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**THE CONVENTION AS A LIVING INSTRUMENT  
ROOTED IN THE PAST, LOOKING TO THE FUTURE**

by **Eirik Bjorge**, Bristol

Introduction .....	243
I. The Living Instrument Approach is not Exclusive to the European Court of Human Rights .....	244
II. Where Next for the Living Instrument? .....	248
1. Systemic Integration and the Living Instrument Approach .....	248
2. European Consensus .....	251
3. Restricting the Convention's Protection through Evolutionary Interpretation? .....	251
4. Extraterritorial Derogations? .....	252
5. Are there Special Rules for the Interpretation of Issues of Jurisdiction? .....	252
6. Was the Interpretative Result in <i>Hassan</i> Supported by the Subsequent Practice of States? .....	253
III. Conclusion .....	255
Appendix: Abbreviations .....	255

**Introduction**

This article is inspired by two reflections. First, when a great international judge steps down, we are afforded the opportunity to look back and analyse their work in ways which were not possible during their tenure. In that regard

Hegel advises us that the owl of Minerva takes wing only with the onset of dusk.<sup>1</sup> That is taken to mean that it is only after a period has closed that we can engage in academic critique and appraisal making explicit the ideas and beliefs that drove that era but could not be fully articulated until it was over. No doubt such crepuscular reflections would not be in Judge Mahoney's spirit if they did not allow criticism in addition to approbation.

Second, when individuals from different backgrounds come together in international forums such as the European Court of Human Rights at Strasbourg ('the Strasbourg Court'), they represent on the one hand their respective national traditions; but on the other hand it is, as Sir Ian Brownlie once said of Sir Humphrey Waldock, a part of the calling of the international lawyer to 'avoid insisting on some preconceived personal or national

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<sup>1</sup> G.W.F. Hegel, *Elements of the Philosophy of Right*, (H.B. Nisbet tr., CUP, 1991) 23.

viewpoint'.<sup>2</sup> That, it can also confidently be said, fairly sums up the work in the Strasbourg Court of Judge Mahoney. He has always understood that the Convention is a part of the larger universe of public international law, or that the Convention, to use a turn of phrase coined in 1980 by the International Court of Justice, 'does not operate in a vacuum' but rather 'in the context of a wider framework of legal rules of which it forms only a part'.<sup>3</sup> Under the tutelage of Registrar Mahoney, these were the exact words used by the Grand Chamber of in *Al-Adsani v. United Kingdom*: 'the Convention ... cannot be interpreted in a vacuum'.<sup>4</sup> On this approach, even the language in which judicial cooperation is couched is shared as between different international courts.

The article has two parts, the first one of which concerns especially the living instrument approach and the domestic courts of the Member States of the Council of Europe; it asks the question, 'How special is the living instrument approach?'<sup>5</sup> The second part moves to the international level, asking the question, 'Where next for the living instrument?'<sup>6</sup> This part engages critically with certain decisions of the Grand Chamber of the Strasbourg Court, especially *Banković v. Belgium*<sup>7</sup> and *Hassan v. United Kingdom*,<sup>8</sup> which, one suspects, bear the discreet signature of Registrar – as he first was – and Judge – as he later became – Paul Mahoney.

### I. The Living Instrument Approach is Not Exclusive to the Strasbourg Court

It is a well-known systemic aspect of the ECHR rights that the rights of the Convention must 'be analysed in the light of the principle, firmly rooted in the Court's case-law, that the Convention is a living instrument which must be interpreted in the light of present-day conditions'.<sup>9</sup> 'The meaning and content of the provisions of the Convention will be understood', as Sir Humphrey Waldock once put it, 'as intended to evolve in response to changes in legal or social concepts'.<sup>10</sup>

In common with the practice of other international courts and tribunals,<sup>11</sup> the European Court of Human Rights will, when the treaty text to be interpreted invites it, rely on evolutionary interpretation or, in its own idiom, the 'living instrument' doctrine.<sup>12</sup> The evolutionary interpretation of treaties has been defined in the following way: where the parties have used generic terms in a treaty, the parties necessarily having been aware that the meaning of the terms was likely to evolve over time, and where the treaty has been entered into for a very long period, the parties must be presumed, as a general rule, to have intended those terms to have an evolving meaning.<sup>13</sup> Thus the words 'evolutionary interpretation', the International Court of Justice explained in *Navigational and Related Rights*, refer to:

*situations in which the parties' intent upon conclusion of the treaty was, or may be presumed to have been, to give the terms used – or some of them – a meaning or content capable of evolving, not one fixed once and for all, so as to make allowance for, among other things, developments in international law.*<sup>14</sup>

Such an approach is not without a mooring in what international law calls the intentions of the parties to the ECHR: it is therefore no more of a threat to State sovereignty than other forms of interpretation.<sup>15</sup> The approach taken by the Strasbourg Court is one which takes seriously the intention on the part of the Contracting States, as set out in the Preamble to the Convention, that not only the 'maintenance' but also the 'further realisation' of human rights and fundamental freedoms is incumbent upon the states members, and by extension also on the Strasbourg Court. The Strasbourg institutions understood early on the necessity of seeking 'the interpretation that is

most appropriate in order to realise the aim and achieve the object of the treaty, not that which would restrict to the greatest possible degree the obligations undertaken by the Parties'.<sup>16</sup>

Increasingly, this requirement is taken seriously by the domestic courts, too,<sup>17</sup> the Swiss Federal Tribunal having already in 1975 taken the view that: '[d]urch ihre Aufzählung übernimmt und entwickelt die Konvention Bestimmungen weiter, welche zahlreiche Staatsverfassungen im Abschnitt über die Freiheitsrechte enthalten oder welche die Vertragsstaaten als ungeschriebene Verfassungsrechte anerkennen'.<sup>18</sup>

It is against this backdrop that the Strasbourg Court has put such a premium upon the object and purpose of the Convention, that is, on safeguarding 'not rights that are theoretical or illusory but rights that are practical and effective'.<sup>19</sup> The nexus between the intentions of the parties and the object and purpose of the Convention was given an accurate description by Judge Fitzmaurice, when he pointed out in *Belgian Police* that 'the object and purpose of a treaty

<sup>2</sup> I. Brownlie, "The Calling of the International Lawyer: Sir Humphrey Waldock and his Work", (1983) 54 *British Yearbook of International Law* 7, 40-42; for a similar French perspective see J. Combacau, "Paul Reuter, le juriste", (1989) 35 *Annuaire français de droit international* 7, 14-16.

<sup>3</sup> *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, Advisory Opinion of 20 December 1980, I.C.J. Rep. 1980, p. 73, 76 at para. 10.

<sup>4</sup> *Al-Adsani v. United Kingdom* [GC], no. 35763/97, 21 November 2001, at § 55 = 23 HRLJ 39 at p. 45 (2002).

<sup>5</sup> See e.g. P. Mahoney, "The Relationship between the Strasbourg Court and the National Courts", (2014) 130 *Law Quarterly Review* at p. 568.

<sup>6</sup> See e.g. P. Mahoney & R. Kondak, "Common Ground: A Starting Point or Destination for Comparative-Law Analysis by the European Court of Human Rights", in: M. Andenas & D. Fairgrieve (eds.), *Courts and Comparative Law*, (OUP, 2015) 119.

<sup>7</sup> *Banković v. Belgium* [GC], no. 52207/99, 12 December 2001 = 22 HRLJ 453 (2001).

<sup>8</sup> *Hassan v. United Kingdom* [GC], no. 29750/09, 16 September 2014.

<sup>9</sup> *Tyrer v. United Kingdom*, no. 5856/72, 25 April 1978, at § 31; *Hirsi Jamaa and Others v. Italy* [GC], no. 27765/09, 23 February 2012 at § 175 = 32 HRLJ 363 at p. 380 (2012).

<sup>10</sup> H. Waldock, "The Evolution of Human Rights Concepts and the Application of the European Convention on Human Rights", in: *Mélanges Reuter*, (Pedone, 1981) 547. Also: M. Sørensen, "Do the Rights Set forth in the European Convention on Human Rights in 1950 have the Same Significance in 1975? Report presented by Max Sørensen to the Fourth International Colloquy about the European Convention on Human Rights, Rome 5-8 November 1975": reprinted in *Max Sørensen: A Bibliography*, (Aarhus University Press, 1988) 23, 54-55; H.J. Cremer, "Regeln der Konventionsinterpretation", in: R. Grote & T. Marauhn (eds.), *EMRK/GG: Konkordanzkommentar zum europäischen und deutschen Grundrechtsschutz*, (2nd edn., Mohr Siebeck, 2013) 193-247.

<sup>11</sup> See E. Bjorge, *The Evolutionary Interpretation of Treaties*, (OUP, 2014).

<sup>12</sup> *Tyrer* (supra note 9).

<sup>13</sup> *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, I.C.J. Rep. 2009, p. 213, 243 at para. 66.

<sup>14</sup> *Ibid.* 242 at para. 64.

<sup>15</sup> See M. Andenas, 'Sovereignty' in C. Baudenbacher (ed.), *Fundamental Principles of the EEA – EEA-ities*, (Springer, forthcoming autumn 2017).

<sup>16</sup> *Wemhoff v. Germany*, no. 2122/64, 27 June 1968, at § 8.

<sup>17</sup> See the UK, French, and German examples below.

<sup>18</sup> *Diskont- und Handelsbank AG* (1975) 101 Entscheidungen des Schweizerischen Bundesgerichts at pp. 66, 69. See also below p. 259, note 15.

<sup>19</sup> *Airey v. United Kingdom*, no. 6289/73, 9 October 1979, at § 24; *Nada v. Switzerland* [GC], no. 10593/08, 12 September 2012, at §§ 182 and 195 = 32 HRLJ 129 at pp. 149 and 150 (2012).

are not something that exist *in abstracto*: they follow from and are closely bound up with the intentions of the parties'.<sup>20</sup>

This approach is shared by the law of treaties more generally. It is, as Judge Higgins has pointed out, the 'wider principle – intention of the parties, reflected by reference to the objects and purpose – that guides the law of treaties'.<sup>21</sup> Thus the Arbitral Tribunal in *Iron Rhine*, chaired by Judge Higgins, in making an evolutionary interpretation of the treaty terms of the treaty at issue in the case, observed that 'an evolutive interpretation, which would ensure an application of the treaty that would be *effective* in terms of its object and purpose, will be preferred'.<sup>22</sup>

This interpretative approach has a long pedigree in the domestic jurisprudence of the French, German and UK courts.<sup>23</sup> Whilst their approaches differ, as a function of legal culture and history, there is nevertheless a striking degree of similarity, both between the different domestic approaches and between the domestic and international approaches.

First, on the basis of long held views as to the interaction between legislation and the judicial function, the UK courts interpret statutes taking a contemporaneous and purposive approach as opposed to a historical and strictly textual one.<sup>24</sup> Lord Bingham in *Quintavalle* set out the common law's view of the relation between the intention of Parliament and evolutions subsequent to the passing of the law. There was no inconsistency between the rule that statutory language retains the meaning it had when Parliament used it and the rule that a statute is 'always speaking'. The words 'always speaking' go back to the Victorian draftsman, Lord Thring, who instructed draftsmen to draft legislation so that 'an Act of Parliament should be deemed to be always speaking'.<sup>25</sup> Against this background, Lord Bingham observed that:

*If Parliament, however, long ago, passed an Act applicable to dogs, it could not properly be interpreted to apply to cats; but it could properly be held to apply to animals which were not regarded as dogs when the Act was passed but are so regarded now. The meaning of 'cruel and unusual punishments' has not changed over the years since 1689, but many punishments which were not then thought to fall within that category would now be held to do so.*<sup>26</sup>

The question arising both in connection with evolutionary interpretations by domestic courts both of domestic instruments and instruments which are – or have a connection to – instruments of international law will be closely bound up with the role to be played by the judiciary under the constitutional principle of the separation of powers. Lady Hale made this point in relation to domestic developments of the level of protection that, in respect of the domestic legal order, flows from the ECHR:

*if we are confronted with a question which has not yet arisen in the European Court, we have to work out the answer for ourselves, taking into account, not only the principles which have been developed in Strasbourg, but also the principles of our own law and constitution.*<sup>27</sup>

*New Zealand Maori Council v. Attorney-General*<sup>28</sup> offers another instructive common law example, which blends domestic and international sources in an attractive manner. In this case, from the New Zealand Court of Appeal, the court made an evolutionary interpretation of provisions contained in the Treaty of Waitangi, a convention signed in 1840 between the Maori and Great Britain. President Sir Robin Cooke, later to be ennobled as Lord Cooke and take up his seat in the Appellate Committee of the House of Lords, observed that 'the treaty has to be seen as an embryo rather than a fully developed and integrated set of ideas'; the correct approach would be to interpret the treaty 'widely and effectively and as a living instrument taking account of the subsequent developments of international human rights norms'.<sup>29</sup>

In France, the courts have taken much the same approach. A classic examples is the line of cases from the Cour de cassation, in which it made an evolutionary interpretation of Article 2279 of the Civil Code.<sup>30</sup> Article 2279 provides that: '*En fait de meubles, la possession vaut titre*'. When the article was drafted, in 1804, non-corporeal property was not considered, as that did not at the time exist in the way in which it would come into existence in the nineteenth century. Thus the question arose as to whether such movables were to be seen as being covered by the terms of the article. The Cour de cassation determined that these later phenomena were in fact covered, as the term '*meubles*' was of itself capable of generalization and thus applicable to all types of movables.<sup>31</sup> Similarly, in *Jand'heur* the Cour de cassation interpreted Article 1384(1) of the Civil Code

<sup>20</sup> Separate opinion of Judge Fitzmaurice, *National Union of Belgian Police*, no. 4464/70, 27 October 1975, at I. 9. (i).

<sup>21</sup> R. Higgins, "Some Observations on the Inter-Temporal Rule in International Law", in: *Theory of International Law at the Threshold of the 21st Century: Essays in Honour of Krzysztof Skubiszewski*, (Kluwer, 1996) 181. Also: *Territorial Dispute (Libya/Chad)*, I.C.J. Rep. 1994, pp. 21, 23; *Lighthouses Case between France and Greece, Judgment* (1934) PCIJ Series A/B No. 62 p. 27; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276* (1970), I.C.J. Rep. 1971, pp. 16, 35 at para. 66; *Aegean Sea Continental Shelf*, I.C.J. Rep. 1978, pp. 3, 22 at para. 52; *Dispute between Argentina and Chile concerning the Beagle Channel*, (1977) 21 RIAA pp. 53, 231; *Young Loan Arbitration*, (1980) 59 ILR 494, 531; *Dispute concerning Filleting within the Gulf of St Lawrence ("La Bretagne") (Canada/France)*, (1986) 82 ILR 591, 659, at para. 67; *Decision regarding delimitation of the border between Eritrea and Ethiopia*, (2002) 25 RIAA pp. 83, 110.

<sup>22</sup> *Award in the Arbitration regarding the Iron Rhine ("Ijzeren Rijn") (Belgium v. Netherlands)*, (2005) 27 RIAA pp. 35, 73 (italics added).

<sup>23</sup> See E. Bjorge, *Domestic Application of the ECHR: Courts as Faithful Trustees*, (OUP, 2015) 18-22 and 131-154, which analyses this domestic case-law in greater detail.

<sup>24</sup> J. Bell, "Interpreting Statutes over Time", in: F. Ost & M. van Hoecke (eds.), *Temps et droit: le droit a-t-il pour vocation de durer?*, (Bruylant, 1998) 31-34; B. Hale, "Common Law and Convention Law: The Limits to Interpretation", [2011] *European Human Rights Law Review* 534, 535-536.

<sup>25</sup> H. Thring, *Practical Legislation*, (John Murray, 1902) 83. Also: R. Cross, J. Bell, and G. Engle, *Cross: Statutory Interpretation*, (3rd edn., Butterworths, 1995) 51.

<sup>26</sup> *R. v. Secretary of State for Health ex p Quintavalle*, [2003] UKHL 13 at para. 9 (Lord Bingham); at paras. 21-23 (Lord Steyn). Also: *River Wear Commissioners v. Adamson*, (1877) 2 App. Cas. 743, 763; *Grant v. Southwestern and County Properties Ltd*, [1975] Ch 185; *Fitzpatrick v. Sterling Housing Association Ltd*, [2001] 1 AC 27 (HL); *R. v. Ireland*, [1998] AC 147 (HL); *Goodes v. East Sussex County Council*, [2000] UKHL 34; *Birmingham City Council v. Oakley*, [2000] UKHL 59; *R. v. Bristol City Council, ex p Everett*, [1999] EWCA Civ 869; *Royal College of Nursing of the United Kingdom v. Department for Health and Social Security*, [1981] AC 800 (HL); *McCarten Turkington Breen (A Firm) v. Times Newspapers Ltd*, [2001] 2 AC 277 (HL); *R. v. Brittain*, [1972] 1 QB 357 (QB); *R. v. R. (Rape: Marital Exemption)*, [1992] 1 AC 599 (HL); *Yemshaw (Appellant) v. London Borough of Hounslow (Respondent)*, [2011] UKSC 3 at para. 56 (Lady Hale).

<sup>27</sup> *Moohan & Another v. The Lord Advocate*, [2014] UKSC 67 at para. 53 (Lady Hale).

<sup>28</sup> *New Zealand Maori Council v. Attorney-General*, [1987] 1 NZLR 641.

<sup>29</sup> *Ibid.* 655-656 and 663.

<sup>30</sup> See e.g. Cour de cassation (1re chambre civile), 20 October 1982.

<sup>31</sup> F. Terré, *Introduction générale au droit*, (9th edn., Dalloz, 2012) 472; J. Bell, "Interpreting Statutes over Time", in: F. Ost & M. van Hoecke (eds.), *Temps et droit: le droit a-t-il pour vocation de durer?*, (Bruylant, 1998) 34-35.

in the light of its broader object and in accordance with latter-day developments.<sup>32</sup> What *avocat général* Matter said in his conclusions applies to the jurisprudence of the Conseil d'État as much as to the Cour de cassation:

*la jurisprudence opère une œuvre créatrice : qu'en présence de tous les changements opérés dans les idées, dans les mœurs, dans les institutions, dans l'état économique de la France, on doit adapter libéralement, humainement, le texte aux réalités et aux exigences de la vie moderne.*

The Conseil d'État takes a similarly evolutionary and teleologic approach to interpretation.<sup>33</sup> This is true not least where the human element invoked by Matter is in play. Thus *commissaire du gouvernement* Ronny Abraham (later to take up his seat as Judge and then President of the International Court of Justice) in his conclusions in *GISTI*, adopted by the Conseil d'État,<sup>34</sup> argued that the term 'minor' in a 1985 French-Algerian extradition treaty must not be constructed according to a 'strictly literal interpretation' as this would be 'contrary to the objectives sought by the negotiators of the 1985 convention'.<sup>35</sup>

The same is the case in German law, where for example the Federal Constitutional Court in a line of authorities beginning in the early 1950s developed German constitutional law by reliance upon a doctrine of constitutional change, 'Verfassungswandel',<sup>36</sup> according to which terms in the Basic Law were interpreted evolutionarily:

*a constitutional provision can undergo a change of meaning, if in its scope of application new facts appear or known facts by way of development appear in new constellations or take on a new meaning. [Author's translation].<sup>37</sup>*

Nonetheless the fact that the Strasbourg Court has taken this approach might suggest that the national courts would have trouble keeping up, insofar as they are bound to apply a set of rights which are, on the Strasbourg Court's own admission, 'dynamic and evolutive'.<sup>38</sup> Some problems will always arise, as might also be the case domestically, as between lower courts and a supreme court. As Bernard Stirn, President of the Section du contentieux (the Judicial Section) of the Conseil d'État, has put it, 'the evolutionary and progressive jurisprudence of the European Court of Human Rights, the role of which has been gradually asserted to the point that it is now quite extensive, has given rise to a solid system of collective protection of fundamental rights, which has become one of the key components of the European legal order'.<sup>39</sup>

Lord Bingham's dictum in *Ullah*, that the national courts must 'keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less',<sup>40</sup> for a long time set the tone for the UK courts' approach to the matter. The approach was called the mirror principle.<sup>41</sup> Its operation was well summarised by Lady Hale in *McCaughey*,<sup>42</sup> where her Ladyship stated that it could not have been Parliament's intention that the Convention rights enshrined in the Human Rights Act 1998 were to remain set in stone as they were when the act was passed or when it came into force. Rather, it must have been intended, she continued,

*that the national courts would, at the very least, 'keep pace with the Strasbourg jurisprudence as it evolves over time'. If the evolutive interpretation of the Convention rights means that they now mean something different from what they meant when the 1998 Act was passed, then it is our duty to give effect to their current meaning, rather than to the one they had before.<sup>43</sup>*

As the *Ullah* approach has developed over time, there is at present room for the UK courts to go beyond the jurisprudence of the Strasbourg Court: but they must not fall short of its standards.<sup>44</sup>

The question has not really come to a head in the same way before the German courts. This is due to the high (and

in no way static) standards of the protection which follow from the Basic Law.<sup>45</sup> *Boussouar* and *Planchenault* are examples of the approach taken by the French courts in this regard.<sup>46</sup> In his *conclusions*, adopted by the Assemblée of the Conseil d'État in its judgment, *commissaire du gouvernement* Mattias Guyomar held that taking into account the European jurisprudence to a certain measure would mean going beyond what the Court requires in the scope of its control *a posteriori* and *in concreto*: 'To refuse to overturn the decisions which are attacked today would be tantamount to accepting to close one's eyes and to waiting for Strasbourg to open them for one'.<sup>47</sup> Thus, the Conseil d'État, in the context of Article 13 and the right of prisoners to an effective remedy in contesting administrative decisions against them, developed its understanding of the Convention rights beyond what the Strasbourg Court had done.<sup>48</sup>

As will be seen, therefore, the domestic courts of France, Germany and the UK have been quite prepared to follow the Strasbourg Court's lead as regards the 'living' character of the Convention rights.<sup>49</sup> As is clear not least from the French and UK approach, the domestic courts seem to have done so on the assumption that *not* to do so would have meant not taking seriously the underlying tenets of the system of the ECHR.

<sup>32</sup> Cour de cassation, 13 February 1930, *Jand'heur c. Les Galeries belfortaises*.

<sup>33</sup> Y. Gaudemet, *Les méthodes du juge administratif*, (LGDJ, 1972) 66-70 and 136-143.

<sup>34</sup> Conseil d'État, 29 June 1990, *GISTI*.

<sup>35</sup> Conclusions of *commissaire du gouvernement* Abraham, in *GISTI*, (1990) 94 RGDIP 882, 906-907.

<sup>36</sup> See A. Voßkuhle, "Gibt es und wozu nutzt eine Lehre vom Verfassungswandel?", (2004) 43 *Der Staat* 450; K. Larenz, *Methodenlehre der Rechtswissenschaft*, (6th edn., Springer, 1991) 328-339.

<sup>37</sup> BVerfGE 2, 380 (401): "eine Verfassungsbestimmung [kann] einen Bedeutungswandel erfahren, wenn in ihrem Bereich neue, nicht vorausgesehene Tatbestände auftauchen oder bekannte Tatbestände durch ihre Einordnung in den Gesamttablauf einer Entwicklung in neuer Beziehung oder Bedeutung erscheinen". Also: BVerfGE 3, 407 (422).

<sup>38</sup> *Goodwin v. United Kingdom* [GC], no. 28957/95, 11 July 2002 at § 74 = 23 HRLJ 72 (2002); *Stafford v. United Kingdom* [GC], no. 46295/99, 28 May 2002 at § 68.

<sup>39</sup> B. Stirn, *Towards a European Public Law*, (translated from French and edited by E. Bjorge, OUP, 2017) 67.

<sup>40</sup> *R. (Ullah) v. Special Adjudicator*, [2004] UKHL 26 at para. 20 (Lord Bingham).

<sup>41</sup> J. Lewis, "The European Ceiling on Human Rights", [2007] *Public Law* 720, 726-738; A. Kavanagh, *Constitutional Review under the UK Human Rights Act*, (CUP, 2009) 153-164.

<sup>42</sup> *McCaughey & Another*, [2011] UKSC 20, [2012].

<sup>43</sup> *Ibid.* 757 (Lady Hale). Also: 769 (Lord Dyson).

<sup>44</sup> *R. (Ullah) v. Special Adjudicator*, [2004] UKHL 26 at para. 20 (Lord Bingham). See Stirn (*supra* note 39) at p. 67.

<sup>45</sup> B. Peters, "Germany's Dialogue with Strasbourg: Extrapolating the *Bundesverfassungsgericht's* Relationship with the European Court of Human Rights in the Preventive Detention Decision", (2012) 13 *German Law Journal* 757, 769.

<sup>46</sup> Conseil d'État, Assemblée, 14 December 2007, *Boussouar*; Conseil d'État, 14 December 2007, *Planchenault*.

<sup>47</sup> M. Guyomar, "Conclusions sur Conseil d'État, Assemblée, 14 décembre 2007, M. Planchenault et Garde des sceaux, ministre de la Justice c/ M. Boussouar" [2008] RFDA 87, 100.

<sup>48</sup> M. Andenas & E. Bjorge, "L'application de la Convention européenne des droits de l'homme: quel rôle pour le juge interne", [2012] *Revue internationale de droit comparé* 384, 405-406; M. Guyomar, "Le dialogue des jurisprudences entre le Conseil d'État et la Cour de Strasbourg: appropriation, anticipation, émancipation", in: *La conscience des droits: Mélanges en l'honneur de Jean-Paul Costa*, (Daloz, 2011) 317-318.

<sup>49</sup> *Tyrer* (*supra* note 9).

The question of evolutionary interpretation bleeds into another important question, one which has come to the fore especially in French and UK law. Evolutionary interpretation may at times segue into what is no more than taking seriously the underlying principles of the ECHR in a type of case which has not hitherto come before the Strasbourg Court. It is clear enough that to shelter behind the fact that, on a particular Convention issue, the Strasbourg Court has not so far spoken would not be a satisfactory approach to the ECHR. That would mean potentially tempering the impact of ECHR law in all those cases which had not, on identical or similar facts to those of which a domestic court is seized, come up before the Strasbourg Court. By applying a principled approach, the courts avoid using any dearth of Strasbourg authority on an issue as a pretext for refusing to give effect to a right which otherwise seems undeniable.<sup>50</sup>

Even if the content of an ECHR right must, in terms of its international meaning, be determined by the Strasbourg Court, that does not mean that there can be no variation in the manner in which it finds expression in the jurisprudence of national courts.<sup>51</sup> While it is true that the national courts are at pains to keep pace with Strasbourg, it is not so that the national courts in France, Germany and the United Kingdom choose to remain stationary in situations where the Strasbourg Court has not taken a pace which would allow national courts to fall into step beside it.<sup>52</sup> In part this is because the national courts take seriously the responsibility resting upon them, according to the principle of subsidiarity,<sup>53</sup> to be the first-line defenders of the Convention rights, or as *commissaire du gouvernement* Mattias Guyomar put it in *Boussouar & Planchenaault*, it means simply that the courts aim to 'give full effect to the subsidiary character of the control of the Strasbourg Court, taking charge of giving full effect before national authorities to Convention rights'.<sup>54</sup>

This is an area in which the development of domestic standards (which may well take colour from those of the ECHR and indeed other international law) and the standards of the ECHR (which may well take colour from the legal culture of the court applying it and adding to its development) tends to become elided.<sup>55</sup>

Lord Kerr has said about the UK courts that 'even if a case can be made that in the past we were excessively deferential to Strasbourg, there are recently clear and vigorous signals that we are no longer'.<sup>56</sup> The approach taken by the Supreme Court seems to bear this proposition out.<sup>57</sup> Lord Bingham in *JJ* held that the task of the national courts in applying the ECHR is 'to give fair effect, on the facts of this case, to the principles which the Strasbourg court has laid down'.<sup>58</sup> To the extent that these words are in need of any gloss, that was provided by Lord Bingham when he, in his final article, said of *JJ* specifically, and the way in which the UK courts will rely on the ECHR as set out in the Strasbourg jurisprudence generally, that what the courts will do is 'to ascertain the true governing principle and apply it'. Lord Bingham did not see *JJ* as falling foul of his own *Ullah* principle; nor did he see the case as an outlier: 'this is not an example cherry-picked to make this point: it is an example repeated over and over'.<sup>59</sup> That must be right: it is even arguable that already in *Ullah* the House of Lords followed just this approach.<sup>60</sup>

If once they did so in the past, the national courts do not anymore hesitate to resolve the question of whether a claim to a Convention right is viable where there is no clear current view from Strasbourg to be seen. They choose the interpretation that most closely accords with their reasoned view of the content of the Convention right; the national courts do not see themselves as relieved of their duty to confront the question of the content of a claimed right. It seems that one can conclude from the jurisprudence of

the national courts that the absence of clear jurisprudence from the Strasbourg Court on an issue will not alone supply the answer to whether a claimed Convention right has the content contended for.<sup>61</sup> By taking such a principled approach to the ECHR as a floor, the national courts in reality also provide an answer to the questions which have been posed as to whether the ECHR rights ought to be seen as a ceiling too.<sup>62</sup>

An additional aspect of this theme merits mention. The Permanent Court of International Justice held in *Access to German Minority Schools in Upper Silesia* that when the Court made an interpretation of a treaty provisions, 'in accordance with the rules of law, the interpretation given by the Court to the terms of the Convention has retrospective effect – in the sense that the terms of the Convention must be held to have always borne the meaning placed upon them by this interpretation'.<sup>63</sup> Or as Alain Pellet has put it, when a court gives an interpretation to a treaty, that treaty 'est réputé avoir toujours eu la signification fournie par cette interprétation'.<sup>64</sup> A similar approach has been taken by the Norwegian Supreme Court, in a case where Justice Møse (who later became a Judge of the Strasbourg Court) gave the judgment of the court. Confronted with the question of whether companies are covered by protections regarding self-incrimination contained in Article 6, the court had been told by counsel for the government that,

<sup>50</sup> E. Bjorge, "The Courts and the ECHR: A Principled Approach to the Strasbourg Jurisprudence", (2013) 72 CLJ 289, 299-300.

<sup>51</sup> *R. (on the application of Nicklinson and another) v. Ministry of Justice*, [2014] UKSC 38 at para. 69 (Lord Neuberger); *Re P (Adoption: Unmarried Couple)*, [2008] UKHL 38 at paras. 33-36 (Lord Hoffmann).

<sup>52</sup> B. Kerr, "The UK Supreme Court: The Modest Underworker of Strasbourg?", lecture, 25 January 2012, at p. 5, www.supremecourt.uk/docs/speech\_120125.pdf.

<sup>53</sup> See *R. (on the application of Nicklinson and another) v. Ministry of Justice*, [2014] UKSC 38 at para. 74 (Lord Neuberger).

<sup>54</sup> M. Guyomar (*supra* note 47). Also: Conseil d'État, 17 February 1995, *Marie & Hardouin* (especially in the conclusions of *commissaire du gouvernement* Frydman); B. Stirn, D. Fairgrieve, and M. Guyomar, *Droits et libertés en France et au Royaume-Uni*, (Odile Jacob, 2006) 251.

<sup>55</sup> Stirn (*supra* note 39) at pp. 147-148; E. Bjorge, "Common Law Rights: Balancing Domestic and International Exigencies", (2016) 75 CLJ 220; P. Craig, *UK, EU and Global Administrative Law: Foundations and Challenges*, (CUP, 2015) 271-285; S. Sedley, *Lions under the Throne: Essays on the History of English Public Law*, (CUP, 2015) 193-208.

<sup>56</sup> Kerr (*supra* note 52) at p. 1.

<sup>57</sup> *Limbuela*, [2005] UKHL 66; *Secretary of State for the Home Department v. JJ*, [2007] UKHL 45 at para. 19; *Re G (Adoption: Unmarried Couple)* sub nom *Re P*, [2008] UKHL 38; *EM (Lebanon)*, [2008] UKHL 64; *Quila & Another*, [2011] UKSC 45; *Rabone & Another v. Pennine Care NHS Trust*, [2012] UKSC 2.

<sup>58</sup> *Secretary of State for the Home Department v. JJ*, [2007] UKHL 45 at para. 19 (Lord Bingham).

<sup>59</sup> T. Bingham, "The Human Rights Act: A View from the Bench", [2010] EHRLR 568, 573; *Lives of the Law: Selected Essays and Speeches 2000-2010*, (OUP, 2011) 183-184.

<sup>60</sup> E. Bjorge (*supra* note 50) at pp. 291-293; M. Andenas & E. Bjorge, "Ambrose: Is the *Ullah* Principle Wrong?", (2012) 128 LQR 319, 322-323. Cf. P. Sales, "Strasbourg Jurisprudence and the Human Rights Act", [2012] *Public Law* 253.

<sup>61</sup> See for example *Ambrose v. Harris*, [2011] UKSC 43; Kerr (*supra* note 52) at p. 17.

<sup>62</sup> Cf. P. Sales, "Strasbourg Jurisprudence and the Human Rights Act", [2012] PL 253.

<sup>63</sup> *Access to German Minority Schools in Upper Silesia*, (1931) PCIJ Ser A/B No. 40, 19.

<sup>64</sup> A. Pellet et al., *Droit international public*, (8th edn., LGDJ, 2009) 276.

were it to reach such a conclusion, it would leap ahead of the Strasbourg Court, whose case-law on this particular question was sparse. Justice Møse, correctly it would seem, took the view that this was not necessarily a matter of evolutionary or dynamic interpretation: it was simply a matter of straight down the line operation of the various means of interpretation.<sup>65</sup> Not everything that glimmers is gold; not everything that is new is evolutionary or dynamic.

## II. Where Next for the Living Instrument?

On the basis of the Strasbourg Court's past jurisprudence regarding the forward-looking 'living instrument' approach, the question could well be asked, Where might the living instrument doctrine take the jurisprudence of the Strasbourg Court in the future? This part of the article tests a number of hypotheses as to where the living instrument approach could take the Court in future years.

### 1. Systemic Integration and the Living Instrument Approach

One aspect of the living instrument approach is, as the International Court of Justice observed in *Namibia*, that 'an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation'.<sup>66</sup>

This, of course, has not been lost on the Strasbourg Court, which in numerous cases has been prepared to take seriously Article 31(3)(c) of the Vienna Convention on the Law of Treaties (VCLT).<sup>67</sup> There is certainly scope in the text of the ECHR for such an approach, even apart from the general exhortation in its Preamble towards the 'further realisation of human rights and fundamental freedoms'.<sup>68</sup> One general and one specific example could be given.

A general licence given by the text of the Convention for such an approach is set out in Article 53, which provides, in pertinent part, that: '[n]othing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured ... under any other agreement to which it is a Party'. This clause, together with cognate clauses in other human rights treaties, has been called an example of 'mobile priority': 'Examples of mobile priority can be found in article 53 of the ECHR. It provides for the priority of the human rights instrument offering the wider protection. The ECHR would thus prevail for the parties when it offers a greater protection'.<sup>69</sup> It provides an attractive and as yet largely untapped textual resource for the further realisation of the rights of the ECHR.

A more specific licence could be thought to have been given by the text of the ECHR in those four provisions of the Convention text which explicitly incorporate general international law, that is, the first sentence of Article 7(1) on no punishment without law;<sup>70</sup> Article 15, on derogation in time of emergency;<sup>71</sup> Article 35, on the Court's admissibility criteria;<sup>72</sup> and Article 1 of Protocol No. 1, on the protection of property. The final of those four provisions relates to a field of law which has, over the last few decades, undergone considerable development, and it is, according to the jurisprudence of the Strasbourg Court, as a conduit into the Convention of developments of what the provision terms 'general principles of international law' one which holds out great promise.

The text of Article 1(1) of Protocol No. 1 provides that: 'Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law'.<sup>73</sup> In *James v. United Kingdom* and *Lithgow v. United Kingdom*, both of which concerned UK nationals,<sup>74</sup> the Strasbourg Court, sitting in its Plenary formation, observed that 'the general principles

of international law', to which Article 1 of Protocol 1 makes explicit reference, whilst they could not apply in respect of nationals, 'are incorporated into that Article ... as regards those acts to which they are normally applicable, that is to say acts of a State in relation to non-nationals'.<sup>75</sup> The fact that these general principles do indeed apply to non-nationals was also emphasised (in a document available only in French) by the Committee of Ministers of the Council of Europe when it opened the Protocol for signature: '*Reconnaissance, en ce qui concerne l'article 1<sup>er</sup> du Protocole, que les principes généraux du droit international, dans leur acception actuelle, comprennent l'obligation de verser aux non-nationaux une indemnité en cas d'expropriation*'.<sup>76</sup>

For the applicants in *James* and *Lithgow* that meant that they could find no succour in general international law; but the Strasbourg Court made it clear that the general principles of international law do indeed apply to acts of a State in relation to non-nationals. Whilst one might quibble with the conclusion in relation to nationals, there can be no cavil with the Court's conclusion in relation to non-nationals: there is no doubt, according to the clear wording of Article 1, that the article does incorporate general international law into its scope and that non-nationals must be able to benefit from that incorporation. Going back to the point mentioned about Article 31(3)(c) of the Vienna Convention above, such an incorporation would have been there even in the absence of the textual conduit of Article 1. Thus, even in cases which have concerned expropriation of the property of *nationals*, the Court has

<sup>65</sup> Rt. 2011 p. 800 at para. 53.

<sup>66</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, I.C.J. Rep. 1971, pp. 16, 35 at para. 53.

<sup>67</sup> Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331; (1969) 8 ILM 679.

<sup>68</sup> J.P. Costa, *La Cour européenne des droits de l'homme: des juges pour la liberté*, (Daloz, 2013) 43.

<sup>69</sup> R. Kolb, *The Law of Treaties*, (Edward Elgar, 2016) 188-189.

<sup>70</sup> "No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed."

<sup>71</sup> "In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law."

<sup>72</sup> "The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken."

<sup>73</sup> See generally J.A. Frowein, "The Protection of Property", in: R. St. J. Macdonald, F. Matscher & H. Petzold (eds.), *The European System for the Protection of Human Rights*, (Nijhoff, 1993) 515.

<sup>74</sup> In *Lithgow* there was initially a French national among the applicants, Mrs Monique Augustin-Normand: but, as she was among those applicants whose complaints were declared inadmissible by the Commission, her complaint was not heard on the merits (*Lithgow and Others v. United Kingdom*, no. 9006/80, 8 July 1986, at §§ 2 and 102).

<sup>75</sup> *James v. United Kingdom*, 8793/79, 21 February 1986, at § 61. See J.-F. Flauss, "Nationalisation et indemnisation préférentielle de la propriété étrangère dans le cadre de la Convention européenne des droits de l'homme", *Gazette du Palais*, 27 November 1986, pp. 729, 731.

<sup>76</sup> See also Commentary by the Secretariat-General on the Draft Protocol of 18 September 1951, Doc DH (57) 10 at 157 ("the phrase 'subject to the conditions provided for ... by the general principles of international law' would guarantee compensation to foreigners, even if it were not paid to nationals").

held that, '[i]n this connection, international case-law, of courts or arbitration tribunals, affords the Court a precious source of inspiration'.<sup>77</sup> The fact that Article 1 actually sets this out in its text makes the point *a fortiori*.

The Strasbourg Court in *James v. United Kingdom* explained why it would be correct as a matter of principle to treat non-nationals and nationals differently in the context of expropriation. The Court determined that Article 14 of the Convention and its prohibition of discrimination did not pose a problem in this connection: 'the Court has consistently held that differences of treatment do not constitute discrimination if they have an "objective and reasonable justification"',<sup>78</sup> which the Court held to be the case with difference of treatment in connection with compensation for expropriation. The Court went on to say:

*Especially as regards a taking of property effected in the context of a social reform, there may well be good grounds for drawing a distinction between nationals and non-nationals as far as compensation is concerned. To begin with, non-nationals are more vulnerable to domestic legislation: unlike nationals, they will generally have played no part in the election of designation of its authors nor have been consulted on its adoption. Secondly, although a taking of property must always be effected in the public interest, different considerations may apply to nationals and non-nationals and there may well be legitimate reason for requiring nationals to bear a greater burden in the public interest than non-nationals.*<sup>79</sup>

The same point has been made in more recent cases in the context of investor-State arbitrations, such as in *Lemire v. Ukraine*, where a Tribunal set up under the auspices of the International Centre for the Settlement of Investment Disputes (ICSID) observed that: 'this unequal treatment is not without justification: justice is not to grant everyone the same, but *suum cuique tribuere*. Foreigners, who lack political rights, are more exposed than domestic investors to arbitrary actions of the host State and may thus, as a matter of legitimate policy, be granted a wider scope of protection'.<sup>80</sup>

But how might those principles contribute to the development and further realisation of the rights of the Convention? Two aspects of the matter will be dealt with here.

First, there can be no doubt whatever that, in respect of expropriation of the property of non-nationals, these principles require *full* compensation, not just the 'appropriate' compensation that the Strasbourg Court has been content to demand in relation to expropriation of the property of nationals. As the Iran-US Claims Tribunal observed in *Sedco v. Iran*, there is overwhelming support for the conclusion 'that under customary international law in a case such as here presented – a discrete expropriation of alien property – full compensation should be awarded for the property taken'; '[t]his is true whether or not the expropriation was otherwise lawful'.<sup>81</sup> In *Biloune v. Ghana* an *ad hoc* Arbitral Tribunal chaired by Stephen Schwebel, President of the International Court of Justice, held that '[u]nder the principles of customary international law, a claimant whose property has been expropriated by a foreign State is entitled to full ... compensation'.<sup>82</sup> Indeed, this is the position customary international law has taken since the 1920s, going back to the Award by the Permanent Court of Arbitration in *Norwegian Shipowners' claim*<sup>83</sup> and the famous *Factory at Chorzów* judgment of the Permanent Court of International Justice,<sup>84</sup> but also numerous other awards.<sup>85</sup>

In 1958 Lord McNair, who was the following year to become President of the Strasbourg Court, took the view that according to the principles of international law a State may lawfully take the property of non-nationals only when, amongst other things, it makes 'full compensation to the alien thereby affected'.<sup>86</sup> Posing the question whether it was possible, under general international law,

even to argue that a non-national who had had his or her property expropriated could be given anything 'less than full compensation', he concluded that he was 'aware of no judicial or arbitral authority whatever for the view that a State is entitled to nationalise the property of foreigners on condition of paying only partial compensation'.<sup>87</sup>

The principles of international law in relation to non-nationals differ from those of the ECHR in relation to nationals in so far as, regardless of how important the reasons for the expropriation are, there can be no diminution of the compensation that is due to the non-national. As the ICSID Tribunal held in *Santa Elena v. Costa Rica*, concerning expropriation for a weighty environmental reason: 'the fact that the Property was taken for this reason does not affect either the nature or the measure of the compensation to be paid for the taking'.<sup>88</sup> Similarly, the margin of appreciation which the Strasbourg Court relies on in connection with Article 1 of Protocol No. 1 claims of nationals is 'not found in customary international law' in respect of expropriation of non-nationals.<sup>89</sup>

There can be little doubt that State practice supports this position. The USA in 1976 announced that with regard to expropriations of property of US nationals 'the Department of State wishes to place on record its view that foreign investors are entitled to the fair market value of their interests'.<sup>90</sup> Occasioned by certain statements by Portugal in relation to the protection of property under the ECHR, the United Kingdom, Germany, and France in 1979 all made public statements to the effect that 'the general principles of international law require the payment of prompt, adequate and effective compensation of the expropriation of foreign property'.<sup>91</sup>

<sup>77</sup> *Papamichalopoulos v. Greece (Article 50, just satisfaction)*, no. 14556/89, 31 November 1995, § 36.

<sup>78</sup> *James v. United Kingdom*, no. 8793/79, 21 February 1986, § 63.

<sup>79</sup> *Ibid.*

<sup>80</sup> *Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award, 28 March 2011, para. 57.

<sup>81</sup> *Sedco v. Iran*, Interlocutory Award, 27 March 1986, (1986) 84 ILR 483, 527.

<sup>82</sup> *Biloune and Marine Drive Complex Ltd. v. Ghana Investments Centre and the Government of Ghana*, (1989) 95 ILR 183, 211 (UNCITRAL Rules).

<sup>83</sup> *Norwegian Shipowners' claims (Norway v. USA)*, (1922) 1 RIAA 307, 338.

<sup>84</sup> *Factory at Chorzów* (1928) Series A, No. 17, p. 47. See C. Brown, "The *Factory at Chorzów* Case" in E. Bjorge & C. Miles (eds.), *Landmark Cases in Public International Law* (Hart Publishing, 2018).

<sup>85</sup> See *Administrative Decision No III*, (1923) 7 RIAA 64, 65-66; *Goldenberg*, (1928) 2 RIAA 901, 909; *De Sabla*, (1934) 28 AJIL 602, 611-612; *Lighthouses Arbitration (France v. Greece)*, (1956) 23 ILR 299, 300-301; *Sapphire International Petroleum Ltd v. National Iranian Oil Company*, (1963) 35 ILR 136, 185-186; *AMCO Asia Corp v. Indonesia (Merits)*, (1984) 89 ILR 366, 505, paras. 267-268.

<sup>86</sup> Lord McNair in: *Report of the International Law Association*, (International Law Association, 1959) 144-145.

<sup>87</sup> Lord McNair, "The Seizure of Property and Enterprises in Indonesia", (1959) 3 *Netherlands International Law Review* 218, 251.

<sup>88</sup> *Compañía de Desarrollo de Santa Elena S.A. v. The Republic of Costa Rica*, ICSID Case No. ARB/96/1, Final Award, 17 February 2000, para. 71.

<sup>89</sup> *Siemens v. Argentina*, ICSID Case No. ARB/02/8 Award, 17 January 2007, para. 354.

<sup>90</sup> "United States: Department of State Statement on Foreign Investment and Nationalization" 30 December 1975, (1976) 15 ILM 186.

<sup>91</sup> United Kingdom, 7 February 1979, (1979) 22 Ybk ECHR 16; Germany, 17 July 1979, (1979) 22 Ybk ECHR 18; France, 4 December 1979, (1979) 22 Ybk ECHR 20.



That full market value means no less than the 'fair market value' requirement<sup>92</sup> is clear from an abundant jurisprudence, such as *Sedco v. Iran* ('fair market value')<sup>93</sup> and *Italian Republic v. Federal Republic of Germany (Plenary Judgment 131)*, where the Arbitral Commission on Property, Rights and Interests in Germany held that full compensation meant that it was 'the market price at the place of dispossession to which the dispossessed is entitled'.<sup>94</sup> Crucially, in international law this has been taken to mean that one has to think away those measures taken by the public authorities of the host State – the measures which in the aggregate make up the nationalization, the expropriation, the dispossession – such that 'fair market value' means 'the amount which a willing buyer would have paid a willing seller for the [property], disregarding any diminution of value due to the [taking] itself or the anticipation thereof, and excluding consideration of events thereafter that might have increased or decreased the value'.<sup>95</sup>

There is, as the Court explicitly recognised in *James and Lithgow*, a great difference as between the level of compensation the Strasbourg Court affords *nationals* and the level of compensation the general principles of international law affords *non-nationals*. As one distinguished Arbitral Tribunal (Reisman, President; Frowein, Kraft, Lagarde and van den Berg) put it, in *Bank for International Settlements*, 'it is true that the jurisprudence of the Strasbourg Court has adopted a flexible standard, described as one of "appropriate" compensation for taking by a State of the property of its nationals'; but 'the general relevance of human rights law aside, the mainstream of general international law', the Tribunal observed, 'has required full compensation'.<sup>96</sup>

That must be correct. It could be added that the European jurisprudence in this regard has thus far related only to nationals,<sup>97</sup> whereas the international jurisprudence in principle concerns non-nationals. For the reasons given by the Strasbourg Court in *James*, the general principles of international law give a higher level of protection to non-nationals than the ECHR gives to nationals. This could be thought to mean that there is no disconnect or conflict whatever between the international jurisprudence demanding full compensation for non-nationals and the Strasbourg jurisprudence that gives less than full compensation for nationals. The two sets of case-law complement each other, as *James* acknowledges, each legal system taking the correct approach within its respective sphere.

Secondly, the question of who is to be deemed a national and who is a non-national is of interest. Article 1 of Protocol 1 is the only article of the Convention to set out on the face of its text that it applies to 'every natural or legal person'; there can thus be no cavil with the proposition, long recognised by the Court, that Article 1 'provides specific recognition of the general position that corporate bodies have rights under the Convention'.<sup>98</sup> It is germane in that connection that, according to general international law, non-nationals who have set up companies in the host State, instead of operating through a company incorporated abroad, will in certain situations enjoy the same protection as they would have done had they been incorporated abroad. This is clear from the judgment of the International Court of Justice in *Elettronica Sicula S.p.A (ELSI) (USA v. Italy)*, where the International Court observed that the US American investors Raytheon and Machlett, who owned parts of ELSI, according to international law enjoyed protection in Italy as non-nationals although their company, ELSI, was incorporated in Italy and not abroad.<sup>99</sup> Sir Arthur Watts explained the decision in the following way: whilst, up until the 1980s, it was not clear that non-nationals who have set up a company in the host State,

instead of electing to operate through a company based abroad, fall under the scope of protection of international law, 'the Court proceeded on this basis in *Elettronica Sicula S.p.A (ELSI)*: the United States claimed against Italy for loss and damage allegedly suffered by two US companies as a result of action taken by the Italian authorities against an Italian company the shares of which were wholly owned by the US companies whose direct rights as shareholders were thereby affected'.<sup>100</sup> This approach has been taken up by other international tribunals, such as the Tribunal in *Azturix*, which observed that, in *ELSI*, 'the ICJ accepted the protection of foreign shareholders by the State of their nationality against the State of incorporation'<sup>101</sup> and *CMS*, where the Tribunal observed that 'the *Elettronica Sicula* decision evidences that the International Court of Justice itself accepted ... the protection of shareholders of a corporation by the State of their nationality in spite of the fact that the affected corporation had a corporate personality under the defendant State's legislation'.<sup>102</sup> Non-nationals who act through a company set up in the host State enjoy the protection afforded by international law to non-nationals; this result is 'in accord with the general purpose' of protection of the possessions of non-nationals, whether that is guaranteed by treaty or customary international law.<sup>103</sup>

There can be no doubt that, in respect of non-nationals, there is much work to be done before it can be said that the Strasbourg Court has given 'the general principles of international law' their fair due in connection with the protection of property. As more applications are directed to the Court in relation to the expropriation of non-nationals, the Court will, on the basis of its approach in

<sup>92</sup> See to this effect e.g. the views of two eminent international lawyers who were both Judges of the Strasbourg Court: S. Petré, "La confiscation des biens étrangers et les réclamations internationales", (1963) 109 *Recueil des cours de l'Académie de droit international* p. 542; A. Verdross, "Die Nationalisierung niederländischer Unternehmungen in Indonesien im Lichte des Völkerrechts", (1959) 3 *Netherlands International Law Review* 278, 286.

<sup>93</sup> *Sedco v. Iran* (*supra* note 81), p. 533.

<sup>94</sup> *Italian Republic v. Federal Republic of Germany (Plenary Judgment No. 131)* (1964) 7 Arbitral Commission on Property, Rights and Interests in Germany pp. 213, 215-216. Also: *Judgment No. 140* (1965) 8 Arbitral Commission on Property, Rights and Interests in Germany pp. 174, 183.

<sup>95</sup> *INA Corp v. Iran*, Award, 12 August 1985, (1985) 75 ILR 595, 603. Also: *Santa Elena*, (*supra* note 88), para. 71; *Sempre Energy Int. v. Argentina*, ICSID Case No. ARB/02/16 Award, 28 September 2007, para. 405; *El Paso v. Argentina*, ICSID Case No. ARB/03/15, Award, 31 October 2011, paras. 702-703.

<sup>96</sup> *Bank for International Settlements (Partial Award)*, 22 November 2002, (2002) 23 RIAA 153, 231 at para. 168.

<sup>97</sup> See note 74 *supra* regarding the non-national initially involved in *Lithgow* whose application was declared inadmissible.

<sup>98</sup> D.J. Harris, M. O'Boyle, E.P. Bates & C.M. Buckley, *Law of the European Convention on Human Rights*, (OUP, 2014), 862.

<sup>99</sup> *Elettronica Sicula S.p.A. (ELSI) (USA v. Italy)*, I.C.J. Rep. 1989, p. 15, 79 at para. 132.

<sup>100</sup> Sir Arthur Watts, "Nationality of Claims", in *Fifty Years of the International Court of Justice*, (CUP, 1996), 424, 435. Also: V. Lowe, "Shareholders Rights to Control and Manage: From *Barcelona Traction* to *ELSI*", in *Liber Amicorum Judge Shiregu Oda*, (Kluwer, 2002), 269, 269-270.

<sup>101</sup> *Azturix v. Argentina*, ICSID Case No. ARB/01/12, Decision on Jurisdiction, 8 December 2003, para. 71.

<sup>102</sup> *CMS Gas Transmission Co v. Argentina*, ICSID Case No. ARB/01/8, Decision of the Tribunal on Objections to Jurisdiction, 17 July 2003, para. 44.

<sup>103</sup> *Elettronica Sicula S.p.A. (ELSI) (USA v. Italia)*, I.C.J. Rep. 1989, p. 15, 79 at para. 132. See G. Gaja, "Trattati internazionali", [1999] *Digesto delle discipline pubblicistiche* 344, 358.

*James* and *Lithgow*, indubitably give full effect to these general principles of international law as developed by international courts and tribunals.

## 2. European Consensus

The nexus between the living instrument approach and the interpretative technique codified in Article 31(3)(b) of the VCLT is a close one. As the Court observed in *A, B & C v. Ireland*, the existence of a consensus has long played a role in the evolution of the Convention provisions from *Tyrer v. United Kingdom* onwards, the Convention being considered a 'living instrument' to be interpreted in the light of present-day conditions: 'Consensus has therefore been invoked to justify a dynamic interpretation of the Convention'.<sup>104</sup> Similarly, as the Special Rapporteur of the International Law Commission (ILC) Georg Nolte has observed, the Strasbourg Court 'frequently relies on subsequent practice when it identifies a "consensus", "vast majority", "generally recognised rules" or a "distinct tendency"' although it does not explicitly advert to Article 31(3)(b) in that regard.<sup>105</sup>

Furthermore, the general approach of the Strasbourg Court in this connection seems to be in line with Draft Conclusion 3 of the ILC<sup>106</sup> on subsequent agreements and subsequent practice in relation to the interpretation of treaties, which stipulates: 'Subsequent agreements or subsequent practice under articles 31 and 32 may assist in determining whether or not the presumed intention of the parties upon the conclusion of the treaty was to give a terms used a meaning which is capable of evolving over time.' As the ILC here brings out, there is nothing special about treaty terms being interpreted as having evolved; the issue of evolutionary interpretation of treaties is one of the correct application of Articles 31-33 VCLT.<sup>107</sup> The possibility, raised by Judge Ziemele in *Rohlena v. Czech Republic*, that a better way of conceptualizing 'consensus', in connection with the living instrument approach, is as a matter of 'particular' or 'regional' customary international law, will not be developed any further here, although it seems to this author a promising avenue for further analysis.<sup>108</sup>

But what is the line that divides what is and what is not capable of interpretation under the living instrument doctrine, or in other words, what could be termed to be living and dead in the European Convention?

In *Hassan* the Strasbourg Court found that 'a consistent practice on the part of the High Contracting Parties, subsequent to their ratification of the Convention, could be taken as establishing their agreement not only as regards interpretation but even to modify the text of the Convention'.<sup>109</sup>

This interpretation was, according to the Court, based on the interpretative techniques codified in Article 31(3)(b)-(c). These considerations did not lead to an evolutionary interpretation that heightened the level of protection afforded by the Convention; rather, they limited or restricted that level of protection. As a matter of treaty interpretation under the rules set out in Articles 31-33 VCLT, i.e. the 'gold standard' of treaty interpretation which the Strasbourg Court itself explicitly follows, this interpretation was not necessarily wrong in principle but was inappropriate by reason of the subsequent practice which existed in the case. Before addressing that question squarely, however, it is necessary first to touch on three other points: first, that *Hassan* is not the first case in which the Grand Chamber has taken an approach which, by way of evolution, restricted Convention rights rather than expanding them; second, the issue of extraterritorial derogation; and, third, the issue of whether, in principle, a special regime of treaty interpretation ought to apply to provisions such as Article 1 ECHR.

## 3. Restricting the Convention's Protection through Evolutionary Interpretation?

As adumbrated above, *Hassan* was not the first case in which the Court arguably has watered down the level of protection flowing from Article 5. Perhaps the most important example is *Mangouras v. Spain*,<sup>110</sup> where, it seems, the Grand Chamber (by a majority of 10 to 7) decided to lower the protection offered by Article 5 of the Convention to the individual claimant, who had caused great harm to the environment in the form of an oil spill. The Spanish courts had set a bail of three million euros, a sum which was, according to the minority of the Grand Chamber, 'far beyond the means of the applicant, with the consequence that he continued to be detained on remand for a total of eighty-three days'.<sup>111</sup> Whilst the case is different in many ways, one could see *Mangouras* as lowering the standards of protection in Article 5 of the Convention concerning the setting of bail against the applicant. Certainly, Judge Tulkens has characterised the judgment as an example of how evolutionary interpretation can 'in some cases, have as an effect the restriction of the scope of the rights protected by the Convention'.<sup>112</sup>

The Grand Chamber stated that in principle 'the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies'.<sup>113</sup> But this did not lead the Grand Chamber to the conclusion that the applicant's rights under Article 5 had evolved towards a higher level of protection for individuals in the applicant's situation. Instead the Grand Chamber stated that it could not 'overlook the growing and legitimate concern both in Europe and internationally in relation to environmental offences'.<sup>114</sup> The subsequent practice in *Mangouras* was evidenced in particular by States' powers and obligations regarding the prevention of maritime pollution and the unanimous determination by European States to identify those responsible and to impose sanctions on them, sometimes using criminal law as a means of enforcing environmental law obligations. The Grand Chamber's analysis in *Mangouras* fell short of the exacting test as to what is subsequent practice drawn up by the International Court of Justice: according to the International Court, in *Kasikili/Sedudu Island*, a subsequent practice is established only when the parties to a treaty, through their authorities, engage in common conduct, and that they acted wilfully and with awareness of the consequences of their actions.<sup>115</sup>

<sup>104</sup> *A, B & C v. Ireland* [GC], no. 25579/05, 16 December 2010, § 234.

<sup>105</sup> G. Nolte, Second Report on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties, A/CN.4/671, para. 69.

<sup>106</sup> ILC 2013 Report, Chapter IV, A/68/10.

<sup>107</sup> See generally E. Bjorge, *The Evolutionary Interpretation of Treaties*, (OUP, 2014).

<sup>108</sup> See *Rohlena v. Czech Republic* [GC], no. 59552/08, 27 January 2015 (concurring opinion of Judge Ziemele), § 2 = 35 HRLJ 106 (2015).

<sup>109</sup> *Hassan* (supra note 8), § 101.

<sup>110</sup> *Mangouras v. Spain* [GC], no. 12050/04, 28 September 2010.

<sup>111</sup> Joint dissenting opinion of Judges Rozakis, Bratza, Bonello, Cabral Barretto, Björgvinsson, Nicolau, and Bianku.

<sup>112</sup> F. Tulkens, *What are the limits to the evolutive interpretation of the Convention?*, (Council of Europe, 2011) 8.

<sup>113</sup> *Mangouras v. Spain* (supra note 110), § 87.

<sup>114</sup> *Ibid.* § 86.

<sup>115</sup> *Kasikili/Sedudu Island (Botswana/Namibia)*, Judgment, I.C.J. Rep. 1999, pp. 1045, 1094.

It seems fair to analyse *Mangouras* as an example of an international court shying away from giving to a treaty provision an evolutionary interpretation that would have gone with the grain of the object and purpose of the treaty, and instead found guidance in the subsequent agreements and practice of the States, which seemed in the event to go in the other direction. In *Mangouras*, in other words, the Grand Chamber gave precedence to subsequent practice over the object and purpose, thus avoiding a divergence between its own jurisprudence and the practice of States Parties.

#### 4. Extraterritorial Derogations?

Second, can it be right for the Strasbourg Court to expand jurisdiction without a consonant enlargement of the potential for derogation? To state the question differently, is it tenable to hold a State accountable because it exercises jurisdiction abroad all the while denying it the possibility to derogate extraterritorially?

The UK Supreme Court in *Abd Ali Hameed Al-Waheed & Serdar Mohammed v. Ministry of Defence* recently took the view that it can scarcely be possible to derogate extraterritorially,<sup>116</sup> and so did the minority of the Grand Chamber in *Hassan*. Simply stated, the obligation to afford human rights protection in the context of the external exercise of State power is not likely to be amenable to derogation. This is so because Article 15 lays down as a condition for express derogation that the emergency in issue be one which is 'threatening the life of the nation'. The Strasbourg Court in *Lawless v. Ireland* determined that the words 'refer to an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed'.<sup>117</sup> Lord Bingham, delivering the lead judgment in *Al-Jedda*, observed that: '[i]t is hard to think that these conditions could ever be met when a State had chosen to conduct an overseas peacekeeping operation, however dangerous the conditions, from which it could withdraw'.<sup>118</sup> Lord Hope, delivering the lead judgment in *Smith v. Ministry of Defence*, observed about the power to derogate that '[t]he circumstances in which that power can properly be exercised are far removed from those where operations are undertaken overseas'.<sup>119</sup> Before *Al-Waheed & Serdar Mohammed*, Campbell McLachlan summarised the legal position thus: '[e]ngaging in an overseas military or peacekeeping operation, undertaken at the State's election, is most unlikely' to meet the requisite criteria for derogation.<sup>120</sup> If the overseas operation is really elective, then it is difficult to imagine that that would meet the criteria of Article 15. These are the views that seem to have convinced the Supreme Court in *Al-Waheed & Serdar Mohammed*.

If the Strasbourg Court were to go against the views of the leading writers and of the House of Lords and the Supreme Court and allow derogations in such circumstances, the acceptability of the derogation is likely to depend heavily on the impugned facts. One might say that there is a difference between the interventions in Libya in recent years, and interventions that, if nothing else, came rather closer to being prompted by the life of the nation being threatened at home. It is certainly not possible to say, *ex ante*, that one can derogate out of all extraterritorial military activity undertaken by armed forces; derogation is not an on-off switch for human rights obligations. The provision provides that the State may take measures derogating from its obligations under the Convention only 'to the extent strictly required by the exigencies of the situation'; as is clear from *A. v. United Kingdom* the Strasbourg Court has been fastidious in upholding the principle on which Article 15 is based,<sup>121</sup> and the Court is likely to follow that same approach in respect of overseas military operations.

In any case, derogations in circumstances such as those prevailing in *Hassan* would, as pointed out by Sari and Quéniwet, come with a series 'of important limitations, including the fact that derogations are incapable of displacing the applicability of the Convention as a whole, that they are subject to scrutiny by the Strasbourg Court and are without prejudice to other applicable rules of international law, including other applicable human rights norms, and that the rules of the ECHR overlap with those of the law of armed conflict in a number of respects'. Derogations therefore should not be regarded as 'a magical panacea'.<sup>122</sup>

#### 5. Are there Special Rules for the Interpretation of Issues of Jurisdiction?

A question that was addressed by both parties in *Hassan* but which did not come to a head directly in the judgment is the correctness or otherwise of what the Court observed in *Banković*<sup>123</sup> about evolutionary interpretation and Article 1 of the Convention. As the Court stated in that case, '[i]t is true that the notion of the Convention being a living instrument to be interpreted in light of present-day conditions is firmly rooted in the Court's case-law'. It continued by pointing out that it had 'applied that approach not only to the Convention's substantive provisions ... but more relevantly to its interpretation of former Articles 25 and 46 concerning the recognition by a Contracting State of the competence of the Convention organs'. Given, however, that 'the scope of Article 1 ... is determinative of the very scope of the Contracting Parties' obligations and, as such, of the scope and reach of the entire Convention system of human rights' protection as opposed to the question ... of the competence of the Convention organs to examine a case', the Court in *Banković* declined to apply the living instrument doctrine to the jurisdictional use of Article 1. The Grand Chamber of the Strasbourg Court in *Banković* held that the living instrument doctrine (or 'dynamic' or 'evolutionary interpretation') did not apply to Article 1, as that Article pertains to jurisdiction.<sup>124</sup>

It is difficult to accept this conclusion on its face. There is, as a matter of principle, no reason why special doctrines of interpretation should apply to issues of jurisdiction. As a matter of international law, Article 1, like any other provision of the European Convention, has to be interpreted in accordance with the rules set out in Articles 31-33 VCLT. No special rules of interpretation apply to jurisdictional provisions. As the senior Arbitral Tribunal (Stephen, President; Crawford; Schwebel) in *Mondev* determined:

*there is no principle either of extensive or restrictive interpretation of jurisdictional provisions in treaties. In the end the question is what the relevant provisions mean, interpreted in accordance with the applicable*

<sup>116</sup> *Abd Ali Hameed Al-Waheed & Serdar Mohammed v Ministry of Defence*, [2017] UKSC 2, para. 45 (Lord Sumption); para. 163 (Lord Mance).

<sup>117</sup> *Lawless v. Ireland*, no. 332/57, 1 July 1961, § 28.

<sup>118</sup> *R. (on the application of Al-Jedda) v. Secretary of State for Defence*, [2007] UKHL 58, para. 38.

<sup>119</sup> *Smith et al. v. The Ministry of Defence*, [2013] UKSC 41 at para. 60.

<sup>120</sup> C. McLachlan, *Foreign Relations Law*, (CUP, 2014) 334.

<sup>121</sup> *A. and Others v. United Kingdom* [GC], no. 3455/05, 19 February 2009 = 30 HRLJ 83 (2009-2010).

<sup>122</sup> A. Sari & N. Quéniwet, "Barking up the Wrong Tree: How Not to Save the British Armed Forces from Legal Defeat", <<http://www.lawfareblog.com/2015/04/barking-up-the-wrong-tree-how-not-to-save-the-british-armed-forces-from-legal-defeat/>>.

<sup>123</sup> *Banković* (*supra* note 7).

<sup>124</sup> *Banković* (*supra* note 7), §§ 64-65.

rules of interpretation of treaties. These are set out in Articles 31-33 of the Vienna Convention on the Law of Treaties.<sup>125</sup>

The Tribunal added: 'Neither the International Court nor other tribunals in the modern period apply any principle of restrictive interpretation to issues of jurisdiction.'<sup>126</sup>

The main point in this connection, however, is a very simple one: whilst it must be incorrect to say, as the Court did in *Banković*, that special rules of treaty interpretation should apply to Article 1, it is also wrong to think that the concept of jurisdiction that the Court now relies on has somehow evolved since the Convention's inception. Rather, what is at issue here is the straight-forward application of a concept that, although it was confused in *Banković*,<sup>127</sup> has always been there and is not so much evolving as finally being allowed fully to apply.

#### 6. Was the Interpretative Result in *Hassan* Supported by the Subsequent Practice of States?

Turning, then, to the main issue to which *Hassan* gives rise, how convincing is the claim of consistency of the interpretative result in *Hassan* with the VCLT?

First, it is worth pointing out that the result in *Hassan* was in no way a novel one; the Commission had already reached it in 1976 in *Cyprus v. Turkey*, where the Commission had taken

*account of the fact that both Cyprus and Turkey are Parties to the (Third) Geneva Convention of 12 August 1949... Having regard to the above, the Commission has not found it necessary to examine the question of a breach of Article 5 of the European Convention on Human Rights with regard to persons accorded the status of prisoners of war.*<sup>128</sup>

It is worth recalling, however, as Judge Greenwood has done, that the Strasbourg Court has no more than 'a restricted jurisdiction and cannot directly enforce rules drawn from outside the body of law which created [it]'.<sup>129</sup> This coheres with the conventional basis of the Strasbourg Court's jurisdiction. Article 19 ECHR establishes the Strasbourg Court '[t]o ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto'. Its jurisdiction, according to Article 32(1), 'shall extend to all matters concerning the interpretation and application of the Convention and the protocols thereto', Article 32(2) adding that '[i]n the event of dispute as to whether the Court has jurisdiction, the Court shall decide'. In recent times, other international courts and tribunals have taken a similar stance to Judge Greenwood's point.

The *Kishenganga*<sup>130</sup> Tribunal, in its interpretation of the Indian-Pakistani Indus Waters Treaty and Annexures, underscored that, in interpreting the treaty, 'principles of international environmental law must be taken into account'.<sup>131</sup> Paragraph 29 of Annexure G to the Indus Waters Treaty, however, made it clear that:

*the law to be applied by the Court shall be this Treaty and, whenever necessary for its interpretation or application, but only to the extent necessary for that purpose, the following in the order in which they are listed: (a) International conventions establishing rules which are expressly recognized by the Parties; (b) Customary international law.*

Thus the Tribunal noted that 'the place of customary international law in the interpretation and application of the Indus Waters Treaty remains subject to Paragraph 29'; 'this Treaty expressly limits the extent to which the Court may have recourse to, and apply, sources of law beyond the Treaty itself'.<sup>132</sup> In an important passage, the Tribunal concluded that:

*if customary international law were applied not to circumscribe, but to negate rights expressly granted in the Treaty, this would no longer be 'interpretation or*

*application' of the Treaty but the substitution of customary law in place of the Treaty.*<sup>133</sup>

That is the danger that other international law is 'applied not to circumscribe, but to negate rights expressly granted in the Treaty' which the court in question is entitled to interpret and apply. Then the court is no longer engaging, to use the wording of Article 32(1) ECHR, in the 'interpretation or application of the Convention and the protocols thereto', but, to use the words of the *Kishenganga* Tribunal, in 'the substitution' of international humanitarian law 'in place of' the ECHR. As was seen above, the ECHR does not include the kind of clause that the Indian-Pakistani Indus Waters Treaty and Annexures included; instead the relationship between the Convention and other international law is regulated through Articles 31-32 VCLT.

On the basis of those rules of interpretation, the Arbitral Tribunal, chaired by Alain Pellet, in *RREEF v. Spain*, created by the Energy Charter Treaty (ECT),<sup>134</sup> and whose competence was challenged on the grounds that the EU Treaties ousted the Tribunal's jurisdiction, observed:

'[I]n case of any contradiction between the ECT and EU law, the Tribunal would have to insure full application of its "constitutional" instrument, upon which its jurisdiction is founded. ... It follows from this that, if there must be a "hierarchy" between the norms to be applied by the Tribunal, it must be determined from the perspective of public international law, not of EU law. Therefore, the ECT prevails over any other norm (apart from those of *ius cogens* – but this is not an issue in the present case).'<sup>135</sup>

Thus, in *Hassan*, the Court set out the 'criterion contained in Article 31 (3)(c) of the Vienna Convention', in respect of which the 'Court has made it clear on many occasions that the Convention must be interpreted in harmony with other rules of international law of which it forms part'.<sup>136</sup> The Court noted that it had already held that Article 2 should be interpreted 'so far as possible in light of the general principles of international law, including the rules of international humanitarian law which play an indispensable and universally-accepted role in mitigating the savagery and inhumanity of armed conflict'.<sup>137</sup>

In addition to the criterion contained in Article 31(3)(c) VCLT came the fact that no Contracting State has

<sup>125</sup> *Mondev v. United States of America*, Award, 11 October 2002, (2002) 6 ICSID Rep. 192 at para. 43.

<sup>126</sup> *Ibid.*

<sup>127</sup> See C. McLachlan, *Foreign Relations Law*, (CUP, 2014) 319-345.

<sup>128</sup> *Cyprus v. Turkey*, nos. 6780/74 et al. (Report of the Commission, 10 July 1976), § 313.

<sup>129</sup> C. Greenwood, "Rights at the frontier: protecting the individual in time of war", in: B.A.K. Rider (ed.), *Law at the Centre*, (Kluwer, 1999) 278.

<sup>130</sup> *Kishenganga* (Final Award), (2013) 157 ILR 362.

<sup>131</sup> *Kishenganga* (Partial Award), (2013) 154 ILR 1, 173 at para. 452.

<sup>132</sup> *Kishenganga*, Final Award, para. 111.

<sup>133</sup> *Ibid.* para. 112.

<sup>134</sup> Energy Charter Treaty (ECT), 17 December 1994, 2080 UNTS 95.

<sup>135</sup> *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à.r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/30, Decision on Jurisdiction, 6 June 2016, para. 75.

<sup>136</sup> *Hassan* (supra note 8), § 102.

<sup>137</sup> *Ibid.* § 102.

purported to derogate from its obligations under Article 5 ECHR in order to detain, during international armed conflicts, persons on the basis of Geneva Convention III and IV. Although, as the Court noted both in *Banković* and *Hassan*, there have been a number of military missions involving Contracting States acting extra-territorially since their ratification of the Convention, none of these States has ever made a derogation pursuant to Article 15 in respect of these activities.<sup>138</sup> The practice of not lodging derogations in respect of detention under Geneva Conventions III and IV during international armed conflicts, the Court pointed out in *Hassan*, is mirrored by State practice in relation to the International Covenant on Civil and Political Rights. Under this instrument no State has explicitly derogated under Article 4 in respect of such detention, even subsequent to the *Nuclear Weapons* and *Wall* Advisory Opinions<sup>139</sup> and *DRC v. Uganda* Judgment,<sup>140</sup> where the International Court made it clear that States' obligations under the international human rights instruments to which they were parties continued to apply in respect of acts done by a State in the exercise of its jurisdiction outside its own territory, particularly in occupied territories.

If it would have been wrong to rely only on extraneous rules of law such as the Geneva Conventions, the interpretation that the Strasbourg Court made was supported too by the subsequent practice of the parties. That takes one dangerously close to the situation described by the *Kishenganga* and *RREEF* tribunals, i.e. one in which the court or tribunal engages not in the interpretation or application of the treaty of which it is the arbiter, and which gave it its jurisdiction, but instead in the 'substitution' of other rules of international law 'in place of the Treaty'.<sup>141</sup>

Perhaps that would have been the case if other rules of international law had been the only means of interpretation in favour of the interpretation that the Court made in *Hassan*. As seen above, however, that was not the case, as another means of interpretation favouring the result was, according to the Court, the subsequent practice on the part of all the States Parties.

This approach was sound in principle. As the ILC has recently confirmed, a subsequent practice is 'an authentic means of interpretation' consisting 'of conduct in the application of a treaty, after its conclusion, which establishes the agreement of the parties regarding the interpretation of the treaty'.<sup>142</sup> The importance of such subsequent practice in the application of a treaty, as an element of interpretation, is obvious, as 'it constitutes objective evidence of the understanding of the parties as to the meaning of the treaty'.<sup>143</sup> On the other hand, as the ILC pointed out both in 1964 and in 2013, subsequent agreements and subsequent practice under Article 31(3)(a)-(b) are not the only "authentic means of interpretation". In particular the ordinary meaning of the text of the treaty is also such a means "the text of the treaty must be presumed to be the authentic expression of the intentions of the parties".<sup>144</sup> By describing subsequent practice as an: "authentic" means of interpretation the Commission recognizes that the common will of the parties, from which any treaty results, possesses a specific authority regarding the identification of the meaning of the treaty, even after the conclusions of the treaty. The Vienna Convention thereby accords the parties to a treaty a role which may be uncommon for the interpretation of legal instruments in some domestic legal systems.<sup>145</sup> In 1964 Special Rapporteur Sir Humphrey Waldock was prepared in certain circumstances to accord particular – even decisive – weight to subsequent practice which is consistent and which embraces all the parties:

Subsequent practice when it is consistent and embraces all the parties *would appear to be decisive of the meaning to be attached to the treaty*, at any rate when it indicates

that the parties consider the interpretation to be binding upon them. In these cases, subsequent practice as an element of treaty interpretation and as an element in the formation of a tacit agreement overlap and the meaning derived from the practice becomes an authentic interpretation established by agreement.<sup>146</sup>

The ILC in 2013 confirmed this approach to the extent that it observed that: 'subsequent agreements and subsequent practice establishing the agreement of the parties regarding the interpretation of a treaty must be conclusive regarding such interpretation when "the parties consider the interpretation to be binding upon them"'.<sup>147</sup>

That, according to the Strasbourg Court's description of the practice of the States Parties, was the case in *Hassan*. In the Court's view, all the States Parties seemed to consider the interpretation to be binding upon them. The subsequent practice in question in *Hassan* was, the Court held, consistent and embraced all the parties to the Convention, as 'no Contracting State has purported to derogate from its obligations under Article 5 in order to detain, during international armed conflicts, persons on the basis of the Third and Fourth Geneva Conventions'.<sup>148</sup> Arguably, in such a case, to use Sir Humphrey Waldock's words, 'subsequent practice as an element of treaty interpretation and as an element in the formation of a tacit agreement overlap and the meaning derived from the practice becomes an authentic interpretation established by agreement'.

As a matter of treaty interpretation the approach the Court took in *Hassan* is possible in principle, but only if one accepts that the failure of the Member States to derogate extraterritorially met the threshold as regards subsequent practice – a point that can certainly be doubted. Could it not be that some States failed to derogate because they thought – *à tort ou à raison* – the Convention would not apply in *Hassan* type cases? Could others, equally, have felt that purporting to derogate could have amounted to agreement that the Convention ought to bind in this type of case? Did the States in this regard act willfully and with awareness of the consequences of their actions?

Another issue is that some States, Germany being one, refrained from detaining any individuals in Afghanistan,<sup>149</sup>

<sup>138</sup> *Banković* (supra note 7), § 62; *Hassan* (supra note 8), § 101.

<sup>139</sup> *Legality of the Threat or Use of Nuclear Weapon*, Advisory Opinion, 8 July 1996, I.C.J. Rep. 1996, p. 226, para. 25 = 17 HRLJ 253 (1996); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, I.C.J. Rep. 2004, p. 136, para. 106 = 25 HRLJ 161 (2004).

<sup>140</sup> *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, I.C.J. Rep. 2005, p. 168, para. 216.

<sup>141</sup> *Kishenganga*, Final Award, para. 112.

<sup>142</sup> ILC 2013 Report, Chapter IV, A/68/10, Draft Conclusion 4(2).

<sup>143</sup> ILC Yearbook 1966 II, pp. 221-222.

<sup>144</sup> ILC Yearbook 1964 II, pp. 204-205; ILC 2013 Report, Chapter IV, A/68/10 p. 20.

<sup>145</sup> ILC 2013 Report, Chapter IV, A/68/10 p. 21.

<sup>146</sup> Humphrey Waldock, *Third Report on the Law of Treaties*, ILC Yearbook 1964 II p. 60 (italics added).

<sup>147</sup> ILC 2013 Report, Chapter IV, A/68/10 p. 22.

<sup>148</sup> *Hassan* (supra note 8), § 101.

<sup>149</sup> Declaration in the Seventh Report by the Federal Government on its Human Rights Policy in the Context of Foreign Relations and in Other Policy Areas (BT-Drs. 15/5800 ...). In the ICRCs Customary IHL database, [https://www.icrc.org/customary-ihl/eng/docs/v2\\_cou\\_de\\_rule99\\_SectionA](https://www.icrc.org/customary-ihl/eng/docs/v2_cou_de_rule99_SectionA), under "Germany. Practice Relating to Rule 99. Deprivation of Liberty. Section A. General" it is stated that: "Since April 2007 German forces have detained no individuals in Afghanistan."

as they in fact assumed that they were bound by human rights obligations in situations such as those at issue in *Hassan*.<sup>150</sup>

Whilst, in principle, subsequent practice could legitimately lead to the kind of extreme interpretative results which was the outcome in *Hassan* – an interpretation that is plainly *contra legem* – it is far from clear that the requisite practice actually obtained in *Hassan*.

There are other limits to such an approach, too, such as the one set out in the judgment of the International Court of Justice in *Whaling in the Antarctic*. There the International Court found that the functions which the International Convention for the Regulation of Whaling<sup>151</sup> conferred on the International Whaling Commission (IWC) had ‘made the Convention an evolving instrument’.<sup>152</sup> The Court observed that ‘amendments to the Schedule and recommendations by the IWC may put an emphasis on one or the other objectives pursued by the Convention, but cannot alter its object and purpose’.<sup>153</sup> In line with this approach, the subsequent practice of the Contracting States to the ECHR may put an emphasis on one or other of the objectives pursued by the ECHR; but it cannot be allowed to alter the Convention’s object and purpose. Whilst it would seem that *Hassan* is within the outer bounds drawn up by the International Court, in that it scarcely altered the very object and purpose of the Convention, the interpretation that the Strasbourg Court made might nevertheless be thought to have been an unsatisfactory one.

### III. Conclusion

If one compares with the approaches taken to legal interpretation by European domestic courts and other international courts and tribunals, there is little that is special about the living instrument approach of the Strasbourg Court. As the Court continues to develop its living instrument approach, and its interpretation of the Convention more broadly, it should do so in a way that is closely wedded to the text of the Convention. For the purposes of the development of the Convention through interpretation and application, there is much interpretative mileage in the text of the Convention’s Preamble, in Article 53 and in specific material provisions such as Article 1 of Protocol No. 1. The recitals in the Preamble and the provisions referred to open up for a living instrument approach that is firmly rooted in the text of the Convention. The real danger for the development of the interpretation of the Convention lies in *contra legem* interpretations such as the one the Strasbourg Court made in *Hassan* and *Banković*. In that regard the Strasbourg Court should take to heart the classic dictum of the International Court, which can apply no less to the European Court than to the International: ‘It is the duty of the Court to interpret’, ‘not to revise’, the Convention.<sup>154</sup>

### Appendix: Abbreviations (selection)

- AC: Appeals Cases
- BVerfGE: Official collection of judgments, Bundesverfassungsgericht, Entscheidungssammlung
- CLJ: The Cambridge Law Journal
- CUP: Cambridge University Press
- EHRLR: European Human Rights Law Review
- EWCA Civ: England and Wales Court of Appeal (Civil Division)
- GISTI: Groupe d’information et de soutien des immigrés
- ICSID: International Centre for Settlement of Investment Disputes, Washington, D.C.
- IHL: International Humanitarian Law
- ILC: International Law Commission
- ILM: International Legal Materials
- ILR: International Law Reports
- LGDJ: Librairie générale de droit et de jurisprudence
- LQR: Law Quarterly Review
- NZLR: New Zealand Law Reports
- OUP: Oxford University Press
- PCIJ: Permanent Court of International Justice
- QB: Queen’s Bench
- RGDIP: Revue générale de droit international public
- RIAA: Reports of International Arbitral Awards (United Nations)
- RFDA: Revue française de droit administratif
- UKHL: United Kingdom House of Lords
- UKSC: United Kingdom Supreme Court
- UNTS: United Nations Treaty Series
- WLR: Weekly Law Reports
- Ybk: Yearbook

<sup>150</sup> For example, “Germany accepts the recommendation and already submitted the following declaration to the United Nations Human Rights Committee in 2004: Pursuant to Article 2(1) CCPR, Germany ensures the rights recognized in the Covenant to all individuals within its territory and subject to its jurisdiction. Wherever its police or armed forces are deployed abroad, in particular when participating in peace missions, Germany ensures to all persons that they will be granted the rights recognized in the Covenant, insofar as they are subject to its jurisdiction”. Germany’s replies in the Universal Periodic Review 2009: Report of the Working Group on the Universal Periodic Review. Germany. Addendum. Views on conclusions and/or recommendations, voluntary commitments and replies presented by the States under review, A/HRC/11/15/Add. 1, 2-3.

<sup>151</sup> International Convention for the Regulation of Whaling, 2 December 1946, 161 UNTS 72.

<sup>152</sup> *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)*, I.C.J. Rep. 2014, pp. 226, 247, para. 45.

<sup>153</sup> *Ibid.* para. 56 (italics added).

<sup>154</sup> E.g. *Rights of US Nationals in Morocco*, I.C.J. Rep. 1952, pp. 176, 196; *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, Second Phase*, Advisory Opinion, I.C.J. Rep. 1950, p. 229.