COUNCIL OF EUROPE CONSEIL DE L'EUROPE

DH-SYSC-II(2018)14

18/07/2018

STEERING COMMITTEE FOR HUMAN RIGHTS
(CDDH)

_____

COMMITTEE OF EXPERTS ON THE SYSTEM OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS
(DH-SYSC)

_____

DRAFTING GROUP ON THE PLACE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS IN THE EUROPEAN AND INTERNATIONAL LEGAL ORDER (DH-SYSC-II)

_____

Draft chapter of Theme 1, subtheme i):

Methodology of interpretation by the European Court of Human Rights and its approach to international law

(as written by co-Rapporteurs Mr Alexei ISPOLINOV and Mr Chanaka WICKREMASINGHE in view of the 4th DH-SYSC-II meeting, 25-28 September 2018)

SYSC II Theme 1 subtheme (i)

Interpretation of the European convention and international law

1. Definitions

Legal interpretation as an act of attributing and then communicating meaning of a word or group of words or sentences in a legal text.

Treaty interpretation is the activity of giving meaning to a treaty or provisions of a treaty
Authentic interpretation is interpretation given by the law-maker or treaty – makers (parties to the treaty)

Authoritative treaty interpretation is a process of attributing meaning of the treaty provisions by an entity authorized for that purpose by the parties of the treaty. According to well-known words of the Permanent Court of International Justice, «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 the power to modify or suppress it." (Question of Jaworzina, Advisory Opinion of 6 December 1923, PCIJ Series B, No. 8, at 37)

Judicial interpretation is an activity through which international courts give meaning to a treaty in the context of a particular case.

2. The rules of interpretation have been codified in the Vienna Convention on the law of treaties (VCLT) of 1969.

The VCLT contains three articles on the interpretation of international treaties.

«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, 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".

In another words the approach offered by the VCLT looks like follows. Firstly the interpreter shall firstly try to interpret the provisions of the treaties in "good faith," in accordance with the "ordinary meaning" of the "terms" or text of the treaty, in their "context," and in light of the treaty's "object and purpose." Secondly the "preparatory work of the treaty and the circumstances of its conclusion" are only secondary sources of interpretation to confirm meaning deduced by the interpreter or in case the meaning of the treaty remains unclear or leads to an absurd result.

Article 33. Interpretation of treaties authenticated in two or more languages
1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.
2. A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.
3. The terms of the treaty are presumed to have the same meaning in each authentic text.
4. Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.

3. Legal status of the VCLT rules of interpretation

Firstly, it should be noted that strictly speaking the VCLT applies only to the treaties concluded between states (bilateral; or multilateral).

Secondly, the VCLT applies only to treaties, which are concluded by States after the entry into force of the present Convention with regard such States (art 4 of the VCLT).

According to the ICJ approach Vienna Convention's rules of interpretation could be applicable even in a dispute where one or even disputants are not parties to the VCLT (ICJ Case concerning *Kasikili/Sedudu Island (Botswana/Namibia),* Decision of 13 December 1999, para. 18.) 'inasmuch as it reflects customary international law'. In the same vein, the ECtHR applies the VCLT rules of interpretation to the European Convention in spite of the fact that the Convention had been signed and came into force before the VCLT.

Other international courts and tribunals have also acknowledged the customary character of these rules - the International Tribunal for the Law of the Sea, the Appellate Body of the WTO, the Inter-American Court of Human Rights, the Court of Justice of the European Union, and tribunals established by the International Centre for Settlement of Investment Disputes. The Vienna Convention rules apply, as a matter of in principle, to all international courts and tribunals, irrespective of their institutional set-up, competence and or geographical location.

It should be noted that the VCLT does not make any distinction between human rights treaties and other international treaties, being equally applicable to all international treaties.

At the same time, the VCLT does not provide any guidance on how these rules of interpretation (recourse to the text, context and object and purpose of the treaty) shall be applied in order to achieve a sufficient result - separately or cumulatively, in what order – as listed on the VCLT or at discretion of the interpreter. The VCLT remains silent about any hierarchical structure between the elements of the General Rule, the binding force of the rules (some prominent commentators even suggest that these rules are not binding) and their exhaustive character. This may leave some room for discussion about the existence of other principles of interpretation, and perhaps too about even a degree of freedom for courts and tribunals to prioritize different interpretative methods or to avoid to use the rules of the VCLT and to develop their own rules of interpretation.

As a result, the courts and tribunals will have potentially three general approaches to interpretation: the textual approach concentrating on deducing the meaning of the text from its language; the historical approach aiming to find the intentions of the drafters; and the teleological approach interpreting the text in accordance with the goals of the treaty. Divergence in the practical application of these approaches to treaty interpretation of different courts and tribunals has been already discovered in the academic literature.

4. The VCLT rules of interpretation in the jurisprudence of the ECtHR.

Under the terms of Article 32 of the Convention, the Court's jurisdiction extends to all matters concerning the interpretation and application of the Convention and the protocols thereto. In spite of the fact that the Convention empowers the Court with the right to interpret the provisions of the Convention, the Convention itself provides no guidance on how the Court should do it. From the perspective of public international law and having in mind, that the Convention is a multilateral international treaty it might be presumed that its interpretation shall be made in accordance with the VCLT rules of interpretation as reflecting customary international law.

It should be borne in mind that an important feature of the Convention's rights is that most of the provisions of the Convention were deliberately drafted in a very abstract form, and their application in a concrete case before the Court will necessarily require a process of interpretation.

The ECtHR expressly relies upon the VCLT rules of interpretation in construing the substantive rights of the Convention and its provisions concerning the Court's competences and jurisdiction. In terms of the frequency of the use by the Court of the VCLT rules, it should be mentioned that:

1) According to the calculations made by one commentator, by 2010 the VCLT has been cited in no more than 60 out of more than 10,000 judgments delivered by the Court [1]
2) as noted in the academic literature the Court its earlier years seems to be more inclined to refer to the VCLT rules than more recently.[2]

[1] G. Letsas, Strasbourg's Interpretive Ethic: Lessons for the International Lawyer // European Journal of international law, 2010 vol 21 No. 3, 509–541

[2]

In its *Golder* judgment of 1975, the Court noted that:

“34 That Convention (VCLT) has not yet entered into force and it specifies, at Article 4, that it will not be retroactive, but its Articles 31 to 33 enunciate in essence generally accepted principles of international law to which the Court has already referred on occasion. In this respect, for the interpretation of the European Convention **account is to be taken of those Articles** subject, where appropriate, to "any relevant rules of the organization" - the Council of Europe - within which it has been adopted (Article 5 of the Vienna Convention).

a) The object and purpose of the Convention.

In setting out the aims of its interpretive approach, the Court has constantly relied on the special purpose and character of the Convention as a human rights treaty and its preamble, which indicates such aims.

In the *Golder* judgment, the Court held that “as stated in Article 31 para. 2 of the Vienna Convention, the preamble to a treaty forms an integral part of the context. Furthermore, the preamble is generally very useful for the determination of the "object" and "purpose" of the instrument to be construed”.

Looking at the Convention as a treaty distinct from other international treaties, the Court observed in the *Ireland v. the United Kingdom* judgment (1978)

> **"Unlike international treaties of the classic kind**, the Convention comprises more than mere reciprocal engagements between Contracting States. It creates, over and above a network of mutual, bilateral undertakings, objective obligations which, in the words of the Preamble benefit from a 'collective enforcement'."

In the *Soering* case the Court turned to the special character of the Convention:

> “87. In interpreting the Convention regard must be had to its special character as a treaty for the collective enforcement of human rights and fundamental freedoms. Thus, the object and purpose of the Convention as an instrument for the protection of individual human beings require that its provisions be interpreted and applied so as to make its safeguards practical and effective “.

In another judgment the Court relied on the “general spirit of the Convention” finding that “any interpretation of the rights and freedoms guaranteed has to be consistent with "the general spirit of the Convention, an instrument designed to maintain and promote the ideals and values of a democratic society" (*Kjeldsen, Busk Madsen and Pedersen* judgment of 7 December 1976).

b) *Travaux préparatoires* (preparatory works) and the intentions of the drafters in jurisprudence of the ECHR

The Court has on various occasions invoked the *travaux préparatoires* of the Convention but never admitting that it did so because “the meaning of the treaty remains unclear or leads to an absurd result” as mentioned in the art 32 of the VCLT.

In its *Johnston and Others v Ireland* (1986) the Court invoked the intentions of the drafters of the Convention (referring to the Collected Edition of the *Travaux préparatoires*) when giving a restrictive reading of art 12 of the Convention:

> "52…..the *travaux préparatoires* disclose no intention to include in Article 12 (art. 12) any guarantee of a right to have the ties of marriage dissolved by divorce".

The decision of the Court in case *Bancović and Others v Belgium and Others* presents one of the recent and vivid examples of "internationalist" approach in the ECHR jurisprudence. Interpreting art 1 of the Convention the Court held that:

> "In any event, the extracts from the travaux préparatoires detailed above constitute a clear indication of the intended meaning of Article 1 of the Convention, which cannot be ignored. The Court would emphasize that it is not interpreting Article 1 "solely" in accordance with the travaux préparatoires or finding those travaux "decisive"; rather this preparatory material constitutes clear confirmatory evidence of the ordinary meaning of Article 1 of the Convention as already identified by the Court (Article 32 of the Vienna Convention 1969)."

In its judgment in the case of *Sejdić and Finci v. Bosnia and Herzegovina* (2015), the Court referred to the preparatory work of the drafters of the Convention and its Protocols:

> "the *travaux préparatoires* demonstrate (vol. VIII, pp. 46, 50 and 52) that the Contracting Parties took into account the particular position of certain parliaments which included non-elective chambers"

In same vein in the *Hirshi Jamaaa* judgment (2012) the Court used the *travaux préparatoires* of the Convention saying:

> "174. The *travaux préparatoires* are not explicit as regards the scope of application and ambit of Article 4 of Protocol No. 4. In any event, the Explanatory Report to Protocol No. 4, drawn up in 1963, reveals that as far as the Committee of Experts was concerned the purpose of Article 4 was to formally prohibit "collective expulsions of aliens of the kind which was a matter of recent history".

In its *Sitaropoulos and Giakoumopoulos v. Greece* judgment (2012) the Court again invoked the *travaux préparatoires* as well as the general context of the Convention in order to interpret art 3 of Protocol No 1 of the Convection:

> 63…However, having regard to the *travaux préparatoires* of Article 3 of Protocol No. 1 and the interpretation of the provision in the context of the Convention as a whole, the Court has held that it also individual rights, including the right to vote and the right to stand for election"

However, on numerous occasions the Court has held that that it cannot rely exclusively on the intention of parties of the Convention deducing the meaning of certain terms. As mentioned by the Court in its *Loizidou* judgment (1995) "**these provisions cannot be interpreted solely in accordance with the intentions of their authors as expressed more than forty years ago** (*Loizidou v. Turkey* (preliminary objections)).

c) "any relevant rules of international law applicable in the relations between the parties"

In relation to the practical use by the Court for the purpose of interpretation of any relevant rules of international law, it is worth noting that on different occasions the Court has expressly mentioned that the Convention " has to be interpreted in the light of the rules set out in the Vienna Convention of 23 May 1969 on the Law of Treaties, Article 31 § 3 (c) of which indicates that account is to be taken of "any relevant rules of international law applicable in the relations between the parties".

According to the Court, the Convention should so far as possible be interpreted in harmony with other rules of international law of which it forms part (*Al Adsani* Judgment (2001) para. 55). In this case the Court referred to "other areas of public international law" as witnessing a growing recognition of the overriding importance of the prohibition of torture. The Court referred to the Article 5 of the Universal Declaration of Human Rights and Article 7 of the International Covenant on Civil and Political Rights as well as jurisprudence of other international courts and tribunals.

On another occasion, the Court has held that Article 2 of the Convention should "be interpreted in so far as possible in light of the general principles of international law, including the rules of international humanitarian law which play an indispensable and universally-accepted role in mitigating the savagery and inhumanity of armed conflict" (*Varnava and Others v Turkey*, 2009)

Similarly in its *Hassan v. United Kingdom* judgment (2014) the Court held that:

> "102. Turning to the criterion contained in Article 31 § 3(c) of the Vienna Convention (see paragraph 34 above), the Court has made it clear on many occasions that **the Convention must be interpreted in harmony with other rules of international law of which it forms part** (see paragraph 77 above). This applies no less to international humanitarian law. The four Geneva Conventions of 1949, intended to mitigate the horrors of war, were drafted in parallel to the European Convention on Human Rights and enjoy universal ratification."

In its judgement in case *Sabeh El Leil v. France* (2011) the Court held that:

> "The Court must therefore be mindful of the Convention's special character as a human rights treaty, and it must also take the relevant rules of international law into account".

In that case it considered the generally recognized rules of public international law on State immunity and the Convention on Jurisdictional Immunities of States and their Property 2004).

References to the case law of the ICJ

In its *Hassan* judgment the ECHR pronounced that the Court must endeavor to interpret and apply the Convention **in a manner which is consistent with the framework under international law delineated by the International Court of Justice**. In this case the Court referred to the ICJ judgment in case of *Armed Activities on the Territory of the Congo (DRC v Uganda)* and ICJ Advisory Opinion on *The Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*.

However in Loizidou judgment (preliminary objection) the Court noted that:

> "84…the context within which the International Court of Justice operates is quite distinct from that of the Convention institutions. The International Court is called on inter alia to examine any legal dispute between States that might occur in any part of the globe with reference to principles of international law. The subject matter of a dispute may relate to any area of international law. In the second place, unlike the Convention institutions, the role of the International Court is not exclusively limited to direct supervisory functions in respect of a law-making treaty such as the Convention.

> 85. Such a fundamental difference in the role and purpose of the respective tribunals, coupled with the existence of a practice of unconditional acceptance under Articles 25 and 46 (art. 25, art. 46), provides a compelling basis for distinguishing Convention practice from that of the International Court.

In the case of *Mamatkulov and Askarov v. Turkey* (2005) the Court stating that "account must be taken of "any relevant rules of international law applicable in the relations between the parties», referred to practice of other bodies on applications for interim measures, including the ICJ (citing extensively its *LaGrand* judgment) , Human Rights Committee of the United Nations, the United Nations Committee against Torture and the Inter-American Court of Human Rights.

ECHR jurisprudence in connection to art 33 of the VCLT.

Due to the fact Convention was signed in English and French, both texts being equally authentic, the Court inevitably faces cases where the meaning of the words or terms in French version differ from the wording in English.

In its *Sunday Times* judgment the Court examined the difference between English "prescibed by the law" and French "prévues par la loi". The Court invoking art 33 para. 4 of the VCLT held that:

> "Thus confronted with versions of a law-making treaty which are equally authentic but not exactly the same, the Court must interpret them in a way that reconciles them as far as possible and is most appropriate in order to realize the aim and achieve the object of the treaty".

It its *James and Others v. the United Kingdom* the Court facing the necessity to reconcile the meaning of the English expression "in the public interest" and French "pour cause d'utilité publicque" also referred to the art 32 of the VCLT and thus paid regard to the to the object and purpose of Article 1 of the Protocol No1.

The Court explicitly invoked to the art 33 of the VCLT and relevant case law of the ICJ as well as a drafting history of the Convention in its *Stoll* judgment (2007) examining the difference in the wording of Article 10(2) of the ECHR in French and English languages.

> "59. The Court does not subscribe to such an interpretation, which it considers unduly restrictive. Given the existence of two texts which, although equally authentic, are not in complete harmony, it deems it appropriate to refer to Article 33 of the 1969 Vienna Convention on the Law of Treaties, the fourth paragraph of which reflects international customary law in relation to the interpretation of treaties authenticated in two or more languages (see the *LaGrand* case, International Court of Justice, 27 June 2001, I.C.J. Reports 2001, § 101)[3]
>
> 60. Under paragraph 3 of Article 33, "the terms of the treaty are presumed to have the same meaning in each authentic text". Paragraph 4 states that when a comparison of the authentic texts discloses a difference of meaning which the application of Articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, is to be adopted.
>
> 61. The Court accepts that clauses, which allow interference with Convention rights, must be interpreted restrictively. Nevertheless, in the light of paragraph 3 of Article 33

[3] In its *LaGrand* judgment ICJ recognized that Article 33(4) VCLT reflected customary international law in relation to the interpretation of treaties authenticated in two or more languages

> of the Vienna Convention, and in the absence of any indication to the contrary in **the drafting history of Article 10**, the Court considers it appropriate to adopt an interpretation of the phrase "preventing the disclosure of information received in confidence" which encompasses confidential information disclosed either by a person subject to a duty of confidence or by a third party and, in particular, as in the present case, by a journalist."

"Subsequent agreement" and "subsequent practice' in the jurisprudence of the ECHR.

The subsequent practice of the States Parties to the Convention plays a very important role in the Court interpretative approach to the Convention. The Court relied on and referred into the subsequent practice in two ways:

1) as a confirmation of the existence of tacit agreement between the States Parties to the Convention regarding interpretation or modification of certain provisions of the Convention and

2) as one of the confirmation of the "European consensus" which according to the Court emerged in course of implementation of the rights under the Convention

Confirmation of the existence of agreement between the States Parties

The ECHR held in *Loizidou v. Turkey* that its interpretation was "confirmed by the subsequent practice of the Contracting Parties", i.e. "the evidence of a practice denoting practically universal agreement amongst Contracting Parties that Articles 25 and 46 (...) of the Convention do not permit territorial or substantive restrictions".

The string of cases starting from *Soering* is also a remarkable example of the jurisprudence of the Court showing how Court invoked the subsequent practice. In these cases, the Court referred to subsequent practice in national penal policy, in the form of a generalized abolition of capital punishment, stating that it could be taken as establishing the agreement of the Contracting States to abrogate the exception provided for under Article 2 § 1 (art. 2-1) (Soering para. 103).

In its *Al-Saadoon and Mufdhi v. United Kingdom* judgment (2010) that Court came to the conclusion that the number of States prohibiting death penalty taken together with "consistent State practice in observing the moratorium on capital punishment, are strongly indicative that Article 2 has been amended so as to prohibit the death penalty in all circumstances" (para 120).

In its judgment in the case of *Cruz Veras and others v. Sweden* (1991) the Court took more cautious approach noting that:

> "Subsequent practice could be taken as establishing the agreement of Contracting States regarding the interpretation of a Convention provision (see… Article 31 § 3 (b) of the Vienna Convention of 23 May 1969 on the Law of Treaties) but not to create new rights and obligations which were not included in the Convention at the outset."

It is important to note that the Court often **referred to the subsequent practice of not all but only some of the States Parties of the Convention, even on occasion considering contrary practice, of a relatively small number of States.**

In its recent *Hassan v. UK* judgment the Court again confirms this approach stating:

> "101. There has been no subsequent agreement between the High Contracting Parties as to the interpretation of Article 5 in situations of international armed conflict. However, in respect of the criterion set out in Article 31 § 3(b) of the Vienna Convention (see paragraph 34 above), the Court has previously stated that **a consistent practice on the part of the High Contracting Parties, subsequent to their ratification of the Convention,** could be taken as establishing their agreement not only as regards interpretation but even to modify the text of the Convention".

The Court's approach could be compared with views of the International Law Commission and other international courts and tribunals.

As the ILC explains in the Commentaries to its original draft of the VCLT, subsequent practice requires that **all of the parties to a treaty, not just some of them**, act in such a way as to evidence their agreement on the interpretation.

The ICJ in its *Namibia* and *Wall* Advisory Opinions considered subsequent practice as tacit consent of the UN members through acquiescence, presuming the absence of direct and repeated objections.

The WTO Appellate Body acknowledged in the *EC—Chicken Cuts* report that "not each and every party must have engaged in a particular practice for it to qualify as a 'common' and 'concordant' practice", requiring active participation in subsequent practice of the **majority of WTO members** complimented by the **tacit acquiescence of the remaining** part of WTO membership.

At the same time the WTO Appellate Body seems not ready to accept for the purpose of interpretation as a sufficient subsequent practice the conduct of even a significant majority of the parties of WTO **where there is contrary practice by a small portion of WTO member states** (EC—Computer Equipment, WT/DS62/AB/R, p.p. 92—93).

The VCLT rules are now mainly invoked by the Court (ECtHR) in cases when it refers to other treaties or instruments of international law, or general principles of international law, citing Article 31(3) VCLT and seeking to find a support to its intention to depart from the Court previous case law. For instance, in the *Scoppola v Italy (No 2)* judgment (2009) the Court was willing to depart from its 40-years practice towards *lex mitior* (retrospective application of a law providing for a more lenient penalty enacted after the commission of the relevant criminal offence) noted that "during that time there have been important developments internationally" referring then to the corresponding provision of the American Convention on Human Rights, the EU Charter of Fundamental Rights and the case law of the CJEU, the statute of the International Criminal Court and the case-law of the ICTY.

Methods of interpretation developed by the ECHR.

Starting from 1970s, the Court has gradually developed its own doctrines of interpretation which are not explicitly mentioned, listed or derived from the VCLT rules of interpretation. The doctrine of autonomous concept had been formulated by the Court in its *Engel* judgment in 1976, the 'living instrument' concept appeared in the *Tyrer* judgment in 1978. The main idea laying behind these innovations is to maintain is aptly illustrated in the *Scoppola (2)* judgement:

> "It is of crucial importance that the Convention is **interpreted and applied** in a manner which renders its rights **practical and effective**, not theoretical and illusory. A failure by the Court to maintain a **dynamic and evolutive approach would risk rendering it a bar to reform or improvement" (emphasis added).**

In its *Johnston* judgment the Court stipulated the limits of the evolutionary interpretation as follows:

> It is true that the Convention and its Protocols must be interpreted in the light of present-day conditions… However, the Court cannot, by means of an evolutive interpretation, derive from these instruments a right that was not included therein at the outset. "

It could be argued that the special object and purpose the Convention might justify the Court's evolutive approach to the Convention, enabling it into account the changing conditions in the respondent State and in the States Parties to the Convention in general and to respond to any emerging consensus as to the standards to be achieved. The same could be said of the Court's emphasis on making rights practical and effective. However it is noticeable that in developing these concepts the Court has not expressly sought to derive them from or otherwise to invoke the VCLT rules of interpretation.

Conclusions.

1. The Court consistently held that the Convention is a part of international public law and thus that is should be interpreted in accordance with the VCLT rules of interpretation.

2. The Court showed no intention to prioritize any interpretative methods provided by the VCLT rules of interpretation, invoking them on a case by case basis depending on the circumstances of the case.

3. It seems that the Court placed the use of preparatory works of the drafters of the Convention on an equal footing with methods of interpretation provided by art 31 of the Convention instead of treating them as supplementary means of interpretation.

4. The reliance that the Court has placed on other rules of international law varies in the caselaw. In some cases the Court repeatedly relied on other norms of international law and jurisprudence of other international courts and tribunals (mainly the ICJ) willing to enhance the acceptance and legitimacy of its conclusions. In other instances the Court explicitly invoked then specific nature of the Convention as a human rights treaty in order to refuse to take in to account the other norms of international law and the caselaw of international account and tribunals.

5. The Court has referred to the subsequent practice of the States Parties to the Convention as a sign of tacit modernization or even amendments of the provisions of the Convention by the States. The use of subsequent practice of the some only of the States Parties to the Convention as a confirmation of the European consensus remains one of the disputable feature of the ECHR interpretative approach nowadays. Such an approach raises questions about the fundamentally consensual nature of State obligations, which apply as much to obligations arising under the Convention as other treaties governed by public international law.

6. In addition to the VCLT rules of interpretation the Court has developed its own concepts of the interpretation of the Conventions without reference to the VCLT,

although it raises the questions of whether: (a) they accord with the VCLT, perhaps as concepts derived from the object and purpose of the Convention; and (b) such developments have been accepted and endorsed by the States Parties to the Convention.