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STEERING COMMITTEE FOR HUMAN RIGHTS
(CDDH)

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

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

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Chapter of Theme 1, subtheme i):

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

Preliminary Note

1. The present text is to be part of the future report of the CDDH on "The place of the European Convention on Human Rights in the European and international legal order". It constitutes the first sub-chapter of part / theme 1 of that future report, which addresses "The challenge of the interaction between the Convention and other branches of international law, including international customary law".

2. The text has been drafted by the co-Rapporteurs Mr Alexei ISPOLINOV (Russian Federation) and Mr Chanaka WICKREMASINGHE (United Kingdom). It has been revised and provisionally adopted by the DH-SYSC-II at its 4th meeting, 25-28 September 2018. Provisional adoption means that the Group has examined the text of the draft chapter paragraph by paragraph and made amendments, both on the content and on the form of the text. The text may be updated in case the European Court of Human Rights delivers new important judgments prior to the final adoption of the entire future report in 2019, in order to harmonise the entire text of the future report and to take into account possible orientations given by the CDDH.

3. The DH-SYSC-II further decided that §§ 29 and 35 of the present text shall be consolidated at the occasion of the final adoption of the future report.

METHODOLOGY OF INTERPRETATION BY THE EUROPEAN COURT OF HUMAN RIGHTS AND ITS APPROACH TO INTERNATIONAL LAW

INTRODUCTION

1. The object of the present chapter is to analyse the way in which the European Court of Human Rights (the ECtHR / the Court) interpreted the European Convention on Human Rights (ECHR) and compare this with the rules of international law on treaty interpretation, notably contained in the Vienna Convention on the law of treaties (VCLT).

2. For the sake of clarity, it may be helpful to keep in mind the following definitions:

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

4. **Treaty interpretation** is the activity of giving meaning to a treaty or provisions of a treaty.

5. **Authentic interpretation** is the interpretation given by the law-maker or treaty – makers (parties to the treaty).

6. **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,[1] "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).

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

A. THE VIENNA CONVENTION ON THE LAW OF TREATIES

1. Vienna Convention on the law of treaties

8. 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;

[1] The Permanent Court of International Justice was subsequently replaced by the International Court of Justice.

(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.

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."

9. In other words the approach offered by the VCLT requires the following. Firstly the interpreter shall 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 provides that in principle all authentic language versions of a treaty shall be equally authoritative.

2. Legal status of Articles 31 to 33 of the VCLT

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

11. Secondly, as Article 4 of the VCLT states, "[w]ithout prejudice to the application of any rules set forth in the present Convention to which treaties would be subject under international law independently of the Convention, the Convention applies only to treaties

which are concluded by States after the entry into force of the present Convention with regard to such States."

12. According to the ICJ approach the Vienna Convention's rules of interpretation could be applicable even in a dispute where one or even both 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 ECHR in spite of the fact that the ECHR had been signed and came into force before the VCLT.

13. 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 principle, to all international courts and tribunals, irrespective of their institutional set-up, competence 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.

14. 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 and their exhaustive character. This may leave some room for discussion about the weight to be given to the different elements of the VCLT rules and some degree of leeway for the courts and tribunals to prioritise between them.

B. THE EUROPEAN COURT OF HUMAN RIGHTS' PERSPECTIVE

1. The reception of the VCLT (*Golder* judgment)

15. Under the terms of Article 32 of the ECHR, the Court's jurisdiction extends to all matters concerning the interpretation and application of the ECHR and the protocols thereto. In spite of the fact that the ECHR provides the Court with the right to interpret the provisions of the ECHR, the ECHR itself provides no guidance on how the Court should do it. From the perspective of public international law and having in mind that the ECHR 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.

16. It should be borne in mind that an important feature of the ECHR's rights is that most of the provisions of the ECHR 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.

17. The ECtHR expressly relies upon the VCLT rules of interpretation in construing the substantive rights of the ECHR and its provisions concerning the Court's competences and jurisdiction. In terms of the frequency of the reference by the Court to 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;[2]
2) As noted in the academic literature the Court in its earlier years seems to be more inclined to refer to the VCLT rules than more recently.[3]

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

> "29. 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)."

2. The VCLT's rules of interpretation in the jurisprudence of the ECtHR

(a) Object and purpose of the ECHR (Article 31 § 1 VCLT)

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

20. 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".

21. Looking at the ECHR 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'."

22. In the *Soering* case the Court turned to the special character of the ECHR:

> "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."

23. 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

[2] G. Letsas, Strasbourg's Interpretive Ethic: Lessons for the International Lawyer / European Journal of international law, 2010 vol. 21 No. 3, 509–541.
[3] See, for instance, Magdalena Forowicz, The Reception of International Law in the European Court of Human Rights, 2010, p. 25.

and values of a democratic society" (*Kjeldsen, Busk Madsen and Pedersen* judgment of 7 December 1976).

(b) Subsequent agreement and subsequent practice (Article 31 § 3 (a) and (b) VCLT)

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

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

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

25. 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".

26. The string of cases starting from *Soering* is also a remarkable example of the jurisprudence of the Court showing how the 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).

27. In its *Al-Saadoon and Mufdhi v. the United Kingdom* judgment (2010) the 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).

28. In its judgment in the case of *Cruz Varas and others v. Sweden* (1991) the Court took a 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."

29. 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 ECHR, even on occasion considering contrary practice, of a relatively small number of States. [add references if this paragraph is to be retained][4]

30. In its recent *Hassan v. the United Kingdom* judgment the Court again confirms this approach[5] stating:

[4] The DH-SYSC-II decided that this paragraph was to be re-discussed at a later stage in the light of the following comment by Greece: This paragraph does not seem to be sufficiently substantiated in the text.

[5] DH-SYSC-II: This formulation is to be verified depending on the formulation of paragraph 29.

> "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".

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

32. As the ILC explains in the Commentaries to its original draft of the VCLT, subsequent practice requires that the parties as a whole to a treaty, not just some of them, accept this interpretation in such a way as to evidence their agreement.[6]

33. 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.

34. 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.

[35. At the same time the WTO Appellate Body seems not ready to accept for the purpose of interpretation as a sufficient 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).[7]]

36. 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 30-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) and noted that "during that time there have been important developments internationally" referring then to the corresponding provisions of the American Convention on Human Rights, the EU Charter of Fundamental Rights and the case law of the CJEU, the Rome Statute of the International Criminal Court and the case-law of the ICTY.

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[6] See the Draft Articles on the Law of Treaties with commentaries adopted by the International Law Commission at its 18th session, in 1966, and submitted to the General Assembly, published in the Yearbook of the International Law Commission, 1966, Vol. II, pp. 221-222.

[7] The DH-SYSC-II decided that this paragraph was to be re-discussed at a later stage in the light of the following comment by Greece: paras. 92-93 of Report of the WTO Appellate Body in EC-Customs Classification of Certain Computer Equipment (W/DS62/AB/R) seem to be about *prior* practice, or rather the parties of the particular dispute (EC-USA) during the Uruguay Round tariff negotiations ("*The purpose of treaty interpretation is to establish the common intention of the parties to the treaty. To establish this intention, the prior practice of only one of the parties may be relevant, but it is clearly of more limited value than the practice of all parties*").

(c) Relevant rules of international law applicable in relations between the parties (Article 31 § 3 (c) VCLT)

37. 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 ECHR "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".

38. According to the Court, the ECHR 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 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.

39. On another occasion, the Court has held that Article 2 of the ECHR 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).

40. 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."

41. In its judgment in the case of *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."

42. 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 of 2004.

References to the case law of the ICJ

43. In its *Hassan* judgment the ECtHR pronounced that the Court must endeavor to interpret and apply the ECHR 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 the 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*.

44. However in the *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.
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> 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."

45. 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), the Human Rights Committee of the United Nations, the United Nations Committee against Torture and the Inter-American Court of Human Rights.

(d) *Travaux préparatoires* (Article 32 VCLT)

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

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

> "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."

48. The decision of the Court in the case of *Banković and Others v. Belgium and Others* presents one of the recent and vivid examples of an "internationalist" approach in the ECtHR jurisprudence. Interpreting Article 1 of the ECHR 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)."

49. 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 ECHR 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."

50. In same vein in the *Hirsi Jamaa* judgment (2012) the Court used the *travaux préparatoires* of the ECHR 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".

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

> "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 implies individual rights, including the right to vote and the right to stand for election."

52. However, on numerous occasions the Court has held that it cannot rely exclusively on the intention of parties of the ECHR 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)).

53. In the recent case of *Magyar Helsinki Bizottság v. Hungary* the *travaux préparatoires* were the subject of considerable discussion, in considering whether Article 10 could be interpreted as encompassing a right of access to information held by public authorities. The Grand Chamber held that in line with Article 32 of the VCLT the *travaux préparatoires* could be a subsidiary means of interpretation in certain cases, but concluded that in the present case they did not have "conclusive relevance" to the question at issue.[8]

(e) Disparities in authentic language versions (Article 33 VCLT)

54. Due to the fact that the ECHR 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 the French version differ from the wording in English.

55. In its *Sunday Times* judgment the Court examined the difference between English "prescribed by the law" and French "prévues par la loi". The Court invoking Article 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".

56. It *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 publique" also referred to Article 32 of the VCLT and thus paid regard to the object and purpose of Article 1 of Protocol No. 1.

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

[8] See on the relevance of the "preparatory work" (*travaux préparatoires)* also the separate opinions of Judge Sicilianos, joined by Judge Raimondi and of Judge Spano, joined by Judge Kjølbro.

"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)[9]

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 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."

3. Other methods of interpretation developed by the ECtHR

58. 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.

59. However, the Court is not alone in resorting to these innovative techniques of interpretation. The two interpretative methods may also be found in other international courts and tribunals' jurisprudence.[10] By way of example, the so-called evolutive or dynamic interpretation was similarly applied by the Inter-American Court of Human Rights.[11] Likewise, the doctrine of autonomous concepts is commonly applied by the CJEU[12] or the Inter-American Court of Human Rights.[13]

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

[10] Even if the ICJ does not apply human rights treaties, it can be noted that it has occasional recourse to the evolutive interpretation approach, see, for instance, *Costa Rica v. Nicaragua and Nicaragua v. Costa Rica*, judgment of 16 December 2015.

[11] See, for example, *Supreme Court of Justice (Quintana Coello et al.) v. Ecuador* of 23 August 2013, § 153; *Mapiripán Massacre v. Colombia*, 2005c, § 106 or in its advisory opinion on the interpretation of the American Declaration of the Rights and Duties of Man OC-10/89 of 14 July 1989, Series A No. 10, at para 37. See also LIXINSKI, Lucas. *Treaty Interpretation by the Inter-American Court of Human Rights: Expansionism at the Service of the Unity of International Law*. The European Journal of International Law, Vol. 21, no. 3, 2010.

[12] See, amongst many authorities, C-66/85 *Lawrie-Blum*, ECLI:EU:C:1986:284 as to the autonomous meaning of the notion of „worker" under the EU law.

[13] See *Mapiripán Massacre v. Colombia*, 2005c, § 187 or *The Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, 2001, § 146.

60. The main idea lying behind these innovations 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."[14]

61. In applying the evolutive method, the Court often reiterates that:

> "[…] the Convention is a living instrument which must be interpreted in the light of present-day conditions, and in accordance with developments in international law, so as to reflect the increasingly high standard being required in the area of the protection of human rights, thus necessitating greater firmness in assessing breaches of the fundamental values of democratic societies."[15]

62. Although the dynamic interpretation is not expressly mentioned in the VCLT, it could be argued that the special object and purpose of the ECHR, and similarly also any subsequent agreements, subsequent practice or relevant rules of international law applicable in the relations between the parties, might justify the Court's evolutive approach to the ECHR. It may be noted that some judges of the Court have attempted to explain that it is implicitly based on and compatible with the underlying logic of the VCLT's general rules of interpretation.[16] The evolutive approach would enable the Court to take into account the changing conditions in the respondent State and in the States Parties to the ECHR 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. 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. However, the language used in this context shows that the Court tacitly operated with the general rules of interpretation as enshrined in the VCLT.

63. There are limits on the extent of such dynamic interpretation that are inherent in the VCLT rules on interpretation and the nature of international law itself. In its *Johnston* judgment[17] the Court acknowledged 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."

Determining where the balance should be struck is therefore a delicate task, particularly where evolutive interpretation appears to result in the creation of new rights (see for example *Demir and Baykara*, and *Magyar*).

64. Some friction between the VCLT and the Court's evolutive interpretation may therefore potentially occur if the latter goes beyond what is stipulated in Article 31(3)(c) of the VCLT. While the provision admits that only those rules of international law that are

[14] *Scoppola v. Italy (no. 2)*, no. 10249/03, judgment [GC] of 17 September 2009, § 104.
[15] See, among other authorities, *Demir and Baykara v. Turkey*, no. 34503/97, judgment [GC] of 12 November 2008, § 146; *Öcalan v. Turkey*, no. 46221/99, judgment [GC] of 12 May 2005, § 163 and *Selmouni v. France*, no. 25803/94, judgment [GC] of 28 July 1999, § 101.
[16] See concurring opinion of judge Sicilianos, joined by judge Raimondi, in the case of *Magyar Helsinki Bizottság v. Hungary*, no. 18030/11, judgment [GC] of 8 November 2016.
[17] *Johnston and Others v. Ireland*, no. 9697/82, plenary judgment of 18 December 1986, § 53.

applicable in the relations between all parties to a treaty can be taken into consideration, on occasion the Court appears to have taken a different stance. In the *Demir and Baykara* case,[18] it observed that "in searching for common ground among the norms of international law it has never distinguished between sources of law according to whether or not they have been signed or ratified by the respondent State". In other words, the Court has considered it sufficient that the relevant international instruments denote a continuous evolution in the norms and principles applied in international law or in the domestic law of the majority of member States of the Council of Europe and show, in a precise area, that there is common ground in modern societies.

CONCLUSION: CHALLENGES AND POSSIBLE SOLUTIONS

1. As agreed by the High Contracting Parties and consistently confirmed by the Court the ECHR is a part of public international law and thus should be interpreted in accordance with the VCLT rules of interpretation. At the same time the Court stressed the special character of the ECHR as an instrument for the protection of individual human beings.

2. The rights and freedoms guaranteed by the ECHR are phrased in a general form. There is thus in some situations a need for concretisation in accordance with Articles 31-33 VCLT.

3. The Court has not established a hierarchy between different interpretative approaches, but in the case-law the use of a dynamic approach is noticeable. It also seems that there is some variation in the Court's use of preparatory works of the drafters of the ECHR.

4. The requirement in Article 31(3)(c) of the VCLT that other rules of international law are taken into account when interpreting a treaty, is an important factor in avoiding the risks of fragmentation of international law. As will become clear in the subsequent chapters, it is essential for States Parties that there is clarity and consistency in the Court's case-law when dealing with these issues.

5. The Court has referred to both the subsequent practice of the States Parties to the ECHR (Art 31(3)(b) VCLT) and other rules of international law (Art 31(3)(c) VCLT) as a means of tacit modernisation of the provisions of the ECHR by the States. Where the Court seeks to establish a "European consensus" in this respect, it is important that such consensus is based on an analysis of the practice and specific circumstances of the States Parties in line with the consensual nature of State obligations under international law.

6. In addressing the need to apply the ECHR in present day circumstances and to ensure that the rights are practical and effective, the Court uses dynamic interpretative approaches. However the traditional rules of treaty interpretation and the consensual nature of international law, as well as the need to avoid fragmentation of the latter, place limits on such approaches. It is important therefore that the Court explains its methods of interpretation within these limits and that the outcomes reached are predictable and understandable for the Contracting States in line with the obligations they have undertaken under the ECHR.

[18] *Demir and Baykara v. Turkey*, no. 34503/97, judgment [GC] of 12 November 2008, §§ 78, 85 and 86; see for several examples of previous cases in which the Court took that stance §§ 78-83 of the judgment.