

Revisiting ECtHR Interpretation of the ECHR: Living Up to a Living Instrument

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FICHL Policy Brief Series No. 65 (2016)

1. The Complexity of the Interpretive Process

1.1. Current Understanding of ECtHR Interpretation of the ECHR

The European Court of Human Rights ('ECtHR' or 'the Court') has developed a unique practice when interpreting the European Convention on Human Rights ('ECHR'), involving evolutive (dynamic) interpretation,¹ autonomous interpretation,² and effective interpretation.³ A high level of scholarly attention has been devoted to how the customary rules on interpretation codified in Articles 31–33 of the 1969 Vienna Convention on the Law of Treaties ('VCLT') are applied, expanded, or deviated from, if not discarded, in the process of ECtHR interpretation of the ECHR. The literature in this regard is considerable, and still growing.

At one extreme, lies the view that the ECtHR has introduced new techniques of interpretation in its practice and jurisprudence which in fact lead to the fragmentation⁴ of interpretive rules in international law; that ECtHR has been dismissive of originalism and textualism, and has opted for the "moral reading" of the Convention rights, thus VCLT rules on interpretation play a limited role in the Court's interpretation.⁵

At the other extreme, we find the view that VCLT rules on interpretation are the starting point of interpreting the

ECHR. Its flexibility and general applicability make it an appropriate framework for the interpretation of the ECHR, amounting to "a uniform holistic approach to interpretation".⁶ An acceptable compromise says that it depends on the "position of the zoom of the lens": when zoomed out, one sees interpretive uniformity; when zoomed in, interpretive divergence emerges.⁷

1.2. Shifting Scholarly Attention to the Real World of Interpretation

The above-mentioned scholarly debate does not seek to provide guidance for the ECtHR's interpretation practice; more likely, it seeks to justify the Court's approach to interpretation with an emphatic focus on the interpretive rules. However, the ECtHR's interpretation practice is a process comprising interpreter, Convention rights being interpreted, interpretive rules, and interpretive outcomes.⁸ In the process of interpreting the ECHR, the judges of the ECtHR are not simply interpreting the Convention, they are also interpreting the facts of the case brought to them (which are usually submitted in written documents).⁹ While identifying the Convention

1 See, e.g., *Marckx v. Belgium*, Judgment, 13 June 1979 (<http://www.legal-tools.org/doc/5a5809/>).

2 See, e.g., *Engel and Others v. The Netherlands*, Judgment, 8 June 1976 (<http://www.legal-tools.org/doc/6bfadc/>).

3 See, e.g., *Airey v. Ireland*, Judgment, 9 October 1979 (<http://www.legal-tools.org/doc/492660/>).

4 Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission Finalized by Martti Koskenniemi, U.N. doc. A/CN.4/L.682, 13 April 2006.

5 George Letsas, "Strasbourg's Interpretive Ethic: Lessons for the International Lawyer", in *European Journal of International Law*, 2010, pp. 509–532.

6 Malgosia Fitzmaurice, "Interpretation of Human Rights Treaties", in Dinah Shelton (ed.), *The Oxford Handbook of International Human Rights Law*, Oxford University Press, 2013, pp. 739–771.

7 Michael Waibel, "Uniformity versus Specialisation: A Uniform Regime of Treaty Interpretation?", in Christian Tams, Antonios Tzanakopoulos and Andreas Zimmermann (eds.), *Research Handbook on the Law of Treaties*, Edward Elgar Publisher, 2014, p. 376.

8 For a similar understanding, see Andrea Bianchi, Daniel Peat, and Matthew Windsor (eds.), *Interpretation in International Law*, Oxford University Press, 2015, in which interpretation as a "game" has been analyzed by the contributors from different aspects such as "object", "players", "rules" and "strategies".

9 Kim Lane Scheppele, "Facing Facts in Legal Interpretation", in Robert Post (ed.), *Law and the Order of Culture*, University of California Press, 1991. The article discusses the issues in the US legal system, where the jury and the judges are responsible for the establishment of facts and law respectively. Nonetheless, it is still inspiring on how to bridge law and fact in a human rights court

as a living instrument that should be interpreted in light of “present-day conditions” and “the developments and commonly accepted standards”,¹⁰ they need to interpret what are the “present-day conditions” and “the developments and commonly accepted standards”.

The VCLT rules on interpretation serve as a guiding framework to interpret the Convention, but the judges are also interpreting the interpretive rules even before they apply the interpretive rules to their interpretation of the Convention rights. If each of the 17 judges sitting in a Grand Chamber has a different way of interpreting the Convention rights, the facts of the case, and the interpretive rules themselves, then the number of possible outcomes of the interpretation process could be very high. Trying to unify the interpretive process seems unrealistic. Trying to identify and clarify the interpretive rules is wishful thinking. Scholars usually research the interpretation of the ECHR by studying ECtHR judgments, in the process of which they themselves add a layer of interpretation of the judgments. Perhaps there should be some guidance for scholars on how to reinterpret the interpretation of the ECHR. The only possible and plausible way to have a relatively objective understanding of the Court’s interpretive process is to interview every judge about every case on how he or she interpreted the law, fact, and interpretive rules, and how the deliberations went. Yet again, even if the judges share their real considerations or way of thinking in their interpretation, they are reinterpreting their own thinking. It seems like a black hole of interpretation from which one can never find a way out.¹¹

Since it might be mission impossible to clarify the rules on interpretation, a more feasible way to ensure coherent interpretation is to clarify the interpretive basis and goal in order to identify the best practice in the ECtHR’s interpretation of the ECHR. The interpretive basis is of course the text of the Convention. And VCLT Articles 31–33 have also set up a basis for interpretation, at least in our interpretation it does. The task is to identify the interpretive goal, for which the role of the ECtHR in the interpretation of the ECHR needs to be revisited.

where they handle both facts and law.

10 *Tyrer v. The United Kingdom*, Judgment, 25 April 1978, para. 31 (<http://www.legal-tools.org/doc/8aa6af/>).

11 It may be asked whether “interpretation” here has not been used in a very broad sense, and whether these considerations should be eliminated from the discussion in the context of international law. However, this is the undeniable real world in which legal interpretation operates, and “[l]egal interpretation, including interpretation in International Law, is a bridge between the inherent universalism of legal rules and the infinite particularity of the everyday situations and events to which the law must be applied”, see Philip Allott, “Interpretation – An Exact Art”, in Andrea Bianchi, Daniel Peat, and Matthew Windsor (eds.), *Interpretation in International Law*, Oxford University Press, 2015, p. 392.

2. Interpretive Goal

2.1. The Role of the ECtHR in Interpreting the ECHR: Secondary versus Second-to-None

It is “an established principle that the right of giving an authoritative interpretation of a legal rule belongs solely to the person or body who has power to modify or suppress it”.¹² Since most treaties in international fora are made by states, states parties are the most important actors in treaty interpretation. Only when states agree to confer the power to interpret a treaty to a third-party, for instance, a court, can the court actually get to interpret treaties. Therefore, the role of the ECtHR in interpreting the ECHR is inevitably secondary.

On the other hand, the making of treaties and the interpretation of treaties by states are influenced by national interests and political considerations.¹³ Complex procedures on both national and international levels may be required to achieve subsequent agreement or practice between states parties to interpret (or amend) a treaty; whereas a court is more independent, has the expertise and can deal with a large number of treaty interpretations on a regular basis. Above all, the ECtHR is designed to protect human rights by mandate. In terms of their effective protection, the role of the ECtHR in the interpretation of the ECHR is second to none. By identifying its role as secondary versus second-to-none, the question then becomes how the Court can do its best in interpreting the ECHR in this limited or secondary international legal framework, theoretically speaking.

2.2. Interpretive Goal in General

In order to do its job, the ECtHR first needs to be clear on its mandate. Using the language of mathematics, the minimum mandate of the Court is towards human rights protection, which justifies its power in interpreting the ECHR and developing its distinctive interpretive methods. The VCLT plays a limited role in this respect.

The Court should also consider the rule of international law as its maximum mandate, which helps the Court avoid fragmentation and promote consistency of the Court’s jurisprudence with general international

12 *Delimitation of the Polish-Czechoslovakian Frontier (Question of Jaworzina)*, PCIJ Advisory Opinion, Series B, No. 8, 1923, para. 80 (<http://www.legal-tools.org/doc/d1d868/>).

13 Although the ECtHR also needs to take account of political realism in its interpretation, the “Court finds itself faced with cases burdened with a political, historical and factual complexity [...] the Convention [...] cannot, if it is to be coherent and meaningful, be either static or blind to concrete factual circumstances”, see *Demopoulos and Others v. Turkey*, Grand Chamber Decision, 2010, para. 85 (<http://www.legal-tools.org/doc/ace44e/>).

law.¹⁴ By the term “rule of international law”,¹⁵ I mean international law should be complied with by all subjects of international law (including international courts and tribunals) consistently, and should play the most important role in their relations. All the procedural and substantive aspects of the rule of law¹⁶ should be reflected in international law by way of constructing a better international law system. The interpretation of human rights treaties by human rights courts will make a substantive contribution to that better system. In terms of the ECtHR’s interpretive process, the interpretive goal in general can thus be identified as balancing the effectiveness of human rights protection and the coherence of the international law system.

2.3. Living Instrument as a Specific Interpretive Goal

2.3.1. Expression and Logic in ECtHR Judgments

The ‘living instrument approach’ is widely acknowledged as the unique characteristic of the ECtHR’s interpretation of the ECHR. It features prominently in debates on whether the Court’s interpretation practice undermines its legitimacy when it changes or expands the scope of fundamental rights crystallized by states through the ECHR. The expression the Court follows in its numerous judgments is that “the Convention is a living instrument which [...] must be interpreted in the light of present-day conditions”.¹⁷ From this we can see that the Court

14 The ECtHR (in particular its practice on interpretation) is often accused of threatening the unity of international law. See Judge Gilbert Guillaume, “The Proliferation of International Judicial Bodies: The Outlook for the International Legal Order”, speech to the Sixth Committee of the General Assembly of the United Nations, 27 October 2000. With the proliferation of international courts and tribunals, “an integrated approach is essential to the stability of the fragile international legal system and the justice that it is expected to disperse”, see Philippa Webb, *International Judicial Integration and Fragmentation*, Oxford University Press, 2013.

15 The common term is “international rule of law”, which basically means rule of law on the international level. Jeremy Waldron refers to “the rule of international law” and focuses on how one should think about the rule of law in the international arena, see Jeremy Waldron, “The Rule of International Law”, in *Harvard Journal of Law and Public Policy*, vol. 30, no. 1, pp. 15–30. However, since each state has its own understanding and practice of the rule of law (China, for example, made a statement presented by GUO Xiaomei at the Sixth Committee of the 67th Session of the UN General Assembly on The Rule of Law at the National and International Levels on 11 October 2012), it is difficult to even discuss rule of law on the international level. This may be one reason why Allott used “towards” in the title of his book, *Towards the International Rule of Law*, Cameron May, 2005.

16 For an in-depth study of the rule of law, see Tom Bingham, *The Rule of Law*, Penguin Books, 2011; Jeremy Waldron, “The Rule of Law and the Importance of Procedure”, in James Fleming (ed.), *Getting to the Rule of Law*, New York University Press, 2011.

17 See, for example, *Tyrer v. United Kingdom*, (Appl No. 5856/72) Judgment, 25 April 1978, Series A no. 26, at para. 31 (<http://www.legal-tools.org/doc/8aa6af/>).

has identified the ECHR *as* a living instrument, and *because* the Convention is a living instrument, it should be interpreted in the light of present-day conditions.

This is a flawed logic that has invited criticisms of the Court’s legitimacy in interpreting the ECHR. A more reasonable logic would be the following: the Convention needs to be interpreted in light of present-day conditions in order to be a living instrument. To be even more clear: to “be interpreted in the light of present-day conditions” is a necessity, while “living instrument” is an interpretive goal.

2.3.2. Is the ECHR Really a Living Instrument?

As an international human rights treaty, the ECHR is “an international agreement concluded between States in written form and governed by international law”.¹⁸ By nature and in theory, it is a frozen instrument containing what members of the Council of Europe conceive of as ‘law’, for which certainty is an intrinsic value. Were the Convention in nature a ‘living instrument’, then the articles enshrining fundamental rights and freedoms would be obsolete, put pointedly; the current Article 1 claiming that the high contracting parties respect and protect human rights would be enough for the entire Convention, since we leave the Court to interpret what are the rights and freedoms in light of present-day conditions. Apparently this is both dangerous and absurd.

The metaphor of ‘living instrument’, which is most probably inspired by the concept of “living constitution”¹⁹ in many legal traditions, simply indicates the hope of judges and academics that the Convention should be capable of development over time to meet new social and moral realities which cannot be foreseen by its framers. It has become an interpretive goal of the ECtHR which is determined by the necessity to consider present-day conditions.

2.3.3. Present-day Conditions versus States Parties’ Consent

That the ECtHR should interpret the ECHR in light of present-day conditions is a prerequisite for its minimum mandate to ensure the best protection of human rights. The Court cites present-day standards in the Council of Europe, even the existence of a trend of evolution as a present-day common standard,²⁰ in order to perform its

[legal-tools.org/doc/8aa6af/](http://www.legal-tools.org/doc/8aa6af/).

18 VCLT Article 1(a).

19 See William Rehnquist, “The Notion of a Living Constitution”, in *Texas Law Review*, 1976, vol. 54, p. 693; and Aileen Kavanagh, “The Idea of a Living Constitution”, in *Canadian Journal of Law and Jurisprudence*, 2003, vol. 16, p. 55.

20 George Letsas, “The ECHR as a Living Instrument: Its Meaning and Its Legitimacy”, in Andreas Føllesdal *et al.* (eds.), *Constituting Europe: The European Court of Human Rights in a National, European and Global Context*, Cambridge University Press, 2013.

function as “new social actors [...] that contribute to evolutions in the state of human consciousness”.²¹ Even when the Court’s interpretation of the ECHR exceeds the comfort zone of states parties, it will not compromise its commitment-based legitimacy,²² as states parties not only commit to a written Convention, but also to “abide by the final judgment of the Court” according to Article 46(1). More importantly, states parties commit to the better protection of human rights.

2.3.4. Primary Rules versus Secondary Rules

The ‘living instrument approach’ is not some unique interpretive technique challenging the VCLT rules on interpretation, but a goal which guides the Court to better apply the general interpretive rules. To separate this approach from secondary rules will help mitigate the effects of the much-described fragmentation in international law. By way of the ‘living instrument approach’ to interpretation, the ECtHR has performed its function²³ on the gradual development of primary rules in international law, which falls into the Court’s maximum mandate for the coherence of the international law system.

3. Policy Choice: Towards a Balanced System of Interpretation

By way of interpretation, the ECtHR has made a great contribution to the most developed human rights protection system to date. Yet its legitimacy has often been challenged by states parties and commentators simply because when the Court claims that the ECHR is a ‘living instrument’, it is both in nature and in fact not. The current scholarly attempts to defend the Court’s ‘living instrument approach’ has usually been based on the VCLT rules on interpretation (“object and purpose” in particular).

In view of the above-mentioned discussion, this

21 Philippe Sands, “Developments in Geopolitics – The End(s) of Judicialization”, available at <http://www.ejiltalk.org/2015-esil-annual-conference-final-lecture-developments-in-geopolitics-the-ends-of-judicialization/#more-13719>.

22 Letsas, *supra* note 20.

23 International courts and tribunals assume the function of gradual development of international law, which is determinant for the very existence of an international rule of law. See Ian G. M. Scobbie, “The Theorist as Judge: Hersch Lauterpacht’s Concept of the International Judicial Function”, in *European Journal of International Law*, 1997, vol. 8(2), pp. 264 and 270.

policy brief takes a step back and admits that the ECHR by itself is not a living instrument, but should be interpreted in light of present-day conditions so that it can live up to a living instrument. This approach guides the ECtHR on how to choose from interpretation techniques provided in the VCLT; it is not the “object and purpose” of the Convention, but rather the interpretive goal of the Court required by human rights protection and rule of international law.

The legitimacy of the Court’s interpretation of the ECHR will be reaffirmed when the Court clearly shows that it is deeply aware of its interpretive goals in performing its functions as an international human rights court, and when it adopts a balanced decoding policy for states parties and scholars on its interpretive practice as illustrated below, connecting the Convention with present-day conditions, and balancing states’ consensus with the humanization of international law.

A Balanced System of ECHR Interpretation	Authority	Legitimacy
ECHR	Certainty	Living Instrument (specific interpretive goal)
State Parties	Consensus	Commitment (general interpretive goal: human rights protection)
ECtHR	Consistency	Coherency (general interpretive goal: rule of international law)

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ISBN: 978-82-8348-044-3.

FICHL-PURL: <https://www.fichl.org/pbs/65-fan/>.

LTD-PURL: <http://www.legal-tools.org/doc/6f6d22/>.