[129] and not at odds with the text, context and purpose of the Convention in order to warrant evolutive interpretation.[130] This standard is relevant for the interpretation of substantive rights.

Beyond this, when an interpretation cannot be based on the text or purpose of a treaty and thus is not grounded in the fundamental consensus of the treaty itself, it is necessary to establish that practice is sufficiently consistent, consolidated over time and shared by a plurality of Contracting states to presume the respective agreement by the Contracting States

[127] ILC, 'Report of the ILC on the Work of its 68th Session' (2 May – 10 June and 4 July – 12 August 2016) UN Doc A/71/10, Draft Conclusion no 7, para 1.
[128] See eg *Christine Goodwin v. the United Kingdom* (n 12), para 85.
[129] For example in *Bayatyan v. Armenia*, the Court based its holding inter alia on the fact that there was 'nearly a consensus' among Council of Europe member States. See *Bayatyan v. Armenia* (n 46), para 103. See also the analysis of international jurisprudence by Arato which demonstrates that the evidentiary standards in this area are lower than for subsequent practice under art 31(3)(b). See Arato (n 18), 476.
[130] In the 'single combined operation' of treaty interpretation these different means of interpretation need to be considered in combination.

(Art. 31 (3) (b) VCLT).[131] This standard is relevant in particular for the interpretation of procedural rules, such as the Court's jurisdiction.

Finally, if it comes to modification it is insufficient to presume such agreement. In cases where a reading cannot be backed up by the text, context and purpose of the Convention, close attention is warranted not only with regard to the consistency of State practice but also with regard to the agreement of the Contracting States in order to legitimize modification. Without the relevant *opinio juris* it is difficult to reconcile such modification with general international law. According to the conventional understanding of international law, there is a need for consent in order to bind States. With respect to treaty obligations, the primary source of consent lies in the ratification of or the accession to a treaty. It establishes the fundamental consensus from which interpretation derives its normative force. If a treaty is insufficiently clear, subsequent practice may convey supplementary consent if it confirms an interpretation which is nevertheless guided by the text, purpose and context of a treaty. As such, subsequent practice translates consent. It can provide additional legitimacy to treaty interpretation and ensure acceptance thereof, if it does not diverge from the object and purpose of the treaty. With respect to treaty modification, State practice cannot rely on the fundamental consensus of the treaty as a basis of consent. It thus needs to be based on *opinio juris* like customary international law.

Based on this understanding the two competing considerations outlined in the introduction of this contribution, the consent-based character and the State-restraining nature of the European Convention, can be reconciled. Though on first sight it appears counterintuitive to allow State practice to change or develop the meaning of a treaty that seeks to retrain State practice, such practice can claim normative value if it enhances the meaning of the Convention in the interest of increased human rights protection. If State practice is guided by a genuine commitment to the protection of human rights, both aspects, the consent-based and the telos, that is the protective nature of the Convention, are mutually reinforcing. However, if this is not the case, subsequent practice is devoid of normative value. When such practice is regressive or jeopardizes the object and purpose of the Convention as an instrument for the protection of the individual, it lacks the necessary legitimacy and effect on treaty interpretation.[132]

5. Conclusion: Subsequent Practice as Catalyst

The consideration of subsequent practice in the application and interpretation of the European Convention on Human Rights can be accommodated within the framework of the law of treaties. It can be rationalized under the rules recognized in articles 31 and 32 VCLT. They provide the matrix for the consideration of subsequent practice in treaty interpretation with the necessary flexibility to accommodate the particular nature of the European Convention as a human rights instrument. The object and purpose as well as the text demonstrate that a certain dynamic is built in the Convention as a human rights instrument, which is intended to be

[131] See art 31(3)(b) VCLT.
The ILC notes in its draft conclusions that the number of parties actively engaging in subsequent practice may vary (ILC, 'Report of the ILC on the Work of its 68th Session' (2 May – 10 June and 4 July – 12 August 2016) UN Doc A/71/10, Draft Commentary Conclusion no 10, para 2) provided that there is a common understanding regarding the interpretation of the treaty which the parties are aware of and accept. (Draft Commentary Conclusion no 10, para1). Silence can constitute acceptance when the circumstances call for a reaction (Draft Commentary Conclusion no 10, para 2). There is no mention of concordant, common and consistent in the Conclusions.

[132] See also Nolte, 'Jurisprudence Under Special Regimes Relating to Subsequent Practice' (n 61) 254.

capable of evolving so that the protection of the individual becomes effective. Accordingly, some variances in the application of the rules of treaty interpretation can be explained with the nature of the Convention. For example, it is not necessary to demonstrate a common agreement of the Contracting states regarding the interpretation of the Convention if domestic changes commonly lead to a higher standard of protection.[133]

Whereas the European Court's dynamic interpretation has been criticized for the lack of methodological consistency, it is possible to reconcile human rights jurisprudence with the rules of interpretation set out in the Vienna Convention on the Law of Treaties. As a template, articles 31 and 32 VCLT outline the perimeters for the interpretation of the European Convention on Human Rights.[134] They remind the European Court of Human Rights not to forget the equal value of textual and contextual analysis when it engages in teleological interpretation and not to frame evolutive interpretation as a separate means of interpretation but to recognize progress as the result of a textual, teleological and contextual analysis.

The normative scale of subsequent practice, which I have outlined above, provides a theoretical frame, which can guide the Court when it refers to State practice and help to enhance its methodological consistency. It explains under what circumstances and to what extent State practice is able to affect the scope and meaning of the Covenant. The exigencies vary depending on the nature of the rule and the normative value of state practice. The higher the normativity, the higher are the exigencies. The Court should be particularly cautious if it comes to treaty modification.

Once state practice meets the required standard it can sustain the legitimacy of treaty interpretation. By considering state practice in the course of its textual, teleological and contextual interpretation, the European Court can avoid the criticism that dynamic interpretation is not subject to democratic accountability. In other words, State practice can be a valuable source of legitimacy for the evolving scope of treaty obligations if the rules of interpretation are duly respected.[135] As such, subsequent practice can serve as a catalyst for the advancement of human rights.[136]

There is sufficient leeway for evolution within the theoretical framework outlined above. In Jefferson's terms: public international law does not require a man (or women!) to wear still the same coat, which fitted when a child. However, clothes can serve a valuable purpose for keeping a check on weight gain. A tight fit may indicate that it is time to keep an eye on extra calories; otherwise, a garment becomes useless. It is thus the task of international jurisprudence to keep this in mind, in an effort to preserve the legitimacy and integrity of human rights treaties. However, treaties should not become straitjackets, which do not give room to breathe. A careful consideration of subsequent practice as outlined above can serve a valuable function in this undertaking.

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[133] See above at 2. b) cc).

[134] According to Villiger, interpretation of the Convention must abide by art 31 VCLT, see Villiger, 'Articles 31 and 32 of the VCLT in the Case-Law of the ECtHR' (n 32) 330.

[135] See part 4 of this contribution.

[136] Bianchi considers subsequent practice as 'a self-regulatory device where meaning is adjusted to a range of expectations and demands of the epistemic communities that control subject-specific regimes.' Andrea Bianchi (n 14), para 140.