universität wien

MASTER THESIS

Titel der Master Thesis / Title of the Master's Thesis

Treaties and Changing Circumstances: A study of evolutionary interpretation in the practice of the ICJ, the GATT/WTO and the ECtHR

verfasst von / submitted by

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angestrebter akademischer Grad / in partial fulfilment of the requirements for the degree of

Master of Laws (LL.M.)

Wien, 2016 / Vienna 2016

Studienkennzahl lt. Studienblatt / Postgraduate programme code as it appears on the student record sheet:	A 992 628
Universitätslehrgang lt. Studienblatt / Postgraduate programme as it appears on the student record sheet:	International Legal Studies
Betreut von / Supervisor:	Assoz. Prof. MMag. Dr. Christina Binder, E.MA.

Table of Contents

1. Introduction

Evolutionary interpretation is a topic so heavily researched that even approaching it almost automatically poses the question 'is there more to say?' The contention here is that this question can be answered affirmatively. Both the complexity of evolutionary interpretation as a legal phenomenon, and the fact that is is, precisely; evolutionary, and thereby of continued relevance in an ever more complex global society, makes this attempt for a contribution to further research and discussion worth writing. Rapid developments in various areas like trade or human rights leads to a need for predictable rights and obligations to be established through binding instruments, while the same developments necessitates flexibility in regulation. The many questions this raises, and to what extent you can use evolutionary interpretation to solve them, is the topic of this paper. In dealing with this sometimes technical field, terminology and meaning of words plays a central role. It is therefore appropriate to start with defining one of the fundamental terms to be used throughout the paper; treaty interpretation.

1.1 What is treaty interpretation?

When defining the term 'treaty interpretation' within the context of international law, it can be useful to separate the two words, starting with asking what a 'treaty' is. Black's Law Dictionary offers a simple, but relatively precise definition; a treaty is an agreement between two or more independent States[1]. Furthermore, a definition for the purposes of the Vienna Convention on the Law of Treaties (VCLT) is provided in the Convention's Article 2(1)(a) VCLT[2], according to which 'Treaty' means 'an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.' To this, it should be added that also other subjects of international law can be contracting parties to treaties[3]. Treaties can be created within a wide range of different fields, and for various purposes. Also, treaties between States can be bilateral or multilateral.

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[1] The Law Dictionary (Black's Law Dictionary), *What is Treaty?*, available online at http://thelawdictionary.org/treaty/ (last visited 12 July 2016).

[2] Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331

[3] As illustrations, see Art. 4, cf. Art. 2 VCLT, and for instance the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, 21 March 1986 (not yet entered into force), A/RES/37/11.

In its general linguistic meaning, 'interpretation' can be defined as 'The action of explaining the meaning of something'[4]. Black's Law Dictionary offers a legal definition of 'interpretation', according to which it is 'The art or process of discovering[5] and expounding the intended signification of the language used in a statute, will, contract, or any other written document, that is, the meaning which the author designed it to convey to others'[6]. This latter definition has a clear focus on the intention of the author. Whether finding the intention of the contracting parties to a treaty is the outcome of an interpretative process, or whether intent is but one of several factors which can be taken into consideration when interpreting treaty text, is not undisputed among international lawyers[7]. If applying the view that intent is just one factor among others, one can ask whether a broader definition of 'interpretation' is more suitable, perhaps simply stating that interpretation it is 'the process of determining the meaning of the language used in the treaty.' In this paper, it will however be submitted that finding the intention of the contracting parties is the ultimate goal of treaty interpretation. The significance of the author's intention, for our purposes being the intention of the contracting parties to treaties, will be examined in relation to evolutionary interpretation in different contexts throughout the analysis below.

As can already be observed, the question of what 'interpretation' means, leads to our first clear encounter with the borderlines between law, linguistics, semantics[8], and hermeneutics. There is much interplay between these disciplines, and the borderlines can sometimes be hard to discern. After all, much of legal science and practical legal work is about understanding and applying textual content in a given context. The interplay and potential overlap is visible already from the

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[4] Oxford Dictionaries, *Definition of Interpretation*, available online at http://www.oxforddictionaries.com/definition/english/interpretation (last visited 13 July 2016).

[5] Using the word 'discover' carries a certain risk of leaving the reader with the impression that a true meaning of the text always exists, and that it can be found as long as the right methods are applied. This can of course be true in many instances, but it is also a perspective which can potentially disguise the complexity of the interpretation process, including the fact that legal texts are usually interpreted by different interpreters and in different contexts, which can affect the outcome of the interpretive process. Alternative words like 'understand' or 'find' do however carry the same risk in this respect as 'discover', and the important matter is therefore to be aware of this challenge. In lack of a more accurate word, the word 'determine' will to some extent be used in this paper, but also other words like 'understand' or 'find', will be used where appropriate.

[6] The Law Dictionary (Black's Law Dictionary), *What is Interpretation?*, available online at http://thelawdictionary.org/interpretation/ (last visited 13 July 2016).

[7] *Bjørge* is an example of a lawyer holding the first view, saying that the aim of treaty interpretation is to find what he calls 'the objectivized intention' of the parties. Bjørge, *Introducing The Evolutionary Interpretation of Treaties*, EJIL: Talk!, 15 December 2014, available online at http://www.ejiltalk.org/introducing-the-evolutionary-interpretation-of-treaties/, with further references to ICJ decisions in support of his argument (last visited 14 July 2016).

[8] A branch or sub-field of linguistics.

definitions; 'linguistics' can be defined as 'the scientific study of language and its structure', 'semantics' can be defined as the 'branch of linguistics and logic concerned with meaning', and the area lexical semantics as 'concerned with the analysis of word meanings and relations between them'[9]. 'Hermeneutics' can be defined as 'the study of the methodological principles of interpretation.' The format of this paper does not allow for an in-depth theoretical study of these fields and their relation to the field of law, but awareness of their existence and interplay is important for understanding the analysis provided in this paper.

Based on the above discussion, treaty interpretation can simply be defined as determining the intended meaning of the terms or phrases in a treaty. This broad definition does not tell us all that much in itself, and the methods for treaty interpretation as they have developed in international law will be accounted for below in Section 1.2. Treaty interpretations in its different forms and being performed by a great number of actors, can have significant implications in a number of fields. A potentially complicating factor in understanding treaty interpretation is that a subjective element will always be present. A text is always understood by a person which has a background, and who interprets the treaty in a particular context, perhaps also with a particular purpose, and who might be affected by a great number of different factors, also in part determined by which approach to interpretation the person in question is applying. This 'subjective factor' is however present in most scientific fields, and not only in the legal field. The human perspective will usually be a factor to take into consideration.

Particular for the legal field is that one will often have a context where two opposing parties, typically before a court or tribunal, argues for two different understandings of a given text. The 'ordinary meaning' of the text might be clear enough[10], and the party claiming that this understanding is the correct one will naturally refer to the text. However, as observed by *Lowe*, the other party is likely to claim that a 'proper interpretation' of the treaty leads to a different result, or that the treaty is simply not applicable to the factual circumstances at hand[11]. A subjective interest in a particular interpretive outcome will therefore often be present, and the task of the court of tribunal will be to determine more objectively what the interpretive result shall be in a given case. How

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[9] Oxford Dictionaries, *Definition of Semantics*, available online at http://www.oxforddictionaries.com/definition/english/semantics (last visited 13 July 2016).

[10] Cf. Art. 31(1) VCLT.

[11] Lowe, *International Law* (2007), at 73.

'objective' this assessment is in different circumstances will to some extent be brought up in this paper in relation to evolutionary interpretation, for instance in relation to the debate on whether some judges in the European Court of Human Rights (ECtHR) have an 'activist' approach to interpretation, cf. below Sections 1.4.2 and 1.4.4, and Chapters 3 and 5. Interpretation can be seen as an exercise of freedom to determine meaning, but exercising this freedom can also be an exercise of authority[12]. The limits for this authority will also be addressed in the paper, particularly in the comparative analysis in Chapter 5 below.

1.2 Methods for treaty interpretation

Three basic approaches to treaty interpretation can be identified in international law[13]. The first one can be termed a 'textual approach', and focuses on the treaty text and on analyzing the treaty terms. While this first approach can be seen as an objective one, the second is of a subjective character, and focuses on the intention of the parties as a tool to resolve ambiguity. As we will see through this paper, for instance in Section 1.3 below, the intention of the parties plays a central role as a factor in the concept of evolutionary interpretation. The problem of resolving ambiguity, and also unclarity, in relation to evolutionary interpretation, will also be addressed below in Section 3.2.5. The third approach is a teleological school, which focuses on the object and purpose of the treaty as key elements in order to determine its meaning. It has been criticized for leaving judges with too much power, as they will have to determine what the 'object and purpose' of a particular treaty is[14]. This same argument can however also be made in relation to other means of interpretation, like the intention of the parties. As we will see through this paper, a particular challenge that has arisen through evolutionary interpretation lies precisely in the question of how much competence or power courts and tribunals should be vested with at the expense of for instance political organs. *Shaw* argues that this third school adopts a wider perspective than the two first mentioned approaches[15], but the truth of this statement is perhaps relative, as for instance also the approach focusing on the parties' intention can entail a wide perspective. *Shaw* rightly concludes that not any of these approaches or 'schools' can operate alone as a sufficient tool for treaty interpretation in

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[12] As described by *Venzke*, who prefer the term 'authority' over 'power' in this context. Venzke, *How Interpretation Makes International Law* (1st ed., 2012), at 11.

[13] Shaw, *International Law* (7th ed., 2014), at 676.

[14] Ibid.

[15] Ibid.

international law[16]. They can all provide valuable insights, and a combination of the approaches will best deliver the means necessary for determining the meaning of a treaty text. This is reflected in the rules on treaty interpretation in the Vienna Convention on the Law of Treaties, which contain elements from all three approaches.

The Vienna Convention on the Law of Treaties (VCLT) Section 3 (Articles 31-33) provides the well-known and widely accepted standard for treaty interpretation. The starting point is found in Article 31(1) VCLT, stating that 'A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.' Article 31 paragraph 2 provides guidance on what the 'context' of a treaty shall comprise for the purpose of treaty interpretation, while paragraph 3 provides that in addition to context, also certain relevant subsequent agreements and practice, and relevant rules of international law, shall be taken into account. According to paragraph 4, 'A special meaning shall be given to a term if it is established that the parties so intended.' Furthermore, recourse may be had to supplementary means of interpretation, including preparatory work of the treaty and the circumstances of its conclusions, on the conditions provided in Article 32. Art. 33 pertains to interpretations of treaties authenticated in two or more languages, and will not be further addressed in this paper. A holistic approach to Article 31 VCLT has come to enjoy relatively wide support. It emphasizes, in the words of the ILC Commentaries to the Draft Vienna Convention, which was the origin of this perspective; treaty interpretation as a 'single combined operation'[17]. This entails that wording, context and object and purpose are 'thrown into a crucible', meaning that they interact with each other as means of interpretation[18]. The ECtHR is an example of an institution which embraced this approach early on[19]. The relation between evolutionary interpretation and the Vienna Convention, will be addressed in detail through the paper, particularly in the comparative analysis in Chapter 5.

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[16] Ibid.

[17] Yearbook of the International Law Commission 1966, Vol. II, at 187, *Reports of the Commission to the General Assembly*, *Draft Articles on the Law of Treaties with commentaries*, at 219 § 8, available online at http://legal.un.org/ilc/texts/instruments/english/commentaries/1_1_1966.pdf (last visited 27 July 2016).

[18] Çali, 'Specialized Rules of Treaty Interpretation: Human Rights', in Hollis (ed.), *The Oxford Guide to Treaties* (2014) 525, at 528.

[19] Ibid.

As regards the legal status of the VCLT, it applies to the States Parties to the Convention, and does not have retroactive effect, cf. Article 4 VCLT. The latter is however without prejudice to the application of any rules set forth in the VCLT 'to which treaties would be subject under international law independently of the Convention', cf. Article 4. The International Court of Justice (ICJ) has held on several occasions that Article 31 VCLT reflects customary international law[20]. ICJ has also mentioned such supplementary means of interpretation as provided in Article 32 VCLT when stating this type of statements[21]. In the *Kasikili/Sedudu Island* case, which was decided in 1999, the ICJ interpreted and applied a treaty from 1890 between the United Kingdom and Germany in accordance with Articles 31 and 32 VCLT. This was done even though none of these countries were contracting parties to the VCLT, and despite the rule of non-retroactivity in Article 4 VCLT[22]. It is also commonly held that both Articles 31 and 32 VCLT reflect customary international law[23]. After establishing the fundamentals of treaty interpretation, the paper now turns to the particular topic here; evolutionary interpretation, starting with a general account for it as a legal phenomenon.

1.3 Evolutionary interpretation

Evolutionary interpretation has become a well-known and frequently discussed topic of international law. While the existence of the phenomenon evolutionary interpretation itself seem to be more or less undisputed, both its potential legal foundation, and its content and applicability in different situations, are continuously subjects of debate. There is no standard definition of 'evolutionary interpretation.' An example of a definition is the one provided by *Nielsen*, who defines 'evolutionary reading of a treaty text' as 'the mechanism by which a term, which originally had a different meaning, can be read to have a different and more modern meaning'[24]. It is submitted here that 'evolutionary interpretation' can be described as an interpretation of a term

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[20] See for instance *Case Concerning Kasikili/Sedudu Island (Botswana/Namibia)*, Judgment, 13 December 1999, ICJ Reports (1999) 1045, § 18, with further references.

[21] *Territorial Dispute (Libuan Arab Jamahiriya/Chad)*, Judgment, ICJ Reports (1994) 6, § 41.

[22] *Kasikili/Sedudu Island*, supra note 20, at for instance § 20. See also Aust, *Vienna Convention on the Law of Treaties,* Encyclopedia Entry, Max Planck Encyclopedia of Public International Law [MPEPIL], last updated June 2006, available online at http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1498, § 15, (last visited 14 July 2016).

[23] The WTO dispute settlement body is an example. See for instance WTO, *Japan - Taxes on Alcoholic Beverages - Report of the Appellate Body*, 4 October 1996, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, at 10.

[24] Nielsen, *The WTO, Animals and PPMs* (2007), at 204.

entailing a departure from its 'original' meaning at the time of creation. The word 'original' denotes here the meaning of the term as it was intended to be by its author at the time of the term's creation. For our purposes the author is the contracting parties to a treaty. Furthermore, this applies not only to singular terms, but also to interpretations of sentences, paragraphs, articles or multiple words taken together. Put differently; to interpretations of the wording of a treaty more generally.
The definition given here is, however, not entirely precise, as the contracting parties could theoretically have intended the treaty term in question to have a dynamic content 'from day one', thereby making it difficult to pinpoint a more precise 'original' meaning. It is also important to note that the intentions of the contracting parties can have changed later on, and manifested itself through for instance subsequent practice or agreements, or through another relevant rule of international law, cf. Article 31(3) VCLT. Therefore, it must be emphasized that we are talking about a deviation from the meaning as it was intended to be when the treaty was created. Again, it can thereby be observed that the 'intention' of the contracting parties comes forward as a central element when examining the term 'interpretation.' This is so also for evolutionary interpretation, where it, as we will discover through the analysis in Chapters 2-5 below, plays a highly important part. The term 'evolutive intent' will be used occasionally throughout this paper to denote an intention from the treaty contracting parties for the treaty's terms to have a meaning capable of evolving.

Evolutionary interpretation is sometimes looked upon as a method alternative to so-called contemporaneous interpretation. The latter term denotes treaty interpretation focusing on maintaining the meaning of the treaty terms as they existed at the time of the treaty's creation[25], and is sometimes referred to as originalist ideas of interpretation. However, evolutionary interpretation can also be seen not as a method of interpretation separate from the 'regular method' provided in Article 31-33 VCLT, but as the occasional result of a proper application of the means of

[25] Judge Max Huber's dictum in the *Island of Palmas* case is a famous illustration of this approach: '(…) a juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or falls to be settled.' *Island of Palmas case (Netherlands v. USA*, Award, 4 April 1928, UNRIAA, Vol. II, 829, at 845. See also Nolte, 'Introduction' in Nolte (ed.), *Treaties and Subsequent Practice*, (1st edition, 2013) 1, at 2. Furhermore, and from the same publication, see Nolte, 'Report 1 for the ILC Study Group on Treaties over Time' 169, at 188, where it is submitted, with reference to the *Case Converning the Delimination of Maritime Boundary Between Guinea-Bissau and Senegal*, that evolutionary and contemporaneous interpretation can coexist, depending on the circumstances.

interpretation provided in these articles[26]. In other words, following the method provided in Articles 31-33 can sometimes lead to an interpretive result that can be characterized as evolutionary, because the resulting meaning of the interpreted term deviates from its 'original' meaning. It is submitted here that this is a correct understanding. Different nuances to this discussion can however be identified. As an example, many scholars focus much on the concept of the intention of the contracting parties, while others argue that also factors outside Articles 31-33 VCLT can lead a court or tribunal to an evolutionary interpretation[27].

Several of the means of interpretation provided in Articles 31-33 VCLT can lead to an evolutionary interpretation, including different combinations of them. Relatively clear examples include the wording of the treaty itself, which can provide explicitly for evolutionary interpretation, in addition to the purpose of the treaty, subsequent agreements and subsequent practice, cf. Article 31(1) and (3)(a) and (b) VCLT. Some argue that evolutionary interpretation can be justified as interpretation 'in good faith' in some instances, cf. Article 31(1), or as following from the maxim *effet utile* ('effective interpretation')[28]. Relevant rules of international law, for instance in the form of another treaty between the contracting parties which sheds light on the meaning of the terms of the treaty subject to interpretation, can also come into play, cf. Article 31(3)(c). The most central factor is still the intention of the contracting parties. The intention of the parties is not a factor explicitly provided for in the VCLT[29], but establishing the intention of the parties can as submitted above be seen as the ultimate goal of treaty interpretation. Throughout this paper, we will examine different material

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[26] This has been described as 'the emerging view of the [International Law Commission] ILC', see R.K. Gardiner, *Treaty Interpretation* (2nd ed., 2015), at at 467. See also G. Nolte, 'Report 1 for the ILC Study Group on Treaties over Time', at 188, ibid. This is also the view held by for instance *Bjørge*. See Bjørge, *The Evolutionary Interpretation of Treaties* (2014), at 2.

[27] See Van Damme, *Is Evolutionary Interpretation Only A Matter of Finding the Parties' Intentions?*, 17 December 2014, available online at http://www.ejiltalk.org/is-evolutionary-interpretation-only-a-matter-of-finding-the-parties-intentions/#more-12741, last visited 21 July 2016. As examples, *Van Damme* mentions interpretive practices being shaped by the particular context or system they operate within, like for instance the WTO or the European Union system, but also for instance the possibility of treaty amendment or authoritative interpretations.

[28] Recognized as one of several maxims or general principles of legal interpretation, which are not mentioned in the Vienna Convention on the Law of Treaties, but that may be described as one of the applicable 'general principles of law recognized by civilized nations', as stated in Art. 38 in the Statute of the International Court of Justice (Annexed to the Charter of the United Nations, 24 October 1945, 1 UNTS XVI). The *Effet Utile* maxim has two meanings. The one relevant here is that if more than one interpretation of a term, sentence paragraph or article is possible, then the one not depriving it of any legal meaning and thus any practical impact, should be preferred. See Kolb, *The Law of Treaties: An Introduction* (2016), at 154-155. In European law, it has been seen both as an independent method, and as a sub-category of dynamic interpretation. See Šadl, 'The role of effet utile in preserving the continuity and authority of European Union law : evidence from the citation web of the pre-accession case law of the court of justice of the EU', 8 Issue 1 European Journal of Legal Studies (2015) 18, at 23.

[29] Although some indications of it might be found in the preparatory work, which is referred to as a supplementary means of interpretation in Article 32 VCLT.

supporting this understanding. Suffice it to mention here as an example that when the ILC started the work with formulating general principles for the interpretation of treaties, it stated that the aim was to set out 'the means of interpretation admissible for ascertaining the intention of the parties'[30].

Alternative to evolutionary interpretation, the terms 'dynamic interpretation' is for instance used by some scholars'[31]. Because it is widely used, and in order to secure consistency, only the term 'evolutionary interpretation' will be used in this paper. *Milanovic* has, in a critique of the ICJs decision in *Navigational Rights*[32], argued for an understanding of evolutionary interpretation more as an 'evolving construction' than an 'evolving interpretation.' This entails that the meaning of the word itself does not change, but the application or construction of the meaning. Though this reasoning can provide some analytical insight, it is submitted here that the concept 'evolutionary interpretation' describes the phenomena of legal terms changing meaning over time relatively well, and the format here does unfortunately not allow for a further discussion of this terminology. The borderlines between 'interpretation' and 'application' will of course frequently be blurred, as interpretation by a Court or Tribunal usually happens in a given factual setting[33].

Evolutionary interpretation is as mentioned above a highly relevant topic of international law. This is becoming particularly visible as large parts of the global society is developing rapidly both within technology, economy and other sectors, and the sometimes pressing need for international law to keep up with the development is often not met. Processes for treaty amendments or the creation of a new treaty can today, as in previous times, be lengthy and challenging. This is often especially true for multilateral treaties. Seating a number of often very different nations together in order to make an agreement can be just an insurmountable challenge today as it was in the past. However, both contracting parties to treaties, but also courts, tribunals and other actors within the field of international law, has sought other ways of adapting the law to various developments in order to

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[30] *Reports of the Commission to the General Assembly*, *Draft Articles on the Law of Treaties with commentaries*, at 219, supra note 17. See also Bjørge, *The Evolutionary Interpretation of Treaties,* at 90, supra note 26.

[31] The European Court of Human Rights' view of the European Convention on Human Rights as a 'living instrument', is also well known (first recognized by the Court in ECtHR, *Tyrer v. United Kingdom*, Appl. no. 5856/72, Judgment of 25 April 1978).

[32] *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, Judgment, 13 July 2009, ICJ Reports (2009) 213. See Milanovic, *The ICJ and Evolutionary Treaty Interpretation*, 14 July 2009, available online at http://www.ejiltalk.org/the-icj-and-evolutionary-treaty-interpretation/ (last visited 13 August 2016).

[33] It is worth noting here that *Milanovic* argues that the ICJ in *Navigational Rights* elided the distinction between 'interpretation' and 'application' completely, ibid.

maintain its relevance and effectiveness. One such way is evolutionary interpretation, and the following chapters will explore how this has been done by the ICJ, the dispute settlement bodies within the GATT/WTO system, and the ECtHR. In order to properly understand this case law, an overview of the institutions, their general characteristics, and their respective need to resort to evolutionary interpretation, will be provided first. A comparison of the institutions as regards their need to resort to evolutionary interpretation, will then be performed. Throughout this paper, the terms 'method for', 'approach to' or 'principles of' interpretation will for practical reasons be used somewhat interchangeably. Important to note is that while some describe for instance the approaches to interpretation developed by the ECtHR as separate 'methods' of interpretation, the argument will be made in this paper that also these approaches can be tied to the Vienna Convention. Furthermore; that the Vienna Convention possesses the flexibility needed to serve as the main interpretive method for all three institutions to be addressed in this paper, also as regards evolutionary interpretation.

1.4 The ICJ, the GATT/WTO and the ECtHR

1.4.1 The ICJ

The International Court of Justice (ICJ) is the principal judicial organ of the United Nations (UN), cf. Article 1 Statute of the International Court of Justice (ICJ Statute). It was established in June 1945 by the UN Charter[34]. The tasks of the ICJ are to settle, in accordance with international law, legal disputes submitted to it by States, and to render advisory opinions on legal questions referred to it by authorized UN organs and specialized agencies[35]. The Court is composed of 15 judges elected by the UN General Assembly and the Security Council[36]. Its judgments are final, binding on the parties[37], and without appeal[38]. The judges are entitled to deliver separate opinions[39]. Article 38 ICJ Statute prescribes which sources of law the ICJ shall apply. These are international conventions, international custom, and the general principles of law recognized by civilized nations, cf. Article

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[34] Article 7(1) Charter of the United Nations, 24 October 1945, 1 UNTS XVI.

[35] Chapter II ICJ Statute and International Court of Justice, *The Court*, available online at http://www.icj-cij.org/court/index.php?p1=1 (last visited 22 July 2016).

[36] Arts. 3-4 ICJ Statute.

[37] Although the judgments' effect as precedents is also widely recognized.

[38] Arts. 59-60 ICJ Statute.The judgments can however be subject to interpretation or revision, cf. Arts. 60-61.

[39] Art. 57 ICJ Statute.

38(1)(a)-(c). Furthermore, as subsidiary means of interpretation, and subject to Article 59[40]; judicial decisions and the teachings of the most highly qualified publicists of the various nations, cf. Article 38(1)(d). On agreement by the parties, a case can also be decided according to 'what is equitable and good' ('ex aequo et bono'), cf. Article 38(2)[41].

Important for our purposes in this paper is to ask what the particularities of the ICJ can tell us in terms of its need to resort to evolutionary interpretation. Firstly, the jurisdiction of the ICJ is not obligatory like that of the ECtHR, cf. Section 1.4.2 below, but based on submission of cases by States. That in itself has the potential for making the ICJ exercise a certain degree of restraint in its interpretations, and for keeping national sovereignty in mind as one among several considerations. Secondly, the ICJ is known for its often relatively formal legal approach, and for being composed of judges who are experts in the field of public international law. This is different from the 'activistic' tendencies found for instance in the ECtHR, cf. Sections 1.4.2 and 5.3 below, and can potentially leave less room for 'creative interpretation.' Nevertheless, as we will see throughout this paper, the ICJ has contributed much in developing evolutionary interpretation as a concept, and evolutionary interpretation is not necessarily about being 'creative', but about a proper application of recognized interpretive methods, including a respect for the intention of the treaty contracting parties. Thirdly, the ICJ's relatively broad jurisdiction, and its large significance for the development of international law, could potentially also work as a factor leading the Court to consider evolutionary interpretation where necessary, precisely because it is an important element for the development of international law.

[40] Prescribing binding force of the Court's decisions only between the parties and in respect of that particular case.

[41] Merriam-Webster, *Defintiion of Ex aequo et bono*, available online at http://www.merriam-webster.com/dictionary/ex%20aequo%20et%20bono (last visited 22 July 2016).

1.4.2 The ECtHR

The European Court of Human Rights (ECtHR) was created in 1959 through the European Convention on Human Rights (ECHR)[42]. The ECHR is known as 'the flagship of the Council of Europe[43]'. The Council of Europe (CoE) has the main responsibility for promoting and protecting human rights in Europe, and the European Court serves a central function in terms of securing compliance with the ECHR. Additional Protocol 11 to the ECHR from 1998 reformed the monitoring system for the ECHR dramatically, with the creation of a single and permanent European Court of Human Rights in Strasbourg, employing full-time judges[44].

The ECtHR's jurisdiction extends to 'all matters concerning the interpretation and application' of the ECHR and its Protocols, cf. Article 32 ECHR. The Court is competent to treat both inter-State cases and individual applications, of which the latter is the most frequent and practical case type, cf. Articles 33-34 ECHR. The ECtHR has become of great importance, and this is likely due to a number of factors, including its availability to individuals, its status as a judicial authority and its highly competent judges, and its willingness to develop human rights protection, inter alia through evolutionary interpretation. The backlog of cases for the ECtHR has at times constituted huge numbers, and one could ask whether the ECtHR has in a sense become at victim to its own success. Certain measures to reduce the backlog has however been taken, for instance through Protocol No. 14 to the ECHR and a type of 'filtering mechanism.'

An important point on which the ECtHR stands out in relation to both the ICJ and the dispute settlement bodies in the World Trade Organization (WTO), is its obligatory jurisdiction. Given fulfillment of the criterion of exhausting domestic remedies, all individuals living in the territory of the Council of Europe (around 800 million people), have the right to file an individual application to the European Court of Human Rights, claiming a violation of their Convention rights by one of the ECHR contracting parties, cf. Articles 34 and 35 ECHR[45]. The ECHR contracting parties even

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[42] Art. 19 Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950,[1950] COETS 1. See also European Court of Human Rights, *The Court in brief brochure*, Available online at http://www.echr.coe.int/Pages/home.aspx?p=court&c= (last visited 22 July 2016).

[43] Nowak, 'The Council of Europe, An introduction to the Human Rights Mechanisms of the Council of Europe', in Nowak, Januszewski and Hofstätter (eds), *All Human Rights for All, Vienna Manual on Human Rights* (2012) 119, at 121.

[44] Ibid.

[45] Ibid.

have an obligation not to hinder the effective exercise of this right, cf. Article 34 ECHR last sentence. This 'direct access' for individuals to the ECtHR makes it different both from the ICJ and the WTO, where the typical situation is that States/Members have to submit cases or ask for the establishment of a panel claiming a violation of certain rules by a different State or Member[46].

The ECtHR's practice has become one of the most well-known and frequently mentioned examples of evolutionary interpretation. Some points regarding the ECtHR and evolutionary interpretation can be taken from the information that has been provided in this section. The very task of the ECtHR as a monitoring body for a human rights treaty can necessitate evolutionary interpretation. Human rights are by their very character typically meant to be effective and independent rights, which can exist for a long period of time. In order to realize this goal, it can be necessary to adapt the meaning of treaty terms to changing circumstances. In case of the ECHR, this is quite clearly in accordance with the intention of the treaty contracting parties, cf. for instance the reference in the ECHR's preamble to 'the maintenance and further realisation of Human Rights and Fundamental Freedoms'[47]. Also, waiting for slow procedures for treaty amendment or treaty creation to move forward in order to secure human rights protection, will not always be sufficient, and some States could even deliberately slow down such procedures in order to avoid responsibility. It can therefore be necessary for the ECtHR to take action through evolutionary interpretation. The fact that one of the parties in a ECtHR case will typically be an individual, and thereby a 'weaker party' compared to the respondent government on the other side, can also be a factor to consider when assessing what it takes to make rights effective in a given case. This leads us to the ECtHR's concept of 'practical and effective' rights, which will be addressed in Chapter 3 below. Furthermore, the obligatory jurisdiction of the ECtHR, coupled with the position and authority the Court holds, and the 'activistic tendencies' among some of its judges[48], might have made the ECtHR less hesitant in using evolutionary interpretation than for instance the ICJ. One might speak of a 'climate' or 'acceptance' for using evolutionary interpretation where deemed necessary, at least among some of the ECtHR's judges.

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[46] In the WTO the term 'Member' is used in stead of 'Member State', as not all WTO Members are States. Cf. for instance Van den Bossche, P., and Zdouc, W., *The Law and Policy of the World Trade Organization* (3rd ed., 2013), at 105.

[47] See also Lugato, 'The "Margin of Appreciation" and Freedom of Religion: Between Treaty Interpretation and Subsidiarity', 52 *Journal of Catholic Legal Studies*, (2013) 49, at 63 note 56, with further references.

[48] See for example Voeten, 'The Politics of International Judicial Appointments: Evidence from the European Court of Human Rights', 61 No. 4 *International Organization* (autumn, 2007) 669, at 670.

1.4.3 The GATT/WTO

Despite the failed attempt to establish an international trade organization with the Havana Charter in 1948[49], 23 countries were in the same year able to agree on a package of trade rules and tariff concessions; The General Agreement on Tariffs and Trade (GATT)[50]. It functioned as a provisional agreement and organization until the establishment of the WTO in 1995 when the WTO Agreement entered into force[51], and was in this period the only multilateral instrument governing international trade[52]. As of today, the WTO functions as the most important organization for international trade, and has a global reach currently encompassing 164 Members[53].

A dispute settlement system in the form of panel procedures existed during the GATT period. However, this system had several shortcomings, the most important being that panel decisions in order to become binding had to be adopted by consensus by the GATT Council. This entailed that a responding party discontent with the result of the panel procedure could block it from attaining legally binding force[54]. This among other reasons led to a reform of the dispute settlement system when the WTO was established in 1995. The WTO dispute settlement system is provided for in the Dispute Settlement Understanding (DSU)[55], which is administered by the Dispute Settlement Body (DSB). Like in the GATT period, *ad hoc* dispute settlement panels is part of the WTO system. With the establishment of the WTO came however an addition to the system which has proven to be very important; the standing Appellate Body (AB). The WTO dispute settlement system is a 'government-to-government' dispute settlement system, and only Members of the WTO have access to it[56].

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[49] United Nations Conference on Trade and Employment, Final Act and Related Documents 1948, E/CONF.2/78, United Nations publication, Sales No. 1948.II.D.4.

[50] General Agreement on Tariffs and Trade 1947, 55 UNTS 194.

[51] Agreement Establishing The World Trade Organization (Marrakesh Agreement) 1994, 1867 UNTS 154.

[52] World Trade Organization, *The GATT years: from Havana to Marrakesh*, available online at https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm (last accessed 22 July 2016).

[53] World Trade Organization, *The WTO*, available online at https://www.wto.org/english/thewto_e/thewto_e.htm (last visited 31 July 2016). The WTO's members does not only include countries, and are therefore termed simply 'WTO Members' or 'Members.'

[54] Van den Bossche and Zdouc, *The Law and Policy of the World Trade Organization (3rd ed., 2013), at 159.*

[55] Understanding on rules and procedures governing the settlement of disputes, Annex 2 to the Agreement Establishing The World Trade Organization (Marrakesh Agreement) 1994, 1867 UNTS 154.

[56] WTO, *United States - Import Prohibition of Certain Shrimp and Shrimp Products – Report of the Appellate Body*, 12 October 1998, WT/DS58/AB/R, § 101.

As for the WTO and evolutionary interpretation, the GATT period was marked by a clear priority for trade objectives, and efforts to maintain stability and avoid to much interference by other policy objectives[57]. A wish to continue along this path is visible from Article 3.2 DSU, which speaks of the preservation of rights and obligations and clarification of existing provisions, in addition to stating that 'Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations' provided in the WTO covered agreements. Cases in the WTO dispute settlement system need to be brought by Members, and individuals do not have standing. Even though exceptions from the WTO trade rules have been developed further as a possibility during the WTO period, the reduction of trade barriers and the achievement of effective trade are of course still central objectives for the WTO, cf. the Preamble to the WTO Agreement, and predictability and stability are often important elements in the realization of these objectives. However, evolutionary interpretations can, depending on the circumstances in a given case, work both to the benefit and to the disadvantage of trade objectives.

Some of the factors mentioned here indicate that the Appellate Body will show restraint in using evolutionary interpretation. However, as we will see through this paper, both the composition of the Appellate Body, the approach it has taken for its legal reasoning, as well as other factors, have led the Appellate Body to operate more independently, and to achieve a larger significance, than initially expected. This has in part contributed in making evolutionary interpretation a relevant option for the AB in some cases. Furthermore, the world of trade is characterized by rapid changes and the saying 'time is money.' As procedures for treaty amendment or treaty creation can be slow also in the field of trade, this factor indicates that evolutionary interpretation can be highly relevant in this field, sometimes perhaps exactly to secure the contracting parties' expectation of a realization of different trade objectives. Some WTO Members might also deliberately slow down procedures for treaty amendment or treaty creation in order to protect its own interests.

As will be seen in Chapter 4 below, evolutionary interpretation can sometimes even contribute to effective trade through ensuring values such as predictability and clarity. Furthermore, the fact that large amounts of money and/or strong national interests are often at stake in the world of trade, can in itself speak both for and against evolutionary interpretation in a given case. Resisting pressure

[57] Venzke, at 156-157, supra note 12.

from the presence of such factors can therefore be the best in order to secure legal stability, as is of course typically the situation also in other legal fields where outside factors might influence courts or tribunals.

1.4.4 Evolutionary interpretation: Comparison of the institutions

The most obvious difference between the ICJ on the one side, and the the GATT/WTO system and the ECtHR on the other, is the ICJ's broad mandate and function. This also potentially affects its need to resort to evolutionary interpretation. While the material jurisdiction of the Dispute Settlement Body of the WTO and the ECtHR is subject specific and limited to certain treaties within their respective fields, the ICJ has a very broad competence. Its jurisdiction comprises 'all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force.' Put simply, this means that the need of the ICJ to resort to evolutionary interpretation is likely to vary according to the circumstances of each case. This is of course true also for the WTO and the ECtHR, but some special characteristics pertaining to these two institutions can at times increase the need for evolutionary interpretation. An obvious difference between the WTO and the ICJ on the one side, and the ECtHR on the other, is that the parties in cases before the two former institutions are States/governments[58], while the parties in a typical ECtHR case is an individual claimant and a respondent government.

Slow procedures for treaty amendment or treaty can in principle play a part as a factor in relation to all of the three institutions which will be examined in this paper. Sometimes, existing law will simply need to be adapted to new realities through evolutionary interpretation before such procedures can be completed. Different particular interests for the various fields can however play a part. As mentioned above, 'time is money' in the world of trade, while insufficient human rights protection can be a potential result of waiting too long in the field of human rights.

Another difference between the ICJ on the one side, and the WTO and the ECtHR on the other, is their caseload. While many years less than 5 cases has been registered for consideration by the ICJ since its commenced its work in 1946[59], the WTO Dispute Settlement Body has registered more

[58] The ICJ can as mentioned above in Section 1.4.1 also issue advisory opinions on the request of authorized UN organs and specialized agencies.

[59] International Court of Justice, *List of Cases referred to the Court since 1946 by date of introduction*, available online at http://www.icj-cij.org/docket/index.php?p1=3&p2=2 (last visited 22 July 2016).

than 500 cases since the establishment of the WTO in 1995[60], and the ECtHR has rendered around 18 500 judgments since its establishment in 1959[61].

An image of large differences between the three institutions in terms of how they approach evolutionary interpretation is often conveyed. According to *Bjørge*, 'it has (…) become *de rigueur* to hold that the methods applied by different types of Tribunal [sic] are widely at variance with each other'[62]. Whether this description is accurate, and if so to what extent, is one of the questions to be addressed through the analysis below in Chapters 2-4, and in the comparative analysis in Chapter 5.

1.5 Research hypothesis and method

The research hypothesis for this paper is that the adjudicatory bodies within the GATT/WTO framework and in particular the European Court of Human Rights, have gone a long way in adapting treaties to changing circumstances. Several examples of evolutionary interpretation can also be found in the practice of the International Court of Justice (ICJ). Certain challenges have arisen as a result of this development. These include the question of maintaining the legitimacy of both the treaties themselves as binding agreements, and the bodies tasked with adjudication based on the treaties. Furthermore, the question of a 'democratic deficit' in international law poses a challenge, as does the question of how to keep track of and to some extent control the development of evolutionary interpretation itself as a concept. Lastly, evolutionary interpretation as seen in these fields is not necessarily transferable to any other area of international law.

This hypothesis will be tested against relevant practice from the GATT/WTO bodies, the ECtHR and the ICJ, in addition to scholarly work in the field and other relevant material. In order to achieve a good understanding of how evolutionary interpretation has taken place in the three institutions, and to provide for a deeper analysis, I have selected only a few cases from each institution to address in the three following chapters. A comparative analysis of the findings will then be provided in Chapter 5 below, but an analytical perspective will also be applied where appropriate through the examination of case law below. Each of the three following chapters will be

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[60] World Trade Organization, *Chronological list of disputes cases*, available online at https://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm (last accessed 22 July 2016).

[61] Council of Europe, European Court of Human Rights, *Overview 1959 - 2015*, available online at http://www.echr.coe.int/Documents/Overview_19592015_ENG.pdf (last accessed 22 July 2016).

[62] Bjørge, *The Evolutionary Interpretation of Treaties*, at 8, supra note 26.

introduced by presenting a broader perspective on the interpretive method(s) of the institution in question, before narrowing the perspective and addressing evolutionary interpretation specifically.

2. The practice of the ICJ

2.1 Introduction

The practice of the ICJ has been of fundamental importance for the development of the concept of 'evolutionary interpretation.' It is submitted here that factors likely to have played a role in achieving this, include the ICJs broad material jurisdiction, the relatively long time period through which its jurisprudence has developed from the era of its predecessor the Permanent Court of International Justice (PCIJ, 1922-1946) and until today, the ICJ's highly competent judges, and the authority the ICJ holds as an international judicial institution. The paper will begin by looking at the ICJ's interpretive method more generally, before addressing evolutionary interpretation in the ICJ's practice.

2.2 The ICJ's interpretive method(s)

The question here is which method(s) of interpretation the ICJ applies more generally. As we will see later, this question touches upon both the wider debate on fragmentation both of international law and of the field of law of treaties. As for the latter, one relevant question is whether different methods of treaty interpretation should be applied to different legal fields. To exemplify, one can ask whether particularities of the human rights field legitimize the application of a method of interpretation for human rights treaties which differs to some extent from the 'ordinary' method in the Vienna Convention. These questions will be addressed to some extent through this chapter and the two ensuing chapters, and also in the comparative analysis in Chapter 5 below.

The ICJ has embraced the Vienna Convention on the Law of Treaties (VCLT), and has in multiple cases even referred to it without examining whether the parties to the dispute are contracting parties to the VCLT[63]. It has, as partly mentioned in Section 1.2 above, held that some of the rules in the VCLT can be considered a codification of existing customary law. That at least some of the method provided in the VCLT was applied by the ICJ also before the VCLT came into existence, is visible

[63] Zemanek, *Vienna Convention on the Law of Treaties*, with reference to the Gabčíkovo-Nagymaros case, United Nations Audiovisual Library of International law, 2009, available online at http://legal.un.org/avl/pdf/ha/vclt/vclt-e.pdf (last visited 26 July 2016).

for instance through the case *Competence of the General Assembly (...)*, where the ICJ held the following:

(...) the first duty of a tribunal which is called upon to interpret and apply provisions of a treaty, is to endeavour to give effect to them in their natural and ordinary meaning in the context in which they occur.[64]

The resemblance to the widely accepted starting point for treaty interpretation in Article 31(1) VCLT is clear:

A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2.3 The ICJ and evolutionary interpretation

2.3.1 Introduction

Many cases could have been addressed in the following sections. We find examples of evolutionary interpretation by the ICJ in a diverse group of cases, spanning from interpretations of multilateral treaties, to bilateral treaties and also unilateral declarations[65]. As mentioned above, a limited selection has however been made. This is both done because of the limits of the format here, and in an attempt to address somewhat in depth a few cases that are particularly relevant in order to understand the ICJ's approach to evolutionary interpretation.

Several structures could have been chosen for this section, but in order to provide an understanding of how the ICJ's practice on evolutionary interpretation has developed, a chronological approach will be attempted as far as possible.

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[64] *Competence of the General Assembly for the Admission of a State to the United Nations*, Advisory Opinion, 3 March 1950, ICJ Reports 4, at 8. In resemblance of the rule which today is found in Art. 32 VCLT, the Court also stated the following on the same page: *If, on the other hand, the words in their natural and ordinary meaning are ambiguous or lead to an unreasonable result, then, and then only, must the Court, by resort to other methods of interpretation, seek to ascertain what the parties really did mean when they used these words.*

[65] Nolte, 'Report 1 for the ILC Study Group on Treaties over Time', at 187, supra note 25.

2.3.2 *Namibia*

A well-known statement was made by the ICJ in the *Namibia Advisory Opinion*[66], which was delivered on a request to the Court of a clarification of the legal consequences of the continued presence of South Africa in Namibia after the termination of South Africa's mandate to administer the territory in 1966. The court was faced with the task of interpreting Article 22 of the Covenant of the League of Nations. Article 22 concerned the so-called 'mandate system', and had the following wording:

To those colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the States which formerly governed them and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilisation and that securities for the performance of this trust should be embodied in this Covenant.

The ICJ set out by referring to 'the primary necessity of interpreting an instrument in accordance with the intentions of the parties at the time of its conclusion'[67]. It then went on to address the three following terms from the above cited passage of Article 22 of the Covenant of the League of Nations: 'the strenuous conditions of the modern world', 'the well-being and development of such peoples', and 'the sacred trust.' The Court remarked that the two first mentioned terms were by definition evolutionary, and that, as a consequence of this, the same was true for the concept of the 'sacred trust.' Furthermore, the Court held that the parties to the Covenant must be deemed to have accepted the terms as such. On this background, the Court held that the 'interpretation cannot remain unaffected by the subsequent development of law, through the Charter of the United Nations and by way of customary law'[68]. A well-known statement followed: '(…)an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation'[69]. This statement could potentially leave the impression that the current

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[66] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 21 June 1971, ICJ Reports (1971) 16.

[67] Ibid, § 53.

[68] Ibid.

[69] Ibid.

legal state at any given time is always decisive when interpreting and applying a treaty, but it is important to remember that the Court, before making the statement, had concluded that the terms in question were by definition evolutionary, and that the parties had to be deemed to have accepted them as such[70]. We can see a clear focus here on the intention of the parties, and, in fact, the ICJ has always made explicit reference to to the intention of the parties when performing evolutionary interpretations[71].

2.3.3 *Gabčíkovo-Nagymaros*

The statement was later relied upon by Hungary in *Gabčíkovo-Nagymaros*[72]. In the case, Hungary argued that a 1977 treaty between Hungary and Slovakia concerning he Construction and Operation of the Gabčíkovo-Nagymaros Project Barrage System should be interpreted in light of new more developed environmental law, and of the law of international watercourses. The case is an example of the approach taken by the ICJ according to which the essential elements of the intentions of the treaty parties are the object and purpose of the treaty[73]. The majority of the Court only had some short remarks on the applicability of the VCLT to the case[74], but found, with reference to the principle of good faith, that in this case the purpose of the treaty and the intentions of the parties should prevail over a literal application of the treaty[75]. The explanation to the above cited statement from *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', found in the separate opinion of Judge Bedjaoui, is however worth examining[76].

Judge Bedjaoui underlined the vagueness of the statement from *Namibia* by stating that 'Taken literally and in isolation, there is no telling where this statement may lead', and prescribed the following precaution to be taken; that an 'evolutionary interpretation' must observe the general rule

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[70] Ibid.

[71] Bjørge, *Introducing The Evolutionary Interpretation of Treaties*, EJIL: Talk!, supra note 7.

[72] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, 25 September 1997, ICJ Reports (1997) 7.

[73] Bjørge, 115, supra note 26.

[74] *Gabčíkovo-Nagymaros*, § 46, supra note 72.

[75] Ibid, § 142.

[76] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, 25 September 1997, ICJ Reports (1997) 7, Separate Opinion of Judge Bedjaoui.

of interpretation as laid down in Article 31 VCLT, that the 'definition' of a concept must not be confused with the 'law' applicable to that concept, and that the 'interpretation' of a treaty must not be confused with its 'revision'[77]. The latter point goes right to the core of one of the questions that will be further examined in the analysis in Chapter 5 below: How far can international courts and tribunals go in evolutionary interpretation without exceeding their conferred authority? Furthermore, the reference to Article 31 touches upon the question mentioned above in Section 1.3 of whether evolutionary interpretation is a separate method of treaty interpretation, or rather the occasional result of a proper application of the method prescribed in the Vienna Convention.

Judge Bedjaoui went on to recall p*acta sunt servanda* as a starting point, and referred to, in Judge Bedjaoui's words, that the Court had in *Namibia* been 'at pains (…) to emphasize' the primary necessity of interpreting an instrument in accordance with the intentions of the parties at the time of its conclusion. Furthermore, he stated that 'the intentions of the parties are presumed to have been influenced by the law in force at the time the treaty was concluded*'*, as, inter alia, that was the law the parties were supposed to know. Judge Bedjaoui elaborated somewhat more on this point, and we shall return to this matter in the comparative analysis in Chapter 5 below, where it will be addressed in relation to the concept of the intention of the parties. As a conclusion to this topic, Judge Bedjaoui stated that what he termed the 'fixed reference' (contemporaneous interpretation[78]) remains the essential basis for the interpretation of a treaty, while 'the mobile reference' (referring to law that has subsequently developed), 'can be recommended only in exceptional cases (…). As example of a situation qualifying (in Judge Bedjaoui's opinion) as an 'exceptional case' in this context, he mentioned the *Namibia Advisory opinion*. According to Judge Bedjaoui, the 'mobile reference' was suitable in that case, as it was the matter of 'an interpretation seeking to avoid archaic elements', that 'was in tune with modern times', and that 'was useful as regards the action of the Applicant, which in this case was the Security Council[79]'. On first glance, the factors referred to here does not appear all that different from the reasoning given by the ICJ in *Namibia*[80].

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[77] Ibid, § 5.

[78] See Section 1.3 above on the term 'contemporaneous interpretation.'

[79] *Gabčíkovo-Nagymaros*, Separate Opinion of Judge Bedjaoui, § 9, supra note 76.

[80] See the discussion of the *Namibia Advisory Opinion* above.

However, Judge Bedjaoui contrasted the situation in *Namibia* with that in the case before him, both in the sense that while 'sacred trust' was found to have an evolutionary meaning in *Namibia*[81], he did not find this to be the case for the term 'environment' as a basic definition. Additionally, he remarked that it was the very object of the treaty (the sacred trust) that evolved in *Namibia*, while the object in *Gabčíkovo-Nagymaros* remains, even though the actual means of achieving it 'may evolve or become more streamlined.' The use of the object of the treaty in a different fashion as a supporting argument, will be exemplified below through the case *Navigational Rights*[82].

Whether, all in all, Judge Bedjaoui was somewhat categorical, thereby potentially setting the threshold to high and sacrificing some flexibility for contracting parties, is an interesting question. It is submitted here that the essential task of an interpreter is to apply the method of interpretation provided in Articles 31-33 VCLT properly, and that occasionally the result will be an evolutionary interpretation. Put simply, 'when it's right then it's right', and to say that evolutionary interpretation can only be applied in 'exceptional cases', could lead to an exaggerated hesitation to interpret evolutionary. This argument might be somewhat in line with the view of *Bjørge*, which is that there is 'nothing exceptional about evolutionary interpretation'[83].

2.3.4 *Navigational Rights*

Continuing now to a relatively recent case which has become well-known; *Navigational Rights*[84]. There, the following explanation of the term 'evolutionary interpretation' was offered by the ICJ:

(...)there are 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[85].

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[81] *Namibia Advisory opinion*, § 53, supra note 66.

[82] *Navigational Rights*, supra note 32.

[83] Bjørge, *The Evolutionary Interpretation of Treaties*, at 188, supra note 26.

[84] *Navigational Rights*, supra note 32.

[85] *Ibid*, § 64.

Again, a focus on the intent of the parties can be observed, and more specifically their intent upon conclusion of the treaty. The ICJ here expressed, in the words of *Lathrop*, the 'possibility of a contemporaneous intent to create an evolutionary meaning', thereby combining the contemporaneous and the evolutive approach[86].

The case concerned the question of whether the phrase 'libre navegación (…) con objetos de comercio' in an 1858 treaty between Costa Rica and Nicaragua covered transportation of paying passengers, and not just transport of goods. The court distinguished its explanation of 'evolutionary interpretation' from situations where subsequent practice of the contracting parties to a treaty can result in a departure from the original intent on the basis of a tacit agreement between the parties[87]. Before making these statements, the court did however express the general starting point, by saying that even though a treaty must be interpreted in light of the parties' common intention, and even though that is by definition contemporaneous with the treaty's conclusion, that does not mean that no account should ever be taken of a meaning that has changed from the time of conclusion until the time of interpretation of the treaty for the purposes of applying it[88]. It is submitted here in addition to this general starting point, that interpreting a treaty in accordance with the parties' intention can sometimes mean exactly to take account of subsequent development of meaning. The paper will return to this point later on, particularly in Chapter 5 below.

One thing is cases where the parties has left relatively clear indications of an intention to create a meaning capable of evolving. Another question is whether such an intention can be 'presumed', in the words of the ICJ in *Navigational Rights*[89]. The court also addressed this question in that case, after referring to its previous reasoning in *Aegean Sea*[90]. The latter case concerned the interpretation of a reservation, but the court stated that its reasoning is fully transposable for purposes of interpreting treaty terms. The Court went on to say the following, which illustrates well how the ICJ assesses the appropriateness of evolutionary interpretation in a given case:

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[86] Lathrop, 'International Court of Justice judgment on free navigation and fishing on a boundary river', 104 No. 3 *American Journal of International Law* (2010) 454, at 457 note 4.

[87] *Navigational Rights*, § 64, supra note 32.

[88] Ibid, §§ 63-64.

[89] Cf. the above cited statement from *Navigational Rights*, § 64, supra note 32.

[90] Ibid, § 65, with reference to *Aegean Sea Continental Shelf (Greece v. Turkey)*, Judgment, 19 December 1978, ICJ Reports (1978) 32, § 77.

(...) 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 or is "of continuing duration", the parties must be presumed, as a general rule, to have intended those terms to have an evolving meaning[91].

On this basis, we can observe two to three elements (depending on how they are grouped), which through their presence can establish a presumption of an intention to allow for terms to have an evolving meaning; generic terms (and awareness of the meaning's likelihood to evolve), and a treaty entered into for a very long period or of 'continuing duration.' On this background, the Court found 'comercio' to be a term intended to have an evolving meaning, and that the object of the treaty between Costa Rica and Nicaragua supported this conclusion, as it was to achieve a permanent settlement between the parties of their territorial disputes[92]. A line can be drawn here to the ICJs treatment of territorial disputes more generally, as the ICJ continued here by stating that territorial rules in this type of treaties are particularly characterized by their permanence, and referred to its previous statements in *Territorial and Maritime Dispute*[93]. In other words, the element 'entered into for a very long period' or 'of continuing duration', is likely to be present for this type of treaties, although an individual assessment must of course always be performed.

2.3.5 'Symbols' and 'references' - ambiguity and unclarity

Torp Helmersen makes an interesting point in referring to that all of the evolutionary interpretations found in the ICJ's practice concerned vague, and not ambiguous terms[94]. This distinction requires an explanation, bearing in mind that alternative terminology could also be applied. *Torp Helmersen* refers to *Ogden* and *Richard's* 'Triangle of reference.' It distinguishes between 'symbol', 'reference' and 'referent.' Here, we will only concern ourself with the two former terms. Applied to treaty language, this entails, in short, that the words used in the treaty are 'symbols', which symbolizes

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[91] *Navigational Rights*, § 66, supra note 32.

[92] Ibid, §§ 67-68.

[93] *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Preliminary Objections, 13 December 2007, ICJ Reports (2007 II) 861.

[94] Torp Helmersen, 'Evolutive Treaty Interpretation: Legality, Semantics and Distinctions', 6 no. 1 *European Journal of Legal Studies* (2013) 161, at 180 ff.

'references'; the phenomena covered by the word(s)[95]. To exemplify, the word (symbol) 'home' can normally be said to symbolize a person's habitual residence; the house, apartment or similar considered by a person as his or hers primary place to live and enjoy private life[96]. As for 'vagueness' and 'ambiguity', *Torp Helmersen*, with reference to *Endicott* and *Waldron*, argues that a vague word has one meaning, although its application can be unclear in some cases, while ambiguous words has more than one meaning, and it can sometimes be unclear which one that is in use[97].

Torp Helmersen presents two reasons for why, in his opinion, evolutionary interpretation is 'an inappropriate tool for resolving ambiguity'[98]. He argues both that it is easier to predict *whether* a reference will change than whether a symbol will change, and that it is easier to predict *how* a reference will change than to predict how a symbolization will change[99]. He points to for instance value-driven terms as an indicator that a term's reference may change, and to the fact that references usually changes through becoming a variation of what it was before. In Section 2.2.2 below, we will see an example of this from the ECtHR's *Tyrer* case[100], concerning the value-driven term 'degrading treatment.' Value-driven terms can be seen as a form of sub-category to generic terms, which is one of the above mentioned elements that according to the ICJ can establish a presumption of evolutive intent from the contracting parties.

Furthermore, *Torp Helmersen* contrasts the potential 'flexibility' of references to the more static nature of symbols. A new and changed symbolization may be quite different from the old one. *Torp Helmersen* uses the word 'gay' as an example, which through time has changed from symbolizing the attribute of being light-hearted and carefree, to symbolizing homosexuality. He draws the line to the 'evolutive intent' by the contracting parties as a precondition for evolutionary interpretation, and argues, using the reasons accounted for above, that a presumption of evolutive intent is much more

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[95] Ibid.

[96] This definition can of course be discussed and/or elaborated upon. It is present as a legal term for instance in Art. 8 ECHR.

[97] Torp Helmsersen, at 180 ff., supra note 94.

[98] Ibid, at 182.

[99] Ibid, at 180-182.

[100] ECtHR, *Tyrer v. The United Kingdom*, Appl. no. 5856/72, Judgment of 25 April 1978.

likely in relation to references than in relation to symbolizations. This approach, as taken by *Torp Helmersen* and others, provides a useful analytical tool for understanding how evolutionary interpretation takes place and develops. It will be revisited below in Section 3.3.4 in relation to good faith and the principle of effectiveness.

2.4 Conclusion

As seen above in Section 1.4.1 on the particularities of the ICJ as an institution, the expectations one might have to the ICJ's approach to evolutionary interpretation are perhaps a bit mixed. On the one hand, factors like the need for submission of cases by States, the relatively broad mandate of the ICJ, the significance of the ICJ's practice for international law, and a composition of judges who are experts on public international law, might generate an expectation of the ICJ approaching evolutionary interpretation with some restraint. This expectation might however be somewhat colored by an idea of evolutionary interpretation as something 'extraordinary' or 'dramatic', while a submission in this paper is that is is nothing more than an occasional result of treaty interpretation in accordance with the rules of interpretation provided by the Vienna Convention. On the other hand, however, it was mentioned above in Section 1.4.1 that precisely the ICJ's significance for the development of international law could lead it to consider evolutionary interpretation where appropriate. The question now is how this reasoning compare to what we have seen in the case analysis above.

The most central point that can be taken out of the ICJ's reasoning on evolutionary interpretation which we have seen above, is that it is consistently tied to the 'intention of the parties' as a means of interpretation. In a sense one could say that it is correct that the ICJ has shown restraint or taken a cautious approach through this seemingly high degree of respect for party autonomy. Both this approach, and the ICJ's frequent references to the VCLT, could be contrasted with for instance the self-labelled methods of the ECtHR which we will examine in Chapter 3 below. Whether this contrast is more apparent than real, and how these different approaches relate to the VCLT, is however also questions to be examined in this paper, see in particular Section 5.2 below. Some of the statements made by the ICJ, like the one from *Namibia;* that an international instrument should be interpreted and applied 'within the framework of the entire legal system prevailing at the time of the interpretation'[101], could indicate a clear subscription by the ICJ to present-day conditions as the

[101] *Namibia Advisory opinion*, § 53, supra note 66.

focus of interpretation. However, as seen above, the statement needs to be read in its context, and the ICJ's search for the intention of the parties can in principle both lead to contemporaneous and to evolutionary interpretive results.

The ICJ's reference to the use of generic terms and to the duration of the treaty commitment in *Navigational Rights,* has by *Milanovic* been taken to mean that if these elements are present, then the treaty terms used are to be updated every time the treaty is applied. In principle this can be correct, but *Milanovic*'s statement leaves the impression of a higher degree of instability than what is really the case. It is important to remember that the ICJ perform careful assessments focusing much on the intentions of the parties, and that interpreting a term evolutionary will require sufficient evidence of this being in conformity with the parties' intentions. In practice, it is also often so that a treaty term does not change 'every other year', but rather through decades and larger changes in the perception of different concepts in society.

A fair conclusion after the case analysis above is that the ICJ is conscious of its task and role in international law, but also not afraid to resort to evolutionary interpretation where that is the appropriate interpretive outcome according to the Vienna Convention. Although the intention of the parties is not included directly among the interpretive means listed in Article 31 VCLT, it is submitted in this paper that the ultimate goal of treaty interpretation is to establish the intention of the contracting parties, see for instance Chapter 3 below. The ICJ has taken care to substantiate its evolutionary interpretations through a somewhat formalistic legal approach, which is understandable in light of its function as the principal judicial organ of the United Nations. This approach has also, as we will see for instance in Chapter 4 below, also been of significance to other adjudicatory bodies when faced with questions of evolutionary interpretation. The ICJ's use of the VCLT as its interpretive basis also underlines one of the arguments that will be made in this paper; that the VCLT is broad and flexible enough to justify evolutionary interpretations where appropriate, and that consistent use of the VCLT as the main method for treaty interpretation will strengthen predictability and clarity in international law.

3. The practice of the ECtHR

3.1 Introduction

One of the most frequently brought up examples of evolutionary interpretation in international law, is undoubtedly the practice of the European Court of Human Rights (ECtHR). Coupled with the Court's enormous development in terms of significance and caseload since its establishment in 1959, as described above in Section 1.4.2, this makes the practice of the ECtHR highly relevant to examine for our purposes here. In discussions on evolutionary interpretation, the practice of the ECtHR is sometimes portrayed as 'the far end of the scale' in terms of the lengths the court is going too in its evolutionary interpretation. Whether this is accurate, and if so whether sufficient legal grounds is in place for such an approach, will be examined in the following section and in the comparative analysis in Chapter 5 below. Also in this chapter, emphasis will be placed on a few particularly relevant cases from the vast case law of the ECtHR, in order to provide for a deeper analysis of the European Court's use of evolutionary interpretation.

3.2 The ECtHR' interpretive method(s)

Relatively few references to the VCLT can be found in the case law of the ECtHR, even though the ECHR as an international treaty is subject to the the Vienna Convention[102]. A question that immediately arises is whether the relatively few references to the VCLT signifies a lack of resort to the VCLT's rules of interpretation, or whether these rules are still applied but often without direct reference. This question forms part of the larger debate on self-contained regimes and fragmentation, on whether there exist one or more specific method(s) of treaty interpretation for instance for the human rights field, and if so whether that can be justified both *Lex lata* and *Lex ferenda*. The format here does not allow space for entering this debate more generally, but its link to evolutionary interpretation will be addressed to some extent both in this chapter and in Chapter 5 below.

According to *Letsas*, 'it is fair to say that the VCLT has played a minor role in the interpretation of the ECHR'[103]. A search for 'The Vienna Convention on the Law of Treaties' in the ECtHR database of judgments does at the time of writing produce 430 results. This number does indeed appear low

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[102] Letsas, 'Strasbourg's Interpretive Ethic: Lessons for the International Lawyer', 21 no. 3 *EJIL* (2010) 509, at 513.

[103] Ibid.

considering the 18 500 cases decided by the Court since its establishment[104]. On the other hand, general statements perhaps indicating that the ECtHR find the VCLT's applicability clear, can also be found, even though the fact that the Court considers the VCLT applicable does of course not have to mean that it applies it often in practice. In *Al-Adsani*, the Court stated that 'It reiterates that the Convention has to be interpreted in the light of the rules set out in the Vienna Convention on the Law of Treaties (…)'[105]. Another example is the *Saadi* case[106], where the Court was called upon to interpret the meaning of Article 5(1)(f) ECHR, and started by stating the following: 'In ascertening the Convention meaning of this phrase, it [the Court] will, as always be guided by Articles 31 to 33 of the Vienna Convention on the Law of Treaties', and referred to several of its previous judgments in this context. One can ask whether statements like these signifies an understanding by the court of the applicability of the VCLT as more or less 'self-evident.' The ECtHR could be of the opinion that the VCLT as the foundation for interpretation is already well established in the Court's practice, and that it is therefore not necessary to invoke the Vienna Convention directly in each case. If so, another question which can be debated is of course whether this approach can be justified in relation to the law of treaties. One way of seeing the matter is that the Court invokes the VCLT when it finds it appropriate, and generally interprets more freely also based on its own self-labelled methods. Whether this is true, is one of the questions to be examined through the analysis below in Section 3.3.

As mentioned above in Section 1.2, the ECtHR subscribed to the ILC's 'crucible approach' early on, and even before the entry into force of the VCLT the Court took this approach in interpreting and applying Article 31 VCLT in the *Golder* case[107]. In this case, we find the ECHR's first discussion of the VCLT[108]. It includes the following pronouncement on Articles 31-33 VCLT, showing the Court's acceptance of the essence of Articles 31-33 as an expression of already existing principles of international law:

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[104] See Section 1.4.4 above, and Council of Europe, European Court of Human Rights, *Overview 1959 - 2015*, available online at http://www.echr.coe.int/Documents/Overview_19592015_ENG.pdf (last accessed 22 July 2016).

[105] ECtHR, *Al-Adsani v. The United Kingdom*, Appl. no. 35763/97, Judgment of 21 November 2001, § 55.

[106] ECtHR, *Saadi v. The United Kingdom*, Appl. no. 13229/03, Judgment of 29 January 2008.

[107] ECtHR, *Golder v. The United Kingdom*, Appl. no. 4451/70, Judgment of 21 February 1975, § 30, and Çali, at 528, supra note 18.

[108] Letsas, at 515, supra note 102.

(...) Articles 31 to 33 enunciate in essence generally accepted principles of international law to which the Court has already referred on occasion.

This was before the ECtHR developed its own and now well-known methods of interpretation, including 'living instrument', 'practical and effective rights' and 'autonomous concepts'[109]. These methods, and their relation to Articles 31-33 VCLT and to evolutionary interpretation, will be addressed through the case analysis in Section 3.3 below, and also in the comparative analysis in Chapter 5. Today, the VCLT is most often invoked by the ECtHR to take account of other treaties or instruments of international law, or general principles of international law. This is done through reference to Article 31(3)(c) VCLT[110]. The mentioned *Al-Adsani* case is an example of this[111].

3.3 The ECtHR and evolutionary interpretation

3.3.1 Autonomous concepts

Although not concerning evolutionary interpretation as such, a relatively clear signal of the ECtHR's will to take steps in order to secure effective human rights protection came already with the *Engel* case[112].The case concerned five conscript soldiers serving in the Dutch armed forces subject to disciplinary proceedings, who claimed a violation of Article 5 ECHR (right to liberty and security) based on both the imposition of penalties on them, and on the proceedings before the military authorities[113]. Although the proceedings were defined as disciplinary in Dutch law, the Court did not find that to be decisive in itself, and established certain criteria for assessing the applicability of the criminal aspect of Article 6 ECHR. These criteria has later become known as the *Engel Criteria*.

The ECtHR's development of what has become known as 'autonomous concepts' also started with its judgment in the *Engel* case, meaning that the Court opened up for a potential asymmetry between the meaning of a term in domestic law and the corresponding term as found in the ECHR.

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[109] Ibid.

[110] Letsas, at 521, supra note 102.

[111] *Al-Adsani*, § 55, supra note 105.

[112] ECtHR, *Engel and Others v. The Netherlands*, Appl. no. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72, Judgment of 8 June 1976.

[113] Letsas, at 524, supra note 102.

The idea is that some of the concepts found in the ECHR have 'a life of their own, entailing that their meaning is not necessarily corresponding with that found in a given domestic legal system containing the same term[114]. Examples include terms like 'criminal charge'[115], or 'home'[116]. To exemplify further; proceedings as a reaction to unwanted behavior, possibly resulting in a form of sanctions, are not always covered by the term 'criminal charge' in domestic law. They could for instance be characterized as disciplinary and not criminal proceedings. Nevertheless, after an assessment of the individual circumstances, such a proceeding can due to its particularities be deemed as covered by 'criminal charge' in the context of the ECHR, which can lead to increased rights protection for instance on the basis of Article 6 ECHR (the right to a fair trial). Some similarities can be observed between this development and for instance the ECHR's method of 'practical and effective rights', which will be examined below.

3.3.2 A 'living instrument'

The famous view of the ECHR as a 'living instrument', meaning that the Convention must be interpreted according to present-day conditions, was introduced by the ECtHR in *Tyrer*[117]. The question to be decided by the Court in the case was whether judicial corporal punishment of juveniles could be defined as 'degrading treatment', thereby amounting to a violation of Article 3 ECHR. As part of its assessment, the Court made the following famous statement:

The Court must also recall that the Convention is a living instrument which, as the Commission rightly stressed, must be interpreted in the light of present-day conditions. In the case now before it the Court cannot but be influenced by the developments and commonly accepted standards in the penal policy of the member States of the Council of Europe in this field[118].

Through this statement, we can see the rejection firstly of originalist ideas about interpretation or so-called contemporaneous interpretation[119]. Secondly, the Court points to an interpretive factor

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[114] Engel, § 80 ff., supra note 112, and Letsas, at 524-525, supra note 102.

[115] Cf. Art. 6 ECHR.

[116] Cf. Art. 8 ECHR.

[117] ECtHR, *Tyrer v. The United Kingdom*, Appl. no. 5856/72, Judgment of 25 April 1978.

[118] Ibid, § 31.

[119] Letsas, at 513

which it has later become known for resorting to; the development and common acceptance of new standards of various kinds among the member States of the Council of Europe, who are also the contracting parties to the ECHR. The 'living instrument' approach has later become one of the most important concepts in the ECtHR's interpretive practice, and a standard element of the ECtHR's reasoning in many cases[120]. How the ECtHR's approach to evolutionary interpretation developed further, and how the 'living instrument' approach, as a means of interpretation, relates to Articles 31-33 VCLT, will be further examined below.

3.3.3 'Practical and effective' rights

Continuing with the series of of important ECtHR judgments in the 1970s, the case *Airey* was decided in 1979[121]. The question before the Court in the case was whether a duty to provide legal aid was included in the right of access to court. The Irish government had argued that the applicant was free to go to court without the assistance of a lawyer, and that there was no duty to provide legal assistance[122]. The ECtHR rejected this argument, and made another well-known statement:

The Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective (...)[123]

The Court went on to add the following:

This is particularly so of the right of access to the courts in view of the prominent place held in a democratic society by the right to a fair trial (...)[124]

To justify this approach, at least in part, the ECtHR has for instance referred to the context of the provisions of the ECHR as follows:

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[120] Senden, 'Interpretation of fundamental rights in a multilevel legal system : an analysis of the European Court of Human Rights and the Court of Justice of the European Union', Doctoral Thesis, 46 School of Human Rights Research Series (2011), at 71.

[121] ECtHR, *Airey v. Ireland*, Appl. no. 6289/73, Judgment of 9 October 1979.

[122] Ibid, § 24.

[123] Ibid.

[124] Ibid.

The Court must have regard to the fact that the context of the provision is a treaty for the effective protection of individual human rights and that the Convention must be read as a whole, and interpreted in such a way as to promote internal consistency and harmony between its various provisions.[125]

To justify this approach further, the ECtHR has also referred to the object and purpose of the Convention[126]. It can thus appear as if the ECtHR has sought to tie its own developed interpretive approach to the Vienna Convention. The 'practical and effective' concept has often been referred to by the ECtHR to establish a positive obligation on a State to take active steps to secure effective rights protection[127]. An important question is whether the 'practical and effective' approach or method is 'adding anything extra' to the field of human rights in terms of interpretive methods, or whether it is just a product of the principles of interpretation found in the Vienna Convention. This includes the question of the relation between this approach and the principle of effectiveness (*effet utile*). The connection between this principle and the VCLT has, as we will se below, been subject to discussion. The paper will begin to examine this by looking at the above cited statements from *Airey* in relation to the element of 'good faith' and the principle of effectiveness.

3.3.4 Good faith and the principle of effectiveness (*effet utile*)

The principle of good faith, as expressed in Article 31 VCLT encompasses several elements, including a direction to the interpreter to interpret terms as having effect rather than no effect[128], including the effect of attracting focus both to the object and to the 'overarching' spirit of the treaty[129]. Furthermore, it encompasses an obligation on the international judge to adjudicate reasonably. This entails that formalism can not prevail over substantive assessments, conforming with the Court's opinion in the *Airey* case cited above that a formal possibility of going before the Court without legal assistance would not constitute effective rights protection. The obligation to adjudicate reasonably does however not stretch so far as to mean adjudication according to

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[125] ECtHR, *Guide on Article 4 of the European Convention on Human Rights*, 2nd edition, available online at http://www.echr.coe.int/Documents/Guide_Art_4_ENG.pdf, at 5, with further references, last visited 30 July 2016.

[126] Ibid.

[127] Senden, at 75-75, supra note 120.

[128] Çali, at 528, with further references, supra note 18.

[129] Bjørge, *The Evolutionary Interpretation of Treaties*, at 68, supra note 26.

equity[130]. In *Gabčíkovo-Nagymaros*, the ICJ held that 'The principle of good faith obliges the Parties to apply it [the treaty] in a reasonable way in such a manner that its purpose can be realized'[131].

To put the above into context; *Gardiner* and the International Law Commission (ILC) has made a useful systematization, according to which the principles of effectiveness *(effet utile*) has a dual aspect[132]. Its 'more specific limb' is the Latin maxim *ut res magis valeat quam pereat*, denoting an interpretation that gives effect or meaning to the term being interpreted rather than none. The other limb of the principle requires preference for an interpretation that realizes the aim of the treaty[133]. Based on this understanding of the principle of effectiveness, it is submitted here that it covers the 'practical and effective' approach as developed by the ECtHR in *Airey*[134]. When both the limbs are taken together, the principle entails both rendering the terms of the ECHR effective and realizing the aim of the treaty, which, based on the preamble of the ECHR can be said to be, inter alia, 'the maintenance and further realisation of Human Rights and Fundamental Freedoms'[135]. Whether there are nuances which could speak for considering the ECtHR's 'practical and effective' approach as somewhat broader than the principle of effectiveness could of course be discussed, but the submission here demonstrates that it is possible to argue for a linkage of this approach to the VCLT. Underlining this, is the ECtHR's own referral to the both the context and the object and the purpose of the treaty in order to justify the approach, as accounted for above in Section 3.3.3. As pointed out by *Van Damme*, the principle of effectiveness can be instrumental in justifying an evolutionary interpretation, and although the principle of effectiveness and evolutionary interpretation tend to be considered as different interpretive methods, they can 'equally mutually support their application'[136]. To explain this further; the passage of time and changing circumstances may necessitate an evolutionary interpretation precisely to maintain a treaty's effectiveness.

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[130] Ibid.

[131] *Gabčíkovo-Nagymaros*, § 142, supra note 72.

[132] Gardiner, at 179-180, supra note 26.

[133] Ibid, at 179.

[134] *Airey*, § 24 note 102. See section 3.3.3 above.

[135] See also *Lugato*, at 63 note 56, with further references, supra note 47.

[136] Van Damme, 'Treaty Interpretation by the WTO Appellate Body', 21 no. 3 *The European Journal of International Law (EJIL)* (2010) 605, at 637.

The principle of effectiveness is, among other principles like *e contrario*[137] or *eiusdem generis*[138], often referred to as maxims of interpretation. They are not explicitly provided for in the VCLT, and a debated subject is whether the VCLT justifies their use, and, if so, through which rule or means of interpretation. Some argue that they can be applied through the reference to international law in Article 31(3)(c) VCLT, others are of the opinion that they are implied through Article 31(1). *Gardiner*'s view is an example of the latter. According to *Gardiner*, the ILC subsumed both limbs of the principle jointly under the two elements 'good faith' and 'object and purpose' in Article 31(1) VCLT[139]. Regardless of the position one takes on this point, there is undoubtedly an interplay between all of the principles and elements mentioned here. One could say that the requirement of 'good faith' requires a sense of fairness and loyalty to the contracting parties, which will not always lead to a contemporaneous interpretation. This is where the link to evolutionary interpretation comes in. If one is to interpret treaty terms in good faith, and consider both the object and purpose and context of the treaty, in addition to the need for rendering both the treaty terms and the treaty as a whole meaning and effect in a given situation, then the result will occasionally be an evolutionary interpretation.

It is submitted here that the ultimate goal of treaty interpretation is to establish the intention of the parties[140], and that this goal will also provide some interpretive guidance in itself. The *Tyrer* case can be used to illustrate this point; The parties to the ECHR clearly wanted to protect the population in the member countries of the Council of Europe against degrading treatment. When the common understanding in the member countries of what constitutes 'degrading treatment' has developed over time, it would not be in interpreting in good faith, or in line with the ECHR's object and

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[137] Could simply be defined as an 'argument from the contrary' (that a conclusion excludes the opposite situation). A special form of this maxim is the maxim Expressio Units Est Exclusion Alterius, meaning that the expression of one thing is the exclusion of another. See Oxford Reference, *Argumentum a contrario*, available online at http://www.oxfordreference.com/view/10.1093/acref/9780195369380.001.0001/acref-9780195369380-e-243 (last visited 1 August 2016), and Duhaime's Law Dictionary, *Expressio Units Est Exclusion Alterius*, available online at http://www.duhaime.org/LegalDictionary/E/ExpressioUniusEstExclusioAlterius.aspx (last visited 1 August 2016).

[138] Meaning 'Of the same kind, class, or nature.' *Black's Law Dictionary* explains the maxims further as follows: 'where general words follow an enumeration of persons or things, by words of a particular and specific meaning, such general words are not to be construed in their widest extent, but are to be held as applying only to persons or things of the same general kind or class as those specifically mentioned (…).' The Law Dictionary (Black's Law Dictionary), *What is Ejusdem Generis*, available online at http://thelawdictionary.org/ejusdem-generis/ (last visited 1 August 2016).

[139] Gardiner, at 179, supra note 26.

[140] Cf. *Navigational Rights*, §48, supra note 32, where the ICJ stated that treaty provisions must be interpreted 'in accordance with the intentions of its authors as reflected by the text of the treaty and the other relevant factors in terms of interpretation.' See also Bjørge, *The Evolutionary Interpretation of Treaties*, at 58-59, with reference to the ILC, who spoke of 'the means of interpretation admissible for ascertaining the intention of the parties', cf. *Reports of the Commission to the General Assembly*, *Draft Articles on the Law of Treaties with commentaries*, at 219, supra note 17.

purpose, if the protection against 'degrading treatment' is, so to say, 'frozen in scope' at the time of the treaties conclusion, incapable of following the development in society. In line with the terminology used by for instance *Torp Helmersen*[141], we can say that the the reference (the thought symbolized by the legal term, which is the symbol) has changed. This is a natural development, as 'degrading treatment' is a value-driven term, and because 'degrading treatment' has one reference (actions considered as such), the scope of which may however change over time. Thereby, it is an unclear but not an ambiguous term, making evolutionary interpretation a suitable tool for adapting it to changing circumstances, cf. the discussion above on *Torp Helmersen*'s approach, the terms symbols and references, and ambiguity in relation to unclarity.

This discussion is naturally a large one, which also touches upon the debate on self-contained regimes, fragmentation, and whether the particularities of a legal field can justify particular methods of interpretation deviating from the method provided by the Vienna Convention. This discussion will to some extent be brought up again in the comparative analysis below in Chapter 5. For now, it suffices to say that individual assessments must always be performed, although some general pronouncements on the characteristics of different legal fields in relation to treaty interpretation can be made. Furthermore, certain legal policy arguments can be raised, for instance the risk of 'watering out human rights protection' and making States more skeptical to taking on human rights obligations. These arguments will also be revisited in Chapter 5.

3.3.5 The ECtHR and Article 31(3)(c) VCLT

A specific point of interest is the ECtHR's use of Article 31(3)(c) VCLT. As mentioned above, most of the Court's references to the VCLT in more recent time is to this rule. The question to be examined here, is whether the court has developed or 'stretched' the meaning of the wording used in Article 31(3)(c), and if so, how this can be understood in relation to evolutionary interpretation.

Article 31(3)(c) VCLT has the following wording, which ensues the rule in Article 31(1) prescribing that the starting point for treaty interpretation is the ordinary meaning of the treaty terms in their context and in the light of the treaty's object and purpose:

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

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[141] Torp Helmersen, at 180 ff, supra note 94. See the discussion above in Section 2.2.2.

(...)

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

As we can see, the first part of the wording ('any relevant rules of international law'), is broadly formulated, while the second part ('applicable in the relations between the parties'), is perhaps a bit unclear, opening up for different interpretive approaches.

The ECtHR has held that the principles underlying the ECHR 'cannot be interpreted and applied in a vacuum', and that relevant rules of international law must be taken into consideration[142]. These statements are themselves nothing else than a confirmation of what Art. 31(3)(c) VCLT provides. However, though Article 31(3)(c) prescribes that any relevant rules of international law must be 'applicable in the relation between the parties', the ECtHR has gone further, and looked also so general principles of international law or instruments that are not legally binding on the respondent State[143]. In accordance with how *Letsas* has approached this topic, it can be useful to group such cases into those where the ECtHR has looked at parts of international law that are not human rights standards, and those where the Court has looked at other international human rights material[144]. *Letsas* points out that while cases of the former category usually has led to an unfavorable result for the applicant, for instance on the basis of state immunity[145], there is a growing number of cases of the latter type, where the Court resorts to other international human rights material.

Of particular interest is the case *Demir and Baykara*, where the Court went into an extensive analysis on the matter. The Court started out by confirming that it must take into account relevant rules and principles of international law applicable in the relations between the contracting parties, and went on to state the following:

The Court further observes that it has always referred to the "living" nature of the Convention, which must be interpreted in the light of present-day conditions, and that it has taken account of

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[142] ECtHR, *Loizidou v. Turkey*, Appl. no. 15318/89, Judgment of 18 December 1996, § 43, and ECtHR, *Al-Adsani v. The United Kingdom*, Appl. no. 35763/97, Judgment of 21 November 2001, § 55.

[143] Letsas, at 521, supra note 102.

[144] Ibid.

[145] An example is ECtHR, *McElhinney v. Ireland*, Appl. no. 31253/96, Judgment of 21 November 2001.

evolving norms of national and international law in its interpretation of Convention provisions (...)[146]

We can recognize the 'living nature' terminology from the *Tyrer* judgment discussed above, which introduced this approach. The Court in *Demir and Baykara* continued by holding that international treaties applicable 'in the particular sphere' has a primacy when international treaties other than the ECHR are resorted to in order to interpret the Convention obligations. From the exemplifications that ensued this statement, some of the treaties found to be 'in the particular sphere' appears to have been more clearly so than others, but a relatively clear case is for instance that conventions on slavery can be relevant in considering the prohibition on slavery[147].

The Court went on to reiterate its indication in the previous *Golder* case[148] that relevant rules of international law 'applicable in the relations between the parties' also includes the 'general principles of law recognized by civilized nations'. Although this might seem less controversial in relation to Article 31(3)(c) VCLT as such principles will typically be binding as customary international law, the ECtHR has in the later years taken a great number of material into account, of which many has been non-binding on the respondent State[149]. Examples include material from different Council of Europe organs, like the European Commission for Democracy through Law (the 'Venice Commission'), but also the EU Charter of Fundamental Rights, the ILO Forced Labour Convention, and the European Convention on State Immunity[150]. This development will be further addressed below in this Chapter, and in the comparative analysis in Chapter 5.

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[146] ECtHR, *Demir and Baykara v. Turkey*, Appl. no. 34503/97, Judgment of 12 November 2008, §§ 67-68.

[147] Cf. Article 4 ECHR, and ibid, § 70.

[148] *Golder*, supra note 107. Cf. the discussion of the *Golder* case above.

[149] *Demir and Baykara*, see in particular §§ 74-75, supra note 146.

[150] Letsas, at 522, with further references, supra note 102. See also the extensive analysis in *Demir and Baykara* §§ 65-86, supra note 146.

Some statements important for assessing the Court's approach to evolutionary interpretation and the relation to the Vienna Convention followed in the *Demir and Baykara* case paragraphs 76-78[151]:

The Court recently confirmed, in its Saadi judgment (…) that when it considers the object and purpose of the Convention provisions, it also takes into account the international law background to the legal question before it. Being made up of a set of rules and principles that are accepted by the vast majority of States, the common international or domestic law standards of European States reflect a reality that the Court cannot disregard when it is called upon to clarify the scope of a Convention provision that more conventional means of interpretation have not enabled it to establish with a sufficient degree of certainty.

(…)
The Court observes in this connection that in searching for common ground among the norms of international law it has never distinguished between sources of law according to whether or not they have been signed or ratified by the respondent State.

What we see above, is the ECtHR's well known method of searching for common ground among the member States of the European Council, and to allow the protection rendered by the ECHR to follow the development of modern societies[152]. Starting with the first of the two above cited passages; the reference to the object and purpose, and, given a fulfillment of the criteria in Article 31(3)(c) VCLT, also the reference to the 'international law background to the legal question before it', can potentially both be in conformity with the method provided by the VCLT. The 'common ground' approach is sometimes spoken of as a search for 'European Consensus.'. It has on some occasions been seen as indicating a change of meaning and that an evolutionary interpretation is appropriate, while on other occasions a lack of common ground/consensus has prevented the ECtHR from resorting to evolutionary interpretation[153].

Most interesting here is the Court's apparent willingness to deviate from the Vienna Convention through a particular form of evolutionary interpretation; The Court stated that that the reality

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[151] *Demir and Baykara*, §§ 76-78, supra note 146.

[152] On the search for 'common ground', se also Section 3.3.2 above on the *Tyrer* judgment.

[153] Dzehtsiarou, 'European Consensus and the Evolutive Interpretation of the European Convention on Human Rights', 12 *German Law Journal* (2011) 1730, at 1731.

reflected by the common international or domestic law standards of European States is one that 'the Court cannot disregard' if 'more conventional means of interpretation' has not lead to a sufficient clarification of the scope of an ECHR provision. 'More convention means of interpretation' is from its wording most naturally read as meaning mainly the method provided by the VCLT, including resorting to object and purpose, context and so forth. The second cited passage above illustrates again the established practice of not distinguishing by sources of law that are binding upon the treaty contracting parties (in practice the respondent State in a given case), and those that are not. Perhaps the most interesting question to ask in this context, is whether the Court itself sees this approach as an application of the VCLT's method, but adapted specifically to the human rights field, entailing a willingness to deviate from the method, or whether they see it as applying their own method of interpretation. If the latter understanding is correct, it can be asked whether the Court sees the Vienna Convention as an element in its own self-developed interpretive method. Alternatively; whether the Court is of the opinion that it applies several methods of interpretation as appropriate, of which the one provided in the Vienna Convention is one of them. We have seen above that for instance the principle of effectiveness can be justified through different arguments, both on the basis of Art. 31 VCLT, and as a maxim which exists more in addition to the VCLT.

The repeated references to the VCLT as guiding the interpretation of the ECHR found in the Court's case law[154], seen together with the statement cited above on resorting to common legal standards among European States when the more conventional means of interpretation has not lead to a sufficient clarification, indicates that the VCLT is still the starting point. However, the Court also stated in *Demir and Baykara* that in interpreting the terms and phrases of the ECHR, it is guided 'mainly by the rules of interpretation provided for in Articles 31 to 33 of the Vienna Convention.' The Court continued to state that 'Since the Convention is first and foremost a system for the protection of human rights(…)', the 'practical and effective' and the 'living instrument' approaches must be followed, and the Convention must be interpreted as a whole and so as to provide 'internal consistency and harmony between its various provisions.' Additionally, 'relevant rules and principles of international law' was also in this context mentioned as relevant[155]. The word 'mainly' used above, seen together with the references to the Court's self-developed interpretive approaches, can indicate that the Court sees for instance the 'living instrument' and practical and effective'

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[154] Cf. Section 2.2.1 above.

[155] *Demir and Baykara*, §§ 65-68, supra note 146.

approaches as interpretive methods separate from the Vienna Convention. This takes us yet again back to the debate on self-contained regimes of interpretation and fragmentation of international law, which will be revisited in Chapter 5 below. Also, in the next Chapter, we will see how the WTO throughout the years has come to sometimes operate more independently from the VCLT. The last question to be examined in this Chapter is whether the ECtHR's resort to 'common international or domestic law standards of European States' can be defined as 'belonging to' any of the means provided in the Vienna Convention.

After the the longer analysis to which the two first cited passages above from *Demir and Baykara* belongs, the Court stated its conclusion, where lastly the following statement was made:

It will be sufficient for the Court that the relevant international instruments denote a continuous evolution in the norms and principles applied in international law or in the domestic law of the majority of member States of the Council of Europe and show, in a precise area, that there is common ground in modern societies (...)[156]

This search for 'common ground' has already been mentioned above in this section and in Section 3.3.2. Seen together with all of the approaches developed by the Court accounted for above ('autonomous concepts', 'living instrument' and 'practical and effective'), this entails a clear subscription to evolutionary interpretation where necessary or appropriate to secure effective human rights protection or clarify the meaning of a provision if the 'more conventional means of interpretation' prove insufficient for the latter purpose in a given case. Considering material not binding on the respondent State is in itself potentially not in accordance with Article 31(3)(c) VCLT. Some 'grey area' cases where for instance a rule could maybe be considered as binding on the respondent State as customary law can of course arise, but as illustrated above, the ECtHR has taken a number of non-binding material into account, and even directly stated that it does not distinguish between material on the basis of their binding or non-binding character[157]. The purpose of the ECHR could possibly justify the Court's search for 'common ground' among European States to a certain extent, thereby linking it to Article 31(1) VCLT. References could be made to statements in the ECHR's preamble, like that the members of the Council of Europe sees the

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[156] Ibid, § 86.

[157] See the discussion above, and *Demir and Baykara*, § 78, supra note 146.

Universal Declaration of Human Rights[158] as aimed at 'securing the universal and effective recognition and observance of the rights therein', that the aim of the Council of Europe is 'achievement of greater unity between its members', and that 'maintenance and further realization of Human Rights and Fundamental Freedoms' is one of the methods by which this aim is to be pursued[159]. However, it is likely that also this approach could prove insufficient in cases where the Court goes relatively far in it search for common ground, as more or less recognized by the Court itself through the above cited statement of the potential insufficiency of the 'more conventional means of interpretations[160].

The Court's mentioning of the case *Taşkin and Others v. Turkey* in the *Demir and Baykara* is illustrating here; Even though the Turkish Government had invoked absence of political support from the member States for creating an additional protocol extending the Convention system to certain economic and social rights, the Court pointed to the fact that a wish among the member States to strengthen the mechanism of the European Social Charter[161] still existed, and took this as a supporting argument for the existence of a consensus among the member States to promote economic and social rights[162]. Although not an extreme example, the case is illustrative of the Court's clear willingness to search for common ground where it find it appropriate. In the analysis in Chapter 5 below, the 'common ground' approach will be addressed to some extent.

3.4 Conclusion

Drawing the line back to Section 1.4.2 above and the ECtHRs use of evolutionary interpretation understood in light of its particularities as an institution, we can recall that the ECtHR can exercise a relatively high degree of freedom as an adjudicatory body. This is due to several factors, including the ECtHR' obligatory jurisdiction, and its relatively broad mandate of securing human rights protection and contributing to the development of human rights protection. It is also a more practical result of the fact that some ECtHR judges follow a more 'activistic' approach than we for

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[158] A/RES/3/217 A, 217 A (III), 10 December 1948 (Universal Declaration of Human Rights).

[159] Preamble, Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), 4 November 1950, [1950] COETS 1.

[160] *Demir and Baykara*, § 76, supra note 146.

[161] Council of Europe, European Social Charter (Revised), 3 May 1996, ETS 163.

[162] *Demir and Baykara*, §§ 83-84, supra note 146, and ECtHR, Taşkin and Others v. Turkey, Appl. no. 49517/99, Judgment of 4 December 2003.

instance can observe in the case of the ICJ[163]. The very character of human rights as rights which are typically meant to be long-lasting and effective in various circumstances, naturally also plays a part in this context.

The case analysis above tells us that the ECtHR has taken the task of securing human rights protection very seriously, and that it has created a judicial identity of its own and established some of the 'tools necessary' to achieve this task through its decades of functioning, one of these being evolutionary interpretation as seen through some of the Court's self-labelled methods. The concepts and approaches developed by the ECtHR, including 'living instrument' and 'practical and effective rights', has gained much attention both in the international legal world and beyond, also raising debates on excessive 'judicial lawmaking.' The argument will be made in this paper that most, if not all, of the ECtHR's approach to evolutionary interpretation, can be tied to the Vienna Convention, cf. Chapter 5 below. While there is nothing wrong in applying terms suitable for a particular legal field, like 'autonomous concepts' or 'living instrument'[164], a question worth asking is whether the ECtHR could have contributed to a higher degree of legitimacy and acceptance of its approach to evolutionary interpretation through tying its reasoning more consistently to the Vienna Convention. Several counterarguments can be raised to such a position. It can be argued that such an approach would be unnecessary formalism, that the ECtHR's references to the VCLT, though few in number, still demonstrates a view of the VCLT as an important basis for the Court's interpretive practice, and that the human rights field requires a flexibility in interpretation which the VCLT cannot always offer. Nevertheless, it is submitted here that the ECtHR, without sliding into excessive formalism, could perhaps have benefitted from being somewhat more clear on the relation between the VCLT and evolutionary interpretation, see more on this in Chapter 5 below. The ECtHR's use of non-binding material raises particular challenges in relation to both Article 31(3)(c) VCLT and the ECtHR's legitimacy as a human rights Court, which will be revisited in Chapter 5 below.

Former President of the ECtHR Luzius Wildhaber, has stated that the European Convention on Human Rights 'has shown a capacity to evolve in the light of social and technological developments that its drafters, however far- sighted, could never have imagined'[165]. At least two

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[163] See for instance Voeten, at 670, supra note 48.

[164] Which could maybe also be suitable to other legal fields than just the human rights field.

[165] Wildhaber, 'The European Court of Human Rights in Action', 21 *Ritsumeikan Law Review* (2004) 83, at 84.

interesting points can be taken from this statement. Firstly, Wildhaber credits the Convention itself much for its capacity to evolve rather than the Court's efforts to this effect, although he also states in the same publication that the Convention evolves through the interpretation of the Court[166]. Secondly, he states that this capacity to evolve which the ECHR holds is of a character which the drafters could never have imagined. Naturally, this raises the question of whether the ECtHR has knowingly stretched the meaning of the Convention terms longer than what can be justified on the basis of the intentions of the contracting parties. While it is true that the ECHR has shown a remarkable potential for development, one can argue that an important element of evolutionary interpretation generally is precisely that treaty drafters can rarely imagine all possible future developments which the treaty might cover, but that an intent for the treaty to keep up with changing circumstances is found to be present, either expressed directly or indirectly. In the words of *Lathrop* as cited above in Section 2.3.4, we can sometimes speak of a 'contemporaneous intent to create an evolutionary meaning'[167]. As mentioned above, it will be argued in this paper that links between the approach taken by the ECtHR to evolutionary interpretation and the VCLT can be established. This includes the intention of the parties, as the ultimate goal of treaty interpretation. Wildhaber's statement can therefore be read as meaning simply that the ECHR has been interpreted evolutionarily to a large extent, leaving it an open question whether these interpretations are justifiable on the basis of the intentions of the contracting parties in all particular cases.

4. GATT/WTO Practice

4.1 Introduction

The last institutional framework to be examined here; the GATT/WTO dispute settlement system, has, perhaps despite images one could have of the significance of predictability as a value in trade, also become known for its evolutionary interpretations and sometimes relatively independent approach. Through this chapter, we will discover how evolutionary interpretation can sometimes even contribute in securing predictability. The WTO Appellate Body has had a large effect on interpretational practice in international trade law[168]. *Jackson*'s opinion on this development is illustrative:

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[166] Ibid.

[167] Lathrop, at 457 note 4, supra note 86.

[168] Venzke, at 149, supra note 12.

[t]here are some important lessons in the GATT/WTO story (….). Perhaps the most significant lesson is that human institutions inevitably evolve and change, and concepts which ignore that, such as concepts which try to cling to 'original intent of draftspersons,' or some inclination to disparage or deny the validity of some of these evolutions and changes, could be damaging to the broader purpose of the institutions[169].

In other words; *Jackson* sees evolutionary interpretation as instrumental in fulfilling the purposes of human institutions more generally. Starting below with examining the GATT/WTO's method of interpretation, the paper will then continue by addressing evolutionary interpretation in the GATT/ WTO.

4.2 The GATT/WTO: Interpretive method(s)

Most focus will in this chapter be placed on case law from after the WTO's establishment in 1995. There are several reasons for this choice. Firstly, the Vienna Convention on the Law of Treaties (VCLT) did not enter into force until in 1980, and although some of its principles has been held to reflect previously existing customary law, it was thereby only existing as a Convention for the last 15 years of the GATT-era. Secondly, the dispute settlement process under the GATT was dominated by diplomats and trade experts, and it was not until the 1980s and further into the time after the creation of the WTO, that a shift in personnel to trained lawyers and a move towards judicial technique took place[170]. In the GATT period, the panels wanted to maintain continuity in their modes of argumentation, and to protect trade objectives from interference by other policy concerns[171]. *Howse* has stated that 'one of the crucial functions of the insider network was to maintain continuity of meaning (…) with respect to treaty interpretation'[172]. Thirdly, the Appellate Body (AB) which was established with the WTO has undoubtedly played the largest part in developing evolutionary interpretation in the GATT/WTO context, and it embraced the VCLT as guidance for interpretation already in their first decisions[173].

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[169] Jackson, *Sovereignty, the WTO and Changing Fundamentals of International Law (*2006), at 82. See also Venzke, at 136, supra note 12.

[170] Venzke, at 149, supra note 12.

[171] Ibid, at 156-157.

[172] Howse, 'From Politics to Technocrazy—and Back Again: The Fate of the Multilateral Trading Regime', 96 *American Journal of International Law* (2002) 94, at 108. Cited in Venzke, at 157, ibid.

[173] Ibid.

Interestingly, the Appellate Body was not expected to have anything more than a limited role for dispute settlement within the WTO[174]. This is an expectation which it through its around 20 years of existence has clearly disproven. Several factors have been suggested as explanations for this development[175]. The format here does not allow for a closer examination of these reasons, but for our purposes it should be pointed out that an important reason for the acceptance of the AB's early choice to assume a court-like function and to establish a judicial identity has been its use of principles of interpretation which are partly codified in the VCLT[176].

The WTO dispute settlement system has a broad material jurisdiction, spanning across the so-called 'covered agreements' in the WTO. cf. Article 1.1 of the Dispute Settlement Understanding (DSU)[177]. Which agreements that are 'covered agreements', is defined in Appendix 1 to the DSU. They include the WTO Agreement, The General Agreement on Tariffs and Trade (GATT) 1994, which incorporates, by reference and with some adjustments, the GATT 1947[178], and all other multilateral agreements on trade in goods. Furthermore, they include the General Agreement on Trade in Services (GATS), the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)[179], the DSU and the plurilateral Agreement on Government Procurement[180]. Guidance on how to interpret the WTO covered agreements can be found in Article 3.2 DSU, which has the following wording:

The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public

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[174] Ibid, at 169.

[175] See for instance the reasons given by *Van den Bossche* in Van den Bossche, 'From Afterthought to Centrepiece': The WTO Appellate Body and its Rise to Prominence in the World Trading System', in Sacerdoti, Yankovich and Bohanes (eds.), *The WTO at Ten: The Contribution of the Dispute Settlement System* (2006) 289, at 300-325. See also *Venzke*, at 169, ibid.

[176] Van Damme, 'Treaty Interpretation by the WTO Appellate Body', at 606, supra note 136.

[177] Appendix 1, Understanding of Rules and Procedures Governing the Settlement of Disputes, 1994, 1869 UNTS 401.

[178] General Agreement on Tariffs and Trade 1994, 1867 UNTS 187.

[179] Agreement on Trade-Related Aspects of Intellectual Property Rights 1994, 1869 UNTS 299.

[180] Agreement on Government Procurement 1994 (revised 2012), 1869 UNTS 508 (text available at 1915 UNTS 103).

international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.

Several elements from this wording leaves the impression of a conservative approach to dispute settlement; the system is a 'central element in providing security and predictability', it serves to 'preserve' rights and obligations and 'clarify (…) existing provisions', and the recommendations and rulings of the Dispute Settlement Body (DSB) cannot 'add to or diminish the rights and obligations' provided in the covered agreements. Sovereignty of the WTO Members and clearly defined competences for the dispute settlement organs does from the wording appear to have been a high priority. We will soon discover that a a literal understanding of this provision does not render a very accurate picture of how dispute settlement in the WTO has developed in practice. The referral in Article 3.2 to 'customary rules of interpretation', and not to the Vienna Convention, is the result of a deliberate choice by the negotiators of the DSU. The reason was that not all WTO Members were parties to the VCLT[181]. As for the temporal aspect of the reference, it may, according to *Van Damme*, be presumed that Article 3.2 refers to customary international law on treaty interpretation as it existed on the date of entry into force of the covered agreements on 1 January 1995, and also to how it developed after this point in time[182]. The lack of reference to the VCLT did not become very important in practice, as the AB confirmed the status of Articles 31-32 VCLT as customary law already in its first reports, and later made the same confirmation also in relation to Article 33 VCLT[183]. Through its first time of existence, the AB relied to a large extent on the VCLT provisions on interpretation, while currently there is a tendency of fewer references to the VCLT in the AB's explanations of its interpretations[184]. The AB has in the past often taken a formal approach in its judicial reasoning, which can have contributed to its acceptance by the WTO Members[185].

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[181] Van Damme, 'Treaty Interpretation by the WTO Appellate Body', at 608, supra note 136.

[182] Ibid.

[183] Ibid, with further references.

[184] Ibid, at 642.

[185] Ibid, at 640-641.

4.3 GATT/WTO and evolutionary interpretation

4.3.1 *US—Shrimp*

A natural starting point for the analysis here is the famous case of *United States—Shrimp*, which was decided by the AB in 1998[186]. In the case, the AB made its first pronouncements on its understanding of evolutionary interpretation. The case concerned Article XX GATT on general exceptions, which can justify trade restrictions that would otherwise constitute a violation of the GATT. Article XX has played an important part in the development of the AB's interpretive practice generally, but here the focus will be placed on the aspects of it relating to evolutionary interpretation. Certain general criteria for invoking an exception on the basis of Article XX can be found in its introductory paragraph (the 'chapeau'), which is ensued by a listing of different categories of exceptions in letters (a)-(j). The measure taken in a given case must fall within one or more of these categories. Measures taken under Article XX normally have non-trade objectives, examples being the protection of 'public morals' (a), and the protection of 'human, animal or plant life or health' (b).

In, *United States—Shrimp,* Article XX(g) was the relevant category. It concerns measures:

relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;

In short, the case concerned a United States (US) import ban of shrimp and shrimp products from countries that were not certified as users of a certain net for shrimp catching constructed to avoid the harming of sea turtles. To justify the import ban, the US invoked Article XX, and the AB was faced with the task of deciding whether sea turtles could be defined as 'exhaustible natural resources', and thereby covered by Article XX(g). A central point was the question of whether Article XX(g), as had been argued by the complainants in the case, was limited to the conservation of 'mineral' or 'non-living' natural resources[187]. The case tells us much about the AB's approach to evolutionary interpretation, and a relatively comprehensive examination of it is therefore in order.

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[186] *US—Shrimp*, supra note 56.

[187] Ibid, § 127.

As part of its assessment, the AB made reference to some of the statements from the above discussed *Namibia Advisory Opinion* from the ICJ in the following manner[188]:

The International Court of Justice stated that where concepts embodied in a treaty are "by definition, evolutionary", their "interpretation cannot remain unaffected by the subsequent development of law ... . Moreover, an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation."[189]

The AB also made reference to the ICJ's *Aegean Sea* case, which was mentioned in Section 2.2.2 above[190]. Through this reference to the general statements of the ICJ, the AB placed the interpretive practice of trade law within the context of international law more generally[191]. Thereby, the AB contributed in tearing down an image one might have had of trade law as a secluded and particular system when it comes to interpretation. In making the reference cited above to *Namibia* and *Aegean Sea*, the AB, clearly drawing on the ICJ's practice, held the following:

From the perspective embodied in the preamble of the WTO Agreement, we note that the generic term "natural resources" in Article XX(g) is not "static" in its content or reference but is rather "by definition, evolutionary'.[192]

The AB went on to note that different modern legal instruments make frequent references to natural resources as covering both living and non-living resources.[193] Before this, the AB had referred to the preamble to the WTO Agreement, and stated that the signatories to that agreement (in 1994) were 'fully aware of the importance and legitimacy of environmental protection as a goal of national and international policy'[194]. The AB also made the following statement:

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188 *Namibia Advisory Opinion*, supra note 66. See Section 2.2.2 above.

189 *United States—Shrimp*, at 48, note 109, supra note 56.

190 Ibid, and *Aegean Sea*, supra note 90.

191 Venzke, at 179, supra note 12.

192 *United States—Shrimp*, § 130, supra note 56.

193 Ibid.

194 Ibid, § 129.

The words of Article XX(g), "exhaustible natural resources", were actually crafted more than 50 years ago. They must be read by a treaty interpreter in the light of contemporary concerns of the community of nations about the protection and conservation of the environment.[195]

Finally, the following ensuing statement by the AB deserves to be cited in full:

Given the recent acknowledgement by the international community of the importance of concerted bilateral or multilateral action to protect living natural resources, and recalling the explicit recognition by WTO Members of the objective of sustainable development in the preamble of the WTO Agreement, we believe it is too late in the day to suppose that Article XX(g) of the GATT 1994 may be read as referring only to the conservation of exhaustible mineral or other non-living natural resources. Moreover, two adopted GATT 1947 panel reports previously found fish to be an "exhaustible natural resource" within the meaning of Article XX(g). We hold that, in line with the principle of effectiveness in treaty interpretation , measures to conserve exhaustible natural resources, whether living or non-living, may fall within Article XX(g).[196]

Multiple important points on evolutionary interpretation can be taken from this lastly cited paragraph, and several lines can be drawn to what has been discussed above both in relation to the ICJ and the ECtHR. The AB had already before making this statement held that Article XX(g) is textually not limited to the conservation of 'mineral' or 'non-living' natural resources[197]. In line with the ICJ's approach in *Namibia*, the AB assessed the character of the term 'natural resources', and found it to be a generic term, and by definition evolutionary in its content and reference[198]. To start with the beginning of the paragraph, the first sentence clearly discards an originalist understanding of Article XX, rendering a preference for a present-day interpretation which takes both legal and other forms of development in society into consideration. An interesting feature is the referral both to the recent acknowledgement by the international community of the importance of protecting living natural resources, put together with a reference to the recent recognition by WTO Members of the objective of sustainable development. The first mentioned reference, seen

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[195] Ibid.

[196] Ibid, § 131.

[197] Ibid, § 128.

[198] Ibid, § 130.

together with the passage cited further above referring to the more than 50 years since the crafting of the words, clearly signifies an evolutionary approach and a will to interpret the treaty in light of the stage of development which the World is in today.

The second mentioned reference to the recognition by WTO Members can, firstly, be seen both as part of the argument above for an evolutionary approach, and/or as a more independent supporting argument for it, as many of the States in the world are also members of the WTO. Secondly, it can be seen as a referral to the intent of the contracting parties to the treaty as guidance for interpretation. Even though the GATT 1947 was incorporated by reference into the GATT 1994, the fact that an entirely new text was not created does not mean that the GATT 1947 was not accepted by the contracting parties in 1994 as part of a new treaty. For this reason, it would possibly be incorrect, and at the least highly formalistic, to follow an approach not taking into account the intent of the contracting parties to the GATT 1994. It is therefore submitted here that the AB rightly took the recognition expressed in the preamble to the GATT 1994 into account. Another interesting fact to note in this context, is that while the preamble to GATT 1994 recognizes the objective of sustainable development, such a recognition can not be found in the GATT 1947, which even referred to 'developing the full use of the resources of the world' as an aim for relations in the field of trade and economic endeavor. This underlines the development that has taken place in the world community, and that has lead to concepts such as 'sustainable development.'

The Court's reference in the lastly cited statement above to previous case law from the GATT period is less interesting for our purposes here. However, the reference to the principle of effectiveness draws a line back to the discussion above in Section 3.3.4 in relation to the ECtHR. It can be assumed from this reference that in the Court's opinion, considering the stage of development the world had come to when the case was decided, it would render Article XX(g) without effect if not also living resources should fall under this provision. Furthermore; that another conclusion would not be in conformity with the intentions of the parties, considering both the choice of an evolutionary term here, and the current view today of natural resources and sustainable development both among the WTO Members and in the broader world community.

United States—Shrimp marked in many ways a revolution in the WTO system. As noted by *Alvarez*: '[n]either the WTO's admirers nor its detractors within the environmental community can deny that the *Shrimp/Turtle* Appellate Body has given a whole new layer of meaning to the bare text

of Article XX of the GATT'[199]. Furthermore, as observed by *Nielsen*, the interpretation of Article XX(g) GATT in *US—Shrimp* shows how an evolutionary understanding of the treaty terms supplements a textual analysis[200]. *Nielsen* further explains this in the following way:

This means that the words are informed by contemporary concerns in the society—as well as adherence to the policy goals laid in the Preamble of the WTO Agreement, which includes reference to both sustainable development and the environment.[201]

This perfectly describes some of the essence of evolutionary interpretation; the treaty terms are not considered 'in a vacuum', as formulated by the ECtHR in *Loizidou*[202], or as frozen in a past time, but are understood in light of present-day conditions. Furthermore, 'adherence to the policy goals' simply means respecting the intention of the treaty contracting parties.

The AB's approach to evolutionary interpretation in relation to Article XX has mostly been considered positive in the literature[203]. *Conrad* argues that both the intention and function of the general exceptions in the GATT makes it seem imperative to emphasize present-day concerns[204]. This is true, as for instance national interests of different character which States may want to protect will often vary over time. As we will see in the following, it is however not only in relation to Article XX GATT that evolutionary interpretation has taken place in the WTO.

4.3.2 *China—Publications and Audiovisual Products*

After *US—Shrimp*, evolutionary interpretation has come up as a topic from time to time in WTO dispute settlement. A relatively recent example is the case *China—Publications and Audiovisual Products*, which concerned the legality of Chinese measures taken to regulate activities relating to

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[199] Alvarez, *International Organizations as Law-Makers* (2005), at 472. See also Venzke, at 180, supra note 12.

[200] Nielsen, at 204, supra note 24.

[201] Ibid.

[202] See Section 3.3.5 above, and *Loizidou*, § 43, supra note 142.

[203] Conrad, *Processes and Production Methods (PPMs) in WTO Law: Interfacing Trade and Social Goals* (2011), at 268.

[204] Ibid.

importation and distribution of certain publications and audiovisual entertainment products[205]. China contended on appeal that the meaning of the schedules through which they had committed themselves to the GATS had been changed by the panel through evolutionary interpretation[206]. China referred to the Vienna Convention, and asserted that a proper examination of the object and purpose of the GATS would lead to the application of a contemporaneous understanding of the terms in question ('sound recording' and 'distribution')[207].

The AB noted very shortly that these terms are 'sufficiently generic that what they apply to may change over time', and continued to make the following statement:

In this respect, we note that GATS Schedules, like the GATS itself and all WTO agreements, constitute multilateral treaties with continuing obligations that WTO Members entered into for an indefinite period of time, regardless of whether they were original Members or acceded after 1995.

This case was decided by the AB around five months after the ICJ's judgment in *Navigational Rights*[208], and the AB made reference to this decision in connection with the above cited passage. The AB also stated that it considered this approach to be consistent with the approach taken previously in *United States—Shrimp.*[209] From the account above of the AB's reasoning, we recognize the elements from *Navigational Rights* which can establish a presumption of evolutive intent; Generic terms and a treaty entered into for a very long period or of 'continuing duration'[210]. Some interesting arguments in support of an evolutionary interpretation not yet touched upon in this paper, can be identified in the AB's statements that followed the above cited passage:

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[205] WTO, *China - Measures Affecting Trading Rights and Distribution Services for Certain obligations and Audiovisual Entertainment Products,* 21 December 2009, WT/DS363/AB/R.

[206] Ibid, § 47.

[207] Ibid, §§ 47 and 395.

[208] See Section 2.2.2 above.

[209] *China—Publications and Audiovisual* Products, § 396, note 705, supra note 205, cf. the discussion on *United States—Shrimp* above.

[210] See Section 2.2.2 above, and *Navigational Rights*, § 66, supra note 32.

We further note that interpreting the terms of GATS specific commitments based on the notion that the ordinary meaning to be attributed to those terms can only be the meaning that they had at the time the Schedule was concluded would mean that very similar or identically worded commitments could be given different meanings, content, and coverage depending on the date of their adoption or the date of a Member's accession to the treaty. Such interpretation would undermine the predictability, security, and clarity of GATS specific commitments, which are undertaken through successive rounds of negotiations, and which must be interpreted in accordance with customary rules of interpretation of public international law.[211]

In essence, the AB argues here that applying a contemporaneous interpretation to GATS specific commitments could endanger predictability, security and clarity of such commitments. At first glance, this might resemble arguments typically used against evolutionary interpretation more generally. Perhaps somewhat ironically then, they are used here to justify an evolutionary approach. However, the reasoning here is very specifically founded. Like the AB points to; GATS commitments are undertaken through successive rounds of negotiations, and both their adoption and accessions to the treaty by different Members can happen on different times. A certain flexibility and potential for development in the interpretation of the commitments, including of their 'ordinary meaning', is therefore necessary in order to secure a sufficient degree of legal stability, and to avoid arbitrary advantages or disadvantages for the various Members. Considering this, the purpose of the WTO agreement might also be invoked as a supporting argument for the approach taken by the AB, thereby establishing a link to Article 31(1) VCLT. It is clear from the Preamble to the WTO Agreement that integration among the WTO Members and a conduct of trade which takes the needs and concerns of different countries into consideration, are central elements of the WTO's purpose. Lack of predictability and differential and arbitrary treatment would hardly be in line with these aims. However, it is understandable that this can create frustration for a WTO Member being negatively affected by such an interpretation, as the one seen above in *China—Publications and Audiovisual Products.* What happens can perhaps, in *Venzke*'s words, be described as that 'something deemed specific and precise at one time, later turns out to be 'generic' and therefore subject to evolution'[212]. The arguments used by the AB here (predictability, clarity and security), could potentially have application also in other legal fields after an individual assessment, although

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[211] *China—Publications and Audiovisual Products*, § 397, supra note 205.

[212] Venzke, at 233, supra note 12.

they were in the case above closely connected to the particularities of the WTO system. This raises an interesting point, as evolution can sometimes be necessary when status quo would entail risks like insecurity and unclarity. If the parties to a treaty intended for it to develop, not allowing for this development can potentially lead to such situations.

Another interesting aspect of *China—Publications and Audiovisual Products*, is that it might signify an increased willingness on the part of the AB to depart more from the formalistic approach with frequent references to the VCLT as taken in past. It referred to the limitations on States' sovereign right to regulate trade which States accept by acceding to the WTO in the following manner, without taking a formalistic interpretive approach[213]:

With respect to trade, the WTO Agreement and its Annexes instead operate, among other things, to discipline the exercise of each member's inherent power to regulate by requiring WTO Members to comply with the obligations that they have assumed together.

This is perhaps indicative of a development where the AB feels comfortable enough to reason also somewhat more freely without following an established pattern of interpretive reasoning in all cases. That does of course not have to mean that the VCLT is not still the basis for interpretation, or that applied interpretations are incompatible with the VCLT. As for the statement cited here, it is merely a recognition of what treaty commitments mean more generally, here in the context of the WTO.

4.3.3 *EU—Tariff Treatment of Certain Information Technology Products*

Lastly here, another relatively recent case will be addressed: *EU—Tariff Treatment of Certain Information Technology Products*[214]. The case resulted in a panel report which was not appealed, and it was adopted by the DSB 21 September 2010. It is used by *Bjørge* as an example of a case where evolutionary interpretation would not have been necessary, as the same result would have followed from 'the plain meaning of the text read in good faith'[215]. The idea is that use of generic terms can in some cases make the use of evolutionary interpretation superfluous. Reference can be

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[213] Van Damme, 'Treaty Interpretation by the WTO Appellate Body', at 646-647, supra note 136.

[214] WTO, *European Communities and its Member States—Tariff Treatment of Certain Information Technology Products*, 16 August 2010, WT/DS375/R WT/DS376/R WT/DS377/R.

[215] Bjørge, *The Evolutionary Interpretation of Treaties,* at 191, supra note 26.

made to the statements of the Permanent Court of International Justice (PCIJ) made already in 1932, in the advisory opinion *Employment of Women during the Night*. The PCIJ made a statement with general application in stating that even though 'certain facts or situations' covered by a convention's terms 'in their ordinary meaning' were not thought of at the time of the convention's conclusion, that 'does not justify interpreting those of its provisions which are general in scope otherwise than in accordance with their terms'[216].

Returning to *EU—Tariff Treatment of Certain IT Products*, the subject at issue was different measures taken by the EU relating to tariff classification and tariff treatment of certain information technology (IT) products. The Panel had to consider certain concession commitments in light of technological development. In finding that LCD screens were covered by the term 'flat panel display devices', the Panel applied the 'customary rules of interpretation on public international law, as codified in the Vienna Convention', and examined the ordinary meaning of the terms found in the EU's commitments and the other relevant material[217]. Furthermore, the Panel referred to the fact that in the concession in question, 'generic terms were used to cover a wide range of products and technologies', and not more precise or exclusive terms[218]. Interestingly, as part of its conclusion, the Panel noted that it did not 'consider it necessary to resort to any form of evolutionary interpretation of the terms', in light of its 'conclusion on the ordinary meaning of the terms'[219].

It is not easy to know exactly what to take out of the Panel's reasoning after this. Taken as it is, the last statement clearly says that evolutionary interpretation did not take place. However, the statement on generic terms referenced above, taken together with a reference in the same paragraph of the Panel report to the above cited passage from *China—Publications and Audiovisual Products* concerning risks connected with 'freezing' the meaning of commitments in time[220], indicates otherwise. Nevertheless, it is submitted here that *Bjørge* is right in arguing firstly that the situation

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[216] *Interpretation of The Convention of 1919 concerning Employment of Women during the Night*, 1932 PCIJ Series A/B, No. 50, at 377. See also Bjørge, *The Evolutionary Interpretation of Treaties,* at 192, supra note 26.

[217] *EU—Tariff Treatment of Certain IT Products, § 7.597,* supra note 214.

[218] Ibid, §§ 7.598-7.599.

[219] Ibid, § 7.600, note 807.

[220] Ibid, § 7.599, note 806.

in this case fell within the one described in *Employment of Women during the Night*, meaning that the terms read in good faith in their ordinary meaning are wide enough to cover phenomena not contemplated when the treaty was concluded, without resorting to evolutionary interpretation. Secondly, as also argued by *Bjørge*, to not consider LCD screens as covered by the term 'flat panel display devices' would clearly be in contradiction of good faith[221]. The arguments discussed here will be revisited to some extent in the comparative analysis in chapter 5 below.

4.4 Conclusion

To conclude this chapter, it can, as in the two preceding chapters, be useful to draw the line back to the discussion of the use of evolutionary interpretation by the WTO dispute settlement bodies in light of their institutional particularities in Section 1.4.3 above. As can be recalled from the discussion above, the GATT era was marked much by a strict focus on trade objectives and stability. While certain factors, like Article 3.2 DSU, indicates a plan of continuing this development after the establishment of the WTO, the Appellate Body proved to be much more significant than expected, and has even included evolutionary interpretation among its interpretive results in some cases. Trade objectives are of course still a dominant purpose also in the WTO today, and stability and predictability can be important values to secure effective trade. However, the picture is not clear, as effective trade might even necessitate evolutionary interpretation, and as in most legal fields, much will depend on the circumstances of each case.

Continuing to the question of how this reasoning compares to the case analysis above, it seems relatively clear that the WTO has been aware of the challenging field it operates in, where many strong interests can be involved. The AB has taken care to refer consistently to the VCLT, which has a recognized position as a starting point for treaty interpretation, and has followed the development of the authoritative reasoning of the ICJ. A further illustration of this point can be found in the commentary to the TRIPS by *Malbon*, *Lawson* and *Davison*, which states that generally, the DSB will 'look for some indication as to whether it was intended that the treaty be interpreted in an evolutionary fashion'[222]. This has again had a form of 'reinforcing effect', perhaps enabling the Appellate Body to operate more independently and with a higher degree of confidence and perceived authority now than in the past. The specific arguments used by the AB in *China—*

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[221] Bjørge, *The Evolutionary Interpretation of Treaties,* at 192, supra note 26.

[222] Malbon, Lawson and Davison, The WTO Agreement on Trade-Related Aspects of Intellectual Property Rights: A Commentary (2014), at 102.

Publications and Audiovisual Products, as accounted for above in Section 4.3.2, underlines this point. It also illustrates the point made above in Section 1.4.3, that sometimes an evolutionary interpretation might be necessary precisely to ensure effective trade by securing values such as predictability and clarity.

What we have seen through the cases analyzed above, seen in relation to how the situation was in the GATT era, might indeed be a gradual 'liberation' of the WTO dispute settlement bodies. It is however likely to be some inherent limitations on how far this development can go. One thing is applying the Vienna Convention directly and following the practice of the ICJ, another thing is going so far as to for instance develop self-labelled methods, like the ECtHR has done. Even though evolutionary interpretation can serve to maintain stability in some cases, the WTO dispute settlement body has a different mandate and a different composition than the ECtHR, and operate in a different legal field. It will therefore be highly interesting to follow the further development of evolutionary interpretation as a concept in the WTO.

5. Comparative analysis

5.1 Introduction

The paper now turns to a comparative analysis of the findings in the three preceding chapters. Lines will be drawn both to the particularities of each institution and their respective need to resort to evolutionary interpretation, and to theory on evolutionary interpretation and treaty interpretation more generally.

To start with a fundamental question; is the evolutionary interpretation being performed by the three institutions we have looked at above all based on one and the same method? While much of the interpretation examined above is tied to the Vienna Convention, both formally through reference and in practice through the means applied, this question is not easy to answer, and is also to some extent a question of terminology. The particularities of each institution's approach and the terms chosen by each of them to describe their understanding of evolutionary interpretation, clearly complicates the picture. However, it will be argued here that even with the particularities of each institution and their approach in mind, all of the evolutionary interpretation we have seen above can be justified through the Vienna Convention. This is of course not a position shared by everyone. Also, it is not necessarily so clear whether the particular institution itself sees this as correct. In fact, there are even indicators that at least some of the institutions not always do. The ECtHR's search for common ground when, in the word of the European Court, the 'more conventional means of

interpretation' has not enabled it to clarify the scope of a Convention provision with a sufficient degree of certainty, is an example of a perception of a move away from the VCLT in some cases[223]. The reasons for why I argue that even the 'common ground' approach can be tied to the Vienna Convention, will be addressed below. The point that will be attempted made in the following is that by explaining their evolutionary interpretations through the Vienna Convention consequently, the different institutions could contribute to a higher degree of certainty and clarity in the practice of interpretation in international law, and still retain a sufficient degree of flexibility for suiting interpretations to the particularities of 'their' legal field.

5.2 One method for evolutionary interpretation?

We have seen through the analysis in chapters 2-4 above that all of the institutions make references to the Vienna Convention more or less frequently. The ICJ and the WTO stands out as the most consistent users of the VCLT more generally, while as we have seen, relatively few references to the VCLT can be found in the ECtHR' vast case law, although several statements from the ECtHR indicates a general subscription to the VCLT as providing guidance for interpretation. The VCLT's authority as guidance for interpretation is widely accepted within the international legal field, and one might get the impression that even in cases where one of the institutions seeks to deviate from the VCLT, they make some introductory references or similar to it in order to establish a sort of basic foundation for the ensuing interpretation. An example is the Appellate Body's (AB) approach in *China—Publications and Audiovisual Products*, as discussed above. For parts of its reasons, the AB followed an almost 'textbook approach' to interpretation, making references to the Vienna Convention, and following the ICJ's approach from *Navigational Rights* in finding grounds for an evolutionary interpretation. It then went on to make the statement regarding risks of loosing predictability, clarity and security if one were to 'freeze' the meaning of GATS commitments in time.

This makes for a transition to the postulate above; that all of the evolutionary interpretation from the three institutions examined in this paper can be justified through the Vienna Convention. As regards some of the means relied on by the institutions which we have seen above, this is relatively uncontroversial. This is so for instance when the ECtHR in order to justify its 'practical and

[223] See for instance *Demir and Baykara*, § 76, supra note 146, and Section 3.3.5 above.

effective' approach has made reference both to context and object and purpose[224]. However, the postulate naturally poses the question of how certain approaches, like the ECtHR's search for 'common ground', and the AB's reference to risks of insecurity and unpredictability, can be fitted within the means provided in the Vienna Convention. These, and some additional approaches or factors will be addressed in the following, in order to assess how they relate to the VCLT.

Starting with the beginning, it is argued here that the ICJ's approach to evolutionary interpretation is, among the three institutions, the one that can most clearly be fitted within the Vienna Conventions's method. The ICJ has placed most emphasis on the intention of the parties, with the wording of the treaty being an important indicator of what the intention is in a given case. For this reason, the ICJ offers a very clear example of how evolutionary interpretation is just a potential product of a proper application of Articles 31-33 VCLT. It is to some extent understandable that the situation becomes somewhat more challenging for institutions like the ECHR and the WTO, which have to consider very particular interests within their respective fields. On the other hand, the ICJ has a relatively broad jurisdiction, and could potentially be faced with many different case types.

A point that can be made, is that the intentions of the parties is not included as a means of interpretation in the Vienna Convention[225]. While that is true, it is as previously mentioned submitted here that the ultimate goal of treaty interpretation is to establish the intention of the contracting parties, and that this is recognized by Article 31 VCLT. When the ILC started the work with formulating general principles for the interpretation of treaties, it stated that the aim was to set out 'the means of interpretation admissible for ascertaining the intention of the parties'[226]. As expressed by *Bjørge*, 'cake' is not included among the ingredients in a recipe for cake[227]. The format here does unfortunately not allow for a deeper dive into this large discussion.

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[224] See Section 3.3.3 above, and ECtHR, *Guide on Article 4 of the European Convention on Human Rights*, at 5, with further references, supra note 125.

[225] Although some indications of it might be found in the preparatory work, which is referred to as a supplementary means of interpretation in Article 32 VCLT.

[226] *Reports of the Commission to the General Assembly*, *Draft Articles on the Law of Treaties with commentaries*, at 219, supra note 17. See also Bjørge, *The Evolutionary Interpretation of Treaties,* at 90, supra note 26.

[227] Bjørge, *Introducing The Evolutionary Interpretation of Treaties*, EJIL: Talk!, supra note 7.

As for the ECtHR, all of its methods or approaches addressed in this paper; 'living instrument', 'practical and effective rights', 'autonomous concepts' and the search for 'common ground', could, is it argued here, be justified on the basis of the Vienna Convention. As for the three first mentioned approaches, they can all be considered in line with the intention of the contracting parties to the ECHR. Furthermore, and partly in accordance with references made by the ECtHR itself, both the context and the object and purpose of the ECHR can be taken as supporting arguments for this understanding, cf. Article 31(1) VCLT[228]. This creates an even stronger link to the VCLT. Additionally, good faith comes into play, and one can also make reference to the principle of effectiveness, even though the latter principle's place within or outside the VCLT is subject to discussion[229]. The preamble to the ECHR refers to the 'maintenance and further realisation of Human Rights and Fundamental Freedoms', and it would simply not be a reading in good faith to assume that the contracting parties wanted the meaning and scope of the rights to be 'frozen in time'[230]. Quite the opposite, understanding the convention as a 'living instrument' which confers 'practical and effective' rights, and which contains autonomous concepts preventing States from 'defining away' rights protection, is nothing but in line with the intention of the contracting parties. After establishing this, it can of course be discussed whether the ECtHR has gone too far in some cases, but that does not render the whole approach or method unjustified on a general basis.

The search for 'common ground' is somewhat more challenging to place within the Vienna Convention. The reason is the ECtHR's consideration also of non-binding material, which appears to contradict Article 31(3)(c) VCLT. It is nevertheless submitted that also this, within certain limitations, is in line with the intention of the parties. If the ECHR for instance would be confined only to consider human rights instruments binding upon a respondent State, and be barred from looking at for instance human rights material from Council of Europe organs which could shed light on the current legal climate among the member States of the European Council, that could lead to unnecessary formalism contradicting the intention of effective human rights protection. Some material of this kind could maybe also be referred to on the basis of Article 31(3)(b) VCLT. Use of non-binding material must be made with a certain degree of caution, and applying material lacking any clear relevance, and material which member States of the European Council might even have

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[228] See the discussion above in this Section, and ECtHR, *Guide on Article 4 of the European Convention on Human Rights*, at 5, with further references, supra note 125.

[229] See Section 3.3.4 above.

[230] See also *Lugato*, at 63 note 56, with further references, supra note 47.

opposed in its preparatory stages, could be outside what it permissible on the basis of the intention of the ECHR contracting parties. Naturally, this would also carry a risk of Council of Europe Member States objecting that they never agreed to be bound be the material in question, thereby jeopardizing some of the Court's legitimacy[231].

The WTO bodies have as demonstrated above, and although loosening up somewhat in the more recent time, become known for a consistent, almost formalistic application of the Vienna Convention as the basis of their interpretations. As part of this, the AB has continued to tie its approach to evolutionary interpretation to the approach developed by the ICJ, as demonstrated relatively recently in the case *China—Publications and Audiovisual Products*[232]. As mentioned above, several reasons both pertaining to the history and particularities of WTO dispute settlement can be pointed to as reasons for the WTO's frequent references to the VCLT. These references have contributed in making the transition over to the new dispute settlement system with the establishment of the WTO acceptable. The reason is that they are important elements in solid juridical reasoning, which contribute to consistency in method. Furthermore, one can ask whether this is particularly important in the world of trade, where national interests and large amounts of money are frequently at stake. The 'strict juridical approach' might have contributed in establishing legitimacy for the Appellate Body, which from a practical perspective can be crucial in order to secure compliance with its decisions. Tying the development of evolutionary interpretation to the approach of the ICJ, which holds a high authority as the principal judicial organ of the United Nations, can from this perspective have been a wise choice.

A need for legitimacy, in addition to respect for decisions and willingness to comply with them, is clearly present also in the context of human rights and the ECtHR. In fact, for all three institutions discussed in this paper, considerations like legitimate expectations, pacta sunt servanda and the limits for the authority conferred upon an adjudicatory body, can potentially conflict with the concept of evolutionary interpretation. Judge Bedjaoui's separate opinion from *Gabčíkovo-Nagymaros*[233], as discussed above in Section 2.2.2, is illustrative in this regard. However, as demonstrated above, an evolutionary interpretation can occasionally be the only correct outcome if

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[231] Senden, at 125, supra note 120, with reference to the complain by Turkey in *Demir and Baykara*, supra note 146.

[232] *China—Publications and Audiovisual Products*, supra note 205, cf. Section 4.3.2 above.

[233] *Gabčíkovo-Nagymaros*, Separate Opinion of Judge Bedjaoui, supra note 76.

one is to respect the intentions of the contracting parties in a given case. A different perspective can therefore also be applied here; 'legitimacy' for an adjudicatory body is not necessarily just tied to respecting the intention of contracting parties, as represented by the original meaning of the treaty terms. It might as well be about the courage to adjudicate according to the current state of the law at a later point if that is the result of a proper application of the Vienna Convention, entailing that it happens in accordance with the intention of the contracting parties. Practical examples can easily be made in the context of all three institutions discussed here, and the point goes to the core of the meaning of 'conferral of authority' and of voluntarily giving up some aspects of national sovereignty. If a member of the European Council has agreed to partake in a Convention designed to create effective and developing human rights protection, than it must be prepared for a situation where a generic and value-driven term like 'degrading treatment' may change in the future. As we have seen, the risk of an adjudicatory body assuming to much authority is present, for instance in the context of the ECtHR and the consideration of non-binding material. However, this risk is mitigated through the approach as developed by the ICJ, which focuses not only on 'generic terms' as an element, but also on the fact that 'the parties had to be deemed to have accepted them as such'[234]. This reflects a respect for the intention of the parties, as the ultimate end of the interpretive exercise.

Additionally, the discussion here provides some answers to the legal policy considerations mentioned earlier about whether extensive evolutionary interpretation in the human rights field runs the risk of 'watering out human rights protection' and making States more skeptical about binding themselves to human rights treaties. Again, this is a challenge not only present in the field of human rights, but also in the world of trade and for the ICJ. Although not concerning evolutionary interpretation, the United States (US) withdrawal from the ICJ shortly after the Court's holding that the US was responsible for several illegal acts against Nicaragua, illustrates how a discontent participating state might withdraw from an entire cooperation, thereby potentially weakening the whole system[235]. However, this takes us back to the point made above: Treaty making is about commitments, and sometimes especially so in treaties designed to develop and to contain effective provisions over time. Going over the limits can however run the risk of endangering the whole cooperation, be it in the world or trade, in human rights or in another field. Treaty amendment or the

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[234] *Namibia Advisory Opinion*, § 53, supra note 66, cf. Section 2.2.2 above.

[235] Rothe, *State Criminality: The Crime of All Crimes* (2009), at 167.

creation of a new treaty should be reserved for the contracting parties, and thereby constitutes 'an ultimate limit' for adjudicatory bodies, although the lines between evolutionary interpretation and treaty amendment can at times be hard to draw[236]. Also, while adjudicatory bodies can to some extent remedy careless drafting, such cases must, as stated by *Van Damme*, be contrasted with 'genuine cases of interpreting silence'[237]. As an example, an adjudicatory body can not create rights of obligations which did not come into being as a result of lack of political consensus. This is of course different from situations where matters are deliberately left open in a treaty for the Courts to decide upon them.

Evolutionary interpretation must, as most other interpretive concepts, be used with care, but following the VCLT's method and respecting the intentions of the parties is potentially one of the best ways to do so. It is also important to remember, as illustrated through the Appellate Body's statements from *China—Publications and Audiovisual Products*, that *not* performing an evolutionary interpretation can also have negative effects in some cases[238]. Following the VCLT should of course not be a straightjacket, and *Van Damme* makes an important point in treaty interpretation by any court of tribunal can never be reduced to 'a mere synthetic application' of Articles 31-33 VCLT[239]. However, with this in mind, the VCLT offers a flexible and widely accepted method for treaty interpretation, which will be of great use as the main method in most cases. Using the VCLT as the ground for evolutionary interpretations wherever possible, can contribute to clarity and predictability in international law.

Where does the above discussion lead us in answering the question of separate methods and self-contained regimes as regards evolutionary interpretation? This question is broad and pertains to treaty interpretation more generally. Suffice here to say some words about the place of evolutionary interpretation in this picture. The simple answer is that despite some indicators to the opposite as mentioned above, including the institutions' own view on this matter, the differences in method are smaller than what one might think. Furthermore, it is possible to justify the evolutionary

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[236] Reference can be made to Judge Bedjaoui's statement from *Gabčíkovo-Nagymaros*, as discussed above in Section 2.2.2, where he stated that the 'interpretation' of a treaty must not be confused with its 'revision,' *Gabčíkovo-Nagymaros*, Separate Opinion of Judge Bedjaoui, § 5, supra note 76.

[237] Van Damme, 'Treaty Interpretation by the WTO Appellate Body', at 628, supra note 136.

[238] *China—Publications and Audiovisual Products*, § 397, supra note 205. See the discussion above in Section 4.3.2.

[239] Van Damme, 'Treaty Interpretation by the WTO Appellate Body', at 641-642, supra note 136.

interpretation of all of the three institutions examined in this paper through the method found in the VCLT. That the method is applied somewhat differently through adaption to different factual and legal realities, including through different emphasis of the means provided in the VCLT, is another matter. When *Van Damme* points to the fact that interpretive practices are shaped by the particular context or system they operate within, that is true, but shaping does not necessarily mean changing the interpretive method all together[240]. Such shaping is only natural, as the VCLT is a general convention on the law of treaties intended to be broad in scope, and it demonstrates the VCLT's flexibility in terms of adapting to different legal fields. This does not entail that one or more of the institutions apply completely different and distinct methods of treaty interpretation.

5.3 The need for evolutionary interpretation - and evolutionary interpretation as a viable option for the future?

The next question to be addressed is whether we can observe any differences between evolutionary interpretation in the ICJ, the WTO and the ECtHR, which can be explained by each institution's particularities and by looking at their respective needs to refer to evolutionary interpretation as accounted for above in Section 1.4.4. This question has in part been answered already in the preceding section. The general starting point is that the answer to this question will always depend on the individual circumstances of each case. The sensitivity of human rights and the large amounts of money and societal interests that be involved in trade, coupled with rapid developments of various forms both in the national societies and on the global level, will sometimes necessitate evolutionary interpretation. However, as we have seen, also the ICJ can be faced with challenging cases necessitating evolutionary interpretation, although the ICJ's case load can simply not compare to that of the WTO and the ECtHR. None of the cases examined in this paper are, all in all and with a possible exception for the use of non-binding material by the ECtHR in some instances, examples of the institution going to far in evolutionary interpretation. It is submitted here that the cases rather demonstrates responses to needs for adapting a treaty to a changed reality, and that this response conformed with the intention of the treaty contracting parties, as either expressed directly or established through presumption.

Returning to the particularities of the different institutions; the ECtHR is vested with obligatory jurisdiction, and operates within the human rights field with a relatively clear mandate to secure and

[240] Van Damme, *Is Evolutionary Interpretation Only A Matter of Finding the Parties' Intentions?,* supra note 27.

develop human rights protection. Whether 'going to far' sometimes in its efforts to secure human rights protection through evolutionary interpretation is therefore 'carrying less risk', than if the ICJ or the WTO bodies were to do the same, is an interesting question. 'Risk' will in this context be taken to mean a risk for loss of legitimacy from the contracting parties and/or the society more generally, which could potentially lead to States or other actors being more skeptical about entering into treaty obligations in the future.

The paper will begin here by addressing the composition of the institutions as a factor. Generally, a search for patterns in the behavior of judges that can be explained by certain variables is a complex exercise, which entails the risk of inevitably 'finding what you are searching for.' However, judges in the ECtHR have different backgrounds, which include for instance human rights activists, academics, former ambassadors and parliamentarians[241]. A division has been observed in the ECtHR between judges who are more activistic on the one side, and those exercising more restraint on the other[242]. Regardless of the complexity of these questions, it is fair to say that some ECtHR judges do to some extent have an 'activistic' approach to interpretation, and that on the background of the Court's practice as it has developed in the past decades, a certain 'climate' and 'acceptance' for an 'activistic approach' might be experienced by at least part of the Court's judges. It is therefore likely that the ECtHR, precisely because of its obligatory jurisdiction, the high authority it holds and the relatively broad competence it has been vested with from the ECHR contracting parties, can 'dare' to go somewhat longer in evolutionary interpretation than both the ICJ and the WTO.

To substantiate this standpoint, reference can be made to the fact that the ICJ is well-known for taking a more formal legal approach, and for being composed of judges who are experts in the field of public international law. As accounted for in Section 1.4.1 above, the ICJ is tasked with settling, in accordance with international law, legal disputes submitted to it by States. The situation is therefore different from that of the obligatory jurisdiction of the ECtHR; States have to submit the cases, and individuals do not have standing before the Court, while individuals have a right to submit applications do the ECtHR claiming rights violations performed by the contracting parties. Furthermore, as accounted for above, much potential for evolutionary interpretation can be found in

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[241] Voeten, at 675-676, supra note 48.

[242] Ibid.

the very mandate of the ECtHR of securing and developing human rights protection, while the same is not necessarily true for the ICJ; it will depend on the circumstances of each case. On a general level, it is therefore probably correct to say that the ECtHR can 'allow itself to go further' in terms of evolutionary interpretation than the ICJ. The reasons are, inter alia, the ECtHR's obligatory jurisdiction, its composition, its perceived authority, and its mandate, while the ICJ will in practice perhaps have less 'freedom' in this regard due both to its composition and its mandate of settling disputes submitted by States. Many nuances to this statement could of course be included and, as seen through this paper, also the ICJ has played a central part in developing the concept of evolutionary interpretation.

As for the WTO, a third situation can be observed in this regard. The wording of Article 3.2 DSU clearly signifies a fear of 'too active' judicial lawmaking from the Dispute Settlement Body, when it both states that the dispute settlement system of the WTO serves to 'preserve (…) rights and obligations', and 'to clarify (…) existing provisions', and that the DSB's recommendations and rulings 'cannot add to or diminish the rights and obligations provided in the covered agreements. The initial mandate did therefore in a sense not leave much room for evolutionary interpretation, although, as illustrated by the AB's ruling in China—Publications and Audiovisual Products, cf. Section 4.3.2 above, evolutionary interpretation can also serve to ensure predictability. A similar form of 'activism' as in the ECtHR can not really be observed in the WTO, but the composition of the Appellate Body does perhaps provide some of the answer to why the development did not proceed as envisaged in Article 3.2 DSU. Both academics and practitioners (including both bureaucrats and attorneys), have served as members of the Appellate Body[243]. One of the explanations given by *Van den Bossche* for the significance the AB has acheived, is its composition of mostly international lawyers with general training who's focus was also broader than trade law[244]. This composition resembles perhaps more the ICJ than the ECtHR. However, although the possibility for exceptions from trade rules has been developed in WTO case law, reducing barriers to trade and creating effective international trade more generally are of course still central objectives of the WTO[245]. As for the jurisdiction of the WTO, the *de facto* rule today is that every

[243] Mavroidis and Van der Borght, 'Impartiality, Independence and the WTO Appellate Body', in Georgiev and Van der Borght (eds), *Reform and Development of the WTO Dispute Settlement System* (2006) 201, at 211.

[244] Van den Bossche, 'From Afterthought to Centrepiece', at 300-325, supra note 175. See also *Venzke*, at 169, supra note 12.

[245] Cf. the Preamble to the WTO Agreement.

Member has the right to a panel[246]. Still, cases have to be brought by the Members against another Member, and individuals do not have standing before the panels or the AB. This need for submitting cases, coupled with the central trade objective of the WTO and the limitations contained in Art. 3.2 DSU, therefore makes it a plausible assumption that the AB cannot risk 'going as far' in evolutionary interpretation as the ECtHR in all instances, without risking its very legitimacy by stepping outside its real or perceived competence. The formal approach taken by the AB, following the VCLT and linking its reasoning to that of the ICJ, supports this assumption. The authority and position the AB has today, could however lead to it going even further in its evolutionary interpretations in the future[247], thereby perhaps placing it somewhere in between the ICJ and the ECtHR in terms of the lengths it is going too. Speaking against such a development, is the very factors which have been mentioned here that indicates that the AB cannot go 'as far' as the ECtHR.

After this, one can ask whether the differences between the institutions in terms of 'how far they can allow themselves to go' in evolutionary interpretations might have some negative aspects, or whether it is just a natural adaption to differences in legal fields, to particularities of different institutions and to the different intentions of the respective contracting parties. A relevant question is whether the differences risk creating differences in interpretive practice in international law which are not always properly justified. Furthermore, one can ask whether evolutionary interpretation as a concept leaves the judges with too much freedom in some instances. It is submitted here that most of the differences observed between the three institutions examined in this paper are more or less inevitable given both the current legal state and the differences between the particularities of each institution. It is simply no escaping the fact that human rights as a field has particular challenges, which one might not necessarily meet in for instance a border dispute, or in the field of trade. However, much also depends on the will of the contracting parties, but with rapid global developments in a number of areas, and current debates on loss of national sovereignty and judicial lawmaking, one can ask whether it is at all plausible that for instance the WTO dispute settlement bodies will be accorded broader competencies than the ones they possess today. The opposite perspective can also be applied, in asking the question of whether the authority of the ECtHR might be curtailed in the future by the CoE Member States, although that might not seem very likely at the moment.

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[246] Due to the negative consensus requirement in Article 6.1 DSU.

[247] The sometimes more 'free reasoning' seen in *China—Publications and Audiovisual Products*, as accounted for above in Section 4.3.2, is illustrative in this regard.

A particular question that could be raised is whether evolutionary interpretation could endanger effective enforcement of decisions. This question is clearly connected to the question of lack of legitimacy. The ECtHR does for example already have challenges in terms of implementation[248]. However, arguing that securing implementation is more necessary than interpreting evolutionarily in some cases, would entail compromising, and a 'lesser of two evils' approach, which particularly a human rights court should avoid. Rather, problems with implementation is best solved on the political level, although Courts and tribunals can also play a part in this context, for instance through the effective enforcement system in the WTO[249].

One could furthermore ask why different procedures for treaty amendment or the creation of new treaties have not been reformed enough and in accordance with the described rapid developments in the world more generally. However, even if reforms are made, a near inescapable problem will likely always be that the political consensus needed for treaty-making is hard to achieve in many cases. For this reason, 'living treaties' able to adapt to a modern and rapidly changing society might be the most realistic and best solution in today's society. Care will naturally have to be taken in the drafting process in expressing as clearly as possible one's intentions with the treaty. That is however necessary more generally when drafting a treaty, and not only for the reason of a potential future evolutionary interpretation. Furthermore, we have seen how the intention of the parties has played an important role as a factor in most of the evolutionary interpretation examined through this paper, either directly or indirectly. The ICJ has expressed the importance of the parties' intentions directly, and has been followed by the WTO dispute settlement bodies, and when the ECtHR states for instance that the ECHR must be seen as a 'living instrument' containing 'practical and effective rights', that is also in line with the intentions of the contracting parties.

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[248] See for instance Anagnostou, *The European Court of Human Rights: Implementing Strasbourg's Judgments on Domestic Policy* (2013), at 227 ff.

[249] See Articles 21 and 22 DSU.

6. Conclusion

To conclude the paper, I would like to draw the attention back to the research hypothesis indicated above in Section 1.5, in order to compare it to the findings and analysis above in Chapters 2-5. A factor to bear in mind is that the case selection examined in this paper is limited considering the total amount of cases available, but hopefully it has still offered some interesting discussions. With the risk of providing a somewhat complex answer to complex questions, it is most right to say that the hypothesis is partly true. While it is true that both the GATT/WTO dispute settlement bodies, the ICJ, and in particular the ECtHR, has gone 'a long way' in evolutionary interpretations, the answer to what a 'long way' is depends on the perspective applied. As with much research; which perspective one applies is a highly subjective matter, and many factors can potentially come into play. A natural question to ask is; 'going a long way in comparison to what?' If the standard to be applied is the meaning of the treaty terms as it was intended to be at the time of the treaty's creation, then these institutions have occasionally gone a long way. If the standard is rather the institution's conferred authority, then it is submitted here that the institutions have, for the most part, simply fulfilled their task in developing the law when that was called for. As long as proper interpretive method is applied, with the establishment of the intentions of the parties as the ultimate goal of the interpretive process, then evolutionary interpretation is a result as justified as any other result. The Vienna Convention offer 'the tools necessary' for evolutionary interpretation, and a consistent application of it as the main method of interpretation by the different institutions would, according to this author's opinion, lead to a higher degree of clarity and predictability in international law. It could perhaps also increase the perceived legitimacy of the institutions.

The challenges that have arisen as a result of the evolutionary interpretation performed by the three institutions addressed in this paper have already to some extent been examined above in Chapter 5. We have seen that 'legitimacy' can have more than one meaning, and that evolutionary interpretation should actually be about respecting the intention of the contracting parties, even if one of them should have a particular interest in or opinion about a case that has arisen later after the treaty's conclusion. This has a clear link to the question of a 'democratic deficit' in international law, which again forms part of a larger debate on how much power that is vested in judicial organs 'at the expense of' political organs. The format here does not allow for any larger discussion on this matter, but it is important to remember the inherent complexity of evolutionary interpretation; Evolutionary interpretation can in a given case both result in negative and positive effects for

governments or individuals respectively, and can work to the benefit of a people discontent with their current government, or have quite the opposite effect.

Of importance, as with all treaty making, is careful drafting and to as clear as possible express the intention of the contracting parties through the treaty text. Also cooperation between the parties later during the treaty's existence is, however, of importance. Material resulting from such cooperation can itself be relevant as a means of interpretation, cf. for instance Article 31(3) VCLT, and we have seen above that the intention of the contracting parties is to a high degree respected by the different institutions. This also constitute important methods for keeping track of and to some extent control the development of evolutionary interpretation. Additionally, reforms of dispute settlement systems remains a possibility, as does treaty amendment or the creation of a new treaty. In some cases, these lastly mentioned methods will be simply unavoidable, making it important also to remember the limits of evolutionary interpretation as a tool. Additionally, and as seen in Section 4.3.3 above, evolutionary interpretation will not always be necessary, as the same result can be reached through other interpretive means, including the wording of the treaty itself. In *Bjørge*'s words; naming the result an 'evolutionary interpretation' in such cases only 'exoticizes something that may already follow clearly from the wording of the treaty'[250]. Furthermore, being clear about when evolutionary interpretation is applied, and when it is not, might lead to increased predictability, and to a higher degree of legitimacy for the adjudicatory bodies. A citation from Judge Robert Jennings also deserve mention in this context, as it illustrates how also development of the law is part of the judicial function: '[P]erhaps the most important requirement of the judicial function [is to] be seen to be applying existing, recognized rules, or principles of law.' This also covers situations when it 'creates law in the sense of developing, adapting, modifying, filling gaps, interpreting, or even branching out in a new direction'[251].

As for the last part of the hypothesis; that evolutionary interpretation as seen in the fields examined in this pager is not necessarily transferable to any other area of international law, this is also partly true. I would however say that it is likely that it can be utilized in a number of fields, and in particular the statements of the ICJ seen in this paper are general and broad in scope. Naturally, an

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[250] Bjørge, at 193, supra note 26.

[251] Shahabuddeen, *Precedent in the World Court* (1996), at 232. See also: Ginsburg, 'International Judicial Lawmaking, 45 *Virginia Journal of International Law* (Spring 2005), available online at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=693861 at 3-4 (last visited 13 August 2016).

individual assessment must always be performed. The Vienna Convention is flexible, and an evolutionary approach have for instance been seen in the field of investment[252]. Evolutionary interpretation has proven to be indispensable for adapting treaties to a constantly changing global society, and more jurisprudence and research on this topic can clearly be expected.

[252] Cf. for instance ICSID, *Mondev International Ltd. v. United States of America - Award*, 11 October 2002, ICSID Case no. ARB(AF)/99/2. See also Bjørge, at 44, supra note 26.

Bibliography

Table of Cases

European Court of Human Rights

- ECtHR, *Golder v. The United Kingdom*, Appl. no. 4451/70, Judgment of 21 February 1975.
- ECtHR, *Engel and Others v. The Netherlands*, Appl. no. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72, Judgment of 8 June 1976.
- ECtHR, *Tyrer v. United Kingdom*, Appl. no. 5856/72, Judgment of 25 April 1978.
- ECtHR, *Airey v. Ireland*, Appl. no. 6289/73, Judgment of 9 October 1979.
- ECtHR, *Loizidou v. Turkey*, Appl. no. 15318/89, Judgment of 18 December 1996
- ECtHR, *Al-Adsani v. The United Kingdom*, Appl. no. 35763/97, Judgment of 21 November 2001.
- ECtHR, *McElhinney v. Ireland*, Appl. no. 31253/96, Judgment of 21 November 2001.
- ECtHR, Taşkin and Others v. Turkey, Appl. no. 49517/99, Judgment of 4 December 2003.
- ECtHR, *Saadi v. The United Kingdom*, Appl. no. 13229/03, Judgment of 29 January 2008.
- ECtHR, *Demir and Baykara v. Turkey*, Appl. no. 34503/97, Judgment of 12 November 2008.

GATT/WTO Bodies

- WTO, *Japan - Taxes on Alcoholic Beverages - Report of the Appellate Body*, 4 October 1996, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R.
- WTO, *United States - Import Prohibition of Certain Shrimp and Shrimp Products – Report of the Appellate Body*, 12 October 1998, WT/DS58/AB/R.
- WTO, *China - Measures Affecting Trading Rights and Distribution Services for Certain obligations and Audiovisual Entertainment Products,* 21 December 2009, WT/DS363/AB/R.
- WTO, *European Communities and its Member States—Tariff Treatment of Certain Information Technology Products*, 16 August 2010, WT/DS375/R WT/DS376/R WT/DS377/R.

Investment Dispute Tribunals

- ICSID, *Mondev International Ltd. v. United States of America - Award*, 11 October 2002, ICSID Case no. ARB(AF)/99/2.

International Court of Justice

- *Competence of the General Assembly for the Admission of a State to the United Nations*, Advisory Opinion, 3 March 1950, ICJ Reports 4.
- *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 21 June 1971, ICJ Reports (1971) 16.
- *Aegean Sea Continental Shelf (Greece v. Turkey)*, Judgment, 19 December 1978, ICJ Reports (1978) 32.
- *Territorial Dispute (Libuan Arab Jamahiriya/Chad)*, Judgment, ICJ Reports (1994) 6.
- *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, 25 September 1997, ICJ Reports (1997) 7.
- *Case Concerning Kasikili/Sedudu Island (Botswana/Namibia)*, Judgment, 13 December 1999, ICJ Reports 1045.
- *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Preliminary Objections, 13 December 2007, ICJ Reports (2007 II) 861.
- *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, Judgment, 13 July 2009, ICJ Reports (2009) 213.

Permanent Court of Arbitration
- *Island of Palmas case (Netherlands v. USA*, Award, 4 April 1928, UNRIAA, Vol. II, 829.

Permanent Court of International Justice
- *Interpretation of The Convention of 1919 concerning Employment of Women during the Night*, 1932 PCIJ Series A/B, No. 50.

Table of Conventions

- Covenant of the League of Nations, 28 June 1919, 108 LNTS 188.
- Charter of the United Nations, 24 October 1945, 1 UNTS XVI
- Statute of the International Court of Justice (Annexed to the Charter of the United Nations, 24 October 1945, 1 UNTS XVI).
- General Agreement on Tariffs and Trade 1947, 55 UNTS 194.
- Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, [1950] COETS 1.
- Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331.
- Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, 21 March 1986 (not yet entered into force), A/RES/37/11.
- Agreement Establishing The World Trade Organization (Marrakesh Agreement) 1994, 1867 UNTS 154.
- Agreement on Government Procurement 1994 (revised 2012), 1869 UNTS 508 (text available at 1915 UNTS 103).
- Agreement on Trade-Related Aspects of Intellectual Property Rights 1994, 1869 UNTS 299.
- General Agreement on Tariffs and Trade 1994, 1867 UNTS 187.
- Understanding of Rules and Procedures Governing the Settlement of Disputes 1994, 1869 UNTS 401.
- Council of Europe, European Social Charter (Revised), 3 May 1996, ETS 163.

United Nations Documents

General Assembly Resolutions
- A/RES/3/217 A, 217 A (III), 10 December 1948 (Universal Declaration of Human Rights).

Other United Nations Documents
- United Nations Conference on Trade and Employment, Final Act and Related Documents 1948, E/CONF.2/78, United Nations publication, Sales No. 1948.II.D.4.

Books

- Alvarez, J.E., *International Organizations as Law-Makers* (2005).
- Anagnostou, D., *The European Court of Human Rights: Implementing Strasbourg's Judgments on Domestic Policy* (2013).
- Bjørge, E., *The Evolutionary Interpretation of Treaties* (2014).
- Çali, B., 'Specialized Rules of Treaty Interpretation: Human Rights', in Hollis, D.B., (ed.), *The Oxford Guide to Treaties* (2014) 525.
- Conrad, *Processes and Production Methods (PPMs) in WTO Law: Interfacing Trade and Social Goals* (2011).
- Gardiner, R.K., *Treaty Interpretation* (2nd ed., 2015).
- Garner, *Garner's Dictionary of Legal Usage*, (3rd. ed., 2011).

- Georgiev, D., and Van der Borght, K., (eds), *Reform and Development of the WTO Dispute Settlement System* (2006).
- Jackson, J., *Sovereignty, the WTO and Changing Fundamentals of International Law (*2006).
- Kolb, R., *The Law of Treaties: An Introduction* (2016).
- Lowe, V., *International Law* (2007).
- Malbon, J., Lawson, C., and Davison, M., The WTO Agreement on Trade-Related Aspects of Intellectual Property Rights: A Commentary (2014).
- Nielsen, *The WTO, Animals and PPMs* (2007).
- Nolte, G., (ed.), *Treaties and Subsequent Practice*, (2013).
- Nowak, M., Januszewski, K.M., and Hofstätter, T., (eds), *All Human Rights for All, Vienna Manual on Human Rights* (2012).
- Rothe, D., *State Criminality: The Crime of All Crimes* (2009).
- Shahabuddeen, M., *Precedent in the World Court* (1996).
- Shaw, M.N., *International Law* (7th ed., 2014).
- Van den Bossche, P., 'From Afterthought to Centrepiece': The WTO Appellate Body and its Rise to Prominence in the World Trading System', in Sacerdoti, G., Yankovich, A., and Bohanes, J. (eds.), *The WTO at Ten: The Contribution of the Dispute Settlement System* (2006) 289.
- Van den Bossche, P., and Zdouc, W., *The Law and Policy of the World Trade Organization* (3rd ed., 2013).
- Venzke, I., *How Interpretation Makes International Law* (2012).

Articles

- Dzehtsiarou, K., 'European Consensus and the Evolutive Interpretation of the European Convention on Human Rights', 12 *German Law Journal* (2011) 1730.
- Ginsburg, T., 'International Judicial Lawmaking, 45 *Virginia Journal of International Law* (Spring 2005), available online at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=693861 (last visited 13 August 2016).
- Howse, R., 'From Politics to Technocrazy—and Back Again: The Fate of the Multilateral Trading Regime', 96 *American Journal of International Law* (2002) 94.
- Lathrop, 'International Court of Justice judgment on free navigation and fishing on a boundary river', 104 No. 3 *American Journal of International Law* (2010) 454.
- Letsas, G., 'Strasbourg's Interpretive Ethic: Lessons for the International Lawyer', 21 no. 3 *EJIL* (2010) 509.
- Lugato, 'The "Margin of Appreciation" and Freedom of Religion: Between Treaty Interpretation and Subsidiarity', 52 *Journal of Catholic Legal Studies*, (2013) 49.
- Šadl, U., 'The role of effet utile in preserving the continuity and authority of European Union law : evidence from the citation web of the pre-accession case law of the court of justice of the EU', 8 Issue 1 European Journal of Legal Studies (2015) 18.
- Senden, H.C.K., 'Interpretation of fundamental rights in a multilevel legal system : an analysis of the European Court of Human Rights and the Court of Justice of the European Union', Doctoral Thesis, 46 School of Human Rights Research Series (2011), at 71.
- Torp Helmersen, S., 'Evolutive Treaty Interpretation: Legality, Semantics and Distinctions', 6 no. 1 *European Journal of Legal Studies* (2013) 161.
- Van Damme, I., 'Treaty Interpretation by the WTO Appellate Body', 21 no. 3 *The European Journal of International Law (EJIL)* (2010) 605
- Voeten, E., 'The Politics of International Judicial Appointments: Evidence from the European Court of Human Rights', 61 No. 4 *International Organization* (autumn, 2007) 669.

- Wildhaber, L., 'The European Court of Human Rights in Action', 21 *Ritsumeikan Law Review* (2004) 83.

Internet Sources

Dictionaries

- Duhaime's Law Dictionary*, Expressio Units Est Exclusion Alterius*, available online at http://www.duhaime.org/LegalDictionary/E/ExpressioUniusEstExclusioAlterius.aspx (last visited 1 August 2016).
- Milanovic, M., *The ICJ and Evolutionary Treaty Interpretation*, 14 July 2009, available online at http://www.ejiltalk.org/the-icj-and-evolutionary-treaty-interpretation/ (last visited 13 August 2016).
- Oxford Dictionaries, *Definition of Interpretation*, available online at http://www.oxforddictionaries.com/definition/english/interpretation (last visited 13 July 2016).
- Oxford Dictionaries, *Definition of Semantics*, available online at http://www.oxforddictionaries.com/definition/english/semantics (last visited 13 July 2016).
- Oxford Reference, *Argumentum a contrario*, available online at http://www.oxfordreference.com/view/10.1093/acref/9780195369380.001.0001/acref-9780195369380-e-243 (last visited 1 August 2016)
- The Law Dictionary (Black's Law Dictionary), *What is Ejusdem Generis*, available online at http://thelawdictionary.org/ejusdem-generis/ (last visited 1 August 2016).
- The Law Dictionary (Black's Law Dictionary), *What is Interpretation?*, available online at http://thelawdictionary.org/interpretation/ (last visited 13 July 2016).
- The Law Dictionary (Black's Law Dictionary), *What is Treaty?*, available online at http://thelawdictionary.org/treaty/ (last visited 12 July 2016).

Other internet sources

- Aust, A., *Vienna Convention on the Law of Treaties,* Encyclopedia Entry, Max Planck Encyclopedia of Public International Law [MPEPIL], last updated June 2006, available online at http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1498, (last visited 14 July 2016).
- Bjørge, E., *Introducing The Evolutionary Interpretation of Treaties*, EJIL: Talk!, 15 December 2014, available online at http://www.ejiltalk.org/introducing-the-evolutionary-interpretation-of-treaties/(last visited 14 July 2016).
- Council of Europe, European Court of Human Rights, *Overview 1959 - 2015*, available online at http://www.echr.coe.int/Documents/Overview_19592015_ENG.pdf (last accessed 22 July 2016).
- ECtHR, *Guide on Article 4 of the European Convention on Human Rights*, 2nd edition, available online at http://www.echr.coe.int/Documents/Guide_Art_4_ENG.pdf, at 5, last visited 30 July 2016.
- European Court of Human Rights, *The Court in brief brochure*, Available online at http://www.echr.coe.int/Pages/home.aspx?p=court&c= (last visited 22 July 2016).
- International Court of Justice, *List of Cases referred to the Court since 1946 by date of introduction*, available online at http://www.icj-cij.org/docket/index.php?p1=3&p2=2 (last visited 22 July 2016).
- International Court of Justice, *The Court*, available online at http://www.icj-cij.org/court/index.php?p1=1 (last visited 22 July 2016).
- Merriam-Webster, *Defintiion of Ex aequo et bono*, available online at http://www.merriam-webster.com/dictionary/ex%20aequo%20et%20bono (last visited 22 July 2016).

- Van Damme, I., *Is Evolutionary Interpretation Only A Matter of Finding the Parties' Intentions?*, 17 December 2014, available online at http://www.ejiltalk.org/is-evolutionary-interpretation-only-a-matter-of-finding-the-parties-intentions/#more-12741, last visited 21 July 2016.
- World Trade Organization, *Chronological list of disputes cases*, available online at https://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm (last accessed 22 July 2016).
- World Trade Organization*, The GATT years: from Havana to Marrakesh*, available online at https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm (last accessed 22 July 2016).
- World Trade Organization, *The WTO*, available online at https://www.wto.org/english/thewto_e/thewto_e.htm (last visited 31 July 2016).
- Yearbook of the International Law Commission 1966, Vol. II, at 187, *Reports of the Commission to the General Assembly*, *Draft Articles on the Law of Treaties with commentaries*, available online at http://legal.un.org/ilc/texts/instruments/english/commentaries/1_1_1966.pdf (last visited 27 July 2016).
- Zemanek, K., *Vienna Convention on the Law of Treaties*, United Nations Audiovisual Library of International law, 2009, available online at http://legal.un.org/avl/pdf/ha/vclt/vclt-e.pdf (last visited 26 July 2016).

Abstract

The paper examines evolutionary interpretation as a phenomenon in the practice of the ICJ, the ECtHR and the GATT/WTO Dispute Settlement Bodies. Through analyzing a selection of cases from each institution, the author looks at how evolutionary interpretation has developed as a concept in the practice of these three institutions, and what the current state of the law is as regards evolutionary interpretation. The practice of the different institutions is looked at both individually and in comparison with each other, in order to discern differences in evolutionary interpretation which might be explained either through the particularities of each institution, or through other relevant factors. Furthermore, lines are drawn to theory on evolutionary interpretation and on treaty interpretation more generally, with a particular focus on the Vienna Convention on the Law of Treaties. In addition to case law, the author looks to different scholarly literature and other relevant material as sources.

The argument is made in the paper that most, if not all, of the evolutionary interpretation examined in the paper could be tied to the Vienna Convention on the Law of Treaties as a basis for interpretation, and that doing so to a larger extent than today would carry certain advantages. An important thesis in the paper is that the ICJ, the ECtHR and the GATT/WTO have gone a long way in terms of evolutionary interpretation. In addition to examining whether this is true, the paper also looks at nuances to this description. The intention of the contracting parties is highlighted in the paper as the ultimate goal of treaty interpretation, and emphasis is placed on the role the intention of the parties has played as a factor in the development of evolutionary interpretation. Furthermore, the paper addresses both positive aspects to evolutionary interpretation, and potential challenges connected to its development as a concept in international law. The potential of evolutionary interpretation as a viable interpretive option for the future is also considered.

Zusammenfassung

Diese Arbeit untersucht evolutive Auslegungen anhand jener Erscheinungsformen, die in der Praxis am Internationalen Gerichtshof (IGH/ engl.:ICJ), dem Europäischen Menschenrechtsgerichtshof (EGMR/ engl.:ECtHR) und bei Streitbeilegungseinrichtungen des GATT/WTO üblich sind. Bei der Analyse einer Auswahl von Fällen der jeweiligen Institution, untersucht der Autor auf welche Art und Weise evolutive Auslegungen die Begriffsbildung in der Praxis dieser drei Einrichtungen entwickelt hat, und wie sich die derzeitige Rechtslage bezüglich evolutiver Interpretationen verhält. Dabei werden die Tätigkeitsbereiche der verschiedenen Institutionen sowohl individuell, als auch im Vergleich zu einander ausgewertet, um jene Unterschiede evolutiver Interpretation herauszufiltern, die kraft der Eigenheiten der bestimmten Einrichtung eventuell erklärbar sind, oder von anderen relevanten Faktoren verursacht worden sein können. Darüber hinaus werden Verbindungen sowohl zu Theorien evolutiver Interpretation, als auch zur Vertragsauslegung generell geknüpft, dabei mit Hauptaugenmerk auf die Wiener Vertragsrechtskonvention. Außer den Urteilen, werden vom Autor auch unterschiedliche Fachliteratur und andere relevante Quellen herangezogen.

Die Untersuchung erörtert, dass die meiste, wenn nicht sogar die gesamte evolutive Interpretation, die in dieser Studie untersucht wird, auf die Wiener Vertragsrechtskonvention als Grundlage für alle Auslegungen zurückgeführt werden kann, und dass diese Vorgangsweise heute bestimmte Vorteile mit sich bringt. Eine wichtige These dieser Arbeit ist die Schlussfolgerung, dass der IGH, der EGMR und GATT/WTO bereits einen langen Weg hinter sich haben, was Auslegungsentwicklungen betrifft. Mehr als nur zu prüfen, ob dies der Wahrheit entspricht, betrachtet diese Studie auch die Nuancierungen dieser Darstellung. Die Absicht der vertragschließenden Parteien wird in der Arbeit als das ultimative Ziel zur Vertragsauslegung hervorgehoben, sodass dem Umstand, in wie weit die Absichten der Parteien eine Rolle gespielt haben, eine besondere Bedeutung bei der Entwicklung evolutiver Auslegungen zukommt. Des Weiteren befasst sich die Studie sowohl mit den positiven Aspekten hinsichtlich evolutiver Interpretation, als auch mit potentiellen Herausforderungen bei Auslegungen, als eine Auffassung von internationalem Recht. Die Möglichkeit evolutiver Auslegungen als interpretative Alternative für die Zukunft wird auch in Betracht gezogen.

Number of words: 28 479 (excluding footnotes and abstracts)