Seminar on:
"The Contribution of the European Court of Human Rights to the Development of Public International Law"
on the margins of the 59th CAHDI meeting in Prague

Interpretation of the European Convention on Human Rights: Remarks on the Court's Approach

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May I begin my intervention by warmly thanking the organizers for inviting the Court to this important exchange of views. I would like also to convey the greetings of President Spano who kindly asked me to represent him on this occasion.

Offer an overall analysis of the interpretative tools and methods of the Court is a difficult task given my time frame. I shall therefore limit myself to share with you some thoughts concerning the so-called "living instrument doctrine" or evolutive interpretation, which seems the most interesting aspect of the Court's methodology. I shall deal first with the method as such and its acceptance in international practice (I). I shall then try to define the limits of the evolutive interpretation by reference to the case law of the European Court of Human Rights and the relevant rules of the Vienna Convention on the Law of Treaties (II). Finally, I shall refer to the use of a number of international law sources to corroborate such evolutive interpretation (III).

I. Evolutive interpretation in international law and practice

It is well known that since its formulation in the *Tyrer v. the United Kingdom* judgment,[1] the idea that "the Convention is a living instrument ... which must be interpreted in the light of present-day conditions" has spread throughout the Strasbourg case-law and has formed the basis for an interpretative approach which has enabled the Court to adapt, over time, the text of the Convention to legal, social, ethical or scientific developments. Where, explicitly or implicitly, it makes use of the "living instrument" doctrine, the Court usually emphasises at the same time the specific features of the Convention as a treaty for human rights protection.[2]

Admittedly, in the area in question the rate of such developments is frequently more rapid than in other areas of international law, which could explain the more frequent recourse to the so-called evolutive method of interpretation. It is perhaps significant that the other bodies for human rights protection – be they judicial or quasi-judicial, international or regional - also often adopt the approach in question.[3] However, as has been amply demonstrated, the evolutive method of interpretation has been used by other international and national judicial bodies, including the International Court of Justice, the arbitral tribunals, the supreme courts of France,

[1] ECtHR, *Tyrer v. the United Kingdom*, 25 April 1978, § 31, Series A no. 26.
[2] See for instance ECtHR, *Magyar Helsinki Bizottsag v. Hungary* [GC], no. 18030/11, §§ 120-122, 16 November 2016.
[3] See, purely by way of indication, the judgment of the Inter-American Court of Human Rights in *Supreme Court of Justice (Quintana Coello et al.) v. Ecuador* of 23 August 2013, § 153, on the henceforth wider interpretation of the concept of an "independent court", confirmed by the judgments in *Constitutional Tribunal (Camba Campos et al.) v. Ecuador* of 28 August 2013 and *López Lone et al. v. Honduras* of 5 October 2015).

the United Kingdom, Germany, etc.[4] In other words, although the "living instrument" doctrine has been emphasised by the Court, the resulting interpretative approach is not exclusively tied to the Convention (or to the other conventions and treaties for human rights protection). It extends far beyond this context and is part of national and international judicial practice in respect of many other areas of international law, and even of law in general.

Although the "living instrument" doctrine and the underlying evolutive method of interpretation may at first sight appear innovative, in reality – and provided that they are applied with prudence (see below) - they are in line with the presumed intention of the contracting states, which are also living entities. To borrow the phrasing of a former President of the Court, Sir Humphrey Waldock (who was also, it will be recalled, the last Special Rapporteur of the International Law Commission on the Law of Treaties):

"The meaning and content of the provisions of the Convention will be understood as intended to evolve in response to changes in legal or social concepts".[5]

This approach has been confirmed and generalised by the International Court of Justice. In the *Dispute regarding Navigational and Related Rights* the ICJ emphasised that:

"... where the parties have used generic terms in a treaty, the parties necessarily having been aware that the meaning of the terms was likely to evolve over time, and where the treaty has been entered into for a very long period or is 'of continuing duration', the parties must be presumed, as a general rule, to have intended those terms to have an evolving meaning".[6]

In other words, far from marking a departure from the parties' intention, the evolutive interpretation of a convention or treaty containing generic terms – which is the case for the European Convention on Human Rights – must be seen as reflecting, in principle, the presumed intention of the contracting states. The nature and scope of the terms used by the drafters of such a treaty, on the one hand, and its indeterminate duration, on the other, lead us to consider that, unless shown otherwise, the parties wish it to be interpreted and applied in a manner that reflects contemporary developments. This interpretative method allows the text of a convention to be continuously adapted to "present-day conditions", without the need for the treaty to be formally amended. The evolutive interpretation is intended to ensure the treaty's permanence. The "living instrument" doctrine is a condition *sine qua non* for the Convention's survival!

This approach is corroborated by the Preamble to the Convention, which refers not only to the "maintenance" but also the "further realisation of Human Rights and Fundamental Freedoms". In other words, the "founding fathers" did not conceive human rights as being static and frozen in time but, on the contrary, as dynamic and forward-looking.

Admittedly, the evolutive method of interpretation is not mentioned *expressis verbis* in Articles 31 to 33 of the Vienna Convention on the Law of Treaties. It could therefore be argued that

[4] See Bjorge E., *The Evolutionary Interpretation of Treaties*, Oxford, Oxford University Press, 2014. + Paris, Pedone, 2019.
[5] Waldock H., "The Evolution of Human Rights Concepts and the Application of the European Convention of Human Rights", in *Mélanges Paul Reuter*, Paris, Pedone, 1981, p. 547.
[6] ICJ, *Dispute regarding Navigational and Related Rights (Costa-Rica v. Nicaragua)*, judgment of 13 July 2009, ICJ *Reports* 2009, p. 213, § 66.

this method arises from a progressive development of international law.[7] The fact remains, however, that it is fully compatible with the underlying logic of the above-mentioned provisions of the Vienna Convention. It is certainly to be borne in mind that Article 31 of that convention refers, *inter alia*, to the object and purpose of the treaty, as well as to subsequent agreements, subsequent practice and any relevant rules of international law "applicable in the relations between the parties", including the instruments ratified by those parties after the conclusion of the treaty that is to be interpreted. All these elements allow for a teleological interpretation, aimed at ensuring that the treaty in question adapts to developments subsequent to its adoption, especially where it contains generic terms whose meaning is likely to evolve over time and where it was concluded for an indefinite period.

In short, the evolutive method of interpretation of the Convention (and its Protocols) reflects, in principle, the presumed intention of the parties, and it constitutes a prerequisite for the survival (at the very least) of the substantive provisions of these instruments, while remaining compatible with the relevant provisions of the Vienna Convention on the Law of Treaties. Nonetheless, it is necessary to clarify the limits of evolutive interpretation.

II. The limits of evolutive interpretation

The Court has always sought to avoid the evolutive interpretation of the Convention from being perceived, particularly by the domestic courts, as a sort of "carte blanche" allowing for excessive liberties with the text of the Convention. This ongoing concern led it to devote the "Dialogue between Judges" seminar, marking the beginning of the 2011 judicial year, to this very topic.[8]

I do not claim to summarise this rich discussion, but it seems to me that there are three limits to the evolutive interpretation: firstly, this interpretive method must not lead to an interpretation *contra legem*; secondly, the proposed interpretation must be compatible with the object and purpose of the Convention in general, and with the provision to be interpreted in particular; and, thirdly, this interpretation must reflect "present-day" conditions and not those which may prevail in the future.

A) The evolutive interpretation ought not to lead to an interpretation *contra legem*

As I stressed before, the evolutive interpretation does not overlook the parties' intention. On the contrary, it reflects their presumed intention. Yet this is a rebuttable rather than an irrebuttable presumption. For it to be confirmed, it is important that the proposed interpretation remains within the limits of the terms used by the Convention and does not directly contradict them. The evolutive interpretation may, if absolutely necessary, be *praeter legem*, but not *contra legem*.

The Court has long emphasised this limit in relation to various provisions of the Convention. Thus, for example, in the *Johnston and Others v. Ireland* judgment,[9] the Court refused to recognise that the right to marry implied the right to divorce. It noted on that occasion that "the

[7] See Sicilianos L.-A., "The Human Face of International Law – Interactions between General International Law and Human Rights: An Overview", in *Human Rights Law Journal*, 2012, nos. 1-6, pp. 1-11, p. 6.
[8] See European Court of Human Rights, *What are the limits to the evolutive interpretation of the Convention? Dialogue between Judges 2011*, Strasbourg, EuropeanCourtHR/Council of Europe, 2011.
[9] ECtHR, *Johnston and Others v. Ireland*, 18 December 1986, § 52, Series A no. 112.

ordinary meaning of the words 'right to marry' is clear, in the sense that they cover the formation of marital relationships but not their dissolution".[10] Even more clearly, in the *Pretty v. the United Kingdom* judgment[11] the Court refused to extend the wording of Article 2 of the Convention, on the right to life, in such a way as to recognise the right to die. It held on that occasion that "Article 2 cannot, without a distortion of language, be interpreted as conferring the diametrically opposite right [to the right to life], namely a right to die; nor can it create a right to self-determination in the sense of conferring on an individual the entitlement to choose death rather than life".

More generally, it is important to note that the Court, as a matter of principle, has carefully avoided interpretations *contra legem* which would represent a "distortion of [the Convention's] language".

This approach is confirmed in more recent cases. I would like to mention in this regard the GC judgment in *Magyar Helsinki Bizottsag v. Hungary*[12] in which the evolutive interpretation has been extensively discussed. This is a good case in order to analyse and illustrate the whole problematic related to the limits of evolutive interpretation.

The main issue in this case was whether to interpret Article 10 of the Convention so as to include not only the right to impart or receive information, but also the right to seek information. The reply of the Court to this question was positive. Its position was that there is nothing in this interpretation that runs counter to the text of Article 10 § 1 of the Convention. Indeed, the words "[this] right shall *include* freedom to hold opinions and to receive and impart information and ideas ..." imply that we have here an enumeration of the main aspects of the right to freedom of expression. They do not exclude the possibility of there being others. It follows that to state that Article 10 § 1 also includes the freedom to seek information amounts to supplementing the terms of this provision, without contradicting them.

B) The evolutive interpretation must be compatible with the object and purpose of the Convention

The second limit on the evolutive interpretation concerns its compatibility with the object and purpose of the Convention in general, and particularly those of the provision to be interpreted. There is no need to insist on the fact that any interpretation of a convention text must reflect its object and purpose, as emphasised in Article 31 § 1 of the Vienna Convention on the Law of Treaties. This is the "golden rule" of any interpretative approach. To thwart the object and purpose of the treaty would be to betray the parties' intention and to undermine the treaty system.

In the *Magyar Helsinki Bizottsag* case, the Court placed particular stress on this point.[13] Without wishing to repeat these arguments, it is appropriate to highlight the generic scope of the first sentence of Article 10 § 1 – "Everyone has the right to freedom of expression" – and to reiterate the fundamental importance given to this provision in all the case-law issued on this matter by the Court, which conceives this freedom as a genuine pillar of democratic government. In those circumstances, to recognise a particular aspect of freedom of expression

[10] See also ECtHR, *V.K. v. Croatia*, no. 38380/08, § 99, 27 November 2012.
[11] ECtHR, *Pretty v. the United Kingdom*, no. 2346/02, § 39, ECHR 2002-III.
[12] ECtHR, *Magyar Helsinki Bizottsag v. Hungary* [GC], no. 18030/11, 8 November 2016.
[13] Cited above, § 155.

– namely the freedom to seek information – "where access to the information is instrumental for the individual's exercise of his or her right to freedom of expression"[14] seems to me entirely compatible with the object and purpose of Article 10 and, more generally, with those of the Convention.

C) The evolutive interpretation should reflect "present-day" conditions, not those which might prevail in the future

The third limit to an evolutive interpretation is, in my opinion, of particular importance, since it represents a safeguard against the possible excesses of this interpretative method. As the Court noted in the *Tyrer* case and has since reiterated on numerous occasions, the aim of the "living instrument" doctrine is to adapt the Convention to "present-day conditions". This is why the Court usually insists on the existence of a "European consensus" or, at any rate, of a significant trend in the legislation and/or practice of the contracting states towards the chosen interpretation. Such a consensus would indicate a common acceptance of the interpretation in question, or even the existence of a regional custom at the time of delivery of the judgment. To borrow wording used elsewhere, "the point of the evolutive interpretation, as conceived by the Court, is to accompany and even channel change...; it is not to anticipate change, still less to try to impose it".[15] In other words, the interpretation adopted, while "evolutive", must be rooted in the present. Attempting to speculate on future developments would risk going beyond the judicial function.

In *Magyar Helsinki*, the Court has devoted considerable reasoning to this question[16] and it has amply demonstrated that its interpretation of Article 10 § 1 is anchored in international law and comparative law as they currently stand. Of the elements referred to by the Court, the one that strikes me as particularly important is the fact that the chosen interpretation already appeared as far back as 1966, that is, half a century ago, in the text of a binding instrument – Article 19 of the International Covenant on Civil and Political Rights - to which all of the states parties to the Convention are now contracting parties. In those circumstances, I find it difficult, if not impossible, to argue that the interpretation adopted goes beyond the above-mentioned limit of the evolutive interpretation. Moreover, although it may appear to be an "evolutive interpretation" from the point of view of the Convention, in reality it does not amount to a real innovation. This interpretation, far from creating new international obligations for the states, corresponds in substance to what the parties to the Convention have already accepted for many years in ratifying the Covenant on Civil and Political Rights.

This brings me to the third and last point of my intervention, namely the reference to other "sources of inspiration" to corroborate an evolutive interpretation.

III. References to other sources

First of all, let me mention a novelty in the structure of the Court's judgments. Until the end of last year, all judgments were divided in two parts: the Facts, the Law. In the first part the Court was mentioning a number of sources, including international law and practice. I personally insisted on different occasions that it was strange for an international Court to consider

[14] *Ibid.*, § 156.
[15] See ECtHR, *X and Others v. Austria* [GC], no. 19010/07, ECHR 2013, joint partly dissenting opinion of judges Casadevall, Ziemele, Kovler, Jociené, Sikuta, De Gaetano and Sicilianos, § 23.
[16] ECtHR, *Magyar Helsinki Bizottsag*, cited above, § 138-148.

international law as "a fact". Since last year, and on the basis of a report by the Committee on working methods, adopted by the Plenary, the judgments of the Court are structured in three parts: "the Facts", the "relevant legal framework", "the Law" (meaning the analysis under the Convention). In the "relevant legal framework" the Court mentions domestic law and if appropriate international law and practice, EU law, as well as comparative law.

A) Comparative law research: establishing subsequent state practice

Comparative law research is extremely important in order to have the complete picture of state practice on a given issue, both legislative and jurisprudential. It is on the basis of such research that we can safely say that there is a so-called "European consensus" or not. As you know, according to the Court's methodology, if there is such consensus the margin of appreciation of states becomes narrower. If there is no consensus and the practice of the contracting parties differ, then the Court is prepared to admit that state authorities have a broad margin of appreciation to regulate and rule on a given issue. The comparative law research is done within the Directorate of the Jurisconsult of the Court. Since a year or so, national supreme courts are systematically invited to contribute to this research through the Supreme Courts Network. The methodology of such research has been streamlined so as to elicit comparable data. To use the terminology of the Vienna Convention on the Law of Treaties, through this comparative research the Court examines whether it exists a "subsequent practice" in the application of the convention "which establishes the agreement of the parties regarding its interpretation" (article 31, para. 3 b) of the VCLT).

To give just an example of a case where the comparative law research has played a significant role, I would mention the GC judgment in *Valianatos v. Greece*[17], concerning exclusion of same-sex couples from "civil unions". According to the comparative analysis, out of the 21 contracting parties who provide for a "civil union" only one does not extend such union to same-sex couples. This means two things: first, that there is no consensus as to the very institution of a "civil union". Therefore, states have a broad margin of appreciation to provide or not to provide for such a union in their domestic law. However, once a given state takes the decision to introduce a civil union into its domestic law - as did Greece, in our example – then there is a "consensus" that such union should be open to same-sex couples. Based on this finding, the Court found by a broad majority (16 to 1) a violation of Article 14 of the Convention (prohibition of discrimination) in conjunction of Article 8 of the Convention (right for respect for private life). I believe that we can safely say that this is another example of "evolutive interpretation", respecting the conditions I mentioned before.

May I also observe that when it appears from the comparative research that there is no consensus on a given issue, the Court generally refrains from evolutive interpretation. I would mention in this respect the very recent GC judgment in *Mugemangango v. Belgium*, concerning *inter alia* the question whether there should be a judicial review of alleged irregularities of an electoral process. The GC found that out of the 38 contracting states examined 32 have a judicial remedy, but the others do not. In such circumstances, the Court affirmed the guarantees of a fair, objective and reasoned decision during the post-electoral phase. It refrained, however,

[17] ECtHR, *Vallianatos and Others v. Greece* [GC], nos. 29381/09 and 32684/09, 7 November 2013.

from saying that providing for a judicial remedy is a strict obligation under Article 3 of Protocol 1 to the Convention.[18]

Generally speaking, comparative research is an almost standard practice in GC cases. The Court is continuously refining its methodology in order to accurately depict the practice of states on a given issue and to take an informed decision in the interpretation of the Convention.

B) Detecting "any relevant rules of international law"

Another important characteristic of the Court's methodology is the reference to various international law sources in an effort to detect "any relevant rules of international law applicable in the relations between the parties" according to Article 31 para. 3 c) of the Vienna Convention on the Law of Treaties. As I have tried to demonstrate in another study,[19] the Court has cultivated a dialogue with other international bodies, jurisdictional and quasi-jurisdictional. Such dialogue tends to become richer and richer during last years. It is also diversified. One can find references to the judgments of the International Court of Justice, for instance when our Court applies the rules pertaining to jurisdictional immunities[20] or when it comes to the application of international humanitarian law (as in the case of *Hassan v. the United Kingdom*[21]). Quite frequently, the Court cites the Inter-American Court of Human Rights, the Human Rights Committee or indeed other UN or regional human rights treaty bodies. Such references concern a broad range of substantive articles of the ECHR. They are often used to support an evolutive interpretation, but in some cases they may also be used to restrict rights.

Even more importantly, the Court often cites other international instruments binding upon the respondent state, thereby taking them into account when interpreting the Convention. The examples are numerous. I would like to mention just one series of cases related to human trafficking. Since the *Siliadin v. France*[22] case up until the very recent unanimous GC judgment in *S.M. v. Croatia*[23] the Court has repeatedly affirmed that trafficking of human beings falls under the scope of Article 4 of the ECHR, prohibiting slavery, servitude and forced labour. In order to make this step extending the scope of application of Article 4, the Court has invoked the EU Charter of Fundamental Rights which prohibits trafficking in human beings as a new form of slavery and forced labour. It has also invoked the Palermo Protocol as well as the Anti-trafficking Convention of the Council of Europe. In other words, the Court was on solid legal ground when finding that Article 4 was applicable to different forms of human trafficking.

[18] ECtHR, *Mugemangango v. Belgium* [GC], no. 310/15, §§ 40-47, 115 ff., 10 July 2020. For another recent example of an extensive comparative research, see ECtHR, *Advisory Opinion concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother* (Request no. P16-2018-001), §§ 22-24, 10 April 2019.

[19] See Sicilianos L.-A., « Le dialogue entre la Cour européenne des droits de l'homme et les autres organes internationaux, juridictionnels et quasi-juridictionnels », dans Sicilianos L.-A., Motoc I., Spano R., Chenal R. (eds), *Intersecting views on National and International Human Rights Protection. Essays in Honour of Guido Raimondi*, Wolf Legal Publishers 2019, pp. 871-893.

[20] ECtHR, *Jones and Others v. the United Kingdom*, nos. 34356/06 40528/06 34356/06 40528/06, 14 January 2014.

[21] ECtHR, *Hassan v. the United Kingdom*, no. 29750/09, 16 September 2014.

[22] ECtHR, *Siliadin v. France*, no. 73316/01, 26 July 2005.

[23] ECtHR, *S.M. v. Croatia* [GC], no. 60561/14, 25 June 2020. See also, among others, ECtHR, *Chowdurry v. Greece*, no. 21884/15, 30 March 2017.

Concluding remarks

By way of conclusion, I would say: 1) that the evolutive interpretation is widely accepted, nowadays, as an interpretative method reflecting the presumed will of the contracting parties; 2) that such method has its limits: evolutive interpretation cannot be *contra legem*, it has to be in conformity with the object and purpose of the Convention; and 3) it is confined to reflect present day conditions, not future ones. The Court continuously refines its methodology in order to establish "European consensus" as a form of "subsequent state practice". It does so with a view to take an informed and solidly motivated decision to go for an evolutive interpretation or not. In the same vein, the Court streamlines its dialogue with other international bodies; carefully selects the "relevant rules of international law"; and has recently changed the structure of its judgments in order to better highlight the various elements of international law and practice taken into account when interpreting the Convention.