

**What is living and what is dead in
the European Convention on Human Rights?
A Comment on *Hassan v United Kingdom***

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1. *Introductory remarks*

The nexus between the living instrument approach and the interpretative technique codified in Article 31(3)(b) of the Vienna Convention on the Law of Treaties (VCLT) is a close one. As the Court observed in *A, B & C v Ireland*, the existence of a consensus has long played a role in the evolution of the Convention provisions, beginning with *Tyrer v the United Kingdom*, with the Convention being considered a ‘living instrument’ to be interpreted in the light of present-day conditions: ‘Consensus has therefore been invoked to justify a dynamic interpretation of the Convention’.¹ As Nolte has observed, although the European Court does refer to Article 31(3)(b) with consistency, it regularly professes its adherence to this method of interpretation, as well as to the provisions on interpretation in the VCLT: ‘It can therefore be assumed that the Court is conscious of and adheres to the Vienna Convention’s rules even when it does not quote them explicitly.’²

Furthermore, the general approach of the European Court in this respect seems to be in line with Draft Conclusion 3 of the International Law Commission (ILC)³ on subsequent agreements and subsequent practice in relation to the interpretation of treaties, which stipulates

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¹ *A, B & C v Ireland* App no 25579/05 (ECtHR [GC] Judgment 16 December 2010) para 234.

² G Nolte, ‘Second Report for the ILC Study Group on Treaties over Time’, UN doc A/CN.4/671, para 1.7.

³ ILC, ‘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, ‘Subsequent agreements and subsequent practice in relation to interpretation of treaties’.



that: 'Subsequent agreements or subsequent practice under articles 31 and 32 may assist in determining whether or not the presumed intention of the parties upon the conclusion of the treaty was to give a term used a meaning which is capable of evolving over time'. As the ILC here mentions, there is, in terms of the law of treaties, nothing special about treaty terms being interpreted as having evolved; the issue of evolutionary interpretation of treaties is one of the correct application of Articles 31–33 VCLT.⁴

The possibility, raised by Judge Ziemele in *Roblena v Czech Republic*, that a better way of conceptualizing the idea of 'consensus', in connection with the living instrument approach, is as a matter of 'particular' or 'regional' customary international law, will not be developed any further here, although it seems to this author to be a promising avenue for further research.⁵

But what is the line that divides what is and what is not capable of interpretation under the living instrument doctrine, or to put it another way, what is living and what is dead in the European Convention?

In *Hassan* the European Court found 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'.⁶

This interpretation was, according to the Court, based on the interpretative techniques codified in Article 31(3)(b) VCLT and 31(3)(c). These considerations did not lead to an evolutionary interpretation that heightened the level of protection afforded by the Convention; rather, they limited or restricted that level of protection.

This short contribution will argue that, as a matter of treaty interpretation under the rules set out in Articles 31–33 VCLT, i.e. the 'gold standard' of treaty interpretation which the European Court itself explicitly follows, was not necessarily wrong in principle, but was inappropriate by reason of the subsequent practice which was available in the case. Before addressing that question squarely, however, it is

⁴ E Bjorge, *The Evolutionary Interpretation of Treaties* (OUP 2014).

⁵ *Roblena v Czech Republic* App no 59552/08 (ECtHR) [GC] 27 January 2015 Concurring Opinion of Judge Ziemele) para 2.

⁶ *Hassan v the United Kingdom* App no 29750/09 (ECtHR [GC] Judgment 16 September 2014) para 101.



necessary first to touch on three other points: first, that *Hassan* is not the first case in which the Grand Chamber has taken an approach which, by way of evolution, restricted Convention rights rather than expanding them; second, the issue of extraterritorial derogation; and, third, the issue of whether, in principle, a special regime of treaty interpretation ought to apply to provisions such as Article 1 ECHR.

2. *Restricting the Convention's protection through evolutionary interpretation? The possible precedent of Mangouras v Spain*

Hassan was not the first case in which the Court arguably has watered down the level of protection flowing from Article 5. Perhaps the most important example is *Mangouras v Spain*,⁷ where, it seems, the Grand Chamber (with a majority of 10 to 7) decided to lower the protection offered by Article 5 of the Convention to the individual claimant, who had caused great harm to the environment in the form of an oil spill. The Spanish courts had set a bail amount of three million Euros, a sum which was, according to the minority of the Grand Chamber, 'far beyond the means of the applicant, with the consequence that he continued to be detained on remand for a total of eighty-three days'.⁸ Whilst the case is different in many ways, one could see *Mangouras* as lowering the standards of protection in Article 5 of the Convention concerning the setting of bail for an applicant. Certainly, Judge Tulkens has characterized the judgment as an example of how evolutionary interpretation can 'in some cases, have as an effect the restriction of the scope of the rights protected by the Convention'.⁹

The Grand Chamber stated that in principle 'the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies'.¹⁰ But this did not lead the Grand Chamber to the

⁷ *Mangouras v Spain* App no 12050/04 (ECtHR [GC] 28 September 2010).

⁸ *ibid*, joint dissenting opinion of Judges Rozakis, Bratza, Bonello, Cabral Barretto, Davíd Thór Björgvinsson, Nicolau, and Bianku.

⁹ F Tulkens, *What are the Limits to the Evolutive Interpretation of the Convention?* (Council of Europe 2011) 8.

¹⁰ *Mangouras* (n 7) para 87.



conclusion that the applicant's rights under Article 5 had evolved towards a higher level of protection for individuals in the applicant's situation. Instead the Grand Chamber stated that it could not 'overlook the growing and legitimate concern both in Europe and internationally in relation to environmental offences'.¹¹ The subsequent practice in *Mangouras* was evidenced in particular by states' powers and obligations regarding the prevention of maritime pollution and the unanimous determination by European states to identify those responsible and imposing sanctions on them, sometimes using the criminal law as a means to enforce environmental law obligations. The Grand Chamber in *Mangouras* admittedly did not follow the exacting test as to what is subsequent practice drawn up by the International Court of Justice in the case concerning *Kasikili/Sedudu Island*. According to the ICJ a subsequent practice can be seen as being established only when the parties to a treaty, through their authorities, engage in common conduct, and when they acted wilfully and with awareness of the consequences of their actions.¹² Nonetheless it seems fair to analyse this case as an example of an international court shying away from giving an evolutionary interpretation to a treaty provision that would have gone with the grain of the object and purpose of the treaty, and instead found guidance in the subsequent agreements and practice of the states, which seemed in the event to go in the other direction. In *Mangouras*, in other words, the Grand Chamber gave precedence to subsequent practice over the object and purpose, thus avoiding a divergence between its own jurisprudence and the practice of states parties.

3. *Extraterritorial derogations?*

Second, can it be right for the European court to expand jurisdiction without a concurrent enlargement of the potential for derogation? In other words, is it tenable simultaneously to hold a state accountable because it exercises jurisdiction abroad yet deny it the

¹¹ *ibid* para 86.

¹² *Kasikili/Sedudu Island (Botswana/Namibia)* (Judgment) [1999] ICJ Rep 1045, para 74.



possibility to derogate extraterritorially? A recent High Court judgment in the United Kingdom has suggested that it must be possible to derogate extraterritorially,¹³ and so did the minority in *Hassan*. The obligation to afford human rights protection in the context of the external exercise of state power is not, however, likely to be amenable to derogation. Article 15 lays down as a condition for express derogation that the emergency in issue be one which is ‘threatening the life of the nation’. The Court in *Lawless v Ireland* determined that the words ‘refer to an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed’.¹⁴ Lord Bingham, delivering the lead judgment in *Al-Jedda*, observed that: ‘[i]t is hard to think that these conditions could ever be met when a state had chosen to conduct an overseas peacekeeping operation, however dangerous the conditions, from which it could withdraw’.¹⁵ Lord Hope, delivering the lead judgment in *Smith v Ministry of Defence*, observed about the power to derogate that ‘[t]he circumstances in which that power can properly be exercised are far removed from those where operations are undertaken overseas’.¹⁶ Campbell McLachlan summarizes the legal position in his recent book *Foreign Relations Law* stating: ‘[e]ngaging in an overseas military or peacekeeping operation, undertaken at the state’s election, is most unlikely’ to meet the requisite criteria.¹⁷ If the overseas operation is really elective, then it is difficult to imagine that that should meet the criteria of Article 15. In any case, if the Strasbourg Court were to go against the views of the House of Lords and of the Supreme Court and allow derogations in such circumstances, the acceptability of the derogation would depend heavily on the impugned facts. It is not possible to say, *ex ante*, that one can derogate out of all extraterritorial military activity undertaken by British troops; derogation is not an on–off switch for human rights obligations. The provision provides that the State may take measures derogating from its obligations under the

¹³ *Serdar Mohammed v Ministry of Defence* [2014] EWHC 1369 (Q.B.).

¹⁴ *Lawless v Ireland* (no 3) App no 332/57 (ECtHR Judgment 1 July 1961) para 28.

¹⁵ *R (on the application of Al-Jedda) v Secretary of State for Defence* [2007] UKHL 58, [2008] 1 AC 332, para 38.

¹⁶ *Smith and others v The Ministry of Defence* [2013] UKSC 41, [2013] 3 WLR 69, para 60.

¹⁷ C McLachlan, *Foreign Relations Law* (CUP 2014) 334.



Convention only ‘to the extent strictly required by the exigencies of the situation’; as is clear from *A v United Kingdom*, the Strasbourg Court has been fastidious in upholding the principle on which Article 15 is based,¹⁸ and the Court is likely to follow that same approach in respect of overseas military operations too. In any case, derogations in circumstances such as those prevailing in *Hassan* would, as pointed out by Sari and Quénivet, come with a series ‘of important limitations, including the fact that derogations are incapable of displacing the applicability of the Convention as a whole, that they are subject to scrutiny by the European Court and are without prejudice to other applicable rules of international law, including other applicable human rights norms, and that the rules of the ECHR overlap with those of the law of armed conflict in a number of respects’. Derogations should not therefore be regarded as ‘a magical panacea’.¹⁹

4. *Are there special rules for the interpretation of issues of jurisdiction?*

A question that was addressed by both parties in *Hassan* but which did not come to a head directly in the judgment is the correctness or otherwise of that which the Court observed in *Bankovic* about evolutionary interpretation and Article 1 of the Convention. As the Court stated in that case, ‘[i]t is true that the notion of the Convention being a living instrument to be interpreted in light of present-day conditions is firmly rooted in the Court’s case-law’. It continued to observe that it had ‘applied that approach not only to the Convention’s substantive provisions ... but more relevantly to its interpretation of former Articles 25 and 46 concerning the recognition by a Contracting State of the competence of the Convention organs’. Given, however, that ‘the scope of Article 1 ... is determinative of the very scope of the Contracting Parties’ obligations and, as such, of the scope and reach of the entire Convention system of human rights’ protection as opposed to the question ... of the competence of the Convention organs to examine

¹⁸ *A v United Kingdom* App no 3455/05 (ECtHR [GC] Judgment 19 February 2009).

¹⁹ A Sari, N Quénivet, ‘Barking up the Wrong Tree: How Not to Save the British Armed Forces from Legal Defeat’ <www.lawfareblog.com/2015/04/barking-up-the-wrong-tree-how-not-to-save-the-british-armed-forces-from-legal-defeat/>.



a case', the Court in *Bankovic* declined to apply the living instrument doctrine to the jurisdictional use of Article 1. The Grand Chamber of the European Court in *Bankovic* held that the living instrument doctrine ('dynamic' or 'evolutionary interpretation') did not apply to Article 1, as that article pertains to jurisdiction.²⁰

As a matter of principle, there is no reason why special doctrines of interpretation should apply to issues of jurisdiction. As a matter of international law, Article 1, like any other provision of the European Convention, has to be interpreted in accordance with the rules set out in Articles 31–33 VCLT. No special rules of interpretation apply to jurisdictional provisions. As the Tribunal (Crawford; Schwebel; Stephen, President) in *Mondev* determined:

'there is no principle either of extensive or restrictive interpretation of jurisdictional provisions in treaties. In the end the question is what the relevant provisions mean, interpreted in accordance with the applicable rules of interpretation of treaties. These are set out in Articles 31–33 of the Vienna Convention on the Law of Treaties.'²¹

The Tribunal added that:

'Neither the International Court nor other tribunals in the modern period apply any principle of restrictive interpretation to issues of jurisdiction.'²²

The main point in this matter, however, is a very simple one: whilst it is incorrect to say, as the Court did in *Bankovic*, that special rules of treaty interpretation should apply to Article 1, it is also wrong to think that the concept of jurisdiction that the Court now relies on has somehow evolved since the Convention's inception. Rather, we are talking here about a straight-forward application of a concept that,

²⁰ *Bankovic and Others v Belgium and Others* App no 52207/99 (ECtHR [GC] Decision 12 December 2001) paras 64–5.

²¹ *Mondev v United States of America* (Award 11 October 2002) [2002] 6 ICSID Rep 192 at [43].

²² *ibid.*



somewhat confused in *Bankovic*,²³ has always been there and is not so much evolving as finally being allowed to apply.

5. *Was the interpretative result in Hassan supported by the subsequent practice of states?*

Turning, then, to the main issue to which *Hassan* gives rise, namely how convincing is the claim of consistency of the interpretative result in *Hassan* with the VCLT?

First, it is worth pointing out that the result in *Hassan* was in no way a novel one; the Commission had already reached it in 1976 in *Cyprus v Turkey*, where the Commission had:

‘account of the fact that both Cyprus and Turkey are Parties to the (Third) Geneva Convention of 12 August 1949... . Having regard to the above, the Commission has not found it necessary to examine the question of a breach of Article 5 of the European Convention on Human Rights with regard to persons accorded the status of prisoners of war.’²⁴

Furthermore, it is worth recalling, as Judge Greenwood did, that the European Court of Human Rights has no more than ‘a restricted jurisdiction and cannot directly enforce rules drawn from outside the body of law which created [it]’.²⁵ This coheres with the conventional basis of the European Court’s jurisdiction. Article 19 ECHR establishes the European Court, ‘[t]o ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto’. Its jurisdiction, according to Article 32(1), ‘shall extend to all matters concerning the interpretation and application of the Convention and the protocols thereto’, Article 32(2) adding that ‘[i]n the event of dispute as to whether the Court has jurisdiction, the Court shall decide’.

Greenwood added, on the other hand: ‘that is no excuse for

²³ See McLachlan (n 17) 319–45; M Milanovic, *Extraterritorial Application of Human Rights Treaties* (OUP 2011).

²⁴ *Cyprus v Turkey* App nos 6780/74 and 6950/75 (Report of the Commission, 10 July 1976) para 313.

²⁵ C Greenwood, ‘Rights at the frontier: protecting the individual in time of war’ in BAK Rider (ed), *Law at the Centre* (Kluwer 1999) 278.



adopting a philosophy, reminiscent of extreme versions of the dualist approach to international law and municipal law, in which the existence of the laws of war is ignored even when such tribunals are confronted with alleged human rights violations in time of war'.²⁶ That must be correct.

Of course, such an approach has certain limits, limits which flow from the treaty to be interpreted. The *Kishenganga*²⁷ Tribunal in its interpretation of the Indian–Pakistani Indus Waters Treaty and Annexures, underscored that in interpreting the treaty, 'principles of international environmental law must be taken into account'.²⁸ However, Paragraph 29 of Annexure G to the Indus Waters Treaty made clear that:

'the law to be applied by the Court shall be this Treaty and, whenever, necessary for its interpretation or application, but only to the extent necessary for that purpose, the following in the order in which they are listed: (a) International conventions establishing rules which are expressly recognized by the Parties; (b) Customary international law'

Thus the Tribunal noted that 'the place of customary international law in the interpretation and application of the Indus Waters Treaty remains subject to Paragraph 29'; 'this Treaty expressly limits the extent to which the Court may have recourse to, and apply, sources of law beyond the Treaty itself'.²⁹ The Tribunal concluded that:

'if customary international law were applied not to circumscribe, but to negate rights expressly granted in the Treaty, this would no longer be 'interpretation or application' of the Treaty but the substitution of customary law in place of the Treaty.'³⁰

The danger is that other international law is 'applied not to circumscribe, but to negate rights expressly granted in the Treaty' which the court in question is entitled to interpret and apply; then the court is

²⁶ *ibid* 278–9.

²⁷ *Kishenganga* (Final Award) 20 December 2013, available at <www.pca-cpa.org/showpage.asp?pag_id=1392>.

²⁸ *Kishenganga* (Partial Award) (2013) 154 ILR 173, para 452.

²⁹ *Kishenganga* (Final Award) (n 27) para 111.

³⁰ *ibid* para 112.



no longer engaging, to use the wording of Article 32(1) ECHR in the 'interpretation or application of the Convention and the protocols thereto'. But, to use the words of the *Kishenganga* Tribunal, 'the substitution' of international humanitarian law '*in place of*' the ECHR. As was seen above, the ECHR does not include the kind of clause that the Indian–Pakistani Indus Waters Treaty and Annexures included; instead the relationship between the Convention and other international law is regulated through Articles 31–32 VCLT.

Thus, in *Hassan*, the Court set out the 'criterion contained in Article 31 (3)(c) of the Vienna Convention', in respect of which 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'.³¹ The Court noted that it had already held that Article 2 should be interpreted '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'.³²

In addition to the criterion contained in Article 31(3)(c), came the fact that no contracting state has purported to derogate from its obligations under Article 5 in order to detain, during international armed conflicts, persons on the basis of Geneva Convention III and IV. Although, as the Court noted both in *Bankovic* and *Hassan*, there have been a number of military missions involving a contracting state acting extra-territorially since their ratification of the Convention, none of these states has ever made a derogation pursuant to Article 15 in respect of these activities.³³ The practice of not lodging derogations in respect of detention under Geneva Conventions III and IV during international armed conflicts, the Court pointed out in *Hassan*, is mirrored by State practice in relation to the International Covenant for the Protection of Civil and Political Rights. Under this instrument no state has explicitly derogated under Article 4 in respect of such detention, even subsequent to the *Nuclear Weapons* and *Wall* Advisory Opinions³⁴ and *DRC v*

³¹ *Hassan* (n 6) para 102.

³² *ibid.*

³³ *Bankovic* (n 20) para 62; *Hassan* (n 6) para 101.

³⁴ *Legality of the Threat or Use of Nuclear Weapon* (Advisory Opinion) [1996] ICJ Rep 226, para 25; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136, para 106.



Uganda Judgment,³⁵ where the International Court made it clear that states' obligations under the international human rights instruments to which they were parties continued to apply in respect of acts done by a state in the exercise of its jurisdiction outside its own territory, particularly in occupied territories.

If it would have been wrong to rely only on extraneous rules of law such as the Geneva Convention, the interpretation that the Court made was supported too by the subsequent practice of the parties. That takes one dangerously close to the situation described by the *Kishenganga* Tribunal, i.e. one in which the court or tribunal engages not in the interpretation or application of the treaty of which it is the arbiter but instead in the 'substitution' of other rules of international law '*in place of the Treaty*'.³⁶

Perhaps that would have been the case if other rules of international law had been the only means of interpretation in favour of the interpretation that the Court made in *Hassan*. As seen above, however, that was not the case, as another means of interpretation favouring the result was, according to the Court, the subsequent practice on the part of all the states parties.

This approach was sound in principle. As the ILC has recently confirmed, a subsequent practice is 'an authentic means of interpretation' consisting 'of conduct in the application of a treaty, after its conclusions, which establishes the agreement of the parties regarding the interpretation of the treaty'.³⁷ The importance of such subsequent practice in the application of a treaty, as an element of interpretation, is obvious, as 'it constitutes objective evidence of the understanding of the parties as to the meaning of the treaty'.³⁸ On the other hand, as the ILC pointed out both in 1966 and in 2013, 'subsequent agreements and subsequent practice under Article 31(3)(a)–(b) are not the only "authentic means of interpretation". In particular the ordinary meaning of the text of the treaty is also such a means[;] "the text of the treaty

³⁵ *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (Judgment) [2005] ICJ Rep 168, para 216.

³⁶ *Kishenganga* Final Award (n 27) para 112.

³⁷ ILC, 'Report of the International Law Commission on the work of its sixty-fifth session' (n 3), Draft Conclusion 4(2).

³⁸ 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.



must be presumed to be the authentic expression of the intentions of the parties”³⁹. By describing subsequent practice as an: “authentic” means of interpretation the Commission recognizes that the common will of the parties, from which any treaty results, possesses a specific authority regarding the identification of the meaning of the treaty, even after the conclusions of the treaty. The Vienna Convention thereby accords the parties to a treaty a role which may be uncommon for the interpretation of legal instruments in some domestic legal systems’.⁴⁰ Special Rapporteur Sir Humphrey Waldock in 1964 was prepared in certain circumstances to accord particular – even decisive – weight to subsequent practice which is consistent and which embraces all the parties:

‘Subsequent practice when it is consistent and embraces all the parties *would appear to be decisive of the meaning to be attached to the treaty*, at any rate when it indicates that the parties consider the interpretation to be binding upon them. In these cases, subsequent practice as an element of treaty interpretation and as an element in the formation of a tacit agreement overlap and the meaning derived from the practice becomes an authentic interpretation established by agreement’.⁴¹

The ILC in 2013 confirmed this approach to the extent that it observed that: ‘subsequent agreements and subsequent practice establishing the agreement of the parties regarding the interpretation of a treaty must be conclusive regarding such interpretation when “the parties consider the interpretation to be binding upon them”’.⁴²

That, according to the Court’s description of the practice of the states parties, was the case in *Hassan*. In the Court’s view, all the states parties seemed to consider the interpretation to be binding on upon them. The subsequent practice in question in *Hassan* was, the Court held, consistent and embraced all the parties to the Convention, as ‘no contracting state has purported to derogate from its obligations under

³⁹ *ibid* 204–5; ILC, ‘Report of the International Law Commission on the work of its sixty-fifth session’ (n 3) 20.

⁴⁰ *ibid* 21.

⁴¹ H Waldock, ‘Third Report on the Law of Treaties’, (1964-II) YB ILC 60; emphases added.

⁴² ILC, ‘Report of the International Law Commission on the work of its sixty-fifth session’ (n 3) 22,



Article 5 in order to detain, during international armed conflicts, persons on the basis of Geneva Convention III and IV'.⁴³ Arguably, in such a case, to use Sir Humphrey Waldock's words, 'subsequent practice as an element of treaty interpretation and as an element in the formation of a tacit agreement overlap and the meaning derived from the practice becomes an authentic interpretation established by agreement'. As a matter of treaty interpretation the approach the Court took in *Hassan* is possible in principle, but only if one accepts that the failure of the states members to derogate extraterritorially met the threshold in terms of subsequent practice – a point that can certainly be doubted. Could it not be that some states failed to derogate because they thought – *à tort ou à raison* – the Convention would not apply in *Hassan* type cases? Could others, equally, have felt that purporting to derogate could have amounted to agreement that the Convention ought to bind in this type of case? Did the states in this regard act wilfully and with awareness of the consequences of their actions? Another issue is that some states, Germany being one of them, refrained from detaining any individuals in Afghanistan,⁴⁴ as they in fact assumed that they were bound by human rights obligations in situations such as those at issue in *Hassan*.⁴⁵

Whilst, in principle, subsequent practice could legitimately lead to the kind of extreme interpretative results which were the outcome in

⁴³ *Hassan* (n 6) para 101.

⁴⁴ Declaration in the Seventh Report by the Federal Government on its Human Rights Policy in the Context of Foreign Relations and in Other Policy Areas (BT-Drs. 15/5800). In the ICRCs Customary IHL database <www.icrc.org/customary-ihl/eng/docs/v2_cou_de_rule99_SectionA>, under 'Germany. Practice Relating to Rule 99. Deprivation of Liberty. Section A. General.' it is stated that: 'Since April 2007 German forces have detained no individuals in Afghanistan.'

⁴⁵ For example, 'Germany accepts the recommendation and already submitted the following declaration to the United Nations Human Rights Committee in 2004: Pursuant to Article 2(1), Germany ensures the rights recognized in the Covenant to all individuals within its territory and subject to its jurisdiction. Wherever its police or armed forces are deployed abroad, in particular when participating in peace missions, Germany ensures to all persons that they will be granted the rights recognized in the Covenant, insofar as they are subject to its jurisdiction.' Germany's replies in the Universal Periodic Review 2009: Report of the Working Group on the Universal Periodic Review. Germany. Addendum. Views on conclusions and/or recommendations, voluntary commitments and replies presented by the States under review UN Doc A/HRC/11/15/Add. 1, 2–3.

Hassan – interpretation *contra legem* – it is far from clear that the requisite practice was actually obtained in *Hassan*.

There are other limits to such an approach too, such as the one set out in the judgment of the International Court of Justice in *Whaling in the Antarctic* case. There the International Court found that the functions which the International Convention for the Regulation of Whaling conferred on the International Whaling Commission (IWC) had ‘made the Convention an evolving instrument’.⁴⁶ The Court observed that ‘amendments to the Schedule and recommendations by the IWC may put an emphasis on one or the other objectives pursued by the Convention, but cannot alter its object and purpose’.⁴⁷ In line with this approach, the subsequent practice of the contracting states to the ECHR may put an emphasis on one or the other objectives pursued by the ECHR but cannot alter its object and purpose. Whilst it would seem that *Hassan* is within the wider bounds drawn up by the International Court, the interpretation it applied was nonetheless an unsatisfactory one.

⁴⁶ *Whaling in the Antarctic (Australia v Japan: New Zealand Intervening)* (Judgment) 31 March 2014 <www.icj-cij.org/docket/files/148/18136.pdf> para 45.

⁴⁷ *ibid* para 56.

