
Strasbourg's Interpretive Ethic: Lessons for the International Lawyer

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Abstract

The article offers an account of the judicial philosophy which underpins the European Court of Human Rights' approach to treaty interpretation. The first part argues that Strasbourg's interpretive ethic has been dismissive of originalism and textualism and has favoured instead the moral reading of the Convention rights. The second part of the article explains why Strasbourg's interpretive ethic is fully justified, by offering an account of the nature of treaty interpretation in general. It argues that treaty interpretation is intrinsically an evaluative task in identifying the moral values which normatively constrain the projects that states pursue on the international plane. Treaty interpretation is only derivatively an exercise in discovering drafters' intentions and in determining the meaning of treaty provisions. Which interpretive methods an adjudicative body should use depends on the nature of the treaty in question and the moral value in play.

1 Introduction

The present symposium is dedicated to treaty interpretation and this article looks at the interpretation of the European Convention on Human Rights (ECHR) by the European Court of Human Rights. So as not to disappoint some readers and in the hope of enticing others, some methodological remarks are in order. Lawyers often use the word 'interpretation' to refer to the judicial outcomes which an adjudicative body has reached in deciding cases according to its jurisdiction. Understood in this sense, interpretations are as many as the cases that an adjudicative body has decided. Given the number of judgments that the European Court of Human Rights has delivered,¹ an

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¹ On 18 Sept. 2008, the Court delivered its 10,000th judgment.

account of how the ECHR has been interpreted, thus understood, would be a Herculean task and certainly not one which could be undertaken here.² Comprehensive studies³ of the ECHR tend to focus on a critical analysis of landmark cases, seeking to identify interpretive patterns in the Court's reasoning under each Convention right.⁴ Other studies choose to focus on the interpretation of a particular Convention right⁵ or on a particular subject-area⁶ which may cut across the Court's case law on different ECHR Articles.

Zooming in on landmark ECHR cases or particular subject areas covered by it appears to be a sound methodological approach to matters of interpretation for many reasons, including the fact that there are significant textual and normative differences between the human rights enshrined in the ECHR. Consider the wording of the ECHR first. Some rights enshrined therein, like the right not to be tortured under Article 3 and the right not to be held in slavery under Article 4(1) are cast in a general and absolute fashion: '[n]o one shall be subjected to torture or inhuman or degrading treatment or punishment'. Other ECHR provisions, like Article 6 which guarantees the right to a fair trial or Article 7 which prohibits punishment without law, contain more specific details regarding the definition and scope of the right in question. Finally, paragraphs (2) of Articles 8–11 contain general limitation clauses with an extensive list of legitimate aims in pursuit of which the rights enshrined therein may be interfered with (so-called 'qualified rights'). Naturally, the reasoning that figures in the interpretation of qualified rights (e.g., the principle of proportionality) will often differ from that of absolute rights.

Moreover, leaving the wording aside, we should expect that some interpretive techniques are relative to the normative principles justifying the right at issue. The right to freedom of expression for example may raise issues to do with the proper functioning of democracy and how protecting the freedom of expression of, say, the media and the press, is conducive to better democratic governance. Any attempt to justify the right of the press to political speech would necessarily have to refer to the value of democracy. But democratic principles may play little or no role in justifying other rights of the Convention such as the prohibition of retrospective punishment.

Despite the obvious merits in the above approaches to the interpretation of the ECHR, it is not the aim of this article to highlight the Court's jurisprudence on particular

² I once mentioned to a judge of the European Court of Human Rights (ECtHR) that I was writing a book on the interpretation of the ECHR; he looked at me very puzzled and said, 'It must be a very long book!'

³ See D. Harris, M. O'Boyle, E. Bates, and C. Buckley, *Harris, O'Boyle & Warbrick, Law of the European Convention on Human Rights* (2nd edn, 2009); A. Mowbray, *Cases and Materials on the European Convention on Human Rights* (2nd edn, 2007); C. Ovey and R.C.A. White, *Jacobs & White, The European Convention on Human Rights* (4th edn, 2006).

⁴ Throughout the article, I shall use 'Court' and 'Convention' to refer to the ECtHR and the ECHR respectively, unless indicated otherwise.

⁵ See, e.g., C. Evans, *Freedom of Religion under the European Convention on Human Rights* (2001); S. Stavros, *The Guarantees for Accused Persons under Article 6 of the European Convention on Human Rights* (1993).

⁶ See, e.g., M. Emberland, *The Human Rights of Companies: Exploring the Structure of the ECHR Protection* (2006); A. Mowbray, *The Development of Positive Obligation under the European Convention on Human Rights by the European Court of Human Rights* (2004).

rights of the Convention. Instead, I shall use the word 'interpretation' in a different sense, to mean any general *normative* propositions which the Court has systematically endorsed in its case law, in relation to either the nature of interpretation or the nature of human rights interpretation (often referred to generically as 'judicial review'⁷) in particular. The epithet 'normative' here contrasts with 'descriptive' and is meant to draw attention to the fact that the way in which courts decide cases is an important moral and political question about which reasonable people may hold different views. Human rights courts in particular, whose job it is to review whether ordinary legislation passed by the elected branch of government violates abstract norms, play an important institutional role with far-reaching political consequences. Not all of us agree on how human rights courts should carry out this institutional responsibility, and not all of us agree on what the moral values underlying human rights are. Some believe that courts should show deference to the elected branch of government when it comes to morally controversial human rights issues. Others believe that courts have a duty to uphold fundamental rights of the individual, even when doing so goes against the will of the elected branch, because rights are inherently anti-majoritarian. Similar discussions take place about the role of international human rights courts: some believe that international courts lack the legitimacy to impose obligations on states to which they did not explicitly consent. Others take the view that state sovereignty is inherently limited by human rights principles and that international human rights courts do not act illegitimately when they impose obligations which states parties never intended or expected to have.

It is against this background of reasonable disagreement about judicial review and human rights that I am going to look at the interpretation of the ECHR in this article. The choice is not only due to lack of space but also because, given lively debates in legal theory about the nature and legitimacy of judicial review, it is important to locate where the European Court stands in these debates. Not surprisingly, most of the interpretive tools which the European Court itself has developed, like the 'margin of appreciation' doctrine or the doctrine of 'evolutive interpretation', relate to debates about the nature of rights, the limits of judicial review, and how the Court understands its own role in Europe's multi-layered legal order. The advantage of the approach I shall follow is that it avoids getting bogged down with the particularities of specific rights (e.g., freedom of expression or the right to life) or specific subjects (e.g., religion or terrorism), while providing an overview of the interpretation of the ECHR which, despite its generality, makes moral sense and contributes to debates about the nature of legal interpretation.

The article is divided into two parts. In the first part (sections 2–5) I begin with a discussion of the rules of treaty interpretation set out in the Vienna Convention on the Law of Treaties (VCLT) and their impact on the interpretation of the ECHR.

⁷ The distinction between theories of rights and theories of judicial review and the focus on the legitimacy of judicial review as a separate normative question from that of the moral foundations of rights has attracted wider attention following Waldron's seminal piece, 'A Rights-based Critique of Constitutional Rights', 13 *Oxford J Legal Studies* (1993) 18 and his subsequent work.

This will enable the reader to make some comparative judgements regarding the impact of the VCLT on the interpretation of other treaties discussed in this volume. I shall then examine, in sections 4 and 5 what I take to be the Court's most important interpretive doctrines in the light of the criterion I set out above: the doctrine of *autonomous concepts*, and the idea of *evolutive interpretation*. The idea in sections 2–5 is to give the reader, who may not be very familiar with Strasbourg's case law, a critical overview of the Court's interpretive ethic, as I shall call it. What I hope to show is that the VCLT has played very little role in the ECHR case law and that the Court's interpretive ethic has been very dismissive of originalism and literal interpretation. The Court has instead opted, albeit not consistently, for the moral reading of the Convention rights.⁸

In the second part of the article (sections 6–7), I discuss what lessons can be learned from Strasbourg's interpretive ethic about treaty interpretation in general. Section 6 looks at two common misconceptions about treaty interpretation which the plain reading of Articles 31–33 VCLT might encourage but which the European Court, unlike other international bodies, has gracefully avoided. The first misconception is to think that Articles 31–33 VCLT set out single rules of interpretation for all treaties; the second is to think that identifying the object and purpose of a treaty is merely an exercise in discovering the intentions of the states parties as found in some historical record. My main thesis is that treaty interpretation is fundamentally neither about the meaning of words nor about the intentions of states parties. It is an inherently evaluative exercise in seeking to determine how fact-independent moral values normatively constrain the pursuit of states' joint projects. The weight an interpreter should place on states parties' intentions and on the text of a treaty depends on the moral character of the project which states seek to pursue. Different kinds of projects will call for different kinds of methods of interpretation. To interpret a treaty is ultimately to interpret a moral value.⁹ In the final section I briefly explore what it is about the morality of human rights that calls for a particular interpretive approach to international human rights treaties, which need not be appropriate for other types of international treaties.

2 The VCLT and the ECHR: the Landmark of *Golder*

As an international treaty, the ECHR is subject to the rules of interpretation of treaties set out in Articles 31–33 VCLT 1961. Articles 31–32 read as follows:

Article 31 General Rule of Interpretation

1. 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. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text,

⁸ I have made some of these arguments at greater length in *A Theory of Interpretation of the European Convention on Human Rights* (2nd edn, 2009). Parts of sects 2, 4, and 5 of this article draw on chs 2 and 3 of that book.

⁹ On the general idea of interpretivism in law see Stavropoulos, 'Interpretivist Theories of Law', in E.N. Zalta (ed.), *The Stanford Encyclopedia of Philosophy* (autumn 2008 edn), available at: plato.stanford.edu/archives/fall2008/entries/law-interpretivist/.

including its preamble and annexes: (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty. **3.** There shall be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) any relevant rules of international law applicable in the relations between the parties. **4.** A special meaning shall be given to a term if it is established that the parties so intended.

Article 32 Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

- a. Leaves the meaning ambiguous or obscure; or
- b. Leads to a result which is manifestly absurd or unreasonable.

Looking at the ECtHR case law one finds relatively few references¹⁰ to Articles 31–33 VCLT, and it is fair to say that the VCLT has played a minor role in the interpretation of the ECHR. The European Court of Human Rights created its own labels for the interpretative techniques which it uses, such as ‘living instrument’, ‘practical and effective rights’, ‘autonomous concepts’, etc. As we shall see shortly, what all these techniques have in common is the rejection of *originalist* ideas about interpretation, according to which the meaning of fundamental rights is somewhat fixed or ‘frozen in time’. A brief outline of originalism may be useful here. Originalist¹¹ theories wish to tie interpretation back to the time when the law was enacted. We can distinguish between two types of originalism. The first one, *textualism*, argues that a legal provision must mean what it was taken to mean originally, i.e., at the time of enactment. Rather than ask ourselves, for example, whether the right not to be subjected to inhuman and degrading treatment under Article 3 ECHR applies to circumstances of extreme poverty, we should ask, ‘Would the public at large in 1950 apply the concept of inhuman and degrading treatment to cases of extreme poverty?’. Textualists invite the interpreter to focus on the text enacted and read it in the light of its social and linguistic context at the time of adoption.¹² Judges must ‘immerse themselves’¹³ in the society which adopted the text and understand the text as they understood it then. The second type,

¹⁰ The VCLT has been cited in no more than 60 out of the 10,000+ judgments which the ECtHR has delivered.

¹¹ See R. Bork, *The Tempting of America* (1989), at 143–160; Scalia, ‘Originalism: The Lesser Evil’, 57 *U Cincinnati L Rev* (1989) 849; Scalia, ‘Common Law Courts in a Civil Law System’, in A. Scalia, *A Matter of Interpretation* (ed. A. Gutman, 1997), at 3; Gray, ‘Do We have an Unwritten Constitution?’, 27 *Stanford L Rev* (1975) 703; Lyons, ‘Constitutional Interpretation and Original Meaning’, 4 *Social Philosophy and Policy* (1986) 85.

¹² Brest, ‘The Misconceived Quest for the Original Understanding’, 60 *Boston UL Rev* (1980) 204, at 208.

¹³ *Ibid.*

intentionalism, argues that a legal provision must apply to whatever cases the drafters had originally intended it to apply. Intentionalism takes legal interpretation to be a form of *conversational* interpretation. Rather than ask ourselves whether the right not to be subjected to inhuman and degrading treatment should be applied to circumstances of extreme poverty, we should ask, 'Did the drafters intend this right to apply to socio-economic conditions?'. Intentionalists usually propose the following scheme: if the drafters contemplated a particular situation, then either they intended to prohibit it or they did not. If they did not intend to prohibit it, then they either intended not to prohibit it or they left the matter open for the courts to decide.¹⁴ Intentionalists place more emphasis on drafting history and preparatory works as their task is to retrieve the original understanding of particular legislators.¹⁵

Why the European Court has placed little emphasis on the VCLT is not clear. Articles 31–32 VCLT neither directly rule out originalism nor prescribe it. The general rule of Article 31(1) is that treaties must be interpreted according to the ordinary meaning of their terms in context and in the light of their object and purpose. It appears that this rule is abstract enough to allow for different interpretive 'techniques' or 'methods',¹⁶ depending on the object and purpose of each treaty. For example, it is logically possible to imagine a treaty the purpose of which is to authorize an adjudicative body to change the content of the obligations of states parties as time goes by and in the light of changing circumstances. But we can also imagine treaties the purpose of which is to ensure that the content of the obligations which states parties undertake remains constant through time and is predictable and clear to states parties or treaties the terms of which must always be construed narrowly. A typical example of an area of law the purpose of which calls for narrow construction is criminal law.

Be that as it may, it is worth looking at some of the cases in which the European Court referred to the VCLT and how it understood the object and purpose of the ECHR in doing so. We can roughly divide the relevant cases into two categories: first, cases in which considerations about the 'object and purpose' of the ECHR under Article 31(1) VCLT informed the Court's reasoning in attributing content to an ECHR right. There are only a handful of such cases, and the most important one is *Golder v. United Kingdom*.¹⁷ The second category, examined in the next section, comprises cases in which the Court took into account other parts of international law (principles, treaties, and non-binding materials) under Article 31(3) VCLT, in order give content to an ECHR right.¹⁸

¹⁴ Perry, 'Interpretivism, Freedom of Expression and Equal Protection', 42 *Ohio State LJ* (1981) 261.

¹⁵ I should note here that textualism, at least as advanced by Scalia, is also a form of intentionalism: it directs us to the intentions of the public at the time of enactment. The difference between the two lies in the group of people, whose intentions the interpreter aims to discover: textualism is directed at the community at large, whereas intentionalism is directed at the drafters.

¹⁶ I shall use these two words interchangeably. Another synonymous term, used in Continental Europe is 'canon'.

¹⁷ *Golder v. United Kingdom*, Series A No. 18, 1 EHRR (1979–1980) 524.

¹⁸ I shall here ignore a third category of ECHR cases, raising issues to do with differences in meaning between authentic languages under Art. 33 VCLT, because this category is not directly relevant for the purposes of this article. On this see *Brogan and others v. United Kingdom*, 11 EHRR (1989) 117 and *Sunday Times v. United Kingdom*, Series A No. 30, 2 EHRR (1979–1980) 245.

Golder is undoubtedly one of the most important cases in the history of the ECHR. It is not just that it contains the first and as yet most extensive discussion of the VCLT and the relevant rules of interpretation. It is also the first major case in its early years where the old Court had to take a stance on what should be the general theory of interpreting the Convention and the relevance of textualism and intentionalism. There was, in 1975, no right of direct access to the Court and very little case law on the substantive rights of the Convention. The VCLT itself had not entered into force. Moreover none of the interpreting methods for which the Court is now famous had at the time been fully advanced. *Tyrer*,¹⁹ which inaugurated the 'living instrument' approach, was decided in 1978. *Engel*,²⁰ which systematized the theory of autonomous concepts, was decided in 1976, and *Airey*, which provided an extensive application of the idea of 'practical and effective rights', was decided in 1978. *Golder* laid the foundations for the interpretative principles which have now become so important for the thousands of applications which the Court receives each year.

The legal question in *Golder* was one which has fuelled the various debates between originalists and non-originalists in the context of American constitutional law, namely that of 'unenumerated' rights.²¹ These are rights which are not expressly mentioned in the text but which it is proposed should nevertheless be 'read into' it. The unenumerated right in *Golder* was that of access to court under Article 6 ECHR. The applicant, a prisoner serving his sentence, had been denied permission to consult a solicitor with a view to instituting libel proceedings against a prison officer. The United Kingdom, which was the respondent state, argued that the ECHR does not confer a right to access to court, given the absence of an explicit provision: if one gets to court one must be given a fair trial, but there is no obligation on the part of the member state to ensure that everyone gets to have one's case heard. The respondent state's argument was not so much to do with the intentions of the drafters as found in preparatory works. Rather it was premised on the idea that the text itself gives a clear indication of drafters' intentions: had the drafters intended to create this right, they would have done so explicitly by choosing a different wording. In support of this argument the respondent state added that the drafters had clearly thought about the right of access since it is expressly mentioned in Article 5(4) and Article 13 yet they omitted it from Article 6 ECHR.

In its judgment, the Court referred to Articles 31–33 of the VCLT and held that, though not in force at the time, these Articles expressed general principles of international law which it had to take into account. It remarked that '[i]n the way in which it is presented in the "general rule" in Article 31 of the Vienna Convention, the process of interpretation of a treaty is a unity, a single combined operation; this rule, closely integrated, places on the same footing the various elements enumerated in the four

¹⁹ *Tyrer v. United Kingdom*, Series A No. 26, 2 EHRR (1979–1980) 1.

²⁰ *Engel and Others v. Netherlands* (1976), Series A No. 22, 1 EHRR (1979–1980) 647.

²¹ On the distinction between enumerated and unenumerated rights see R. Dworkin, *Life's Dominion* (1993), at 129.

paragraphs of the Article'.²² It then first examined the language of Article 6 ECHR and whether it settles the relevant legal question, namely whether the ECHR protects the right of access to court. It concluded that the language does not 'necessarily refer only to proceedings already pending' but may well imply 'the right to have the determination of disputes relating to civil rights and obligations made by a court or "tribunal"'.²³ In other words it held that the wording itself was compatible with both options.

The Court then elaborated on the 'object and purpose' of the Convention, by turning to the preamble to the Convention, as provided for in Article 31(2) of the VCLT. It cited the passage in the ECHR preamble which refers to the 'common heritage of political traditions, ideals, freedom and the rule of law' of European countries and noted that 'in civil matters one can scarcely conceive of the rule of law without there being a possibility of having access to courts'.²⁴ This account of the rule of law was, in the Court's view, in accordance with a general principle of law among Contracting States whereby a civil claim must be capable of being submitted to a judge.

The Court moved on to examine a hypothetical: if the Convention did not guarantee the right to access to court, states 'could without acting in breach of that text, do away with courts, or take away their jurisdiction to determine certain class of civil actions and entrust it to organs dependent on the Government'.²⁵ Such assumptions, the Court held, are 'indissociable from a danger of arbitrary power' and would have serious consequences which are 'repugnant' to the principle of the rule of law. It concluded that the right of access constitutes an element which is 'inherent' in the right stated by Article 6(1), and warned that this is not an 'extensive interpretation forcing new obligations on the Contracting States: it is based on the very terms of the first sentence of Article 6 para 1 (art. 6-1) read in its context and having regard to the object and purpose of the Convention'.²⁶ It added that there was no need to resort to supplementary means of interpretation as envisaged in Article 32 of the VCLT.

The reader of *Golder* may not, at first glance, realize what a bold and revolutionary approach to interpretation the above line of reasoning was. The Court not only rejected the view, defended by the United Kingdom, that lack of an explicit provision in the text constitutes a reason against granting an unenumerated right. It also stressed that the question whether to grant an unenumerated right is not a question whether we should stick to the actual text or read words into the text. For the majority of judges in *Golder* did not think they added the right of access to court to Article 6 ECHR. They insisted that by recognizing the right to access to court they followed an interpretation

²² *Golder v. United Kingdom*, *supra* note 17, at para. 30. See also *Witold Litwa v. Poland*, 33 EHRR (2001) 1267, at paras 58–59 where the Court noted that '[T]he sequence in which those elements are listed in Article 31 of the Vienna Convention regulates, however, the order which the process of interpretation of the treaty should follow. That process must start from ascertaining the ordinary meaning of the terms of a treaty – in their context and in the light of its object and purpose, as laid down in paragraph 1 of Article 31'.

²³ *Golder*, *supra* note 17, at para. 32.

²⁴ *Ibid.*, at para. 34.

²⁵ *Ibid.*, at para. 35.

²⁶ *Ibid.*, at para 36. The Court added that there was no need to resort to supplementary means of interpretation.

based on 'the very terms' of the first sentence of Article 6(1) and did not force any new obligations on the Contracting States. We may summarize the Court's line of reasoning as follows:

- (1) In interpretation, one should look at the object and purpose of the law.
- (2) The object and purpose of the ECHR is to promote the rule of law.
- (3) One can scarcely conceive of the rule of law in civil matters without right of access to court.
- (4) The right of access to court is inherent in the right to fair trial under article 6 ECHR.
- (5) The ECHR protects the right of access to court.

Moreover, the Court followed this reasoning without feeling the need to resort to supplementary means of interpretation such as the preparatory works. It felt confident that 'the object and purpose' of the ECHR contains the ideal of the rule of law which leaves no ambiguity (which triggers resort to supplementary means under Article 32 VCLT) as to whether it contains a right of access to court. Though the text appeared neutral to the legal question at hand, the question became quite clear in the light of the value of the rule of law.

How bold the Court's reasoning was is also evident in the dissent. In a lengthy separate opinion, Sir Gerald Fitzmaurice mounted an originalist attack on the majority judgment. He objected that it is unacceptable to read into the text a right 'which the Convention does not trouble to name, but at the most implies, and which cannot even usefully be implied without at the same time proceeding to a rather careful definition of it, or of the conditions subject to which it operates, and which, by circumscribing it, define it'.²⁷ Fitzmaurice followed a typical intentionalist argument: if the drafters did not clearly intend to create a right of access to court then they could not have created one.²⁸ In his view, lack of an express provision and detailed definition of a right of access meant that states were not bound by such a right and that the European Court should not impose a new obligation on member states by recognizing it.

Fitzmaurice's arguments in his separate opinion in *Golder* merit a more careful discussion. His intentionalist views were based on an argument about the importance of *certainty* in international law. It is important, the British judge argued, that states have knowledge of the obligations they have undertaken by signing a treaty. 'The parties', he said, 'cannot be expected to implement what would be an important international obligation when it is not defined sufficiently to enable them to know exactly what it involves'.²⁹ At this point Fitzmaurice drew a distinction between national and international law. Judicial legislation, he argued, may be acceptable in domestic adjudication, but it is totally unacceptable in international adjudication

²⁷ Judge Sir Gerald Fitzmaurice, separate opinion in *ibid.*, at para. 28.

²⁸ See also *ibid.*, at para. 40: 'It is hardly possible to establish what really were the intentions of the contracting States under this head; but that of course is all the more reason for not subjecting them to obligations which do not result clearly from the Convention, or at least in a manner free from reasonable doubt.'

²⁹ *Ibid.*, at para. 30.

which is based on agreement between states.³⁰ Even if the lack of a right of access is a regrettable defect of the ECHR, he argued in an eloquent call for restraint:

It is for the States upon whose consent the Convention rests, and from which consent alone it derives its obligatory force, to close the gap or put the defect right by an amendment, – not for a judicial tribunal to substitute itself for the convention-makers, to do their work for them.

The only case in which an international tribunal would be justified in substituting itself for the Convention-makers, according to Fitzmaurice, is if states parties clearly intended to delegate this power to it. But he did not find any signs of such intention in the ECHR.

Fitzmaurice's originalist call for judicial restraint did not persuade other Strasbourg judges to change their interpretive methods. In a case which was decided eight months after *Golder*, Fitzmaurice continued to defend originalism against an idea which was becoming more and more popular with the European Court judges, namely that the Convention should not be understood in terms of the intentions of the parties in 1950. Such an idea, he insisted, 'lacks realism and reason'.³¹ Yet he could not have been more wrong. In the following 30 years or so, the European Court (and the former Commission) fully endorsed the idea that the Convention is a 'living instrument' which must be interpreted in the light of present-day conditions rather than what the drafters thought back in 1950.³² As we shall see in section 5, this method, also called evolutive or dynamic interpretation, proved neither unrealistic nor unreasonable. Over time the Court settled on the view that lack of a clear intention on the part of the drafters is simply irrelevant when one is considering whether to recognize a right or not. A fine example is found in *Matthews v. United Kingdom*, where the issue was whether elections for the European Parliament fall within the right to vote under the ECHR:

That the Convention is a living instrument which must be interpreted in the light of present-day conditions is firmly rooted in the Court's case law . . . *The mere fact that a body was not envisaged by the drafters of the Convention cannot prevent that body from falling within the scope of the Convention.*³³

But the European Court went even further than that. It not only recognized rights which the drafters had not clearly intended to grant, but it also recognized rights which the drafters had clearly intended *not* to grant. The best example is *Young, James and Webster*.³⁴ The case raised the issue of whether so-called 'closed shops' in Britain,

³⁰ Compare Lord Hoffmann's similar views in *Jones v. Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya (the Kingdom of Saudi Arabia) and others* [2006] UKHL 26, [2006] 2 WLR 1424, at para. 63.

³¹ Separate opinion in *National Union of Belgian Police v. Belgium*, 1 EHRR (1979–1980) 578, at para 7.

³² See *Tyrer v. United Kingdom*, *supra* note 19, at para. 31: '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.'

³³ *Matthews v. United Kingdom*, 30 EHRR (1999) 361, at para. 39 (emphasis added).

³⁴ *Young, James and Webster v. United Kingdom*, Series A No. 44, 11 EHRR (1989) 439.

i.e., the legal requirement that all employees of a certain class are members of a specified trade union, were compatible with freedom of association under Article 11 ECHR. The applicants in this case were rail workers in British Rail who had refused to enter a closed-shop agreement on the ground that they disagreed with the political aims of the specified trade unions and who were later dismissed fairly under English law. Their argument in Strasbourg was that Article 11 ECHR embodies negative freedom of association, i.e., a right not to join a trade union – if one does not want to – without any negative consequences and that therefore dismissal for failing to be a member of a specified trade union amounts to a violation.

The UK government argued that Article 11 ECHR does not confer any right not to be compelled to join an association because this right 'had been deliberately excluded from the Convention', adding in proof the following passage in the preparatory works:³⁵

On account of the difficulties raised by the 'closed-shop system' in certain countries, the Conference in this connection considered that it was undesirable to introduce into the Convention a rule under which 'no one may be compelled to belong to an association' which features in [Article 20(2) of] the United Nations Universal Declaration.³⁶

It is clear in this passage that the drafters explicitly intended not to confer this right. Yet interestingly, the European Court did not find this decisive. Here is what it said:

Assuming for the sake of argument that, for the reasons given in the above-cited passage from the travaux préparatoires, a general rule such as that in Article 20 par. 2 of the Universal Declaration of Human Rights was deliberately omitted from, and so cannot be regarded as itself enshrined in, the Convention, it does not follow that the negative aspect of a person's freedom of association falls completely outside the ambit of Article 11 (art. 11) and that each and every compulsion to join a particular trade union is compatible with the intention of that provision. To construe Article 11 (art. 11) as permitting every kind of compulsion in the field of trade union membership would strike at the very substance of the freedom it is designed to guarantee.³⁷

The Court then went on to find a violation of Article 11 ECHR on the ground that there was an illegitimate interference with the substance of the applicants' right to freedom of association.³⁸ It is obvious in the quoted passage how dismissive the Court was of the relevance of drafters' intentions. Indeed, three dissenting judges complained as follows:

Reference to the 'substance' of freedom of association is not relevant in the present context. Although the Court has often relied on the notion of the substance of the rights guaranteed by the Convention, it has done so only when the question was what regulation or limitation of a right was justified. It has held that even in cases where regulation or limitations were allowed explicitly or by necessary implication, they could not go so far as to affect the very substance of

³⁵ Ibid., at para. 51.

³⁶ Report of 30 June 1950 of the Conference of Senior Officials, Collected Edn of the 'Travaux Préparatoires', iv, at 262.

³⁷ Ibid., at para. 52.

³⁸ The Court was as always careful to find a violation in the particular case, not regarding closed shops in general, and to note that compulsion to join a particular trade union may not always be contrary to the Convention. See *ibid.*, at para. 55.

the right concerned. In the present case, however, the problem is whether the negative aspect of the freedom of association is part of the substance of the right guaranteed by Article 11 (art. 11). For the reasons stated above the States Parties to the Convention must be considered to have agreed not to include the negative aspect, and no canon of interpretation can be adduced in support of extending the scope of the Article (art. 11) to a matter which deliberately has been left out and reserved for regulation according to national law and traditions of each State Party to the Convention.³⁹

Both the government and the dissenting judges placed great emphasis on the fact that the matter had been deliberately omitted by the drafters, as a *decisive* factor against the finding of a violation. The Court, however, insisted that it is the *substance* of the right which is important, downplaying any significance drafting history may have.

In sum, the use of the VCLT in *Golder* inaugurated the Court's rejection of originalism (in both the textualist and the intentionalist strands) and paved the way for the development of the doctrines of *autonomous concepts* and *evolutive interpretation*. With the development of these new doctrines, both the old Court and the new Court (i.e., after the 1998 Reform of Protocol 11) made only sparse references to the 'ordinary meaning' and the 'object and purpose' of Article 31(1) VCLT. It is telling that in two judgments⁴⁰ delivered in the mid-1980s concerning interpretive difficulties regarding the applicability of Article 6(1) to proceedings relating to social security benefits, the Court reasoned about the character of these proceedings and whether they are civil in nature without any reference to the VCLT, the ordinary meaning of terms, or the preparatory works. And it was the dissenting judges who invoked the VCLT, disagreeing with the Court's ruling that such proceedings are civil. They argued, amongst others, that the drafting history (as a supplementary means of interpretation) clearly indicated that the parties intended that Article 6(1) would not be applicable to such proceedings. The Court's interpretive ethic became one of looking at the substance of the human right at issue and the moral value it serves in a democratic society, rather than engaging in linguistic exercises about the meaning of words or in empirical searches about the intentions of drafters. The Court's motto became that the Convention must be interpreted in a manner which renders its rights 'practical and effective, not theoretical and illusory'.⁴¹ Following *Golder*, the Court not only rejected originalism; it also rejected a view, common amongst many lawyers and judges, that legal interpretation is an inquiry into the linguistic meaning of words. Dictionary definitions never had a field day in Strasbourg, as they do in the hands of other international bodies.⁴² Under the Court's interpretive ethic, Article 31(1) VCLT became almost obsolete.⁴³

³⁹ Ibid., Dissenting opinion of Judge Sorensen, joined by Judges Thor Vilhjalmsson and Lagergren, at para. 4.

⁴⁰ *Feldbrugge v. Netherlands*, Series A No. 99, 8 EHRR (1986) 425 and *Deumeland v. Germany*, Series A No. 100, 8 EHRR (1986) 448.

⁴¹ *Airey v. Ireland*, Series A No. 32, 2 EHRR (1979–1980) 305.

⁴² On the interpretive techniques of the Appellate Body of the WTO see the article by Isabelle Van Damme in this volume.

⁴³ Two notable exceptions to the Court's interpretive ethic are *Johnston v. Ireland*, Series A No. 112, 9 EHRR (1987) 203 and *Bankovic and others v. Belgium and Others*, Admissibility Decision of 12 December 2001, 44 EHRR (2007) SE5. Both contained references to the VCLT and to preparatory works. In *Johnston* the Court reasoned that the ordinary meaning of the term 'right to marry' in Art. 12 ECHR does not include

3 VCLT After *Golder*: Searching for Common Values in International Law

The VCLT is now mainly invoked by the Court (ECtHR) when it takes into account other treaties or instruments of international law, or general principles of international law, citing Article 31(3) VCLT. The Court's position here is that the interpretation of the ECHR does not take place 'in a vacuum' and that the ECHR must be interpreted 'according to other parts of international law of which it forms part'.

That the Court cannot ignore the presence and relevance of other international organizations and treaties is most obvious when states parties to the ECHR become members of other treaties and ECHR rights are affected as a result of that membership. The Court's position on this is that states retain liability under the Convention in relation to treaty commitments subsequent to the entry into force of the ECHR.⁴⁴ In a case concerning a regulation of the European Union, of which almost half of the ECHR states parties are members, the Court developed the rebuttable presumption that measures necessary to comply with obligations flowing from membership in another international organization are not in breach of the ECHR, so long as that organization provides human rights protection which is 'equivalent' to that of the Convention.⁴⁵

More interesting for our purposes are cases where the Court seeks interpretive guidance in general principles of international law or in instruments which are not legally binding on the respondent state. When the parts of international law the Court looks at are not human rights standards, the result has usually been unfavourable to the applicant, as evidenced in the cases of *Al-Adsani*⁴⁶, *Foggarty*,⁴⁷ and *McElhinney*,⁴⁸ where the Court took into account the doctrine of state immunity in interpreting the right of access to court under Article 6 ECHR.⁴⁹

But there is also now a growing number of cases in which the Court looks at other international human rights materials for interpretive guidance, citing Article 31(3) VCLT.⁵⁰ The Court takes the view that in looking beyond the ECHR for interpretive guidance it searches for common ground in the sources of international law and that it should not exclude from its consideration non-binding materials (such as declarations, guidelines, or reports) or relevant human rights treaties to which the respondent state is not a party. In an extensive analysis of its approach to international law

the right to divorce and that preparatory works confirm this interpretation. In the admissibility decision in *Bankovic*, the Court – sitting as a Grand Chamber – had to decide whether NATO's bombing campaign in Former Yugoslavia fell within the jurisdiction of contracting states under Art. 1 ECHR. In an unfamiliar fashion and instead of sticking to its preferred method of 'evolutive interpretation' the Court rushed into invoking Arts 31–32 VCLT, including the relevance of preparatory works.

⁴⁴ See *Waite and Kennedy v. Germany*, 30 EHRR (1999) 261 and *Matthews v. United Kingdom*, *supra* note 33.

⁴⁵ See *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v. Ireland*, 42 EHRR (2006) 1.

⁴⁶ *Al-Adsani v. United Kingdom*, 34 EHRR (2002) 11.

⁴⁷ *Foggarty v. United Kingdom*, 34 EHRR (2002) 12.

⁴⁸ *McElhinney v. Ireland*, 34 EHRR (2002) 13.

⁴⁹ See the analysis in Voyiakis, 'Access to Court v State Immunity', 52 *Int'l Comp LQ* (2003) 297.

⁵⁰ See *Saadi v. United Kingdom* (Grand Chamber), 47 EHRR (2008) 17. In paras 26–40, the Court referred to a number of international human rights treaties, declarations, reports, and guidelines.

in the landmark case of *Demir and Baykara*,⁵¹ the Court noted that it ‘has never considered the provisions of the Convention as the sole framework of reference for the interpretation of the rights and freedoms therein’ and that ‘in defining the meaning of terms and notions in the text of the Convention, it can and must take into account elements of international law other than the Convention, the interpretation of such elements by competent organs, and the practice of European States reflecting their common values’. Since 2000, the new Court has taken into account an impressive number of materials – most of which were non-binding on the respondent state – such as: recommendations and resolutions of the Committee of Ministers and the Parliamentary Assembly,⁵² reports of the ‘Venice Commission’,⁵³ reports of the European Commission Against Racism,⁵⁴ the European Social Charter,⁵⁵ the EU Charter of Fundamental Rights,⁵⁶ the European Convention on State Immunity,⁵⁷ the Oviedo Convention on Human Rights and Biomedicine,⁵⁸ the Aarhus Convention on Access to Information,⁵⁹ the ILO Forced Labour Convention,⁶⁰ and many others.⁶¹ In a hugely important recent judgment, *Rantsev v. Cyprus and Russia*,⁶² the Court had to decide whether human trafficking falls within the scope of Article 4 ECHR which prohibits ‘slavery’, ‘servitude’, and ‘forced or compulsory labour’. After looking at a number of international materials on human trafficking, the Court reasoned as follows in a passage worth quoting in its entirety:

[T]he absence of an express reference to trafficking in the Convention is unsurprising. The Convention was inspired by the Universal Declaration of Human Rights, proclaimed by the General Assembly of the United Nations in 1948, which itself made no express mention of trafficking. In its Article 4, the Declaration prohibited “slavery and the slave trade in all their forms”. However, in assessing the scope of Article 4 of the Convention, sight should not be lost of the Convention’s special features or of the fact that it is a living instrument which must be interpreted in the light of present-day conditions. The increasingly high standards required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably require greater firmness in assessing breaches of the fundamental values of democratic societies. There can be no doubt that trafficking threatens the human dignity and fundamental freedoms of its victims and cannot be considered compatible with a democratic society and the values expounded in the Convention. In view of its obligation to interpret the Convention in light of present-day conditions, the Court considers it unnecessary to identify whether the

⁵¹ *Demir and Baykara v. Turkey* (2008), 48 EHRR (2009) 54. See the extensive analysis by the Court in paras 69–86.

⁵² *Oneriyildiz v. Turkey*, 41 EHRR (2005) 20.

⁵³ *Russian Conservative Party of Entrepreneurs v. Russia*, 46 EHRR (2007) 863.

⁵⁴ *Bekos and Koutropoulos v. Greece*, 41 ECHR (2005) 840.

⁵⁵ *Sorensen and Rasmussen v. Denmark*, 46 EHRR (2006) 572.

⁵⁶ *Christine Goodwin v. United Kingdom*, 35 EHRR (2002) 447.

⁵⁷ *Al-Adsani v. United Kingdom*, *supra* note 46.

⁵⁸ *Glass v. United Kingdom*, 39 EHRR (2004) 15.

⁵⁹ *Taskin and Others v. Turkey*, 42 EHRR (2005) 50.

⁶⁰ *Siliadin v. France*, 43 EHRR (2006) 16.

⁶¹ On the ‘integrated approach’ to interpretation according to which the interpretation of civil rights documents, and the ECHR in particular, should integrate the existence of social rights treaties and materials, see Mantouvalou, ‘Work and Private Life: *Sidabras and Dziautas v. Lithuania*’, 30 *Eur L Rev* (2005), 573.

⁶² App. No. 25965/04, *Rantsev v. Cyprus and Russia*, Judgment of 7 Jan. 2010, available at:

treatment about which the applicant complains constitutes 'slavery', 'servitude' or 'forced and compulsory labour'. Instead, the Court concludes that trafficking itself, within the meaning of Article 3(a) of the Palermo Protocol and Article 4(a) of the Anti-Trafficking Convention, falls within the scope of Article 4 of the Convention.⁶³

The search for 'common values' in international human rights materials is fully compatible with, indeed it is entailed by, the Court's anti-originalist stance, as it was initiated in *Golder*. The practice of looking at non-binding materials of international bodies and at treaties which have not been ratified by the respondent state (sometimes not even by the majority of ECHR members) contradicts the view that states have a treaty obligation if, and only if, they have clearly intended to undertake such an obligation; it also negates the view that no new obligation may be imposed on a member state unless there is express consensus now amongst member states to be bound by it. The Court searches for common *values* as found in a multitude of sources (both within and outside Europe) and it then examines how such values bear on the case before it. And it does so in a *holistic* way, looking at how each and every part of international law can be made *coherent* with every other. In striving for coherence, the Court increasingly stresses that the interpretive questions it faces are not questions about the linguistic meaning of a Convention term, but rather questions about what can be considered 'compatible with a democratic society and the values expounded in the Convention'. Hostility towards conceiving interpretive questions as semantic ones about the linguistic meaning of words found in the Convention can also be seen in the Court's case law on autonomous concepts to which I now turn.

4 Autonomous Concepts and the Rejection of Textualism

It is highly unlikely that drafting states would have had intentions regarding the almost infinite number of cases which may arise under the Convention rights. It is highly unlikely, for instance, that states could have contemplated the many different types of legal proceedings which can exist and taken a view as to whether they are criminal or civil (and hence protected by the right to fair trial under Article 6 ECHR). As we saw in *Golder*, the Court rejected the interpretive presumption, favoured by intentionalists, that if drafters did not clearly intend that the Convention apply to a particular situation then they intended that it should not apply. But the rejection of this intentionalist presumption left another question open, namely whether the Court should define Convention terms by reference to the meaning they have in the domestic law of the respondent state. We can see why a textualist approach to interpretation would encourage such a view: textualists insist that the meaning of legal provisions tracks common usage at the time of enactment and that interpretations which transcend common usage of terms be ruled out. Given that many terms of the Convention are legal *fictions*, textualism would require placing great emphasis on the ordinary meaning assigned to those terms within the legal tradition of member states. As early as the late 1960s, the Court took the anti-textualist view that the meaning of many

⁶³ *Ibid.*, at paras 272–282.

legal terms in the Convention is *autonomous*, not necessarily the same as that found in the respondent state's legal tradition.

The Court's case law on autonomous concepts started with the *Engel*⁶⁴ case in 1972. Cornelis Engel and four other conscript soldiers serving in the Netherlands armed forces lodged an application with the ECtHR, claiming a violation in the imposition of penalties by military courts for disciplinary offences. The applicants complained, amongst others, that the penalties imposed on them constituted deprivation of liberty contrary to Article 5 ECHR (right to liberty and security) and that the proceedings before the military authorities did not satisfy the requirements of Article 6 (right to fair trial).⁶⁵

The government of the Netherlands responded that there had been no violation of Article 6 because the proceedings against the applicants involved the determination neither of 'civil rights and obligations' nor of 'any criminal charge' as the above Article requires. The government argued that under Dutch law such military penalties constituted strictly disciplinary, and not criminal, offences, and that therefore Article 6 ECHR was not at all applicable. Drawing on the distinctness of the two concepts in domestic legislation, the respondent state submitted that the guarantees of Article 6 do not extend to disciplinary charges but are limited to criminal charges and the 'determination of civil rights and obligations'. In its judgment, the ECtHR accepted that the distinction between disciplinary and criminal proceedings was sound and reflected a longstanding practice in all the contracting states. Yet it did not find this to be decisive. It asked, 'Does Article 6 cease to be applicable just because the competent organs of a Contracting State classify as disciplinary an act or omission and the proceedings it takes against the author, or does it, on the contrary, apply in certain cases notwithstanding this classification?'

We can see in the above quotation that the Court was concerned with cases where some acts or omissions are classified by the contracting state (either intentionally or by oversight⁶⁶), as disciplinary offences, in a way which escapes the guarantees of Article 6.⁶⁷ In one of the first characterizations of autonomous concepts, the former Commission had already noted that the Convention terms 'criminal charge' and 'civil rights and obligations' 'cannot be construed as a mere reference to the domestic law of the High Contracting Party concerned, but relate to an autonomous concept, which

⁶⁴ *Engel and Others v. the Netherlands*, Series A No. 22.

⁶⁵ Art. 6 ECHR reads as follows: 'In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.'

⁶⁶ The Court does not explain whether the classification is made with the specific intention of circumventing the Convention guarantees or whether the circumvention is a mere consequence of such a classification. It does imply though that this distinction is not important. What matters is whether the Convention guarantees have been circumvented as matter of fact, regardless of whether states intended so.

⁶⁷ A few paras later the Court expressed this concern as follows: 'If the Contracting Parties were able at their discretion to classify an offence as disciplinary instead of criminal . . . the operation of the fundamental clauses of art. 6 and 7 would be subordinated to their sovereign will.' The Court found this fear to be a legitimate one according to the provisions of the Convention, something which, if tolerated, would lead to 'results incompatible with the purpose and object of the Convention'.

must be interpreted independently, even though the general principles of the High Contracting Parties must necessarily be taken into consideration in any such interpretation'.⁶⁸ The Court made use of the idea of autonomous concepts in *Engel* to counter the possibility of what it took to be a circumvention of the Convention guarantees. In order to do this, the Court conceded the possibility of an asymmetry between Convention and domestic meaning: what the respondent state's law means by 'criminal charge' and 'disciplinary charge' is not the same as what the Convention means by the same terms. This enabled the Court to examine whether a situation which the respondent state classifies as a 'disciplinary offence' may turn out to be a 'criminal offence', thus demanding higher protection: '[t]he Court therefore . . . has jurisdiction to satisfy itself that the disciplinary does not improperly encroach upon the criminal'.

Ever since the *Engel* case, the Court has developed the theory of autonomous concepts to make it a significant doctrine of its jurisprudence. The Court and the former Commission have so far characterized as autonomous a significant number of concepts that figure in the Convention: criminal charge,⁶⁹ civil rights and obligations,⁷⁰ possessions,⁷¹ association,⁷² victim,⁷³ civil servant,⁷⁴ lawful detention,⁷⁵ home.⁷⁶ In its most recent decisions, almost 30 years after *Engel*, the Court qualified autonomous concepts as those the 'definition [of which] in national law has only relative value and constitutes no more than a starting point',⁷⁷ and which 'must be interpreted as having an autonomous meaning in the context of the Convention and not on the basis of their meaning in domestic law'.⁷⁸

What is distinctive about the case law on autonomous concepts is that at first sight the state appears to have provided in its legislation all the relevant guarantees, in terms of securing the enabling conditions for the exercise of the right. Take, for

⁶⁸ App. No. 3134/67 etc., *Twenty One Detained Persons v. Germany*, EComHR, Dec. 6 Apr. 1968, 27 Coll 97, at para. 4 (emphasis added).

⁶⁹ *Demicoli v. Malta*, 14 EHRR (1992) 47; *Öztürk v. Germany*, 6 EHRR (1984) 409; *Campbell and Fell v. United Kingdom*, Series A No. 80, 7 EHRR (1985) 165; *Ravnborg v. Sweden*, Series A No. 283-B, 10 EHRR (1994) 38.

⁷⁰ App. No. 4618/70, *X v. Germany*, EComHR, Dec. 21 Mar. 1972; *König v. Germany*, Series A No. 27; *Sporrong and Lönnroth v. Sweden*, 5 EHRR (1983) 35.

⁷¹ *Gasus Dosier- und Fordertechnik GmbH v. Netherlands*, 20 EHRR (1995) 403; *Pressos Compania Navera S.A. and others v. Belgium*, 21 EHRR (1996) 301; *Matos e Silva, Lda., and others v. Portugal*, 24 EHRR (1997) 573; *Iatridis v. Greece*, 30 EHRR (2000) 97; *Beyeler v. Italy*, 33 EHRR (2001) 52; *Former King of Greece v. Greece*, 33 EHRR (2001) 21.

⁷² App. No. 20652/92, *Djavit An v. Turkey*, EComHR, 40 EHRR (2003) 1002; App. Nos 25088/94, 28331/95, & 28443/95, *Chassagnou and Others v. France*, 29 EHRR (1999) 615; App. No. 32441/96, *Karakurt v. Austria*, Dec. 14 Sept. 1999.

⁷³ App. No. 29121/95, *Asselbourg and 78 others and Greenpeace Association-Luxembourg v. Luxembourg*, Dec. 29 June 1999.

⁷⁴ *Pellegrin v. France*, 31 EHRR (2001) 26; *Frydlender v. France*, 31 EHRR (2001) 52.

⁷⁵ *Eriksen v. Norway*, 29 EHRR (2000) 328; *Witold Litwa v. Poland*, *supra* note 22.

⁷⁶ *Khatun and 180 others v. United Kingdom*, EComHR, 26 EHRR (1998) CD12.

⁷⁷ *Chassagnou and Others v. France*, *supra* note 72, at para. 100; *Karakurt v. Austria*, *supra* note 72, at 4.

⁷⁸ App. No. 22942/93, *R. L. v. The Netherlands*, EComHR, Dec. 18 May 1995, available at: <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=666324&portal=hbkms&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>.

example, the right to fair trial which was the issue in the *Engel* case. The state is under a duty to take actions which are necessary in order to secure the enjoyment of the right: inform the accused person promptly, give him adequate time for the preparation of his defence, provide him with legal assistance, allow the examination of witnesses, and the like. Such actions are enabling conditions for the exercise of the right or ways of respecting that right. Every failure by the state to meet these conditions will constitute a violation of the corresponding right. Many of these enabling conditions for the exercise of a right, however, take the form of legislation. This is notably the case in Article 6: rights of the accused person operate within an institutional framework of courts and tribunals and enjoyment of the right requires the granting of several sub-rights through the enactment of relevant legislation. Absence of this legislation constitutes a violation under the ECHR.

All of the above considerations appear initially to have been met in *Engel* as there was relevant legislation granting the right of fair trial to persons charged with criminal offences. It appeared, that is, that under Dutch law all persons faced with a criminal charge had the right to a fair trial. The question therefore was certainly not whether the Netherlands had relevant legislation granting the right or whether Dutch courts applied existing legislation which grants this right. Rather, the problem arose at the level of the scope of national legislation: the state had authoritatively qualified a Convention concept such that some instances of it were explicitly excluded from its scope, even though they should not be, in the Court's opinion. By the term 'authoritative' here I mean that the classification was made in the legal sources of this country (statutes, Constitution, decrees, etc.) and applied to the applicant's case. Moreover, these classifications and understandings were not the product of a bad-faith attempt to deprive a group of citizens of their right to a fair trial. For it is true that disciplinary offences do exist and that they need not attract the guarantees of Article 6 ECHR. The question was whether military offences were disciplinary.

There are some interesting features in this type of violation which distinguish it from other cases of human rights violations. First, it has a semantic dimension: the applicants claim a violation by disputing the meaning which the state has assigned to a legal concept. Secondly, it is indirect: though the state takes itself to have provided all the necessary guarantees for the protection of a right, it turns out that it did not do so for all required cases. These two ideas suggest that the European Court is willing indirectly to review national legislation with a view to spotting good-faith errors regarding the way in which the Convention rights are affected by definitions employed in national legislation or judicial practice. Another way to put the point is to say that the Court takes definitions and classifications made by the respondent state to be *fallible*. In the Court's reasoning, it is possible for a state to go wrong in identifying an instance of a Convention concept, despite the fact that this identification is officially made in some piece of legislation and is traditionally accepted and confirmed by the judiciary of this country. The Netherlands, for example, was wrong to classify criminal offences as not covering military offences. In fact, the Court makes the even stronger claim that the meaning of these concepts should not be subordinated to the states' 'sovereign will'. This remark certainly implies that these concepts

should not be understood in a conventionalist sense, by looking at how most officials apply them. Their meaning may transcend what most people in the respondent state think or how officials classify the concept. Judge Van Dijk eloquently captured this idea behind autonomous concepts in a dissenting opinion concerning the meaning of sex under Article 8 ECHR: 'I cannot see any reason why legal recognition of reassignment of sex requires that biologically there has also been a (complete) reassignment; the law can give an *autonomous meaning* to the concept of "sex", as it does to concepts like "person", "family", "home", "property", etc'.⁷⁹ 'Autonomous meaning' is here linked directly to the idea that the Convention concepts should not be interpreted in a conventionalist way.

The *fallibility* of state definitions and the willingness to review *good-faith* mistakes in domestic definitions are further evidence of the Court's strong anti-textualist interpretive ethic. The Court could have taken a different approach, getting hold of copies of law dictionaries from member states and seeing how they define terms like 'possessions', 'criminal charge', 'association', etc. Instead it chose to understand its interpretive task as being more about whether respondent states have honoured the spirit of the obligations under the ECHR and less about the meaning of words found in the Convention.⁸⁰

5 'Living Instrument': The Moral Reading of the Convention

Perhaps no other doctrine in its case law better captures the Court's interpretive ethic than the idea that the Convention is a 'living instrument', which must be interpreted according to present-day conditions. This idea, often called 'evolutive' or 'dynamic' interpretation, directly contradicts originalism under both its intentionalist and textualist guises. This section looks at some of the early cases on the 'living-instrument approach' which have shaped the Court's interpretive ethic. As I hope will become apparent the Court has used the living-instrument approach in order to establish the autonomy of the Convention rights, not from domestic definitions and classification this time, but from the various moralistic views that dominated member states when the Convention was drafted and may still survive in some respondent states. By 'moralistic' I mean views which propose that someone should be deprived of a liberty or an opportunity solely because others (usually the majority) think of him as less than an equal or do not care about him as they care about others. Examples of categories of people whom the majority in the 1950s and 1960s considered less than equal (and perhaps in many ways still does) are homosexuals, prisoners, juvenile offenders, children born out of wedlock, Romas, and many others. It will emerge from the examples discussed below that in applying the living-instrument approach, the Court does not always care to establish an explicit consensus across Contracting States (e.g. in legislative or executive practices) that these moralistic views have now been abandoned.

⁷⁹ Judge Van Dijk Dissenting in *Sheffield and Horsham v. United Kingdom*, 27 EHRR (1999) 163.

⁸⁰ For a full analysis of autonomous concepts see Letsas, 'The Truth in Autonomous Concepts: How to Interpret the ECHR', *EJIL* (2004) 279.

The Court is more interested in the moral value the Convention rights serve and what arguments best support it rather than on whether such arguments are widely shared across the Council of Europe. This is what I shall call the *moral* reading of the Convention.

The ‘living-instrument’ approach first appeared in *Tyler*,⁸¹ after both *Engel* and *Golder*. The Court had to decide whether judicial corporal punishment of juveniles amounts to degrading punishment within the meaning of Article 3 of the Convention. The punishment, having the form of bare-skin birching carried out by a policeman at a police station, was prescribed by law and practised in the Isle of Man, a dependent territory of the United Kingdom with a significant degree of legislative autonomy. At that time, judicial corporal punishment had been abolished in the rest of the United Kingdom and was also not to be found in the vast majority of the other Contracting States. In his submissions, the Attorney-General for the Isle of Man argued that judicial corporal punishment could not be considered degrading because it ‘did not outrage public opinion in the Isle of Man’.⁸²

The Court took issue with this argument. It noted that public acceptance of judicial corporal punishment could not by itself mean that the punishment is not degrading, and that in fact the opposite might be true: the reason people favour a type of punishment may well be the fact that they take it to be degrading and can therefore operate as a strong deterrent. The Court in other words rejected the view that communal reactions provide some privileged insight into the truth of the protected right. A few lines earlier, the Court had noted that in assessing whether a particular punishment is degrading one must look at all the circumstances of the case and ‘in particular the *nature* and context of the punishment itself and manner and method of its execution’.⁸³ The Court drew a stark contrast here between what public opinion thinks about birching and what is the real character of this punishment and added:

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.⁸⁴

This passage inaugurated the Court’s extensive use of evolutive interpretation in later years and up to today. Interestingly, the Court in *Tyler* did not feel the need to cite any detailed evidence regarding ‘the developments and commonly accepted standards in the penal policy of the member States of the Council of Europe’. The Court based its decision directly on substantive considerations. It held that ‘the very *nature* of judicial corporal is that it involves one human being inflicting physical violence on another human’⁸⁵ and that it is an institutionalized assault on a person’s dignity and physical integrity, which is precisely what Article 3 of the Convention aims to protect.

⁸¹ *Tyler v. United Kingdom*, *supra* note 19.

⁸² *Ibid.*, at para. 31.

⁸³ *Ibid.*, at para. 30 (emphasis added).

⁸⁴ *Ibid.*, at para. 31.

⁸⁵ *Ibid.*, at para. 33 (emphasis added).

It further added that the institutionalized character of the punishment, the fact that it is inflicted by total strangers to the offender, and the fact that it is administered over the bare posterior all add up to the punishment being degrading. The Court concluded by finding a violation of Article 3 of the Convention.

In *Marckx*,⁸⁶ decided just a few months after *Tyrrer*, the applicants, a child born out of wedlock and his unmarried mother, complained – among other things – that Belgian legislation violated their right to respect for family life under Article 8 of the Convention, and discriminated against them contrary to Article 14 of the Convention. Belgian law at the time did not confer maternal affiliation by birth alone with respect to ‘illegitimate children’, contrary to the so-called *mater certa semper est* maxim. Unlike in the case of ‘legitimate children’, maternal affiliation between a child born out of wedlock and its mother could be established only either by voluntary recognition or by a court declaration.

The Court noted straightforwardly that Article 8 makes no distinction between ‘legitimate’ and ‘illegitimate’ family and that such distinction would anyway contradict Article 14 of the Convention, which prohibits any discrimination grounded on birth.⁸⁷ It then noted that ‘respect for family life’ may well impose positive obligations on the state, and further argued that Belgian law puts illegitimate families under unfavourable and discriminatory conditions.⁸⁸ At that point the Court was faced with an objection raised by the Belgian government. The respondent government conceded that the law favoured the traditional family, but maintained that this was for the purpose of ensuring the family’s full development as a matter of ‘objective and reasonable grounds relating to morals and public order’.⁸⁹ The Court took issue with the Belgian Government’s objection. While admitting that at the time the Convention was drafted it was regarded as permissible to distinguish between ‘legitimate’ and ‘illegitimate’ families, it emphasized that ‘the domestic law of the great majority of the member States of the Council of Europe has evolved and is continuing to evolve, in company with the relevant international instruments, towards full juridical recognition of the maxim “mater semper certa est”’.⁹⁰

There is an important difference between *Tyrrer* and *Marckx*. In the latter the Court went on to refer explicitly to two international conventions (the Brussels Convention on the Establishment of Maternal Affiliation of Natural Children and the European Convention on the Legal Status of Children Born out of Wedlock) as a way to demonstrate the existence of ‘commonly accepted standards’. In doing so, the Court moved away from construing commonly accepted standards as solely those found in the legislation of member states because these two international conventions were far from being signed by the majority of the contracting states at the time. But the Court noted that ‘the existence of these two treaties denotes that there is a clear measure of common ground in this area amongst *modern societies*’. It added further that Belgian law itself shows signs of this ‘evolution of rules and *attitudes*’.

⁸⁶ App. No. 6833/74, *Marckx v Belgium*, 2 EHRR (1979–1980) 330.

⁸⁷ *Ibid.*, at para. 31.

⁸⁸ *Ibid.*, at paras 36–39.

⁸⁹ *Ibid.*, at para. 40.

⁹⁰ *Ibid.*, at para. 41.

This shift from commonly accepted standards in domestic legislation to signs of evolution of attitudes amongst modern societies is particularly noteworthy. Commonly accepted standards found in legislation were not a necessary component of what count as present-day conditions. The Court was content to show and to emphasize that the distinction between 'legitimate' and 'illegitimate' families was no longer regarded as appropriate in European societies. Whether or not this attitude is reflected in the majority of domestic legislation was not so decisive. In *Marckx*, 'living instrument' meant, above all, keeping in pace with evolving European attitudes and beliefs, rather than with some specific legislation to be found in the majority of member states.

The introduction of this abstract standard of common European attitudes and beliefs manifests how loose the requirement of consensus became in *Marckx*. For there is an apparent difficulty in construing this 'common ground among modern societies'. Does it mean what all or most citizens accept? Or does it rather mean what reasonable and fully informed citizens would accept? Moreover, how is the Court to say when this common ground has been achieved? By consulting opinion polls? By relying on judges' limited personal experience? To be sure, none of these worries arose in *Marckx*. The Court did not explain how this common ground among societies is to be found. On the contrary, such assertion was a mere addition to a chain of substantive reasoning: the Court had said, independently, that the distinction between legitimate and illegitimate children is discrimination based on birth, that 'illegitimate' children were left motherless for a period of time, and that illegitimate families faced unfavourable circumstances in law. The Court did not say that modern societies no longer accepted the distinction between legitimate and illegitimate families; therefore there was a violation of the right to respect for family life. Rather, the Court argued that the above distinction violates the right to life as a matter of what this right really amounts to and that, *in addition*, this is becoming common ground in modern societies.

In a series of later judgments, the Court proceeded in the exact same way: it examined the legal issue involved thoroughly, made claims and assumptions about the purpose of the protected right, and explained in detail why governmental acts fall short of serving this purpose.⁹¹ Nowhere did it subscribe to a conventionalist approach to interpretation: it is not the case that what constitutes a violation changes whenever rules and attitudes change. Its reasoning clearly implied the idea of a substantive *discovery*: the complained-of behaviour has always constituted a violation, even when it was not considered to be so.

In the well-documented *Dudgeon* case the main issue was whether penalization of homosexuality in Northern Ireland violated the right to respect for family life guaranteed by Article 8(1). The Court held:

As compared with the era when that legislation was enacted, there is now a better understanding, and in consequence an increased tolerance, of homosexual behaviour to the extent that in the great majority of the member States of the Council of Europe it is no longer considered to be necessary or appropriate to treat homosexual practices of the kind now in question as in themselves a matter to which the sanctions of the criminal law should be applied.⁹²

⁹¹ See, e.g., *Guzzardi v. Italy*, 3 EHRR (1981) 333.

⁹² *Dudgeon v. United Kingdom*, 4 EHRR (1982) 149, at para. 60.

It then went on to find a violation of the right in question. Though there is an apparent effort in the quoted passage to base its reasoning on what is now believed in the great majority of the member states, it is equally striking that the Court takes contemporary understanding in member states to be *better* and not merely different from that at the time when anti-homosexual legislation was enacted. It emerges that for the Court it is not sufficient that there has been a change in attitudes amongst contracting states since the drafting; for the change to affect the interpretation of an ECHR right the change must constitute an improvement, moving closer to the truth of the substantive protected right.

The above cases suggest that the Court was primarily interested in evolution towards the moral truth of the ECHR rights, not in evolution towards some commonly accepted standard, regardless of its content. First, the Court does not take the time to look at domestic legislation in some comparative exercise and aggregate what most states do. Secondly, its reasoning is informed by substantive considerations about the protected right, not by a 'common denominator' approach, i.e., by what all member states do or would accept. Thirdly, the Court takes 'present-day conditions' to be relevant *in so far as* they amount to a better understanding of the *moral* values which underlie the ECHR rights. In sum, the Court applied a first-order moral reading of the ECHR rights, adding hesitant and redundant remarks about this being somehow commonly accepted. The above case law suggests that (a) there is an objective substance or value of the protected right, (b) evolution is important only because and in so far as it gets this value right, (c) for the evolution to constitute a standard of correctness for the ECHR it is not necessary to establish any concrete consensus among the majority of contracting states. The idea is more that of a hypothetical consensus: given the principles we now believe underlie the Convention, how would reasonable people agree to apply these principles to concrete human rights cases? But there need not be actual consensus on the application of these principles.

It would be a mistake however to suggest that the moral reading of the Convention has been consistently applied by the Court, in the sense that Convention rights have always been interpreted without reference to the *currently* held moralistic views of the majority. In a large number of cases, mainly under the qualified rights of the Convention (Articles 8–11 ECHR), the Court has granted states a 'margin of appreciation'⁹³ on the ground that no consensus exists amongst contracting states on whether the applicant is entitled to the right she claims to have under the ECHR. I have argued elsewhere⁹⁴ at length that using consensus as an interpretive criterion risks conditioning the enjoyment of the ECHR rights on the currently held moralistic preference of the majority, and hence offending one of the most fundamental moral values which human rights serve. Properly analysed, the doctrine of the margin of appreciation is at best redundant and at worst a danger to the liberal-egalitarian values which underlie human rights. Thankfully the use of the doctrine appears to

⁹³ For an analysis of the different uses of the margin of appreciation doctrine by the ECtHR see Letsas, 'Two Concepts of the Margin of Appreciation', *Oxford J Legal Studies* (2006) 705.

⁹⁴ See Letsas, *supra* note 8, chs 4–6.

have been in retreat in recent years⁹⁵ following criticisms by academics and judges alike.⁹⁶

6 Debunking Common Misconceptions about Treaty Interpretation

Is Strasbourg's endorsement of autonomous concepts and evolutive interpretation justified? And is its dismissive attitude towards literal interpretation and originalism warranted? It is not hard to imagine a totally different approach which the ECtHR could have taken when faced with interpretive controversies: instead of elaborating on how to make rights 'practical and effective' it could have declared that, unless some right is part of the clear meaning of the Convention terms, then it is not protected under the ECHR; instead of giving an autonomous meaning to Convention concepts it could have deferred to the meaning given by the national authorities of the respondent state; instead of elaborating on the value that the ECHR rights serve when it is ambiguous what they cover, it could have had recourse to Article 32 VCLT and to the preparatory works; instead of interpreting the Convention by searching for common values in various non-binding and binding sources of international law, it could have declared that it cannot, through interpretation, impose obligations on sovereign states which they have not expressly undertaken.

Before we examine whether what the Court did is preferable to what it could have done, it is worth considering whether the Court's interpretive ethic has *really* been dismissive of the importance of the VCLT and of drafters' intentions. I shall argue in this section that neither the 'object and purpose' nor drafters' intentions commit one to a particular method of interpretation. There is therefore a sense in which the Court has shown fidelity to both the VCLT and drafters' intentions. The only thing which can justify interpretive outcomes is *moral* reasons to do with the value of law and with the moral principles governing the area of law in question. Or so I shall argue.

In what follows I discuss two common misconceptions about treaty interpretation in general. The ECtHR has by and large avoided these misconceptions and international lawyers can draw lessons from its interpretive ethic. Once these misconceptions are debunked, it will emerge that questions about treaty interpretation cannot but be evaluative questions about the moral value of international law and the moral principles governing particular areas of it.

A That the VCLT Sets Out a Single Rule of Interpretation

Saying that treaties must be interpreted according to their object and purpose does not commit one to using a single technique of interpretation (e.g., seeking to discover

⁹⁵ The Court has stopped relying heavily on it even in very controversial cases which raise important issues of moral controversy such as the display of crucifixes in classrooms. See recently App. No. 30814/06, *Lautschie v. Italy*, Judgment of 3 Nov. 2009, in which the Court found a violation of the ECHR.

⁹⁶ See the recent concurring opinion of Judge Rozakis in App. No. 34438/04, *Egeland and Hanseid v. Norway*, Judgment of 16 Apr. 2009.

the intentions of the drafters or the ordinary linguistic meaning of terms) for all treaties; it simply makes interpretive methods relative to the object and purpose of each treaty. Though 'purposive interpretation' is usually understood as one amongst many methods of interpretation (such as literal interpretation or intentionalism), this is somewhat misleading because it is the *purpose* of a treaty (or any text of law) that will determine what meaning should be assigned to its terms or – in different words – what methods of interpretation (such as textualism, intentionalism, literal interpretation, etc.) are appropriate. The purpose of a treaty occupies a different, and normatively prior, logical space to that of so-called interpretive methods.

The real question is therefore how one should go about determining what the object and purpose of a specific treaty is. And the VCLT is not at all clear about this question. Article 31 refers to the preamble to the treaty and what counts as relevant context for interpreting its terms (such as subsequent practice or agreement by states parties), but it is not at all clear how much weight these elements should be given in determining the object and purpose of a treaty. Nor does the VCLT make clear how far, if at all, the object and purpose of a treaty may diverge from the intentions and practices of states parties. And these are important issues given that there will always be a number of different ways to understand the object and purpose of a treaty. Preambles are usually cast in broad and abstract terms and drafting parties do not necessarily share the same views about the purpose of their agreement. There are also possible tensions between the object of a treaty (e.g., human rights) and the aims which states parties seek to achieve by it (e.g., market efficiency, or accession to an international organization), as sometimes states seek to achieve goals which are incompatible with the means they choose to use. Individuating the object and purpose of a treaty is by no means a mechanical exercise; it is *itself* an interpretive question.

The above remarks indicate that the VCLT's general rule that treaties must be interpreted according to their object and purpose is a rather trivial statement about treaty interpretation: how *else* could they be interpreted? If one denies that treaties must be interpreted according to their object and purpose, then one must be taken to mean, not that the object and purpose are irrelevant, but that the object and purpose of a treaty (or all treaties) are such that a non-purposive reading (e.g., narrow, intentionalist, or literal) of its terms is called for. It emerges that 'purpose' in Article 31 VCLT simply means normative 'point' or 'value' and that all that Article 31(1) does is to reiterate a truism, namely that interpretation must be relative to the point or value of that which is interpreted.⁹⁷ One might be tempted to say that this truism is one single method of interpretation for all treaties but the truism is so abstract and so universal that it applies to everything, not just to treaty interpretation, verging on a tautology: something should be interpreted as it should be interpreted; or, to put it colloquially, an interpreter's got to do what an interpreter's got to do.

⁹⁷ If anyone wants to defend the claim that the word 'purpose' in the VCLT does not mean 'point' or 'value' as I suggest, but rather refers to, say, the 'intended aims' of states parties, then I would reply that the claim does assume that treaties have a point in the light of which they must be interpreted and that the defender of the claim takes this point to be the serving of the intended aims of states parties.

That the VCLT's general rule of interpretation cannot really provide much help with the question of which interpretive techniques are appropriate for each treaty is an instance of a more general paradox about interpretative rules which we know from Wittgenstein:⁹⁸ if rules of interpretation are required in order to determine the meaning of a text, then further rules of interpretation would be required in order to determine the meaning of the rules of interpretation and then further rules of interpretation would be required to interpret the rules for interpreting the rules of interpretation, and so on and so forth *ad infinitum*. On pain of infinite regress, rules of interpretation cannot have the same form as their object: norms expressed in strings of black letters printed in legal documents by some officials. On pain of infinite regress, no treaty can tell us how to interpret treaties.

Though trivial in one sense, the idea that treaties ought to be interpreted according to their object and purpose is hugely instructive as to *how* one should go about identifying the object and purpose of a treaty. For every *fact* which the interpreter takes into account as relevant for determining the purpose of a treaty (such as the preamble, the treaty terms, dictionary definitions, the preparatory works, etc.) there must ultimately be a *non-factual* explanation of why this fact (and not some other fact) is relevant for so doing. The explanation must be non-factual because if it is factual then we run up against the problem of infinite regress: if our question is why a certain fact is relevant (e.g., the text of the preamble) and we answer it by citing another fact (e.g., that the parties included it in the treaty), then there will be new a question as to what makes that further fact relevant. No matter how many facts one cites as an explanation (e.g., the fact that everybody accepts that whatever parties include in the preamble is relevant), there will always be a question as to what justifies taking those facts as relevant. Facts by themselves cannot justify the relevance of other facts.⁹⁹ Unless a non-factual explanation is given at some point, the attempt to provide a justification will go on forever.

What then can be a non-factual explanation? The only possible non-factual explanation is a *normative* explanation: facts are relevant if and only if, in the chain of justification, there is ultimately a fact-independent normative reason making them relevant.¹⁰⁰ Suppose we ask why the existence of a preamble is relevant for interpreting a treaty. We answer by saying that it is relevant by virtue of being the best guide to discovering the commonly intended aims of states parties. We then ask why is the fact that states intended to pursue some aims relevant for interpreting a treaty. And we answer this further question by saying that only when the intentions of the parties are respected in interpreting a treaty can states pursue joint projects. We then

⁹⁸ See L. Wittgenstein, *Philosophical Investigations, The Revised German Text with a Revised English Translation* (trans. G.E.M. Anscombe, 2001), at 68, para. 198: 'Any interpretation still hangs in the air along with what it interprets, and cannot give it any support. Interpretations by themselves do not determine meaning.'

⁹⁹ As Nicos Stavropoulos puts it, 'It is generally impossible for any descriptive facts of practice, alone, to determine their own normative significance and therefore to determine a rule.' I am indebted to his 'Why Principles?', available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1023758, at 10.

¹⁰⁰ I am here drawing heavily on G.A. Cohen's splendid piece, 'Facts and Principles', 31 *Philosophy and Public Affairs* (2003) 211.

further ask why is the fact that states aim to pursue projects relevant. And we would here reach a non-factual explanation if we were to say: *because there is a moral duty to respect and help states pursue their joint projects*, other things being equal (e.g., assuming the projects are not unethical, etc.). This explanation is fact-independent in that it expresses a normative proposition, one the truth of which does not purportedly depend on any fact obtaining, and hence one which is not falsifiable by empirical facts. The truth of this normative proposition does not depend on whether or not any state has or pursues projects, on whether or not the intentions of states are accurately expressed in the preamble, and so on and so forth; it does not even depend on whether any states currently exist in the world. What depends on whether or not facts obtain is the applicability of a normative principle, not its truth. The point I am hammering home is that which facts are relevant for interpreting a treaty must ultimately depend on some normative proposition about moral reasons or values. Interpretation, in that sense, is inherently an exercise in seeking to establish the truth of some normative proposition and only derivatively an exercise in discovering meanings or intentions (i.e., derivative of the truth of some normative proposition to that effect). Interpretation is intrinsically evaluative.¹⁰¹

Armed with this conclusion we can revisit the claim that treaties must be interpreted according to their object and purpose. If our guiding normative principle is that, in interpreting treaties, we ought to respect states in pursuing joint projects,¹⁰² then a lot will depend on what the project in question is: different projects require different means of pursuit. And in individuating a treaty's project we will be constrained by the truth of many normative propositions: for example, some projects (like genocide or slavery) would be automatically excluded – no matter how badly states want to pursue them – because the duty to help states pursue a project is conditional on the project not being unethical. The pursuit of other projects (like economic co-ordination) may require – if they are to succeed – that parties know exactly what their obligations under the treaty are. The pursuit of yet other types of projects (like protection of human rights) may require less attention to co-ordination between states and more emphasis on the moral character of the project. Normative truths permeate the process of individuating what project states choose to pursue and which means are appropriate and necessary in order to facilitate it. Very often, several normative reasons apply simultaneously and courts need to assess their weight against each other.

In sum, the task of individuating the object and purpose of a treaty and of interpreting the treaty in the light of them, is – from beginning to end – a thoroughly evaluative, not empirical, exercise. Often in the literature of international law, sophomoric

¹⁰¹ So as to avoid a widespread misunderstanding of this abstract claim, I should stress that it differs from the banal claim – very popular outside analytic legal philosophy – that interpreters are routinely influenced by their biases, prejudices, ideology etc. One should not confuse the normative question of what reasons apply to one's actions with the empirical question of what motivates someone to act in a particular way.

¹⁰² I do not intend to propose this normative proposition as a complete theory of the morality of treaty law-making. Apart from obvious parallels with the morality of promising, the morality of treaty law-making must also take into account the reasons for respecting the autonomy of states. See sect. 7 on the purpose of human rights treaties.

objections to evaluative objectivity prevent scholars from acknowledging this important truth about interpretation.¹⁰³ Such misleading objections in turn often lead scholars to endorse either a cynical and sceptical attitude towards interpretation (the ‘it’s-all-about-politics attitude’) or a formalistic reading of legal texts which may serve no normative purpose whatsoever.¹⁰⁴ Reading Article 31(1) VCLT as a call for taking up an evaluative standpoint towards treaty interpretation does great justice to it. No doubt, not all interpreters will take up the correct evaluative standpoint, and even those who do may not always be consistent in applying it. But the alternative is to commit oneself to saying the VCLT expresses the tautology that treaties must be interpreted as they should be interpreted. And like in so many other things in life, sometimes getting it wrong is preferable to being trivially right.

B That Respect for Drafters’ Intentions Entails a Particular Method of Interpretation

Some lawyers believe that in interpreting a legal text one seeks to discover the intentions of its drafters which, alone, fix the meaning of the words found therein, and that doing so requires employing particular methods of interpretation such as looking at preambles, preparatory works, accompanying reports, etc. Yet the truth is that, contrary to some originalist ideas, fidelity to drafters’ intentions is compatible with very many techniques of interpretation.

Consider for instance cases where the drafters themselves expressly authorized courts to revise or update the interpretation of the text. We can imagine the following provision enacted either in a constitution or in an international human rights treaty: ‘[i]nhuman and degrading treatment is prohibited. Treatment is inhuman or degrading only if it is supported by the best moral arguments available to the court at each given time and regardless of drafters’ or the community’s views on the matter.’ A judge applying this provision would have to attribute to it a different meaning depending on the views of the community at each given time. Hence what was not prohibited as inhuman and degrading in the 18th century may be prohibited now and vice versa. It would be the judge’s duty, out of respect for the drafters, to adjust the meaning of the provision to contemporary circumstances. Were she to attribute a fixed meaning she would be disregarding their will.

But the more important flaw in the idea that drafters’ intentions alone can determine how to interpret a legal text lies in the problem of circularity.

Drafters’ intentions come in different kinds and at various levels of abstraction. Take the ECHR. Drafting states in 1950 had the *abstract* intention that human rights are fundamental moral norms which must be respected in Europe, but they also had

¹⁰³ For an insightful discussion of moral objectivity in the context of international law see Voyiakis, ‘International Law and the Objectivity of Value’, 22 *Leiden J Int’l L* (2009) 51.

¹⁰⁴ That rule-scepticism and rule-formalism are not the only alternatives from which to choose in giving an account of legal interpretation was noted by H.L.A. Hart as early as 1961. See his *The Concept of Law* (2nd edn, 1997), at ch. 7.

more *concrete* intentions¹⁰⁵ about which situations in their view human rights cover and what limitations the ECHR would impose on their sovereignty. As Steven Greer has shown, the ECHR was not originally intended as a means of delivering individual justice to all Europeans, as it now functions, but rather as a means of contributing to the peace of Western Europe in the context of the Cold War.¹⁰⁶ Now we may ask which of these intentions is crucial: the intention to protect a list of fundamental freedoms of their citizens whatever these may be (intentions of principle), or the intention to protect what they, 50 years ago, believed these freedoms to be (intentions of detail)? Presumably, drafters had the former intention as much as they had the latter: they had a concrete idea of what human rights there are, but it was their more abstract belief in the moral objectivity and universality of these rights that led them to draft the ECHR following the World War II atrocities. Objectivity, however, denotes a certain kind of mind-independence: like any of us, drafters may have been wrong about morality's demands. Which intention did drafters take as more dominant? Their concrete intention to be bound by what, they thought, these moral rights were or their more abstract intention of being bound by whatever moral standards the human rights in the Convention really enact?

One may be tempted to suggest that we should try to discover which of the two (and perhaps at which level) were thought to be more important by the drafters themselves. This is to introduce a third kind of intention: what is called the drafters' *meta-intentions*.¹⁰⁷ It is possible that the drafters felt more strongly about their abstract intention to protect the fundamental moral rights which people are indeed entitled to rather than their concrete intention to protect those rights which they, 50 years ago, believed individuals are morally entitled to.¹⁰⁸ Recall that in his dissent in *Golder*, Fitzmaurice welcomed the possibility that the Convention makers could expressly authorize the Court to expand, through interpretation, the scope of the Convention rights. He just required that their meta-intentions be clearly expressed.

Yet introducing all these kinds of intentions and seeking to choose amongst them without any further criterion commits us to a circular explanation. Recall that there are at least three different types of intentions which drafting states¹⁰⁹ have: concrete, abstract, and meta-intentions. Suppose we take their meta-intentions as being the most important ones, and then we use those as a ground for prioritizing their concrete intentions. Why, one may ask, are their concrete intentions more important than their abstract ones? If we answer by saying that they are more important because the drafters so intended, then we beg the question; we ask what the ground is for taking

¹⁰⁵ The distinction between abstract and concrete intentions is taken from Dworkin. See Dworkin, 'The Forum of Principle', in R. Dworkin, *A Matter of Principle* (1985), at ch. 2. See also Dworkin, *supra* note 21, at ch. 5 and Dworkin, 'Comment', in Scalia, *A Matter of Interpretation*, *supra* note 11, at 115.

¹⁰⁶ Greer, 'What's Wrong with the ECHR?', 30 *Human Rts Q* (2008) 680.

¹⁰⁷ Also called, 'interpretive' intentions: see Dworkin, *A Matter of Principle*, *supra* note 105, at 52.

¹⁰⁸ Dworkin argues that in the case of the American constitution we may invoke various facts in support of this claim: that the rights are framed in abstract rather concrete wording and that the drafters could not have thought their views were the final ones in moral matters.

¹⁰⁹ I shall ignore here difficulties with identifying group intentions.

drafters' intentions to be relevant, and we answer this question by saying that the ground is that the drafters so intended. The explanation is circular because, by assuming that some type of intentions becomes relevant by virtue of the fact that the drafters so intended, we assume the truth of what we are seeking to establish. On pain of circularity, the ground for choosing between any of these different types of intentions cannot have anything to do with intentions. Dworkin puts this very well in the context of constitutional interpretation: '[s]ome part of any constitutional theory must be independent of the intentions or beliefs or indeed acts of the people the theory designates as Framers. Some part must stand on its own in political or moral theory; otherwise the theory would be wholly circular.'¹¹⁰

In short, only *moral* reasons can serve as a ground for prioritizing either the concrete or the abstract intentions of the drafters. If, for example, the moral reason in question is to enable co-ordination between states in selected areas of mutual economic benefit (e.g., trade agreements), then we would be justified in prioritizing their concrete intentions regarding the scope and application of their agreement. But if the moral reason in question is states' obligation to respect human rights, then we would be justified in prioritizing their abstract intention to set up an international system of legal protection over their concrete intentions about the scope and application of human rights.

7 The Purpose of Human Rights Treaties

I have given in this article a general account of Strasbourg's interpretive ethic, an ethic which dismisses the relevance of drafters' specific intentions about the limits which the ECHR imposes on state sovereignty, as well as the relevance of dictionary definitions and member states' legal classifications. It is an interpretive ethic, which prioritizes the moral reading of the Convention rights and the semantic autonomy of its terms from the intentions, practices, and conventions of contracting states. I then argued that in interpreting treaties in general, our task is a morally evaluative one, which consists roughly in individuating which project states seek to pursue and how values of international law constrain the pursuit of that project. My thesis is that, for each treaty, the appropriateness of any interpretive technique depends ultimately on what project, as constrained by values of international law, states are taken to have agreed to pursue. There are *no* general methods of treaty interpretation, if by 'methods' we mean some set of fixed rules which takes the relevance of certain facts (e.g., preamble, state intentions, practices, etc.) as given. In this final section I wish briefly to elaborate on what kind of project states pursue by joining a human rights treaty and whether, in the light of this project, certain interpretive methods are called for.

It is worth beginning with elaborating on the sense in which human rights are a special category of legal rights. Sometimes we use the word 'right' when referring to legal provisions which purport to create a specific entitlement for a specific category

¹¹⁰ Dworkin, *A Matter of Principle*, *supra* note 105, at 54.

of persons. We say, for instance, that under English property law the seller has a right to use the buyer's deposit, between exchange of contracts and completion, in order to purchase another property. We do not, in saying so, mean to imply that buyers around the world have a moral right to use the buyer's deposit before the completion of the sale. For we can imagine a number of different legal arrangements which do not grant the seller such a right and which nevertheless do not violate his moral rights. The same applies to legal duties. The fact that buyers under English property law have a legal duty to pay stamp duty on the purchased property within a month of completion is not premised on a general moral duty to pay stamp duty (let alone pay it within a month of completion).¹¹¹ By contrast, the normative link between constitutional or international human rights and general moral rights is more direct. Consider the following abstract moral truths: individuals have a general moral right not to be tortured and everybody has a general moral duty not to torture; individuals have a general moral right not to be deprived of liberty on the sole ground that others think of them as less than equals and governments have a moral duty to respect this right; individuals have a moral right to choose and pursue a conception of the good life and the government has a duty not to interfere with the exercise of that choice. The truth of these general moral propositions does not depend on institutional recognition or communal acceptance. Governments have a duty to treat individuals as equals and to respect their autonomy regardless of whether they believe they have such duty and regardless of whether they have promised other states to undertake such duty. Moreover, these are not just any moral truths (e.g., like the moral truth that cheating is *pro tanto* wrong), but ones which have a special kind of weight and urgency: a state which mistreats individuals by murdering and torturing them and which treats some persons as less than human commits a grave moral wrong which entitles other states to hold it to account.¹¹²

We can easily notice the link between such abstract moral truths and the human rights which were enshrined in the Universal Declaration of Human Rights (UDHR) and all the major international human rights treaties: the right not to be tortured, the right to private life, to freedom of expression, to freedom of association are elliptical expressions of these abstract moral truths. I say 'elliptical' because these documents were not drafted by moral philosophers and the wording of some of the rights enshrined therein sometimes arbitrarily restricts the scope of the respective moral

¹¹¹ That is not to say, of course, that it is not premised at all on moral principles (e.g., principles of promising which govern contract law). It is just not premised on an abstract moral right the content of which is the same as the content of the legal right. Nor do I mean to imply that legal rights are not moral rights, in the sense that it is morally justifiable to respect and enforce them.

¹¹² The idea that human rights are those moral norms the violation of which warrants some kind of intervention by other states has come to be called the 'political' conception of human rights and is attributed to John Rawls and Joseph Raz. See Raz, 'Human Rights without Foundations', in S. Besson and J. Tasioulas (eds), *The Philosophy of International Law* (2010), at ch. 15. The political conception of human rights is contrasted with the 'orthodox' conception according to which human rights are universal moral entitlements which people have by virtue of being human and which are discoverable through natural reason: see Tasioulas, 'Taking Rights out of Human Rights', forthcoming in *Ethics* (2010).

right¹¹³ (under-inclusiveness), and sometimes is so abstract as to appear to encompass liberties to which we have no moral right (over-inclusiveness).¹¹⁴ Still, there is no doubt that states which set up international mechanisms for the protection of human rights intended to give effect to the more abstract moral truths rather than to their own imperfect understanding of what these moral truths are. And the reason which makes their abstract intention morally relevant is that states are anyway – regardless of their treaty obligations – under a duty to respect these abstract moral truths and entitled to hold each other to account when they do not. The project states undertook in drafting all these human rights treaties was not one of creating new contractual obligations for themselves, as a means to pursue some further end; rather, it was a project of finding ways to strengthen moral obligations they *already* had. Unlike with obligations undertaken voluntarily by economic, commercial, or trade agreements in pursuit of states' goals, complying with the obligations human rights impose on states is an *end in itself*.

It follows from the above remarks that Strasbourg's interpretive ethic of dismissing drafters' specific intentions, of steering away from dictionary definitions and forays into linguistic analysis, and of applying a moral reading to the ECHR rights is fully justified by the object and purpose of human rights treaties. If the purpose of international human rights law is to make states accountable for the violation of some fundamental moral rights which individuals have against their government, then the purpose of human rights courts is to develop, through interpretation, a moral conception of what these fundamental rights are. It is to discover, over time and through persuasive moral argument, the moral truth about these fundamental rights. In order to fulfil this purpose, neither empirical inquiries into the consensus between states parties nor dictionary definitions are required. On the contrary, by relying on what the majorities take the rights to be, through the idea of consensus, human rights courts risk offending the very values they are there to protect: if one of the functions of human rights law is to protect people against the moralistic views of the majority then we cannot take the majority's moralistic preferences into account in defining what rights people have.

This is not to say that other moral considerations, not based on the abstract moral truths to which human rights aim to give effect, are outside the remit of human rights courts. Just as the moral reason which makes a particular method for interpreting a treaty relevant is grounded outside the text of that treaty, likewise, other moral values, such as efficiency and co-ordination, may direct a court to take into account international treaties (and practices) other than the one which it has jurisdiction to apply. On the view defended here, according to which the judge's task is to interpret how fact-independent moral values bear on states' action, it is no surprise that international courts, like Strasbourg, often look at the practices of other international

¹¹³ Consider, e.g., that in the ECHR public morals constitute a legitimate aim for limiting rights such as freedom of expression and the right to private life.

¹¹⁴ In *Hatton v. United Kingdom*, 34 (2002) EHRR 1, the ECtHR held that the liberty to sleep at night free from noise interference is part of a person's right to private life.

organizations. The 'openness' of regional instruments to other parts of international law is not a choice, a process, or a recent development. It is a necessary consequence of the fact that the adjudicative task of international courts and other bodies is one of moral evaluation, not one of textual interpretation. This kind of interpretive holism is, I think, elegantly captured in Strasbourg's motto that 'the interpretation of the Convention does not take place in a vacuum'. It is a motto which other international bodies will do well to adopt.

8 Conclusion

I have argued in this article that Strasbourg's interpretive ethic not only is fully justified by the point and purpose of human rights treaties but also unmask some general truths about the nature of treaty interpretation. Treaty interpretation is intrinsically an evaluative task in identifying the moral values which constrain the projects which states pursue on the international plane, and only derivatively an exercise in discovering drafters' intentions and in determining the meaning of treaty provisions. Given that the appropriateness of different interpretive methods depends on the nature of the treaty in question and the moral value in play, it is no exaggeration to say that there are no general methods of treaty interpretation.

To be sure, courts sometimes fail to carry out their evaluative task successfully. No doubt, there are many judgments in the history of the ECtHR the reasoning of which merits strong criticism from the point of view of the morality of human rights. There are perhaps even more judgments the outcome of which you and I disagree with, even though we agree with the Court's reasoning. Be that as it may, it would be unfair not to acknowledge that Strasbourg's interpretive ethic has made a huge contribution to a deeper understanding of matters of legal interpretation, avoiding some of the pitfalls which have bedevilled other areas of international law. International lawyers have much to learn from a close study of Strasbourg's interpretive ethic.