

*Subsequent practice in Hassan v United Kingdom:
When things seem to go wrong in the life of a living instrument*

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‘[L]a vita, che da un canto ha bisogno di muoversi sempre, ha pure dall’altro canto bisogno di consistere in qualche forma. Sono due necessità che, essendo opposte tra loro, non le consentono né un perpetuo movimento né un’eterna consistenza. Pensate che se la vita si movesse sempre non consisterebbe mai; e che, se consistesse per sempre, non si moverebbe più.’^{**} (*L Pirandello, Se il film parlante abolirà il teatro*)

1. *Introduction*

The *Hassan v United Kingdom* case decided by the Grand Chamber of the European Court of Human Rights (the Court, ECtHR) on 16 September 2014¹ raised a procedural issue and several substantive questions. The Court of Strasbourg could have focused on a simplistic procedural problem – i.e. the UK’s lack of communication to the Council of Europe under Article 15 of the suspension of certain rights of the European Convention on Human Rights (the Convention, ECHR) in time of war – and could have sanctioned the violation of Article 5, but instead it decided to address several hot topics in

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^{**} ‘[L]ife, though on the one hand it needs perpetual movement, has nevertheless a need to consist in some form or other. These two needs which are opposed to one another do not allow life to have either perpetual movement or perpetual consistency. Consider that if life were to move forever, it would never be consistent, whilst if it were always consistent, it would never move’.

¹ *Hassan v United Kingdom* App no 29750/09 (ECtHR [GC], 16 September 2014).

contemporary international law. These included the coordination of the ECHR with international humanitarian law (IHL),² and the role of subsequent practice in interpreting treaties (a topic currently under the consideration of the United Nations International Law Commission, ILC).³ The necessary premise, in line with the Court's previous decisions, is that the ECHR also applies in conflicts outside the territory of the Contracting Parties.

2. *The Case*

The case concerned the United Kingdom's alleged violation of Articles 2, 3 and 5 of the ECHR (right to life; prohibition of torture and inhuman treatment; right to liberty) during the 2003 invasion of Iraq, in relation to the capture and detention of an Iraqi citizen, Tarek Hassan, and his subsequent death a few months later. Hassan, a professional soccer player, brother of a high-ranking politician of the Ba'ath party, and general of the Al-Quds Army, was captured by UK forces on 22 April 2003, when he was found guarding a house belonging to his brother (who had fled) with a Kalashnikov rifle. Detained for a number of days and interviewed twice by the British authorities, he was released early in May, at the end of hostilities.⁴ His body was found later, on 1 September 2003, in a region of Iraq far from the detention camp.⁵

² *ibid* paras 102-107. Among many, on the specific issue of the coordination of the ECHR with IHL, see M Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (OUP 2011) 229-265. The general topic was recently the subject of a broad study by the ILC on the *Fragmentation of international law: difficulties arising from the diversification and expansion of international law*, completed in 2006 in a well-known report finalized by Martti Koskenniemi (Doc A/CN.4/L.682, 13 April 2006).

³ *Hassan* (n 1) paras 100-101. On this, see most recently ILC, 'Report of the International Law Commission on the work of its sixty-sixth session' (5 May - 6 June and 7 July - 8 August 2014) UN doc A/69/10, 2014, chp VII, paras 66-76: 'Subsequent agreements and subsequent practice in relation to interpretation of treaties'.

⁴ *Hassan* (n 1) paras 12, 21-24, 28.

⁵ *ibid*, para 29.



The Court, after dealing quickly with the issue of its jurisdiction over facts that occurred outside the territory of a signatory Country,⁶ and swiftly dismissing the claims on the violations of Articles 2 and 3 by unanimous vote,⁷ focused on the alleged violation of Article 5 and the applicability of international humanitarian law for its interpretation. The applicant contested that Article 5 was fully applicable against the UK, its Government not having made the formal notification to the Secretary-General of the Council of Europe to limit the applicability of the ECHR in conformity with Article 15. Thus, the deprivation of Tarek Hassan's liberty by UK troops would have to be qualified as illegitimate,⁸ since it would not have been conducted as required by Article 5 and its exceptions – a list that, according to the consolidated interpretation given by the Court, is exclusive and cannot be interpreted broadly.⁹

In short, according to the applicant, given the absence of any declaration of the UK under Article 15 to suspend Article 5 in time of war, even if the conduct of the UK could be legitimate under International Humanitarian Law (IHL), it was contrary to ECHR Article 5.

The Court was, therefore, facing a puzzle: on the one hand, given its articulated interpretation¹⁰ of how the Convention applies in conflicts outside the territory of a Contracting Party, it could simply apply the Convention, with the double consequence of stigmatizing the conduct of a State that had correctly applied IHL, and of opening the door for thousands of similar applications from other Iraqi citizens arrested during the 2003 conflict in Iraq. Alternatively, it could interpret the Convention in a way that accommodated the UK's conduct, but this would mean *inter alia* a lack of consequences for the failure to provide notification that certain rights would be suspended during a conflict.

⁶ *ibid*, paras 74-80, referring to its consolidated case-law on the matter and in particular extensively quoting *Al-Skeini and Others v United Kingdom* App no 55721/07 (ECtHR [GC], 7 July 2011).

⁷ They were declared inadmissible given the large span of time between the release of Hassan and his death, and the lack of a clear connection between the death of Hassan and the UK, *ibid* paras 59-64.

⁸ *Hassan* (n 1) paras 81-85.

⁹ M Gialuz, 'Articolo 5', in S Bartole, P De Sena, V Zagrebelsky (eds), *Commentario breve alla Convenzione europea per la salvaguardia dei diritti dell'uomo e delle libertà fondamentali* (CEDAM 2012).

¹⁰ P De Sena, *La nozione di giurisdizione statale nei trattati sui diritti dell'uomo* (Giappichelli 2002); Milanovic (n 2).

These paradoxical results could have been avoided if the Court had opted simply to contest the UK's lack of notification and sanctioned the violation of Article 5, but without awarding pecuniary damages, leaving the decision itself as satisfaction. Such a decision would have served as a strong warning of the need for Contracting Parties to meet the procedural requirements established by the Convention. At the same time, it would have prevented the stigmatization of the conduct of a state acting in compliance with IHL, and avoided opening a Pandora's box of thousands of new, similar applications. Instead, the Court decided to take a different route, interpreting the Convention in a creative way to accommodate its application in the context of conflicts outside a signatory territory.

3. *The central argument*

The argument of the Court deals at the same time with Article 5 and 15 of the Convention, and has two prongs. A first, short part is dedicated to the modifying effect of the subsequent practice of the parties. In the second, longer part, the Court uses an integrationist interpretive approach with IHL. The relevant excerpts of the whole reasoning read:

'100. The starting point for the Court's examination must be its constant practice of interpreting the Convention in the light of the rules set out in the Vienna Convention on the Law of Treaties... [...]

101. [I]n respect of the criterion set out in Article 31 § 3(b) of the Vienna Convention... 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 practice of the High Contracting Parties is not to derogate from their obligations under Article 5 in order to detain persons on the basis of the Third and Fourth Geneva Conventions during international armed conflicts... [N]o State has ever made a derogation pursuant to Article 15 of the Convention in respect of these activities... Moreover, it would appear that the practice of not lodging derogations under Article 15 of the Convention in respect of detention under the Third and Fourth Geneva Conventions

during international armed conflicts is mirrored by State practice in relation to the International Covenant for the Protection of Civil and Political Rights. Similarly, although many States have interned persons pursuant to powers under the Third and Fourth Geneva Conventions in the context of international armed conflicts subsequent to ratifying the Covenant, no State has explicitly derogated under Article 4 of the Covenant in respect of such detention... even subsequent to the advisory opinions and judgment referred to above, where the International Court of Justice made it clear that States' obligations under the international human rights instruments to which they were parties continued to apply in situations of international armed conflict...

102. Turning to the criterion contained in Article 31 § 3(c) of the Vienna Convention [...], 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... [...]

103. In the light of the above considerations, the Court accepts the Government's argument that the lack of a formal derogation under Article 15 does not prevent the Court from taking account of the context and the provisions of international humanitarian law when interpreting and applying Article 5 in this case'.¹¹

Even if it held in favour of the UK, the Court did not to follow the reasoning which the UK Government had expressed during the public hearing. The Government's argument was to apply IHL as *lex specialis* instead of Article 5, or to interpret Article 5 or consider it modified so as to allow IHL as a legitimate ground to deprive somebody of liberty during an armed conflict. However, the Government did not refer in detail to the Vienna Convention on the Law of Treaties of 1969 (Vienna Convention, VCLT) and only rather vaguely described how these changes occurred.¹²

It was the Court that, with a quite short explanation, chose to avoid any typical Strasbourg terminology or techniques, such as 'living instrument' or 'European consensus',¹³ and decided to ground the whole change in the Vienna Convention, and in particular Article 31(3)

¹¹ *ibid* paras 99-103.

¹² The hearing of 11 December 2013 can be viewed on the ECtHR website, <www.echr.coe.int/Pages/home.aspx?p=hearings&w=2975009_11122013&language=lang&c=&py=2014> ('Webcasts of Hearings, 2013', last visit March 15 2015).

¹³ *A, B & C v Ireland* App no 25579/05 (ECtHR [GC], 16 December 2010) para 254.

letters (b) (subsequent practice) and (c) (systemic interpretation).¹⁴ The Court decided to refer to the fact that the Contracting Parties do not make an explicit derogation to the Convention in order to apply IHL as a ground for limiting Article 5 during armed conflicts (as Article 15 as previously interpreted by the Strasbourg Court would have required),¹⁵ and then concluded by saying that the arrest of Tarek Hassan fulfilled the conditions set by Article 5(1), being *lawful* according to the law applicable in the circumstances (i.e. IHL) and not *arbitrary*.¹⁶

4. *Vienna-like subsequent practice or a different subsequent practice?*

The Introduction to this *Zoom-in* goes straight to some key questions arising from this judgment: whether the Court is actually basing its reasoning on the interpretive technique codified in Article 31(3)(b) VCLT, and whether the Court is consistent with its previous case law in using this interpretive dynamic.

4.1. *On Article 31(3)(b) and interpretation of treaties*

The well-known Article 31(3)(b) VCLT says that, in interpreting a treaty, '[t]here shall be taken into account, together with the context: ... (b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation'. According to the *literal* interpretation of this provision – the orthodox reading of this provision, as used in certain decisions of the ICJ¹⁷ and

¹⁴ *Hassan* (n 1) para 100. On the controversial use of the VCLT emerging from some recent decisions of the ECtHR see C Pitea, 'Interpreting the ECHR in the Light of "Other" International Instruments: Systemic Integration or Fragmentation of Rules on Treaty Interpretation?', N Boschiero, T Scovazzi, C Pitea, C Ragni (eds) *International Courts and the Development of International Law: Essays in Honour of Tullio Treves* (Springer 2013) 545.

¹⁵ *Lawless v Ireland* (No 3) (1961) 1 EHRR 15, 31; *A and Others v United Kingdom*, App no 3455/05, (ECtHR, 19 February 2009) para 179.

¹⁶ *ibid* paras 105-111.

¹⁷ See among others *Kasikili/Sedudu Island (Botswana/Namibia)* (Judgment, Merits) [1999] ICJ Rep 1045, para 74. On this decision as the orthodox interpretation of Art 31(3)(b) see L Crema, 'Subsequent Agreements and Practice within the Vienna Convention', in G Nolte (ed), *Treaties and Subsequent Practice* (OUP 2013) 13, at 16-17, with reference to other similar decisions.



described by the ILC¹⁸ – to consider subsequent practice in interpreting a treaty, three conditions must be fulfilled: it should be a *i*) practice of the member states, *ii*) in the application of the treaty, *iii*) which establishes the agreement of the parties. Any other form of practice falls outside Article 31(3)(b) and qualifies as another generic, supplementary means of interpretation under Article 32 VCLT.

In *Hassan*, the Court does not carry out a detailed analysis under these criteria. The analysis of the practice is referred to in a generic way. It is not clear that the practice was in the application of the treaty, or that it established an agreement. The Court also makes a non-specific reference to the practice of members regarding another treaty, without stating whether it is referring to all the states, the ones involved in the trial, or another group.¹⁹ Under a literal interpretation of Article 31(3)(b) and according to the recent work of the ILC, this practice would come under Article 32 – supplementary means of interpretation – to be used only in exceptional cases, when the meaning of a treaty term is not clear.

In the case at stake it would be hard, if not impossible, to fulfill all the criteria of Article 31(3)(b), given that the ‘practice’ considered by the Court is made up of a purely negative conduct: the *lack* of a notification. Here the question is not whether silence or an omission can amount to subsequent practice – a question that has already been answered positively as depending on the circumstances of the case²⁰ – but rather how to determine that a lack of a declaration *is in the application of a treaty*. The issue would be different if a treaty required specific conduct (eg control of goods at a boundary according to a treaty regulating custom duties between certain countries) and

¹⁸ G Nolte, *First report on subsequent agreements and subsequent practice in relation to treaty interpretation* (19 March 2013) UN doc A/CN.4/660, 36-45 (with *Draft Conclusion 3*); the Draft Conclusion after the work of the Drafting Committee became Draft Conclusion 4 (see *Statement of the Chairman of the Drafting Committee Mr. Dire Tladi* (31 May 2013) 9-13; the new draft conclusion is reproduced in Report of the International Law Commission on the work of its sixty-fifth session (6 May - 7 June and 8 July - 9 August 2013) UN doc A/68/10, 2014, chp IV, 31-41, *Conclusion 4*, with commentary). The Second report on subsequent agreements and subsequent practice in relation to treaty interpretation ((26 March 2014) UN doc A/CN.4/671, goes into more depth on each of those characteristics.

¹⁹ *Hassan* (1) para 101.

²⁰ Second report 2014’ (19) 29-33 (although with some distinctions, cf at 29, para 69).

established another requirement (e.g. issuing a certain certificate), and a party did not act in conformity with the second requirement. In this example, the circumstances lead us to understand that the omission of required conduct falls under the application of that specific treaty. But in the present case it is hard to see how a practice of not performing a formal requirement can be linked to the application of the ECHR.

This observation suggests that Article 31(3)(b) is highly specific, because where certain kinds of treaties are involved, like the ECHR, relevant (lack of) practice would be excluded because of the difficulty of determining whether that practice were in application of the treaty. For this reason, the Court's failure to address this criterion does not seem to be of great importance in this case, given that it is difficult to say whether a state's conduct (or omission) is performed in application of the ECHR. Moreover (and not surprisingly) the case law of the ECtHR has been consistent in not considering this element to be a decisive one.²¹

More significant is the fact that the Court took into consideration the practice of the Contracting Parties to the International Covenant on Civil and Political Rights (ICCPR) on a similar matter.²² This use of parties' practice, although different from the one contained in Article 31(3)(b), reveals that the Court was looking to establish the parties' intentions, considering *how they behaved in similar situations coming under other agreements*. This was fairly common in other international decisions,²³ but it highlights another way to consider subsequent practice beyond what Article 31(3)(b) contains. The *Hassan* decision falls into that stream of decisions that consider practice of the parties that does not fall within the strict requirements of Article 31(3)(b), and use it as an element to assess the intention of the parties towards certain obligations.²⁴

It can be noted, however, that the Strasbourg Court has not always been very careful with these requirements,²⁵ and it has elaborated its

²¹ *ibid* 8; A Mowbray, 'The Creativity of the European Court of Human Rights' (2005) 5 Human Rights L Rev 57.

²² *Hassan* (n 1) para 101.

²³ *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v Norway)* (Judgment) [1993] ICJ Rep 38, para 28.

²⁴ *Crema* (n 18) 22-25.

²⁵ For example, it has considered any legislation or acts of the State as interpretive of the rights in the Convention, even if those decisions and laws were not explicitly passed in the application of the treaty, cf 'Second report 2014' (n 19) 8: '[W]hen describing the domestic legal situation in the member States, the Court rarely asks

own interpretive arguments (based on the ‘European consensus’ or on the ‘living instrument doctrine’), which, although similar to subsequent practice, take different approaches.²⁶

The Partly Dissenting Opinion of Judge Spano, joined by Judges Nicolaou, Bianku and Kalaydjieva, includes criticism of the interpretation of Article 31(3)(b) for these reasons, but also gives a peculiar interpretation of that provision. It notes:

‘[T]he Court has [...] been rather cautious in its application of the subsequent practice rule, as Article 31 § 3 (b) of the Vienna Convention must be understood to cover only subsequent practice common to all Parties, as well as requiring that the practice be concordant, common and consistent. Subsequent practice of States Parties which does not fulfil these criteria may only constitute a supplementary means of interpretation of a treaty’.²⁷

The dissenting opinion gives a reading of Article 31(3)(b) that is even stricter than in the decision. The dissenting judges characterize subsequent practice under Article 31(3)(b) in a rather restrictive way, saying that it must *i*) be of *all* the parties, and *ii*) be *concordant, common and consistent*. On the importance of the practice of *all* parties, a term that was explicitly removed from the draft articles on the law of treaties to avoid confusion, the dissenting opinion is fairly originalist, referring (imprecisely) to the *ILC Yearbook* of 1966,²⁸ without mentioning the

whether this legal situation results from a legislative process during which the possible requirements of the Convention are discussed. The Court nevertheless presumes that the member States, when legislating or otherwise acting in a particular way, are conscious of their obligations under the Convention, and that they act in a way which reflects their bona fide understanding of their obligations’, internal fn omitted. See also ‘Report of the ILC 2014’ (3) 175.

²⁶ S Touzé, ‘Les techniques interprétatives des organes de protection des droits de l’homme’ (2011) 115 *Revue générale de droit international public* 517.

²⁷ Partly Dissenting Opinion of Judge Spano, Joined by Judges Nicolaou, Bianku and Kalaydjieva to the *Hassan* case (n 1) para 13.

²⁸ The ILC in 1966 said a different thing: ‘The text provisionally adopted in 1964 spoke of a practice which ‘establishes the understanding of all the parties’. By omitting the word ‘all’ the Commission did not intend to change the rule. It considered that the phrase ‘the understanding of the parties’ necessarily means ‘the parties as a whole’. It omitted the word ‘all’ merely to avoid any possible misconception that every party must individually have engaged in the practice where it suffices that it should have accepted

contemporary works of the ILC. Precisely on the topic of that *Yearbook* the special rapporteur Georg Nolte noted:

‘The Commission thus assumed that not all parties must have engaged in a particular practice but that such practice could, if it is “accepted” by those parties not engaged in the practice, establish a sufficient agreement regarding the interpretation of a treaty’.²⁹

The characterization that an interpretive practice must be *concordant, common and consistent* was not given by the ILC either in the sixties, nor in its recent works, nor in a consolidated interpretation of Article 31(3)(b): the only case that mentions that expression is a report of the Appellate Body of the WTO of 1996, *Japan: Alcoholic Beverages*.³⁰ That case takes the expression from scholarly sources,³¹ who probably picked it up from the dissenting opinion of the 1974 *Fisheries Jurisdiction* case, which dealt with customary international law.³² This description, which special rapporteur Georg Nolte defined in his report of 2013 as a ‘narrow definition of interpretive subsequent

the practice’; ILC, ‘Report of the International Law Commission on the work of its eighteenth session’ (4 May-19 July 1966) (1966-II) YB ILC 221–222

²⁹ Second Report’ (n 19) para 60. See in general *ibid* 42-70.

³⁰ *Japan: Alcoholic Beverages II*, Report of the Appellate Body (4 October 1996) WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, sect. E, at 13: ‘subsequent practice in interpreting a treaty has been recognized as a ‘concordant, common and consistent’ sequence of acts or pronouncements which is sufficient to establish a discernable pattern implying the agreement of the parties regarding its interpretation’.

³¹ The WTO refers to the book of Ian Sinclair on the law of treaties, *The Vienna Convention on the Law of Treaties* (Manchester University Press 1984) 137, which refers to the Hague Course of Mustafa Yassen, that in fact says: ‘La pratique ultérieure doit donc être concordante, commune et d’une certaine constance’, M K Yasseen, ‘L’interprétation des traités d’après la Convention de Vienne sur le droit des traités’ (1976) 151 *Recueil des Cours Recueil des Cours de l’Académie de Droit International* 1, at 48; on this see also I Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists* (OUP 2012) 235.

³² Separate Opinion of Judges Bengzon, Forster, Jiménez de Aréchaga, Nagendra Singh, and Ruda, to the *Fisheries Jurisdiction Case* (United Kingdom v Iceland) (Merits) [1974] ICJ Reports 3 at 50, para 16: ‘Another essential requirement for the practice of States to acquire the status of customary law is that such State practice must be common, consistent and concordant. Thus contradiction in the practice of States or inconsistent conduct, particularly emanating from these very States which are said to be following or establishing the custom, would prevent the emergence of a rule of customary law’.



practice',³³ does not have a real status in international law, and neither does it correspond to the position so far taken by the ECtHR in dealing with the interpretive role of party practice.

4.2. *On Article 31(3)(b) and the modification of treaties*

The Court, however, determined not only that the practice was interpretive, but that it had a modifying effect, opting to classify the practice as a modification, rather than a mere interpretation. The literal reading of Article 31(3)(b) shows a fourth (tautological?) requirement, that the practice of the parties (in the application of the treaty, which establishes their agreement) 'regard[s] its *interpretation*'. This seems obvious, since Article 31 is dedicated to the interpretation of treaties; however, once practice exists that establishes the agreement of the parties, it may also have a modifying effect.

Indeed, this is what the ECtHR determined in the *Hassan* decision, in line with the ECtHR's previous decisions. The Court has some unusual case law on Article 31(3)(b). Most of its decisions dealing with this provision are about the modification of the Convention. The ECtHR envisaged the possibility that the subsequent practice of the parties, and Article 31(3)(b) in particular, could modify the Convention in the famous interlinked sequence of cases *Soering-Öcalan-Al Saadoon* between 1989 and 2010, that dealt with the abolition of death penalty in times of peace and then war.³⁴ In *Soering* the possibility to amend the Convention through subsequent practice was envisaged in theory, but not in the actual holding.³⁵ In *Öcalan*, modificative subsequent practice was considered together with the widespread ratification of Protocol 6 to declare the modification of the Convention (the abolition of the death penalty in peacetime). In relation to the death penalty in wartime,

³³ 'First report' (19) 37.

³⁴ On these cases see C Contartese, 'La prassi successiva come metodo per modificare un trattato nella giurisprudenza della Corte Europea dei Diritti dell'Uomo' (2014) 97 *Rivista di diritto internazionale* 419.

³⁵ In *Soering v United Kingdom*, App no 14038/88 (ECtHR, 7 July 1980) (subsequent practice of the European Countries abolished the death penalty in peacetime) the Court admitted this possibility at para 103, at least in theory; it explained, however, that the Convention could not be considered amended yet because the Parties, by negotiating Protocol 6 on the same issue, were showing the intention to amend the Convention in a different way.

the Court used the same reasoning that was used in *Soering*, and mentioned it as possible grounds for amending the Convention, but did not ultimately uphold it.³⁶ In both cases, the Court said that practice could modify the Convention, but because a protocol on the same issue was open to signature by the parties, it recognized that the Contracting Parties had expressed a clear intention to modify the Convention through a protocol, and not through subsequent practice. In *Al Saadoon* this line of reasoning was abandoned, and – without mentioning the VCLT – the Court decided to take into account an overall trend (although not a unanimous one) demonstrated by many member States of the CoE to abolish the death penalty in wartime, *notwithstanding* the fact that there was a protocol open to signature by the parties to the CoE, to which some signature and ratifications were missing:

‘All but two of the Member States have now signed Protocol No. 13 and all but three of the States which have signed have ratified it. These figures, 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.’³⁷

This line of reasoning is maintained in *Hassan*, diverging from what the special rapporteur at the ILC on the modification of treaties through practice recently sustained. He observed:

‘[W]hile there are indications in international jurisprudence that, absent indications in the treaty to the contrary, the agreed subsequent practice of the parties may lead to certain limited modifications of a treaty, the actual occurrence of that effect is not to be presumed. Instead, States and courts should make every effort to conceive an agreed

³⁶ *Öcalan v Turkey* [dec], App no 46221/99 (ECtHR, 12 March 2003); *Öcalan v Turkey* App no 46221/99 (ECtHR [GC], 12 May 2005) para 163, quoting the Chamber judgment: ‘an established practice within the member States could give rise to an amendment of the Convention’. The Court replicated the reasoning used in the *Soering* judgment (Protocol 13 showing a different method of amendment chosen by the Parties) this time in the context of the death penalty in wartime), and also affirmed that the signature by all the CoE States of Protocol 6, together with the practice of the parties, had abolished the death penalty in peacetime.

³⁷ *Al-Saadoon and Mufdhi v United Kingdom*, App no 61498/08 (ECtHR, 2 March 2010) para 120.



subsequent practice of the parties as an effort to interpret the treaty in a particular way.³⁸

The short statement of the ECtHR in *Hassan* ('The practice of the High Contracting Parties is not to derogate [under Article 15] from their obligations under Article 5')³⁹ seems far from the rigorous analysis that, a few months earlier, the special rapporteur and the ILC had said would be essential for identifying a practice having modifying effect.⁴⁰

In conclusion, the use of Article 31(3)(b) in the *Hassan* case appears significant for two reasons. First, by referring to the practice of the parties under other treaties dealing with similar matters, it implies an idea of interpretation focused on the intention of the parties. This reasoning is different from the one mentioned in Article 31(3)(b): a literal interpretation of the Article, as used by the ILC and ICJ, gives a more precise and structured description of the kind of subsequent practice that should be taken into account. Second, the Court takes the modifying effect of Article 31(3)(b) as a given; this reading is consistent with previous cases of the ECtHR, but is an interpretation specific to the Court, that is not found in general international law.

5. *Neutral interpretive techniques, or descriptions of expansionist decisions? Two possible ways to understand 'evolution'*

Hassan, therefore, has a good precedent for the modification of the Convention and the use of Article 31(3)(b) on this matter. However, if the

³⁸ 'Second report 2014' (n 19) 60, para 142. The special rapporteur Georg Nolte therefore proposed the Draft Conclusion 11, *Scope for interpretation by subsequent agreements and subsequent practice*, at 71: 'It is presumed that the parties to a treaty, by a subsequent agreement or a subsequent practice, intend to interpret the treaty, not to modify it. The possibility of modifying a treaty by subsequent practice of the parties has not been generally recognized.' This draft conclusion, in the work of the Drafting Committee, became the third paragraph of Draft Conclusion 7, *Possible effects of subsequent agreements and practice in interpretation*, cf. UN doc A/CN.4/L.833, 3 June 2014, *Statement of the Chairman of the Drafting Committee Mr. Gilberto Vergne Saboia*.

³⁹ *Hassan* (n 1) para 101.

⁴⁰ 'Second report 2014' (n 19); 'ILC Report 2014' (3) 192. However, in the same report the ILC commenting on *Al-Saadoon* (38) observed, 'the European Court of Human Rights cases suggest that a treaty may permit the subsequent practice of the parties to have a modifying effect', *ibid* 191.

Court's modifying technique has a precedent, the result in *Hassan* does not. The case is different because the practice of the state parties does not *expand* the rights of the beneficiaries, the individuals, as in *Al-Saadoon*. Rather, the practice here affected two provisions: it expanded the admitted grounds for deprivation of liberty (Article 5.1), and impacted a provision explicitly intended to hold States accountable before the CoE and other member States for limiting the scope of individual rights (Article 15).

This difference was clearly raised in the dissenting opinion.

'[I]n assessing whether a State practice fulfils the criteria flowing from Article 31 § 3 (b), and thus plausibly modifies the text of the Convention... there is, on the one hand, a fundamental difference between a State practice [...] towards a more expansive or generous understanding of their scope than originally envisaged, and, on the other, a State practice that limits or restricts those rights, as in the present case, in direct contravention of an exhaustive and narrowly tailored limitation clause of the Convention protecting a fundamental right'.⁴¹

The dissenting judges make clear that, beyond any aseptic technicality, what is important in the interpretation of the Convention is the result reached with an interpretation, and not the technique that leads there. In this framework, the underlying question that precedes interpretive techniques is whether they expand or restrict the Convention. 'Subsequent practice', 'living instrument', and 'European Consensus' in themselves are neutral expressions, independent from any particular criterion: a practice, the life of a treaty, or a consensus can go in the direction of either restricting or expanding a right. For the dissenting judges, however, these are not neutral terms, but are only valid where they tend to expand rights under the Convention; where they are restrictive, we should instead consider them a breach of the Convention.

Evolution itself, a concept borrowed from biology that refers to the differentiation of species, is a term that in law can be found used in a progressivist way (evolution as progress, as opposed to regression) both in legal scholarship and by the ECtHR,⁴² but also in a neutral way, as a

⁴¹ Separate Opinion (n 28) para 13.

⁴² *Soering* (n 36) para 103; *Hatton and Others v United Kingdom* App no 36022/97 (ECtHR [GC], 8 July 2003), *Joint Dissenting Opinion of Judges Costa, Ress, Türmen, Zupancic and Steiner*, para 2: 'As the Court has often underlined: "The Convention is a

dynamic that merely changes over time.⁴³ The ILC, too, has referred to it in its work in a neutral way.⁴⁴ A prominent representative of American legal pragmatism, Richard Posner, well describes this understanding of evolution very well. He places evolution as a typical feature of American legal pragmatism, referring it to the circumstances rather than to any end-state or goal:

‘Another implication of Darwinism [...] places the theory side of intellectual activity in perspective: our most cogent intellectual procedures are likely to be experimental rather than aprioristic ones. Evolution is an experimental process, a process of trial and error. Mutations create heritable variations, and natural selection in effect picks the most adaptive’.⁴⁵

Posner describes the selection of mutations that are ‘most adaptive’ (or ‘fittest’ to use the term used by Charles Darwin) under the circumstances.⁴⁶ This approach is different from the systematic and progressivist one of idealism (implicitly adopted by the dissenting judges), which envisions the development of the law over time as

living instrument, to be interpreted in the light of present-day conditions” (see, among many other authorities, *Airey v Ireland* (judgment of 9 October 1979) Series A no. 32, at 14-16, para 26, and *Loizidou v Turkey* (preliminary objections), judgment of 23 March 1995, Series A no. 310, at 26-27, para 71). This “evolutive” interpretation by the Commission and the Court of various Convention requirements has generally been “progressive”, in the sense that they have gradually extended and raised the level of protection afforded to the rights and freedoms guaranteed by the Convention to develop the ‘European public order.’” J Arato, ‘Subsequent Practice and Evolutive Interpretation: Techniques of Treaty Interpretation over Time and Their Diverse Consequences’ (2010) 9 *L and Practice of Intl Courts and Tribunals* 443.

⁴³ M Fitzmaurice, ‘Dynamic (Evolutive) Interpretation of Treaties and the European Court of Human rights’ in A Orakhelashvili and S Williams (eds), *40 Years of the Vienna Convention on Treaties* (British Institute of International and Comparative Law 2010) 55. On the many facets of evolutive interpretation see also the fine excellent paper by G Distefano, ‘L’interprétation évolutive de la norme internationale (2011) 115 *Revue générale de droit international public* 373.

⁴⁴ ILC, ‘Report 2013’ (n 19) 24-30, dynamic meaning opposed to a static one.

⁴⁵ R A Posner, *Law, Pragmatism, and Democracy* (Harvard University Press 2003) 31.

⁴⁶ C Darwin, *On the Origin of Species by Means of Natural Selection, or the Preservation of Favoured Races in the Struggle for Life* (5th ed, John Murray 1869) 91–92.



approaching an end of determinate content.⁴⁷ In Posner's perspective, evolution does not always lead to what can be called progress: the concept of progress relies on its reference to a substantive set of values or a political project. Not so the concept of evolution – or that of fittest, living instrument, consensus, or common practice.

The idealistic approach can be slippery for an international jurisdiction, which could be facing a situation involving values on which States are in disagreement.⁴⁸ Indeed, it is rare to read decisions in which the Strasbourg Court speaks explicitly about a principle of progressive or expansive interpretation and explains it with a neutral expression like 'consensus' or 'common practice.' More often we see these expressions utilized as a legal method to arrive at the content of rules in line with the States' current understanding of those rules (if any). But, as Pier Giuseppe Monateri has noted, interpretive techniques can amount to nothing more than a screen for other reasoning, and in interpreting law there is no room for candid choices: in contesting the *Hassan* decision the dissenting judges do not contest the methods themselves, but the direction toward which they lead.⁴⁹

⁴⁷ 'Historical development, therefore, is not the harmless and unopposed simple growth of organic life but hard, unwilling labor against itself. Furthermore, it is not mere formal self-development in general, but the production of an end of determined content.' Georg W F Hegel, *Reason in History, a general introduction to the Philosophy of History* (The Bobbs-Merrill Company 1953) Chap. III.iii, para 61. P-M Dupuy, 'Evolutionary Interpretation of Treaties: Between Memory and Prophecy', in E Cannizzaro (ed), *The Law of Treaties Beyond the Vienna Convention* (OUP 2012) 122, 131-2.

⁴⁸ Giorgio Gaja criticized the possible political use of such a technique, 'Does the European Court of Human Rights Use Its Stated Methods of Interpretation?', in *Divenire sociale e adeguamento del diritto: Studi in onore di Francesco Capotorti*, Vol 1 (Giuffrè 1999) 213, 221-222.

⁴⁹ PG Monateri, "Correct our watches by the Public Clock". L'assenza di fondamento dell'interpretazione del diritto', in J Derrida, G Vattimo (a cura di), *Diritto Giustizia e interpretazione* (Laterza 1998) 204, implicitly replying to the last chapter of Guido Calabresi, *A Common Law for the Age of Statutes* (Harvard University Press 1982) 178.



6. *Evolution or Breach of Treaty?*

Aside from the political connotations of these issues and of the (impossible to satisfy?) need to make interpretive processes more transparent, this debate raises a serious theoretical question: when does the consensus of the parties modify the Convention, and when is it actually a breach of the Convention, no matter how many of the Parties are in agreement in violating it (amounting to a general, or even unanimous breach.)? To say that the Parties act in a way that differs from the Convention can may amount to its amendment; but it can may also say mean that they the Parties are simply violating the Convention, and the Court, in which case the Court using the law must reintroduce order where society (in this case a society of States) has strayed from it.

The terms of this dialectic have been set up very clearly by Eskridge and Scalia in the American discussion over the interpretation of the US Constitution – an instrument that is more than 150 years older than the European Convention on Human Rights.⁵⁰ The dynamic vision of law and society (a new society comes before an old law) places Eskridge's position as evolutionist; Scalia's 'Matter of Interpretation' describes a strong originalism according to which *if our fathers passed a written Constitution, it was to avoid a society making the mistakes of the past, and not allow it to change it. Quite* probably, following Monateri's realist account of interpretation, they are just using interpretational theories to shore up their value judgments on the evolutionary direction of society: Eskridge liking it, and foreseeing a new law that surpasses the old one; Scalia disliking it, and hoping that law can prevent this change.⁵¹

⁵⁰ W N Eskridge, 'Dynamic Statutory Interpretation' (1986-1987) 135 *University of Pennsylvania L Rev* 1479; A Scalia, *A Matter of Interpretation* (Princeton University Press 1997).

⁵¹ This debate has become richer over time, see among many L B Solum, 'Semantic Originalism' *Illinois Public Law and Legal Theory Research Papers Series No. 07-24* (2008) and Jack M. Balkin, *Living Originalism* (Belknap Press 2011). Any such debate about the European Convention on Human Rights is far less developed, as Kanstantsin Dzehtsiarou and Conor O'Mahony have observed in 'Evolutive Interpretation of Rights Provisions: A Comparison of the European Court of Human Rights and the U.S. Supreme Court' (2013) 44 *Columbia Human Rights L Rev* 309, 329: 'The status of the ECtHR as a living instrument open to evolutive interpretation is now firmly established in the case law of the ECtHR, in contrast with the more controversial notion of the living constitution in the United States'. However, see L Hoffman, 'The Universality of

Neither position can be absolute (indeed, Scalia elsewhere referred to originalism as ‘the lesser evil’, not as the optimal option).⁵² As Pirandello suggests: life can have neither perpetual movement nor perpetual consistency. On the one hand, law is an outgrowth of a society, which is a living reality, subject to mutation over time. But on the other, the law provides structure to a society, which can degenerate; in which case the law should step in to prevent it.

So what is the yardstick which should orient the interpreter in understanding whether society is changing in a way that should be accommodated or corrected? One might suggest the object and purpose of the treaty. If a consensus, a practice, an evolution is in accordance with the object and purpose of the treaty, it should be recognized; if not, it must be rejected. In most of the cases the object and purpose of a treaty can be of sufficient assistance in resolving this issue. But in certain cases this may be problematic, not only because there can be disagreement over the object and purpose of a treaty, but also because, even if there is agreement on the object and purpose, this does not always provide clarity in deciding a case. *Hassan* was not the first case to bring before the Court a restrictive interpretation of Article 5. In *Mangouras* the Court accepted an enormous amount of bail, which one would consider disproportionate according to settled criteria, because of the social concern on environmental issues that European States were demonstrating. The protection of the individual here was opposed by the right of other individuals to have a safe environment, and laws embodying it. The judges recognized ‘new realities’ that made a once-disproportionate bail amount acceptable under the new conditions. This interpretation weakening the protection for an individual was dictated by a collective, European need for attention paid to environmental crimes.⁵³ Here, between the right of individuals to have a healthy

Human Rights’ (2009) 125 L Q Rev 416; D Nicol, ‘Original Intent and the European Convention on Human Rights’ [2005] Public L 152, 155.

⁵² A Scalia ‘Originalism: The Lesser Evil’ (1988-89) 57 U Cincinnati L Rev 849.

⁵³ *Mangouras v Spain* App no 12050/04 (ECtHR [GC], 28 September 2010) paras 86-7: ‘[T]he Court cannot overlook the growing and legitimate concern both in Europe and internationally in relation to environmental offences. This is demonstrated in particular by States’ powers and obligations regarding the prevention of maritime pollution and by the unanimous determination of States and European and international organisations to identify those responsible, ensure that they appear for trial and, if appropriate, impose sanctions on them... The Court considers that these



environment and the right to freedom, the object and purpose of the Convention would have been of little help. In this case, the Court, without any difficulty, accepted that new realities in environmental law could determine decreased protection for an individual.

Of course, one can say that the object and purpose of the European Convention is the protection of the single individual, and so whatever change does not add further protection to single individual cannot be accepted. This is indeed what the dissenting opinion said. But this interpretation leads to an application of an idealized Convention that ignores concrete, serious social challenges that might arise and risks becoming naive.

7. *Regression or Adjustment?*

Notwithstanding the fact that the dissenting judges strongly state that it does, the *Hassan* decision does not seem to fit the description of a regressive interpretation of the Convention. The Court decided to fix one of the issues arising from the application of the Convention in conflicts abroad, a situation not foreseen when the Convention was adopted, and to which Article 15 was not written to apply.⁵⁴ The Court's precedent, on the other hand, had elaborated the applicability of the

new realities have to be taken into account in interpreting the requirements of Article 5 § 3 in this regard'. E Borge, *The Evolutionary Interpretation of Treaties* (OUP 2014) 78-79.

⁵⁴ See e.g. *Collected edition of the 'Travaux préparatoires'*, Vol VI (Martinus Nijhoff 1979) 155 ff. Art 15 (suspension of rights) refers to the internal 'state of war' and to civil strife, not to conflicts abroad. In addition, the fact that the applicability of the Convention to the colonies was controversial at the time of the drafting of the ECHR, and that States were requested to make specific declarations on this matter, shows that states did not agree on the application of the ECHR outside the territory of a State, cf. *ibid*, Vol IV (Martinus Nijhoff 1978) 76; Vol VII (Martinus Nijhoff 1985) 20-2 and 72-4. In the outdated parlance of civilizers, it was even emphasized: 'Under paragraph (d) the signatory States are permitted to give due regard to special conditions which may exist in certain overseas territories. It is felt that the state of civilization of certain overseas territories does not permit the application of fundamental rights under the same conditions as for European territories. The States concerned have, however, to perform the task of bringing civilization to their overseas territories, a task of which the aim is precisely that of making the human rights applicable to these territories', Vol III (Martinus Nijhoff 1976) 266 (see critics and defences of this provision at 172-176, 182, 236 and Vol VII (Martinus Nijhoff 1985) 60-62. See also Milanovic (n 2) 12-16.

Convention in conflicts abroad. The *Hassan* decision adjusts the Convention to be consistent with this evolution in its case law. Enlarging the perspective to consider not only this decision, but the whole journey taken by the Court in its history, *Hassan* is an adjustment of the Convention to suit the broadened scope already elaborated upon by the Court. By saying that the concept of lawful in Article 5(1) also covers a IHL during conflicts abroad, the Court did not lower the protection of the individual, but adjusted the applicability of the Convention to a new situation not envisaged by its drafters.

The theoretical questions that arise, however, which have been dealt with very critically in the recent past with regard to measures against terrorism, and less critically on measures in favour of the environment, remain, cannot be resolved once and for all, and belong to the ongoing struggle of jurists to understand whether a collective effort of several states in the same direction (maybe unanimously) is progress or, in some cases, a violation of the Convention, a degeneration of society.⁵⁵ Mechanical answers, leading in opposite directions, like stating that any European consensus leads to a good modification of the Convention, or (as suggested by the dissenting opinion) that only a common practice that enhances the rights of an individual can be accepted, can be good rhetorical arguments, but do not seem well-suited to the problem at stake. Rather, this discernment must be carried out starting from a proper evaluation of the rights at stake, the way their expansion or restriction impacts the dignity of the individuals, and the reasons that underlie a common practice of States.

⁵⁵ George Letsas, for example, speaks of a *moral reading* of the ECHR that can run against any European consensus, *A Theory of Interpretation of the European Convention on Human Rights* (OUP 2009) 40; *ibid*, 'The Truth in Autonomous Concepts: How to Interpret the ECHR' (2004) 14 *Eur J Intl L* 279, 302-305.