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**SUBSEQUENT PRACTICE AND EVOLUTIVE
INTERPRETATION: TECHNIQUES OF TREATY
INTERPRETATION OVER TIME AND THEIR
DIVERSE CONSEQUENCES**

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**Subsequent Practice and Evolutive Interpretation:
Techniques of Treaty Interpretation over Time and Their Diverse Consequences***

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This paper compares two different means of treaty interpretation by which a treaty or treaty provision may change over time: the interpretation and reinterpretation of a treaty on the basis of its evolutive character, and the (re)interpretation of a treaty on the basis of the subsequent practice of the parties. I contend that evolutive interpretation and interpretation based on subsequent practice do not simply refer to two different and distinct phenomena – as a practical matter they constitute two different “techniques of interpretation” which may or may not both be applicable in a particular case, and may sometimes both be applicable but mutually exclusive. The basic problem of the paper revolves around the following question: where the evidence is uncertain, or ambivalent, which technique – if any – should be applied? My goal is to show that although both techniques may be applicable to a treaty in a given case, the application of one or the other doctrine will have different consequences in the short and long term. In so doing, I will first expound the immediate effects of the techniques by examining them individually with an eye to their evidentiary criteria and their relative expansive potentialities. I shall then illustrate and compare their respective long-term consequences, which I categorize as “vertical” (with respect to successive interpretations of the particular treaty in question) and “horizontal” (referring to effects on the interpretation of other treaties). Ultimately, I want to argue that neither means of interpretation is more appropriate across the board, and therefore the choice between the two techniques should be informed by the consideration of their consequences in light of the object and purpose of the particular treaty to be interpreted.

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Introduction

“Treaties are not just dry parchments. They are instruments for providing stability to their parties and to fulfill the purposes which they embody. They can therefore change over time, must adapt to new situations, evolve according to the social needs of the international community and can, sometimes, fall into obsolescence.”

— Georg Nolte.¹

One way or another, treaties are capable of adaptation to new factual and legal situations.² The questions of the day are when, why, and how much treaties can and should change over time – especially with respect to change through interpretation.³ As Professor Nolte notes, problems arise frequently in the context of the evolution of treaties over time, and “as certain important multilateral treaties reach a certain age, they are even more likely to arise in the future.”⁴ Partly this is because the rules of treaty interpretation over time are themselves in flux.⁵ Although most agree that treaties can adapt to new circumstances over time, a pervasive lack of clarity on the means by which this adaptation can occur seriously implicates certainty and legitimacy in international treaty regimes.

The starting point for any developmental interpretation of a treaty over time must in some way be the intention of the parties.⁶ In some cases the parties intend, from the outset, that their treaty be capable of evolving over time, that it can remain effective or relevant in the face of changing conditions.⁷ In other cases, the parties decide at a later stage to reinterpret their treaty, irrespective of their original intentions.⁸ Reflecting these

¹ Rep. of the Int’l Law Comm’n, 60th Sess., May 5 – June 6, July 7 – Aug. 8, 2008, U.N. Doc. A/63/10; GAOR, 63d Sess., Supp. No. 10 (2008), Annex A, ¶ 1 [hereinafter ILC 60th Report, Annex A].

² *See Id.* Though no one would suggest that, empirically, States and courts never reinterpret treaties, or that the Vienna Convention on the Law of Treaties (VCLT) does not permit treaty development in any way, there has been some very strong normative criticism of treaty development through interpretation. *See* Hugh Thirlway, *Reflections on Lex Ferenda*, 32 NETHERLANDS YRBK INT’L L., 24 (2001).

³ *See* ILC 60th Report, Annex A, *supra* note 1.

⁴ *See id.* ¶ 6.

⁵ *See, e.g.*, Malgosia Fitzmaurice, *Dynamic (Evolutive) Interpretation of Treaties*, Part I, 2008 HAGUE YRBK INT’L L. 101, 153 [hereinafter M. Fitzmaurice, Part I] (arguing that evolutive interpretation is a developing concept, whose contours are as yet quite unclear).

⁶ *Id.*

⁷ For an eloquent statement of the thesis that a treaty is only legitimately “evolutive” on the basis of the intent of the parties to make the whole agreement, or a provision of it, evolutive, see M. Fitzmaurice, Part I, *supra* note 5, at 102 *et seq.* *See also* INTERNATIONAL LAW COMMISSION, CONCLUSIONS OF THE WORK OF THE STUDY GROUP ON THE FRAGMENTATION OF INTERNATIONAL LAW: DIFFICULTIES ARISING FROM THE DIVERSIFICATION AND EXPANSION OF INTERNATIONAL LAW ¶¶ 22–23(2006) [hereinafter FRAGMENTATION CONCLUSIONS]; INTERNATIONAL LAW COMMISSION, FRAGMENTATION OF INTERNATIONAL LAW: DIFFICULTIES ARISING FROM THE DIVERSIFICATION AND EXPANSION OF INTERNATIONAL LAW ¶ 478 *et seq.* (2006)(finalized by Martti Koskenniemi) [hereinafter FRAGMENTATION REPORT].

⁸ *See* Vienna Convention on the Law of Treaties art. 31(3)(b), May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT]. *See also* *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West*

possibilities, there are thus two main approaches to determining the intention of the parties that their treaty develop over time: one based on the original intent of the parties, and the other based on their later intentions of the parties. Following Malgosia Fitzmaurice, I shall refer to first category of approaches as “evolutive interpretation” – where the developmental interpretation is based on some evidence of the original intention of the parties that the treaty be capable of evolution.⁹ Following the express language of the Vienna Convention on the Law of Treaties (VCLT) I shall refer to the second category, whereby a treaty is interpreted developmentally on the basis of something about the later behavior of the parties, as interpretation based on “subsequent practice.”¹⁰

Evolutive interpretation and subsequent practice have long been employed by international tribunals.¹¹ Both are considered permissible under the rules of the 1969 VCLT. The Vienna rule expressly provide for interpretation on the basis of subsequent practice in art. 31(3)(b). The VCLT has been frequently interpreted as implicitly endorsing evolutive interpretation.¹² Evolutive interpretation has been grounded in art. 31(1), on interpreting a treaty in light of its object and purpose,¹³ and in art. 31(3)(c) on interpreting a treaty in light of the changing applicable rules of international law.¹⁴ Indeed it is not

Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 16, ¶¶ 21–22 (June 21) [hereinafter *Namibia*].

⁹ See M. Fitzmaurice, Part I, *supra* note 5, at 102 *et seq.* (arguing that “evolutive” interpretation is a more useful term than “teleological” interpretation because it is the more inclusive of the two). See FRAGMENTATION CONCLUSIONS, *supra* note 7, ¶¶ 22–23.

¹⁰ VCLT, art. 31(3)(b).

¹¹ See, e.g., the ICJ in *Namibia*, *supra* note 8, ¶¶ 21–22, 53; and *Aegean Sea Continental Shelf*, 1978 I.C.J. 3, ¶ 77 (Dec. 19) [hereinafter *Aegean Sea*]. See also the WTO Appellate Body, for example Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 130, WT/DS58/AB/R, DSR 1998: VII, (Oct. 12 1998) [hereinafter WTO AB, *Shrimp-Turtle*] (holding that the term “natural resources” in Article XX(g) of the WTO Agreement is “generic” and “by definition evolutionary.”); and the European Court of Human Rights, for example *Öcalan v. Turkey*, 2005-IV Eur. Ct. H.R. (2005) [hereinafter ECtHR, *Öcalan*] (reinterpreting the right not to be subject to inhuman and degrading treatment on the basis of a combination of subsequent practice and evolutive interpretation).

¹² The Inter-American Court of Human Rights (IACtHR) has stated that “evolutive interpretation is consistent with the general rules of treaty interpretation established in the 1969 Vienna Convention.” The Right to Information on Consular Assistance In the Framework of the Guarantees of the Due Process of Law, Advisory Opinion OC-16/99, Inter-Am. Ct. H.R. ¶ 114 (Oct. 1, 1999) [hereinafter IACtHR, *Information on Consular Assistance*]. See also FRAGMENTATION REPORT, *supra* note 7, ¶ 478 (a); RICHARD GARDINER, TREATY INTERPRETATION 225, 276 (2009); Daniel Rietiker, *The Principle of “Effectiveness” in the Recent Jurisprudence of the European Court of Human Rights: Its Different Dimensions and its Consistency with Public International Law*, 79 *Nordic J. Int’l L.* 245, 255 (2010).

¹³ See, e.g., *Iron Rhine Arbitration (Belg. v. Neth.)*, 27 R.I.A.A. 35, 73 (¶ 80) [hereinafter *Iron Rhine Arbitration*]. Rietiker states that the flexible formulation of “object and purpose” in VCLT art. 31(1) justifies the Court’s evolutive approach. Rietiker, *supra* note 12, at 253, 255.

¹⁴ FRAGMENTATION REPORT, *supra* note 7, ¶ 478 (a) (The Fragmentation Report considers evolutive interpretation to be grounded in VCLT art. 31(3)(c), reading that article as supporting interpretation of “generic terms” in light of the definition of those terms in international law at the time of application). The IACtHR has considered 31(3)(c) as requiring that the interpretation of a treaty take into account the evolving conditions of the legal system of which it that treaty is a part. IACtHR, *Information on Consular Assistance*, *supra* note 12, ¶¶ 113–115.

difficult to find support for these two modes of interpretation in the sources of international law. The problem is that these sources say very little about how these doctrines of interpretation actually work, or how they should work. It is far more difficult to determine their contours, their spheres of applicability, and the extent to which they can be distinguished from one another in practice. In particular, very little attention has been given to comparing the consequences of their respective application.¹⁵ This paper starts from the position that a degree of order in these doctrines of treaty interpretation over time would go a long way to buttressing stability, certainty, and legitimacy in the law and political relations of international treaties.¹⁶

The goal of this paper is to clarify some of the consequences of applying one or the other doctrine of interpretation: evolutive interpretation or subsequent practice. I hope to show that while in theory the two doctrines are contained, applying to discreet phenomena – one based on interpreting the original intent of the parties, the other based on their subsequent intent – it may be far less clear which if any pertains in a particular case. In many cases the interpreter is faced with a choice, which has certain consequences. In some instances, either doctrine could be applied to a treaty, yielding divergent results. Other times, both doctrines may achieve the same immediate result in a particular case, with dramatically different long-term consequences: *vertically*, with respect to the same treaty in successive future interpretations; and *horizontally*, with respect to the interpretation of other treaties. Ultimately, I want to argue that interpreters should take into consideration the short and long-term consequences of the interpretative doctrines they are asked to apply, and that they should be especially cautious when the evidence seems to support the application of more than one doctrine. This paper will analyze subsequent practice and evolutive interpretation, expounding and comparing their structure, criteria, and consequences, so as to begin to develop an approach toward articulating the considerations most important to interpretation over time.

1.1. *Concretizing the Difficulty and Consequences of Choice: Costa Rica v. Nicaragua.*

The potential mutual applicability of subsequent practice and evolutive interpretation and the consequences of their respective application are best illustrated by example. For the remainder of this introduction, I shall therefore use the recent case *Costa Rica v. Nicaragua*, handed down by the International Court of Justice in 2009, as an analytical device to outline the argumentative structure of the paper.

¹⁵ Richard Gardiner, for example, dedicates only a single page to comparing the two doctrines in his otherwise masterful treatise on treaty interpretation. GARDINER, *supra* note 12, at 242.

¹⁶ Hence the ILC has taken up an as of yet undefined part of this topic. See ILC 60th Report, Annex A, *supra* note 1.

Costa Rica v. Nicaragua concerned a dispute over use-rights to a maritime boundary delineated by a bilateral Treaty of Limits of 1858. That Treaty posited the San Juan River as the border between the two States: the entire river would be under Nicaraguan sovereignty, while Costa Rica would retain a right to freely navigate the river for the purpose of commerce (“*comercio*”). The relevant aspect of the dispute concerned the definition of *comercio*: Nicaragua advanced a narrow definition of the term, limited to trade in goods pursuant to the meaning of the term in 1858;¹⁷ Costa Rica argued for a broad reading, encompassing “any activity in pursuit of commercial purposes and includ[ing], *inter alia*, the transport of passengers, tourists among them, as well as of goods.”¹⁸ The Court took a compromise position, interpreting *comercio* to mean trade in both goods and services, including tourism but not including the navigation of vessels used in the performance of governmental or public activities not pursued for profit.¹⁹ The Court held that “*comercio*,” as incorporated in this treaty, must be given a broad meaning in 2009, even though its meaning in 1858 was probably narrow.

Most of the judges agreed that the meaning of the 1858 Treaty had changed over the last century, but they disagreed as to *why*.²⁰ The Court held that the term *comercio* is inherently evolutive, and must *ipso facto* be interpreted in light of its contemporary meaning at the time of application.²¹ According to the Court, this is so because *comercio* is a highly general term incorporated in a treaty intended to remain in force in perpetuity.²² Conversely, Judge Skotnikov contended that the mere inclusion of a generic term in a boundary treaty should not be treated as evidence of the intention of the parties that the treaty can evolve over time²³; rather, he argued, in the context of territorial borders this mode of interpretation cuts against the venerable presumption of *in dubio mitus* – that limitations on sovereignty are not to be implied.²⁴ According to him, Nicaragua granted

¹⁷ Dispute Regarding Navigational and Related Rights, (*Costa Rica v. Nicar.*), Judgment, ¶ 58 (July 13, 2009), available at <http://www.icj-cij.org/docket/files/133/15321.pdf> [hereinafter *Costa Rica v. Nicaragua*].

¹⁸ *Id.*, ¶ 59.

¹⁹ *Id.*, ¶ 71.

²⁰ The one exception was Judge ad hoc Guillaume who, while acknowledging the validity of interpretation over time in general (including evolutive interpretation and subsequent practice), insisted that the term had not changed over time because it had *always* had the broad meaning of trade in goods and services. See *Costa Rica v. Nicaragua*, *supra* note 17, ¶ 16 (declaration of Judge Guillaume).

²¹ *Costa Rica v. Nicaragua*, *supra* note 17, ¶ 70.

²² *Id.*, ¶¶ 67–68.

²³ *Costa Rica v. Nicaragua*, *supra* note 17, (Separate Opinion of Judge Skotnikov).

²⁴ *Id.* (citing the Judgment of the Permanent Court of International Justice in *S.S. Wimbledon*). Judge Skotnikov offers no argument that *in dubio mitus* remains a presumption grounded in international law, itself a highly debatable position. However Marcelo Kohen argues that the presumption should at least retain force in interpreting territorial treaties – especially those concerning the delimitation of international borders. See Marcelo Kohen, *The Decision on the Delimitation of the Eritrea/Ethiopia Boundary of 13 April 2002: A Singular Approach to International Law Applicable to Territorial Disputes*, in PROMOTING JUSTICE, HUMAN RIGHTS AND CONFLICT RESOLUTION THROUGH INTERNATIONAL LAW. LIBER AMICORUM LUCIUS CAFLISCH 767, 772 (Marcelo Kohen, ed., 2007). It should be noted that Kohen was arguing more precisely about interpreting border delineation, not the interpretation of clauses articulating cross border use-rights, as were at issue in *Costa Rica v.*

Costa Rica certain rights to the river in 1858, and it should not be presumed that Nicaragua intended these rights to be capable of expanding over time, further limiting Nicaragua's sovereign control of the San Juan river.²⁵ Nevertheless, Judge Skotnikov agreed that the meaning of *comercio* in the Treaty had changed since 1858 – for a different reason. For at least ten years Costa Rica had used the river for the purposes of tourism without objection - Nicaraguan authorities merely required tourists on Costa Rican vessels to obtain Nicaraguan visas. According to Judge Skotnikov, the Treaty came to include trade in services, like tourism, because the subsequent practice of the parties evidenced their common interpretation of *comercio* as including such services.²⁶

The dispute between Skotnikov and the Court in *Costa Rica v. Nicaragua* usefully demonstrates four points, which track the general structure of this paper: (1) in some cases the evidence supports application of both techniques; (2) in such cases the application of one technique or the other may lead to a different immediate result; and (3) may entail different vertical and/or (4) horizontal consequences in the long-term.

First, although in theory subsequent practice and evolutive interpretation rest upon different evidentiary criteria, *Costa Rica v. Nicaragua* shows that the evidence before a tribunal may support the application of either doctrine. When conceived as ideal-types the doctrines refer to different phenomena, to either the parties' subsequent practice or their original intent as crystallized in the text. Nevertheless, their spheres of application overlap in practice. In hard cases it may be unclear from the evidence whether one, the other, or both should be applied. Such hard cases further bring into relief the possibility that the doctrines have different consequences in the short and long terms.

The second point illustrated by *Costa Rica v. Nicaragua* is that the doctrines may have different immediate consequences in a particular case. Judge Skotnikov and the Court agreed that the Treaty of 1858 had come, over time, to include some rights of trade in services, but disagreed slightly as to the precise results of this change. The Court held that Costa Rica's freedom to pursue commerce had evolved to mean that Nicaragua could not require tourists to obtain visas when touring the river on Costa Rican vessels, even though Nicaragua had consistently required such visas of tourists. But precisely because the subsequent practice of the parties was thus limited, Judge Skotnikov contended that Nicaragua could not be seen as having relinquished its sovereign right to require visas for tourism on its territory.²⁷ Thus in some instances, though both doctrines may be

Nicaragua. Use-rights have been interpreted as evolutive in other cases. See e.g., *Iron Rhine Arbitration*, *supra* note 13.

²⁵ *Costa Rica v. Nicaragua*, *supra* note 17, (Separate Opinion Judge Skotnikov).

²⁶ *Id.*

²⁷ Judge Skotnikov does not expressly note the variance in result that would arise from the application of his preferred mode of interpretation as opposed to the evolutive interpretation favored by the Court. However the voting record reveals their differences on the substance of the new interpretation. Judge Skotnikov voted with the majority on the result that the Costa Rica has the right of conveying tourists along the river under

applicable, an evolutive interpretation may support a more dramatic reinterpretation than would be available on the basis of the subsequent practice of the parties. In other cases the reverse may be true.²⁸

Third, *Costa Rica v. Nicaragua* illuminates the doctrines' different vertical consequences, regarding future reinterpretations of the same treaty. Even if, hypothetically, the immediate result of the application of either doctrine would have led to the same immediate result, the decision will have normative effects on future interpretations of the Treaty. As the Court notes the notion of *comercio* in the Treaty of Limits is now to be interpreted anew on each occasion the Treaty is applied, since interpreting a treaty as "evolutive" entails a claim about the dynamic *nature* of the treaty itself.²⁹ Conversely, when a treaty is reinterpreted on the basis of subsequent practice, its new interpretation will remain fixed in the absence of further subsequent practice (or formal amendment). In other words, each successive reinterpretation on the basis of subsequent practice depends upon new evidence that the parties intend to reinterpret, whereas an evolutive treaty will by its nature be always susceptible of further evolution whenever certain factual or legal conditions are met.³⁰

Fourth, the decision raises the possibility that the doctrines have different horizontal consequences, regarding the interpretation of other treaties. The ICJ had previously considered the definition of "commerce" in the context of a dispute between the U.S. and Iran concerning an FCN treaty, and had refused to give that term the broad interpretation advanced by Iran.³¹ The *Costa Rica v. Nicaragua* judgment that the term "commerce" is inherently evolutive implies that in the future the ICJ may well consider that term evolutive in other treaties, effectively encouraging States in Iran's position to reassess their own treaties incorporating the term "commerce" to see if advantage can be found in reinterpreting that ubiquitous word. Where a court or tribunal determines a treaty provision as being inherently evolutive, this finding may well have a persuasive effect on the interpretation of other treaties with the same or similar terminology³²; conversely an

"*comercio*," however he voted against the majority on the question of visas, finding that persons travelling on the river on board Costa Rican vessels could be required to obtain Nicaraguan visas. See the *recitative* in *Costa Rica v. Nicaragua*, *supra* note 17, ¶ 156 (1)(b), (1)(d), (4)(a).

²⁸ See GARDINER, *supra* note 12, at 230–31.

²⁹ *Costa Rica v. Nicaragua*, *supra* note 17, ¶ 70.

³⁰ *Id.*

³¹ Case concerning Oil Platforms (Iran v. U.S.), 2003 I.C.J. 161, ¶¶ 4.48–4.50 (Nov. 6) [hereinafter *Oil Platforms*].

³² In some cases, Judges may follow their prior decisions that certain terms are inherently evolutive in other treaty contexts, and in others Judges may follow such holdings by other courts by way of analogy. In still other cases, an argument could be made that Judges must interpret treaty-terms in similar ways under VCLT 31(3)(c), which according to the ILC has as one of its function the systemic integration of treaty regimes. See *e.g.*, FRAGMENTATION CONCLUSIONS, *supra* note 7, ¶¶ 37–43. The reasoning would go that if one Court, say the ICJ, determined "commerce" to be inherently evolutive, it should do so again when interpreting other treaties, and so too should other judicial bodies engaged in treaty interpretation.

interpretation based on subsequent practice will be based exclusively on the practice of the parties to the treaty, and should have no effect on the interpretation of other treaties whose parties have not engaged in or acquiesced in the same or similar practice.

The four points gleaned through analysis of the *Costa Rica v. Nicaragua* decision track the progression of this paper. In Section Two I suggest that subsequent practice and evolutive interpretation may be best understood as techniques of interpretation, available to be applied in different sets of circumstances that often overlap. In Section Three I attempt to expound the two techniques, with the aim of articulating, generally, the conditions for their application and elucidating their respective potentials to expand or change a treaty over time. In Section Four I will try to demonstrate some of the immediate, vertical, and horizontal consequences of applying one or the other technique. The goal of this article is to highlight the potential short and long-term consequences of applying subsequent practice and evolutive interpretation, and to suggest that these consequences should be taken into consideration in the interpretation of a particular treaty, in light of the usual factors of the Vienna rule: plain text, context, and object and purpose.

2. Techniques of Interpretation

Construed as ideal types, subsequent practice and evolutive interpretation appear to correspond to two entirely different phenomena. The former is warranted only where there is a certain kind and degree of practice on the part of the parties evidencing their subsequent intention to interpret the treaty in a certain way. The latter is warranted only where there are signs, in the text or elsewhere, that the parties intended the treaty to have an evolutive character linked to subsequent developments in law or facts. From the perspective of the interpreter, however, it is not always clear on which basis a particular treaty should be interpreted. There may be evidence to support both positions, and indeed the same evidence may support either position, as was the case in *Costa Rica v. Nicaragua* – at some point an interpreter must decide to apply one, the other, or both.³³ Therefore the doctrines should not be understood as rigid rules of interpretation, but rather as techniques of interpretation to be employed (or not) based on full consideration of their respective consequences.³⁴

Where the evidence is ambivalent, supporting both subsequent practice and evolutive interpretation, interpreters are frequently confronted with a *choice*.³⁵ The choice between these techniques is most stark in cases where either doctrine may be applied, but not both. This situation arises where the evidence supports applying either doctrine of

³³ See *Costa Rica v. Nicaragua*, *supra* note 17, ¶¶ 64–70.

³⁴ This presumption-based understanding is in keeping with the codified part of the law of treaty interpretation in VCLT art. 31, which according to the ILC commentaries lists a series of *factors* relevant to interpretation. INTERNATIONAL LAW COMMISSION, DRAFT ARTICLES ON THE LAW OF TREATIES WITH COMMENTARIES, 1966 Y.B. I.L.C., Vol. II, 219–220 [hereinafter ILC DALT] As the commentaries make clear, these factors were not meant to be rigid rules of interpretation, but to constitute parts of a single general rule to be weighed against one another in practical cases. In addition, the commentaries note that “the character of a treaty may affect the question whether the application of a particular principle, maxim, or method of interpretation is suitable in a particular case.” ILC DALT, *supra* note 34, at 219. Thus, taken together the commentaries suggest that an interpreter should weigh the various applicable elements of the Vienna rule against one another, taking their consequences into account in light of the character of the treaty. For example, even in the presence of clear subsequent practice, satisfying all formal requirements (*see infra*, § 3.2), the object and purpose of a treaty may militate against a reinterpretation so strongly as to trump the subsequent practice – as in the hypothetical case of a human rights treaty, where the parties subsequent failures to meet the standards they’ve set for themselves should be interpreted not as subsequent practice evidencing a radically narrow interpretation of the treaty, but as breaches of the agreement. *See further, infra* §4; and Kohen, *supra* note 24, at 772 (arguing that treaty interpretation entails employing many different kinds of substantive presumptions, and balancing them against each other. In other words the process entails making choices about how to interpret a treaty based upon the relevance of the factors in the VCLT rule, in light of other presumptions like the finality of boundaries, or the idea that limitations on sovereignty are not to be inferred).

³⁵ In the words of Sir Percy Spender in his Separate Opinion to the *Certain Expenses* case, “All canons of interpretation, however valuable they may be, are but aids to the interpreter.” *Certain Expenses of the United Nations*, Advisory Opinion, 1962 I.C.J. 151, 187 (July 20) [hereinafter *Certain Expenses*] (Separate Opinion of Judge Spender) (referring specifically to subsequent practice and evolutive interpretation, among other doctrines of interpretation).

interpretation, but their application would yield mutually exclusive results – for example where the application of one doctrine appears to justify expanding a right within certain limits while the other appears to justify a much broader expansion. In such cases they cannot logically both be applied. Again, *Costa Rica v. Nicaragua* is illustrative. In that case, the interpretation based on subsequent practice would have only supported an interpretation of *comercio* as including Costa Rica's right to use the river for tourism without affecting Nicaragua's right to require tourist visas; the evolutive interpretation used by the Court allowed Costa Rica the right to convey tourists without the need to obtain visas. In that case the Court recognized the existence of both doctrines, but chose to only apply evolutive interpretation³⁶; Judge Skotnikov argued for the opposite choice.³⁷

This is not to say that there are no cases where both techniques can be applied in harmony. The European Court of Human Rights (ECtHR), for example, has stated that evolutive interpretations of the European Convention of Human Rights (ECHR) cannot directly contravene the text. Yet in *Öcalan*, the Grand Chamber held that subsequent “practice within the Member States could give rise to an amendment of the Convention...and hence remove a textual limit on the scope for evolutive interpretation.”³⁸ The crucial point is that the ECtHR was applying the two techniques to different parts of the Convention to yield a harmonious result.³⁹ By contrast, in a case like *Costa Rica*, where the subsequent practice and evolutive interpretation would yield divergent interpretations of the same right, it is impossible to interpret a treaty on the basis of both doctrines. Had it claimed to have applied both, the ICJ would have merely masked its exclusive reliance on evolutive interpretation – in point of fact the subsequent practice could only justify the narrower interpretation and indeed militated against the broader interpretation.⁴⁰

Subsequent practice and evolutive interpretation should not be understood as rigid rules of interpretation automatically applicable whenever supported by the evidence. As with all parts of the Vienna rule, these doctrines should be understood as two different techniques of interpretation, capable of yielding divergent immediate and long-term results, whose application should depend upon a variety of considerations and

³⁶ *Costa Rica v. Nicaragua*, *supra* note 17, ¶ 64.

³⁷ *Id.*, (Separate Opinion of Judge Skotnikov).

³⁸ ECtHR, *Öcalan*, *supra* note 11, ¶ 163. The language cited is originally that of the lower Chamber, which the Grand Chamber adopts in full on this point.

³⁹ The Grand Chamber held that the subsequent practice could be relied on to interpret one article out of existence (article 2§1, permitting the death penalty), thereby removing a textual limitation on the evolutionary potential of another article (article 3, prohibiting inhuman and degrading treatment).

⁴⁰ It might be said that the parties' subsequent practice illuminates their intention from the outset that the treaty be evolutionary by nature. However this would mask the decisive question– whether or not to limit the developmental interpretation to what could be gleaned from the subsequent practice of the parties, or to go further based on the judgment that the treaty was, irrespective of the later conduct of the parties, capable of evolution. Treating the practice as evidence of the latter only masks the choice involved.

presumptions.⁴¹ Sometimes, as in *Öcalan*, they may both be applicable and indeed may actually be applied together to yield a harmonious result. In other cases, like *Costa Rica v. Nicaragua*, they may both be formally applicable yet cannot both be applied because they would yield mutually exclusive results. In those cases, interpreters are confronted with a choice to apply one or the other, or neither. In any case, to make an informed choice about applying one technique, the other, both, or neither in any given case, there are several important considerations that ought to be taken into account, including the immediate effects of that choice on the particular treaty in light of its object and purpose, as well as the long-term vertical and horizontal effects of interpretation.⁴²

⁴¹ Such an understanding is consistent with the general approach to treaty interpretation under the VCLT as a process of weighing factors, considerations, and in some cases presumptions, rather than applying hierarchical bright-line rules. ILC DALT, *supra* note 34, at 219–220. See GARDINER, *supra* note 12, at 9. (“A key to understanding how to use the Vienna rules is grasping that the rules are not a step-by-step formula for producing an irrebuttable interpretation in every case.”) Courts and scholars have recognized that the question of whether a treaty is or is not evolutive entails weighing various considerations and presumptions, as does the question of whether a treaty can be reinterpreted on the basis of subsequent practice. For example, according to Judge ad hoc Guillaume, the question of whether a treaty may be considered evolutive comes down to weighing presumptions. See *Costa Rica v. Nicaragua*, *supra* note 17, ¶¶ 11–12, 15 (Declaration of Judge ad Hoc Guillaume) (“In effect, in most cases, the Parties are not precise in the text of treaties as to whether they intend to solidify the meaning of terms that they employ or whether they accept that their meaning can evolve. Consequently, it is necessary to resort to presumptions.”) Similarly, According to Marcelo Kohen, the question of whether adaptation based upon subsequent practice is appropriate in particular cases depends upon weighing considerations and presumptions, like the ICJ’s usual presumption of the finality of boundaries. See Kohen, *supra* note 24, at 772–773. See *contra* the statement of the Ethiopia/Eritrea Boundary Commission that, even if there is a presumption against modifying boundaries through conduct, “The conduct of one Party must be measured against that of the other. Eventually, but not necessarily so, the legal result may be to vary a boundary established by treaty.” Delimitation of the Border (Eth. v. Eri.), 25 R.I.A.A. 83, ¶ 3.29 (Apr. 13, 2002) [hereinafter *Ethiopia/Eritrea*]. I contend, similarly, that the question of which of the two techniques to apply should depend upon considerations and/or presumptions.

⁴² See *infra*, §4.

3. Expounding the Techniques

Subsequent practice and evolutive interpretation have very different characters. Their application depends upon incongruent sets of evidentiary criteria, and in the abstract they support different kinds and degrees of change. Empirically, in different contexts either technique may justify more or less change or expansion of rights and obligations than the other.⁴³ Because in many circumstances it may be unclear which, if either, is appropriate to apply, it is worth taking into account their possible consequences. Therefore the goal of this section is to expound the two techniques, comparing their evidentiary criteria and their respective expansive potentials – in other words the degree to which they are capable of establishing treaty change.

Both subsequent practice and evolutive interpretation are the subjects of significant literatures (which surprisingly do not, for the most part, overlap), and a great deal of controversy. Disputes as to the exact contours of either technique shall not be addressed in this paper. They should, and hopefully will, be addressed in multilateral fora.⁴⁴ Rather, this section attempts to expound the operational capacity of subsequent practice and evolutive interpretation, as they are generally applied in practice. Instead of attempting to exhaustively analyze either technique, I will focus on: first, the evidentiary bases for applying each technique; and second, their relative expansive potentials. In fact the two issues are connected – the question of what evidence is required to apply one or another technique plays a role in delineating the limits of the technique's expansive potential.

3.1. Interpretation and Change

Throughout this paper I refer to evolutive interpretation and subsequent practice as techniques capable of establishing *change*, by which I mean to include all kinds of treaty development ranging from fleshing out an ambiguous term to reinterpreting a treaty in ways not foreseen by the text, or even against the weight of its plain meaning. The term “change” is preferable modification or amendment, for two reasons. First, although it is generally accepted that in some cases treaties may be dramatically reinterpreted by these techniques, the proposition that a treaty can be actually amended or modified through reinterpretation is controversial.⁴⁵ Moreover, even if there is a distinction to be made

⁴³ See *Costa Rica v. Nicaragua*, *supra* note 17.

⁴⁴ One possibility is the ILC, which is currently undertaking a study subsequent practice under the rubric “Treaties over time” – a study which may be expanded to include, *inter alia*, an examination of evolutive interpretation.

⁴⁵ Regarding modification through subsequent practice, the ILC's original draft articles on the Law of Treaties included a provision suggesting that a treaty could be modified by subsequent practice. ILC DALT, *supra* note 34, 236 (art. 38 and commentary). However, this “art. 38” was the sole article rejected outright by the Vienna

between reinterpretation and modification, the borderline is a mercurial one.⁴⁶ Second, the concepts of modification and amendment are too narrow to capture all of the ways in which a treaty may be altered, or adapted over time – such as through more subtle interpretation and reinterpretation.

Conference of 1969 in finalizing the VCLT. However Special Rapporteur Waldock insisted at the time that the possibility of modification through subsequent practice reflected a practice already extant in international law, and agreed with Yasseen (delegate of Iraq) that art. 38 reflected positive (customary) international law. See Waldock's Statements to the Vienna Conference in debating whether article 38 should remain in the final treaty, United Nations Conference on the Law of Treaties, 1st Sess., Mar. 26 – May 24, 1968, *Summary Records of the Plenary Meetings and of the Meetings of the Committee as a Whole*, 214, U.N. Doc. A/CONF.39/C.1/SR.38 [hereinafter VCLT Conference Minutes] (echoing his position as Special Rapporteur responsible for the DALT, and agreeing with Yasseen's statement that art. 38 reflected positive international law). In the DALT itself, Waldock cited the recent ad hoc arbitration between France and the United States, *Air Services*, as evidence of his view. Agreement Arbitration (U.S. v. Fr.), 38 ILR 182, 248–255 (1963) [hereinafter *Air Services*]. Later judicial decisions, including some by the ICJ, have suggested that the customary law of treaties still permits such modification on the basis of subsequent practice. See e.g., *Namibia*, *supra* note 8, ¶¶ 21–22 (where, in 1970, the ICJ interpreted art. 27 of the U.N. Charter on the basis of subsequent practice, but in a manner very much at odds with the plain meaning of the text – ruling that the expression “an affirmative vote of nine members including the concurring votes of the permanent members” means that the permanent members must not vote *against* the measure – not, as the language “concurring votes” would suggest, that they all vote for the measure (my emphasis)). By contrast, turning to evolutive interpretation, in principle no amount of reinterpretation of an evolutionary treaty can amount to modification because there is nothing to modify – an evolutive term is inherently dynamic, so giving it successive interpretations over time, even if these directly contradict one another, do not amount to modification but merely dynamism. However, from an external perspective an evolutive interpretation may lead to a treaty entailing substantive obligations that would appear to be wildly outside of the scope of its plain meaning. In *López-Ostra*, for example, a Chamber of the ECtHR interpreted art. 8 of the ECHR, (the right to “a private and family life”), as encompassing a freedom from environmental pollution. *López-Ostra v. Spain*, Application No. 16798/90, 303C Eur. Ct. H.R. (ser. A), ¶¶ 51, 58 (1994) [hereinafter ECtHR, *López-Ostra*] (This dynamic interpretation was unanimously affirmed by the Grand Chamber in *Guerra & Others v. Italy*, 1998-I Eur. Ct. H.R.). From the ECtHR's perspective in *López-Ostra* (and *Guerra*), dynamic interpretation was no modification but an illumination of the evolutive right to a private life. Yet from a quantitative perspective on the rights and obligations connoted by the treaty, the interpretation signals quite a large-scale reassessment of the obligations connoted by the right to a private life. Indeed, a seven judge dissent of the ECtHR insisted, in *Feldbrugge*, that evolutive interpretation must be somehow limited to ideas contained in the treaty and indeed cannot support modification – not because it is logically impossible but because those judges believed the doctrine should not be understood as supporting large-scale change of any kind. *Feldbrugge v. Netherlands* ECHR Case No. 8/1984/80/127 (judgment of 23 April 1986) [hereinafter ECtHR, *Feldbrugge*], Joint Dissenting Opinion ¶¶ 23–24 (“An evolutive interpretation...does not allow entirely new concepts or spheres of application to be introduced into the Convention: that is a legislative function that belongs to the Member States of the Council of Europe”). In the same year, a majority of the ECtHR agreed with the dissenter's view on the limits to evolutive interpretation, at least in theory. In *Johnston v. Ireland*, the applicant asked the Court to interpret art. 12 (the Right to Marry) as including the right to divorce and remarry. The Court rebuffed the request, stating that the evolutive approach cannot go so far as to derive a right that was not included at the outset. *Johnston v. Ireland*, (1986) 112 Eur. Ct. H.R. (ser. A) ¶ 53 [hereinafter ECtHR, *Johnston*]. Evidently the language in 1986 of the dissenters in *Feldbrugge* and of the Court in *Johnston* is in tension with the decisions of *López-Ostra* (1994) and *Guerra* (1998). Whether a decision like *López-Ostra* constitutes “illumination” or “modification” is perennially debatable, as is the question of when a reinterpretation based on subsequent practice becomes a modification. Thus the broader notion of change is preferable, because it encompasses the whole gradient from interpretation, to reinterpretation, to informal modification.

⁴⁶ ILC DALT, *supra* note 34, 236 (commentary to art. 38).

For the purposes of this paper I shall thus employ the term “change” to connote all sorts of elaboration, extension, and expansion of a treaty through interpretation: from the interpretation of a previously unclear term, to the reinterpretation of a term or provision in a sense contrary to its original meaning, and even a reinterpretation shading into modification, (bracketing the questions of where precisely the latter begins and whether in its starkest form it is a legally permissible end-run around formal amendment procedures).

3.2. *Subsequent Practice*

The doctrine of interpretation based on subsequent practice is enshrined in the VCLT as a part of the general rule for the interpretation of treaties. Article 31(3)(b) states that in interpreting a treaty account shall be taken of “any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.”⁴⁷ The principle of this mode of interpretation is that the practice of the parties in *applying* a treaty shall provide evidence for how they interpret, or have come to reinterpret, that treaty. As stated by the Permanent Court of Arbitration in 1912, “the fulfillment of engagements between States, as between individuals, is the surest commentary on the meaning of those engagements”;⁴⁸ application provides the best evidence of common interpretation.

The ILC makes clear, in its Commentaries to the Draft Articles on the Law of Treaties (DALT), which provided the basis for the VCLT, that subsequent practice constitutes an element of interpretation equal in importance to plain-meaning, object and purpose, and context.⁴⁹ According to the Special Rapporteur, the various parts of the general rule of interpretation should be understood as non-hierarchical, possessing basically equal weight.⁵⁰ The subsequent practice of the parties can support an authoritative interpretation, and if the evidence of such practice is sufficiently compelling it may even support an interpretation in tension with the plain meaning of the text, or the treaty’s purported object and purpose.

⁴⁷ VCLT, art. 31(3)(b).

⁴⁸ Russian Claim for Interest on Indemnities (Russ. v. Turk.), 11 R.I.A.A. 433 (Perm. Ct. Arb. 1912).

⁴⁹ See ILC DALT, *supra* note 34, at 219–220 (indicating that there is no hierarchy between the elements of the rule. “All the various elements, as they were present in any given case, would be thrown into the crucible, and their interaction would give rise to the legally relevant interpretation”).

⁵⁰ *Id.*

3.2.1. What Counts as Subsequent Practice?

As Sir Humphrey Waldock states in the commentaries to the DALT, “the value of subsequent practice varies according as it shows the common understanding of the parties as to the meaning of the terms.”⁵¹ In other words, the more clear and consistent the practice, the more interpretive value it will possess. Conversely the conduct of the parties in applying the treaty must meet a minimum evidentiary standard to count as relevant “subsequent practice.”⁵² The VCLT leaves unclear precisely what is required for practice to show such common understanding, raising the question: what kind of conduct can count as subsequent practice? And who must engage in the conduct for it to count?

Subsequent practice should be first be distinguished from mere conduct. Above all *intentionality* is required, as the ICJ has indicated in *Kasikili/Sedudu*: to qualify as practice a conduct must be linked to the acting party’s belief that its conduct reflected a position taken on the interpretation of the treaty.⁵³ Furthermore, commentators agree that in addition to intentionality some degree of *consistency* is required. Villiger states that for conduct to count as relevant practice, “it must be consistent rather than haphazard” and “should have occurred with a certain frequency.”⁵⁴ Sinclair suggests in somewhat stronger language that the practice must be “common, concordant, and consistent.”⁵⁵ Finally practice must be conduct *in the application of the treaty*. This requirement is broad, and applies to the application of the treaty as a whole - it need not be limited to the application of the particular provision being interpreted.⁵⁶ As should be evident, these rules are vague and may be in some degree of flux; it is to be expected that any particular tribunal may apply each of these considerations more or less strictly.⁵⁷

Second, a question may arise as to which parties must participate in a practice, and in what way, for it to evidence their common understanding. The commentaries to the DALT state that all the parties to a treaty, not just some of them, must act in such a way as to evidence their agreement on the interpretation. However, the Commentaries stress that this does not mean that all of the parties must actually *engage* in the practice – simply that any non-engaging party must *acquiesce* in the practice.⁵⁸ The perennial question of what constitutes acquiescence applies, and different tribunals may be more or less tolerant of a

⁵¹ ILC DALT, *supra* note 34, at 222.

⁵² GARDINER, *supra* note 12, at 230–232.

⁵³ *Kasikili/Sedudu Island (Botswana/Namibia)* 1999 I.C.J. 1045, ¶ 74 [hereinafter *Kasikili/Sedudu*].

⁵⁴ M. VILLIGER, COMMENTARY ON THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES 431 (2009).

⁵⁵ SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES, 136–137.

⁵⁶ GARDINER, *supra* note 12, at 232.

⁵⁷ The current ILC project on Treaties over Time will likely seek to further codify or at least clarify some of these standards. See ILC 60th Report, Annex A, *supra* note 1.

⁵⁸ ILC DALT, *supra* note 34, at 222. See also VILLIGER, *supra* note 54, at 431.

claim by a party of having not acquiesced due, for example, to having had no actual knowledge of the other party's subsequent conduct.

The constituent instruments of international organizations pose a particular evidentiary problem for establishing relevant subsequent practice.⁵⁹ For most treaties, the requirement of “all the parties” is an evidentiary standard restrictive of much non-consensual development; all parties must play an active, or at least a passive role for subsequent conduct to count as “practice” - acquiescence, as always, can only be imputed where the active party's actions were at least somewhat clear, consistent, and evident. However regarding the constituent instruments of international organizations, tribunals seem on the whole willing to presume the consent of the parties to the interpretations evidenced by the practice of the organization's constituted organs.⁶⁰ In the *Namibia* case, for example, the ICJ considered the conduct of the UNSC, coupled with the acquiescence of the Member States, sufficient to count as subsequent practice.⁶¹ On the other hand, in some instances the judicial organs of international organizations have been hostile to reinterpreting the constituent instrument on the basis of the subsequent practice of the parties acting outside of the organs of the organization.⁶² Evidently, the question will vary

⁵⁹ Gardiner states that the constituent instruments of international organizations “can raise specific problems of interpretation owing, *inter alia*, to their character which is conventional and at the same time institutional; the very nature of the organization created, the objectives which have been assigned to it by its founders, the imperatives associated with the effective performance of its functions, as well as its own practice, are all elements which may deserve special attention when the time comes to interpret these constituent treaties.” GARDINER, *supra* note 12, at 247.

⁶⁰ See *Id.*; J. ALVAREZ, INTERNATIONAL ORGANIZATIONS AS LAW MAKERS 80 (2005).

⁶¹ See *Namibia*, *supra* note 8, ¶¶ 21–22 (where the ICJ liberally interprets the practice of only the few members of the UNSC as sufficient for supporting an interpretation of art. 27(3) of the UN Charter). See also *Certain Expenses*, *supra* note 35, at 157.

⁶² The WTO Appellate Body (AB), for example, appears relatively hostile to considering the subsequent practice of the parties, and has rejected several panel reports for interpreting the Treaties on the basis of subsequent practice in too loose a fashion. See *e.g.*, Appellate Body Report, *European Communities—Customs Classifications of Frozen Boneless Chicken Cuts*, ¶¶ 259, 276, WT/DS286/AB/R (Dec. 12, 2005) (rejecting the Panel's application of subsequent practice, and stating that it does not consider the practice of a single party to a multilateral convention, or of very few parties, to be very probative for establishing subsequent practice evidencing the subsequent agreement of *all* the parties), and ¶ 272 (adding that the AB agrees with the panel that “in general, agreement may be deduced from the affirmative reaction of a treaty party,” but expressing its “misgivings about deducing, *without further inquiry*, agreement with a practice from a party's ‘lack of reaction.’”). See also Appellate Body Report, *Japan—Alcoholic Beverages*, §E, WT/DS8/AB/R (Nov. 1, 1996) (rejecting the Panel's Report for considering an isolated act as sufficient to establish subsequent practice, stating that “an isolated act is generally not sufficient to establish subsequent practice; it is a sequence of acts establishing the agreement of the parties that is relevant.”) According to Alexander Feldman, the WTO AB has never itself made use of subsequent practice in establishing an authentic interpretation. A. Feldman, *Evolving Treaty Obligations: A Proposal for Analyzing Subsequent Practice Derived from WTO Dispute Settlement*, 41 NYUJ. INT'L POL. 655, 676.

from organization to organization, depending in part upon attitudes and perspectives in the particular judicial organ.⁶³

In sum the evidentiary standards are thus far unclear, but as of now for a party's conduct to qualify as subsequent practice it must *at least* be describable as consisting of non-isolated actions, committed consistently in the application of the treaty, reflecting a position on interpretation, and engaged in or legitimately acquiesced in by all of the parties.

3.2.2. Expansive Potential: What Kinds of Change can Subsequent Practice Support?

Subsequent practice can support interpretation, reinterpreted, and arguably even modification. Oftentimes the disputes in which subsequent practice proves decisive mark the first time a treaty provision has had to be authoritatively interpreted. Thus under article 31(3)(b), subsequent practice provides evidence of the intention of the parties to give a certain term or provision a certain interpretation. However, subsequent practice may just as well evidence the parties' intention to *reinterpret* the treaty – in other words to augment or reject a prior interpretation by positing a new one that may be different or even contrary to the prior interpretation. The parties are generally free to reinterpret their treaty again and again; the judicial interpreter should simply examine whether the subsequent practice of the parties establishes their intention to depart from a prior interpretation. Finally, an interpretation or reinterpretation based on the subsequent practice of the parties may be on its face beyond the scope of, or even contrary to, the plain meaning of the treaty text – in such cases interpretation shades into modification.⁶⁴ In the words of the ILC, modification of treaties by subsequent practice means cases “where the

⁶³ Nolte thus proposes that the ILC deal separately with subsequent practice in the context of treaty regimes that establish judicial organs or provide some other form of institutionalized dispute settlement, because in some cases these “develop their own rules of interpretation which differ from the classical canons of general international law.” ILC 60th Report, Annex A, *supra* note 1, at ¶ 34. *See also id.*, ¶¶ 33, 35.

⁶⁴ The VCLT is silent on the question of whether modification through subsequent practice is possible – indeed the ILC's Draft Article 38 providing for such modification was purposefully dropped from the final Vienna Convention. However the VCLT does not expressly preclude the possibility, and international tribunals have accepted the possibility of modification through subsequent practice before and after the VCLT entered into force. *See Certain Expenses*, *supra* note 35, at 230–231 (Dissenting Opinion of President Winiarski)(stating that “if a practice is introduced without opposition in the relations between the contracting parties, this may bring about, at the end of a certain period, a modification of a treaty rule.”); *Air Services*, *supra* note 45, at 249; *Namibia*, *supra* note 8, ¶ 53; *Ethiopia/Eritrea*, *supra* note 41; ECtHR, *Öcalan*, *supra* note 11, ¶ 163. Waldock and Yasseen seem to have been correct in stating at the Vienna Conference that even if art. 38 should be voted out of the Convention, modification through subsequent practice was already sanctioned in positive law international practice, and perhaps even enshrined in customary international law. VCLT Conference Minutes, *supra* note 45, at 211, 214. *See also* VILLIGER, *supra* note 54, at 432.

parties by common consent in fact apply the treaty in a manner which its provisions do not envisage.”⁶⁵

As posed in VCLT art. 31(3)(b), subsequent practice can clearly support both interpretation and reinterpretation. However there remains serious controversy as to whether it can support a modification, especially in the case of a treaty regime with an express amendment rule.⁶⁶ Waldock believed unequivocally that the subsequent practice of the parties could lead to a modification:

“...a consistent practice, establishing the common consent of the parties to the application of the treaty in a manner different from that laid down in certain of its provisions, may have the effect of modifying the treaty.”⁶⁷

⁶⁵ ILC DALT, *supra* note 34, at 236.

⁶⁶ The problem is that amendment rules are almost invariably more demanding than meeting the requirements of subsequent practice – even in the relatively rare cases when they provide for majority voting, they almost invariably require ratifications within many of the Member States. Relying on the mere practice of the governments of *some* members, coupled with the acquiescence of the rest, amounts to a serious end-run around the normally highly restrictive amendment rules. This problem has led to a great deal of controversy in the context of the NAFTA, for example, with respect to the interpretation of art. 1105 on fair and equitable treatment by the Free Trade Commission on July 30, 2002 (the FTC is empowered to issue binding interpretations of the NAFTA as set out in Article 1131(2)). Several commentators believe the interpretation went beyond the text of art. 1105 and therefore amounted to an amendment, and thus an impermissible end-run around the normal amendment rule of the NAFTA. *See Methanex Corp. v. United States*, Second Expert Opinion of Professor Sir Robert Jennings, Q.C. 8 (Sept. 6, 2001, available at <http://naftaclaims.com/Disputes/USA/Methanex/MethanexResubAmendStateClaimAppend.pdf>); Charles H. Brower, II, *Fair and Equitable Treatment Under NAFTA's Investment Chapter*, 2002 A.S.I.L. PROC. 9, 10–11. However, in the *Methanex* award, the Ch. 11 Tribunal found that Methanex cited no authority for the proposition that “far reaching changes in a treaty must be accomplished only by formal amendment rather than by some form of agreement between all of the parties.” (IV.C ¶ 20). The Court found, further, that under the VCLT no particular mode of amendment is required. (IV.C. ¶ 21). In contrast, the ECtHR has taken a different approach: there the presumption seems to be that subsequent practice *can* under some conditions, establish an amendment of the ECHR unless there is some evidence of intent to the contrary – especially specific intent to use the normal amendment rule. In *Soering*, the ECtHR explained that it considers amendment on the basis of subsequent practice possible in some instances. *Soering v. United Kingdom*, App. No. 14038/88, 11 Eur. H.R. Rep. 439, ¶ 103 (1989) [hereinafter ECtHR, *Soering*] (“Subsequent practice in national penal policy, in the form of a generalised abolition of capital punishment, could be taken as establishing the agreement of the Contracting States to abrogate the exception provided for under Article 2 § 1 (art. 2-1) and hence to remove a textual limit.”) However in that case, the Court held, the subsequent practice could not establish an amendment, because a subsequent written agreement, Protocol No. 6, showed the intention of the parties to use the normal amendment rule to create a new optional instrument that would oblige those who opt-in to abolish capital punishment during peacetime. *Id.* Because the members had expressed their intention to use the normal amendment rule to create an *Optional* Protocol in a subsequent agreement (cognizable under VCLT 31(3)(a)), their practice abolishing the death penalty domestically could not be used to sidestep the express provisions for modification of the ECHR. Note, however, sixteen years later, in 2005, the Grand Chamber issued *dicta* in *Öcalan* that the overwhelming increase in member-state practice abolishing the death penalty during peace-time *de jure* since *Soering* was now likely enough to find that the members intended by their subsequent practice to amend the ECHR, thus obliging even the three states that had not yet abolished the penalty to do so. (the point remained *dicta*, because the Court disposed of the case on other grounds). ECtHR, *Öcalan*, *supra* note 11, ¶ 163.

⁶⁷ ILC DALT, *supra* note 34, at 236. *See also Id.*, 236 (citing *Air Services*, *supra* note 45, at 249 (In some cases a

The ILC originally approved Waldock's position, including a provision in the DALT (article 38) to the effect that subsequent practice could support modification.⁶⁸ After the VCLT committee voted to reject art. 38, Waldock contended that the principle was nevertheless enshrined in positive (customary) international law.⁶⁹ International Courts and tribunals of general and *ad hoc* jurisdiction have reaffirmed Waldock's view since 1969, treating the VCLT as not barring the possibility, for example the ICJ in its advisory opinion on *Namibia*, and the Tribunal's boundary delimitation in *Ethiopia/Eritrea*.⁷⁰ The ECtHR, too, has held in *Soering* and *Öcalan* that under certain conditions, subsequent "practice within the Member States could give rise to an amendment of the Convention."⁷¹ Either way, as Waldock noted in the Commentaries, the border between interpretation and modification is hazy and the main purpose of the division of the Articles was to illustrate that subsequent practice could undergird two ideally distinct legal phenomena that shade into one another in reality.⁷² In any event it seems relatively clear, at least according to several scholars and international tribunals, that the proposition that subsequent practice can support a modification reflects international law, either sourced in custom formed before or after the VCLT.⁷³

"course of conduct may, in fact, be taken into account not merely as a means of useful for interpreting the Agreement, but also...as a possible source of a subsequent modification, arising out of certain actions or certain attitudes, having a bearing on the juridical situation of the parties and on the rights that each of them could properly claim").

⁶⁸ ILC DALT, *supra* note 34, art. 38.

⁶⁹ See VCLT Conference Minutes, *supra* note 45, at 214 (agreeing with Yasseen's statements at p. 211, and based on cases like *Air Services*, *supra* note 45). Sir Gerald Fitzmaurice, the previous special rapporteur on the law of treaties, had also believed subsequent practice to be a legitimate means of modification under contemporary international law – indeed, even though he was hostile to expansive evolutive interpretation, he states that just as "it is the duty of a tribunal 'to interpret treaties, not to revise them', it is equally the duty of a tribunal to interpret them as revised, and to give effect to any revision arrived at by the parties." He adds that "there is little doubt that [such] agreement can result from conduct". G. Fitzmaurice, *The Law and Procedure of the International Court of Justice 1951 – 4: Treaty Interpretation and Other Treaty Points*, 33 BRIT. Y.B. INT'L L. 203, 225 (1957).

⁷⁰ *Namibia*, *supra* note 8, ¶ 53; *Ethiopia/Eritrea*, *supra* note 41, ¶¶ 3.29, 4.60.

⁷¹ ECtHR, *Öcalan*, *supra* note 11, ¶ 163; See also ECtHR, *Soering*, *supra* note 66, ¶ 103.

⁷² ILC DALT, *supra* note 34, at 236(commentary to art. 38).

⁷³ See e.g., *Air Services*, *supra* note 45, at 249; *Namibia*, *supra* note 8, ¶¶ 21–22; *Ethiopia/Eritrea*, *supra* note 41, ¶ 4.60; ECtHR, *Öcalan*, *supra* note 11, ¶ 163. See further S. Engle, "Living" International Constitutions and the World Court (*The Subsequent Practice of International Organs under their Constituent Instruments*), 16 ICLQ 865, 909 (1967); Yasseen and Waldock's comments to the Vienna Conference, VCLT Conference Minutes, *supra* note 45, at 211, 214; and more recently Malcolm Shaw, *Title, Control, and Closure? The Experience of the Eritrea-Ethiopia Boundary Commission*, 56 ICLQ 755 (2007). In light of the proliferation of cases recognizing the possibility of modification on the basis of subsequent practice since the Vienna Conference dropped DALT art. 38, the argument could even be made that cases the VCLT has been reinterpreted, on the basis of subsequent practice in its application, to mean that under art. 31(3)(b) interpretation can shade into modification by subsequent practice.

Accepting the view that, given clear evidence of intent, subsequent practice can support a modification, the expansive potential of the doctrine has no limit in the abstract. Even setting aside the controversy over whether modification is permissible, the boundary between interpretation and potentially impermissible modification is hazy; even if modification were considered a limit (against the weight of judicial opinion), interpretation could support quite an expansive degree of change in and of itself. Thus it would seem that in practice the expansive potential of subsequent practice is limited by the extent of the actual practice of the parties and acquiescence being identifiable, but not clearly by much else.

3.3. *Evolutive Interpretation*

The basis of evolutive interpretation is the idea that parties may conclude a treaty, with the intention that it, or some of its provisions, be capable of evolving in meaning over time, in light of certain changes in factual or legal circumstances – ranging from scientific or technical developments to the emergence of new legal regimes. The doctrine of evolutive interpretation, then, is that a treaty or treaty provision may be determined to have an evolutive character on the basis of certain kinds of evidence about the original intentions of the parties. After such a determination, in the ICJ's words, any evolutive obligations "must be understood to have the meaning they bear *on each occasion* on which the Treaty is to be applied, and not necessarily their original meaning."⁷⁴ The doctrine has foundations in several sources of international law: customary international law⁷⁵; the VCLT general rule of interpretation in article 31, specifically 31(1) on interpreting a treaty in light of its object and purpose,⁷⁶ and 31(3)(c) on interpreting a treaty in light of the changing applicable rules of international law⁷⁷; and most recently a more thorough treatment in the ILC's *Fragmentation Report*.⁷⁸

The cornerstone of evolutive interpretation is the original intention of the parties – it is permissible to consider a treaty as entailing evolving obligations if and only if the parties intended that a particular term, or the treaty as a whole, have an evolutive character.⁷⁹ The obvious and difficult question is, of course, how such intent is to be

⁷⁴ *Costa Rica v. Nicaragua*, *supra* note 17, ¶ 70 (my emphasis).

⁷⁵ See e.g., the ICJ in *Namibia*, *supra* note 8, ¶ 53, and *Aegean Sea*, *supra* note 11, ¶ 77; the WTO Appellate Body in *WTO AB, Shrimp-Turtle*, *supra* note 11, ¶ 130; and the ECtHR in *Dudgeon v. UK*, 4 Eur. H.R. Rep. 1981, 149.

⁷⁶ See e.g., *Iron Rhine Arbitration*, *supra* note 13, ¶ 80.

⁷⁷ FRAGMENTATION REPORT, *supra* note 7, ¶ 478 (a) (The Fragmentation Report considers evolutive interpretation to be grounded in VCLT art. 31(3)(c), (reading that article as supporting interpretation of "generic terms" in light of the definition of those terms in international law at the time of application).

⁷⁸ FRAGMENTATION REPORT, *supra* note 7, ¶ 478.

⁷⁹ Even Sir Gerald Fitzmaurice, who most vehemently insisted on limiting evolutive interpretation, admitted that it was possible for parties with the requisite intention to establish a treaty with the capacity to evolve. See G. Fitzmaurice, *supra* note 69, at 223 (arguing that in principle parties may incorporate a term with the

determined. Must it be explicit? And if not, what evidence might provide the basis for imputing an evolutive character to a treaty or treaty provision?

Like subsequent practice, evolutive interpretation requires meeting certain evidentiary standards before adjudging a treaty or treaty provision to be susceptible of evolution. In the case of evolutive interpretation, that standard is some manifestation or signal of the parties' evolutive intent. Unlike subsequent practice, however, the evidentiary standard for supporting an evolutive interpretation does not itself indicate what *content* the new interpretation should have. Substantiating the new interpretation depends on an additional set of evidence, *external* to the treaty – the content is to be derived from, or at least in relation to, changing legal⁸⁰ or factual⁸¹ circumstances.⁸²

capacity to evolve – but from the perspective of the interpreting Court, where there is no clear evidence in the text as to this alleged intention the only legitimate approach is to adopt a strict presumption of “contemporaneity” – giving to each term its historical meaning instead of the modern one). In other words, according to Fitzmaurice while it is possible for parties to intend that a treaty be capable of evolution, such intention can in general not be legitimately presumed, at risk of judicial legislation. *Id.* 208. Likewise even those most willing to liberally apply evolutive interpretation, like the ECtHR, ground their use of the interpretive doctrine in the intention of the parties. See ECtHR, *Johnston*, *supra* note 45, ¶ 53 (stating that although as a human rights treaty and a constitutional document of European integration it can be presumed that the parties intended the ECtHR to be capable of evolution in light of changing conditions, citing *Loizidou*, the Court cannot insert a right into the text that was not there at the outset – “particularly where this omission was deliberate”).

⁸⁰ Changed legal circumstances are cognizable under VCLT art. 31(3)(c), requiring consideration of “any relevant rules of international law applicable in the relations between the parties.” See also FRAGMENTATION REPORT, *supra* note 7, ¶ 478 *et seq.* Such developments may include changes in legal instruments incorporating a new meaning of a given term, as in WTO AB, *Shrimp-Turtle*, *supra* note 11, ¶ 130 (where upon determining the term “natural resources” as evolutive, the AB determined its meaning in light of Article 56 of the UNCLOS). They may also entail non-linguistic developments in a legal regime, as in *Aegean Sea*, *supra* note 11, ¶ 77 (where the ICJ determined that the concept “territorial status” was evolutive, and must be interpreted in light of fundamental changes to the law of territory, and thus to include the relatively new concept of a continental shelf).

⁸¹ Changed factual circumstances may entail changes in the ordinary usage of a term, cognizable as a new “ordinary meaning” under VCLT art. 31(1). See *Costa Rica v. Nicaragua*, *supra* note 17, ¶ 64 (relying on the generally accepted contemporary meaning of “comercio”). Such changes also include developments in non-legal circumstances necessitating an evolutive approach to maintain the treaty's effectiveness in light of its object and purpose. See *Iron Rhine Arbitration*, *supra* note 13, ¶ 80.

⁸² It is important to note that the relevance in this context of ordinary meaning, object and purpose, and other applicable rules of international law is for deciding upon the new meaning of a term already deemed evolutive. As Linderfalk notes, the fact that the ordinary meaning of a term has changed does not of itself offer a *reason* to reinterpret the treaty in light of its contemporary meaning as opposed to its historical meaning; likewise the emergence of changed factual or legal circumstances affecting the performance of the treaty, or other legal rules applicable among the parties that incorporate similar terms, do not provide reasons to reinterpret. U. Linderfalk, *Doing the Right Thing for the Right Reason – Why Dynamic or Static Approaches should be Taken in the Interpretation of Treaties*, 10 INT'L CMTY. L. REV. 109, 111 (2008). That reason must be found in the intention of the parties to create a treaty with evolving obligations – an intention that may indeed be imputed based on the terms used or the object and purpose of the treaty. But once such a determination of the intention of the parties has been established, contemporary meanings, effectiveness in light of object and purpose, and the substance of other applicable rules of international law become relevant again as sources for deciding upon the current meaning of the evolving term or provision.

Malgosia Fitzmaurice has recently stated that “the dynamic (evolutive) interpretation of treaties is still unquestionably a developing concept and therefore its analysis is also fluid and for the time being awaiting some general and definite conclusions.”⁸³ This point is well taken – it is crucial to note that the operational rules of evolutive interpretation are in flux. Yet for the time being, the practice of evolutive interpretation may be tentatively categorized into two discreet forms, differing in terms of evidentiary standards and expansive potential: evolutive interpretation based on terminology⁸⁴ and evolutive interpretation in light of object and purpose.⁸⁵

3.3.1. Evolutive Terms

The first basis for determining a treaty to have an evolutive character is where a particular term or expression incorporated therein is considered inherently evolutive. The concept of evolutive terminology is well founded in the practice of international courts and tribunals. For example, the ICJ has found the terms “territorial status”⁸⁶ and “commerce”⁸⁷, among others, to be “not static,” but “by definition evolutionary.”⁸⁸ Likewise the WTO Appellate Body found the term “natural resources” in Article XX (g) of the WTO Agreement to be “by definition evolutionary.”⁸⁹ The basis for such decisions, according to these courts, is always the intention of the parties – the idea is that the parties chose particular expressions with the knowledge and intention that these expressions would be capable of evolving over time. The difficulty is always, of course, in establishing such intent.

The intention of the parties to give a term an evolutionary character is rarely, if ever, explicitly stated in a treaty. Rather, the evolutionary character of the treaty is *imputed* on the basis of the character of one or some of the terms chosen by the parties to express their intentions. The World Court has been relatively explicit in pronouncing the imputational aspect of this form of interpretation in *Costa Rica v. Nicaragua*. “There are situations,” the Court ruled, “in which the parties’ intent upon conclusion of the treaty was, *or may be presumed to have been*, to give the terms used – or some of them – a meaning or content

⁸³ M. Fitzmaurice, Part I, *supra* note 5, at 153.

⁸⁴ See *Namibia*, *supra* note 8, ¶ 53; *Aegean Sea*, *supra* note 11, ¶ 77.

⁸⁵ *Iron Rhine Arbitration*, *supra* note 13, ¶ 80.

⁸⁶ *Aegean Sea*, *supra* note 11, ¶ 77 (holding the expression “the territorial status of Greece” to be inherently evolutionary).

⁸⁷ *Costa Rica v. Nicaragua*, *supra* note 17, ¶ 64 (reading the term “commerce” as having an evolutive character).

⁸⁸ See also *Namibia*, *supra* note 8, ¶ 53 (holding that the concepts embodied in art. 22 of the Covenant of the League of Nations – “the strenuous conditions of the modern world” and “the well-being and development of the peoples concerned” – were by definition evolutionary).

⁸⁹ WTO AB, *Shrimp-Turtle*, *supra* note 11, ¶ 130 (interpreting “natural resources” in light of Article 56 of the UNCLOS in support of the proposition that natural resources could include both living and non-living resources).

capable of evolving, not one fixed once and for all..."⁹⁰ In light of the general reliance upon the implied intention of the parties, two crucial questions arise regarding this mode of evolutive interpretation: what characteristics of a term will support an imputation of evolutive intention; and what external evidence may be drawn upon to establish the new interpretation?

First, in theory only certain kinds of terms will support an imputation of the intention of the parties to give the provision or treaty an evolutive character. The ILC has attempted to bring some order to the question of what kinds of terms support such an imputation through a soft codification, or at least categorization, in the *Fragmentation Report*. The categories are articulated most succinctly in the *Conclusions*, which state that a concept in a treaty may be considered to have an evolutive character where:

- (a) The concept is one which implies taking into account subsequent technical, economic or legal developments; (b) the concept sets up an obligation for further progressive development for the parties; or (c) the concept has a very general nature or is expressed in such general terms that it must take into account changing circumstances.⁹¹

In other words, it is fair to presume that parties using technical or highly general terms intend these concepts to have an evolutive character. It may be assumed, for example, that by using a scientific term the parties did not intend to fix its meaning and thereby potentially ground their future obligations on outmoded or falsified scientific concepts, but intended the terms to connote obligations keyed to the evolving meaning of those terms.⁹² Similarly, it is said that the expression of obligations in very general terms may be interpreted to connote an evolving obligation, because it evidences the parties' intention to subscribe to the common meaning of these terms, even if such meaning develops over time.⁹³ Where parties use very general expressions like "natural resources"⁹⁴ or "sacred trust of civilization,"⁹⁵ courts and tribunals have expressed their willingness to consider the meaning of those terms as intended to evolve in light of

⁹⁰ *Costa Rica v. Nicaragua*, *supra* note 17, ¶ 64 (my emphasis).

⁹¹ FRAGMENTATION CONCLUSIONS, *supra* note 7, ¶ 23 (internal citations deleted). Neither the conclusions nor the report itself give any indication as to the meaning of category (b).

⁹² *Id.*, citing Case Concerning the Gabčíkovo-Nagymaros Project (Hung. v. Slov.), 1997 I.C.J. 7, ¶ 112 (Sep. 25) (where the Court asserted that by inserting highly technical provisions in the Treaty, "the parties recognized the potential necessity to adapt the Project. Consequently, the Treaty is not static...By means of articles 15 and 19, new environmental norms can be incorporated in the Joint Contractual Plan").

⁹³ Rietiker, *supra* note 12, at 270-271. See *Albert & Le Compte v. Belgium*, App. Nos. 7299/75 & 7496/76, 5 Eur. H.R. Rep. 533, ¶3 (1983) (Partly Dissenting Opinion of Matscher, J.) (Agreeing with the Court on the point of law that "'evolutive' interpretation of the Convention...is especially appropriate when the Convention employs general and undefined terms (for example, 'necessary in a democratic society')." See also *Costa Rica v. Nicaragua*, *supra* note 17, ¶ 67.

⁹⁴ WTO AB, *Shrimp-Turtle*, *supra* note 11, ¶ 130 ("we note that the *generic* term "natural resources" in Article XX(g) is not "static" in its content or reference but is rather "by definition, evolutionary." (my emphasis)).

⁹⁵ *Namibia*, *supra* note 8, ¶ 53.

contemporary factual circumstances and/or the changing rules of international law. Neither the *Fragmentation Conclusions* nor the *Report* give any elucidation or citations for the meaning of (b), concepts setting up obligations for progressive development by the parties, but it seems to concern the more explicit circumstances like a framework convention, where parties agree that in the future they may further develop the obligations inherent in the treaty language – as far as can be gleaned, this category is more clearly based on continued express manifestations of the parties' intent, and not an instance of *ex post* imputation.

The question of what kinds of terms support an imputation of evolutionary character to the treaty is directly linked to the expansive potential of the doctrine of evolutive interpretation. In theory at least, according to the ILC, imputation of evolutive intent should be limited to technical, economic, and legal concepts, or concepts articulated in highly general terms. However, judicial practice since the recent promulgation of the report has already pushed against the boundaries of these categories. In *Costa Rica v. Nicaragua*, the ICJ considered *comercio* to be a sufficiently general term to support an evolutive interpretation.⁹⁶ However, commerce is by no means obviously a “highly general term,” and indeed Nicaragua made a strong argument that its meaning at the time of signing in 1858 was clear and specific: *comercio* meant trade in goods. Perhaps recognizing that it was opening a floodgate by imputing an evolutive intent to the parties on the basis of the “general” character of the term “commerce” alone, the Court appealed to the intended “unlimited duration” of the 1858 Treaty as further evidence for the evolutive character of the term. Arguably this *dictum* indicates that the Court would be more willing to interpret a term as evolutive due to its generality where there was some further indication that the term was supposed to connote a perpetual obligation whose meaning would have to be keyed to changing factual or legal circumstances to remain relevant as a right over time.⁹⁷ But in any case, the opinion seems to broaden the field of what terms may, by virtue of their generality, support an imputation of evolutive intent.

The second question crucial to finding a treaty evolutive on the basis of the kinds of terminology used asks: what evidence may be relied upon to establish the substance of the term's new meaning? The *Fragmentation Report* makes clear that under VCLT 31(3)(c) evolutive terms should draw their meaning from international law applicable to the parties at the time of the application of the treaty.⁹⁸ This is consistent with most judicial practice – at the very least the content of evolutive terms should be keyed to subsequent changes in

⁹⁶ *Costa Rica v. Nicaragua*, *supra* note 17, ¶ 67 (referring to “*comercio*” as inherently evolutionary *because* it is a “generic term, referring to a class of activity”).

⁹⁷ *Id.*, ¶ 66.

⁹⁸ FRAGMENTATION REPORT, *supra* note 7, ¶ 443, 478 *et seq.*; VCLT 31(3)(c).

the meaning of those terms *as enshrined in international law*.⁹⁹ However this standard has proven both flexible and non-exhaustive.

First, the meaning of the “law” relevant to interpreting an evolutive term has been increasingly broadly construed. VCLT 31(3)(c) states that in interpreting a treaty, account may be taken of “any relevant rules of international law applicable in the relations between the parties.” The suggestion of the *Fragmentation Report*, then, is that as a corollary or subsidiary to VCLT 31(3)(c), evolutive interpretation should be substantiated only by law “applicable in the relations between the parties.” However, judicial practice does not always bear this boundary out. The ECtHR, in the 1979 *Marckx* case, interpreted an evolutive term in the ECHR on the basis of two other treaties neither signed by all the parties to the ECHR at that time, nor ratified by even a majority of them.¹⁰⁰ The Court expressed little worry about whether the treaties constituted appropriate substantiating evidence as law “applicable in the relations between the parties,” observing that “[t]he existence of these two treaties denotes that there is a clear measure of common ground in this area among modern societies.”¹⁰¹

Second, the ICJ has held that in certain instances it was not necessary to limit the scope of evolutive interpretation to a subsidiary of VCLT 31(3)(c). In *Costa Rica* it took into account evolving *factual* circumstances in interpreting an evolutive term, in other words what it deemed to be a development in the ordinary meaning of the expression “*comercio*.” The Court stated that a term with “a meaning or content capable of evolving [may] make allowance for, *among other things*, developments in international law,” and promptly offered no legal evidence for its claim that commerce had come to mean something more than mere trade in goods. Presumably, after having determined the term to be evolutive, the Court simply relied upon what it considered to be the contemporary ordinary meaning of *comercio*.¹⁰²

There is, however, a strand that unites the ECtHR and ICJ’s use of broad bases of evidence: both Courts appear to rely on external evidence for substantiating the new meaning of a treaty term in light of the object and purpose of the treaty.¹⁰³ Taking their

⁹⁹ See, e.g., *Aegean Sea*, *supra* note 11, ¶ 77.

¹⁰⁰ See M. Fitzmaurice, Part I, *supra* note 5, at 135.

¹⁰¹ *Marckx v. Belgium*, 2 Eur. H.R. Rep. 1979, ¶ 41 [hereinafter ECtHR, *Marckx*]. Cf. B. Simma & T. Kill, *Harmonizing Investment Protection and International Human Rights: First Steps Towards a Methodology*, in INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY (C. Binder et al. eds., 2009).

¹⁰² *Costa Rica v. Nicaragua*, *supra* note 17, ¶ 64 (my emphasis). The ordinary meaning of a term is of course cognizable under VCLT 31(1), but presumably where there may be a difference between the contemporary and historical ordinary meanings of a term, the former is only cognizable *after* the treaty has been determined evolutive on other grounds.

¹⁰³ See e.g., *Costa Rica v. Nicaragua*, *supra* note 17, ¶ 68 (relying upon the “object itself of the Treaty, which was to achieve a permanent settlement between the parties of their territorial disputes” as the key support for reinterpreting the treaty based on the modern “ordinary meaning” of commerce); and the recent case

statements at face value, the Courts have indicated that evolutive interpretation will not simply justify any kind of expansion so long as some evolutive intent is identified. It seems that the ultimate interpretation of the evolutive terms must at least be in line with the object and purpose of the treaty. Thus if the *dicta* of these Courts is any guide, it may be posited that the outer limit of evolutive interpretation is the treaty's object and purpose (a limiting principle broad and problematic enough in itself).¹⁰⁴

3.3.2. *Evolutive Interpretation based on Object and Purpose.*

A second mode of evolutive interpretation takes object and purpose as its starting point, rather than its outer limit. Rather than imputing an evolutive intention to the parties on the basis of the terminology of the text, this mode of interpretation determines a treaty or treaty provision to be evolutive on the basis of its object and purpose. Likewise, the demands of the treaty's object and purpose will supply the substance of the term's evolved meaning. The principle was stated most clearly by the Tribunal in the *Iron Rhine* arbitration:

“In the present case it is not a conceptual or generic term that is in issue, but rather new technical developments relating to the operation and capacity of the railway. But here, too, it seems that an evolutive interpretation which would ensure an application of the treaty that would be effective in terms of its object and purpose, will be preferred to a strict application of the intertemporal rule....”¹⁰⁵

Although the terminology of that particular treaty appeared clear and presumably static, in the context of dramatically changed factual circumstances the agreement would have to be reinterpreted to remain effective toward its object and purpose: effecting a stable border delineation between Belgium and the Netherlands based on carefully negotiated mutual rights to a major interstate railway. Rather than inquiring into the semantics of the language used in the treaty to establish the parties' evolutive intent, a court or tribunal applying this mode of evolutive interpretation would ask two questions: (1) whether it is necessary to give the treaty an evolutive reading to make the agreement *effective* in terms of its object and purpose; and (2) how the demands of object and purpose substantiate the

before the Grand Chamber of the ECtHR, *Sergey Zolotukhin v. Russia*, (app. No. 14939/03) ¶¶ 78–80 (Feb. 10, 2009) (*available at* <http://www.echr.coe.int>) (stating that “a failure by the Court to maintain a dynamic and evolutive approach would risk rendering [the ECHR] a bar to reform or improvement...” but that in any case “The provisions of an international treaty such as the Convention must be construed in light of their object and purpose...”).

¹⁰⁴ See *infra*, text accompanying note 107.

¹⁰⁵ *Iron Rhine Arbitration*, *supra* note 13, ¶ 80.

term's evolved meaning at the time of application.¹⁰⁶ Because of the complexity of defining and determining object and purpose, the general evidentiary standards of this mode of evolutive interpretation are relatively low.

Basing evolutive interpretation on the object and purpose of a treaty gives rise to familiar questions: what does the "object and purpose" of a treaty mean, and how can it be determined?¹⁰⁷ The answers given to these questions will have a strong bearing on whether or not, by this mode of interpretation, a treaty can be interpreted to be evolutive and how to substantiate its new content.

A first concern, relative to the issue of evolutive interpretation, is the question of whether a treaty has just one "object and purpose" or whether it can have several. If several, are they all general, or can individual provisions have different objects and purposes? On the one hand, in *Shrimp-Turtle*, the Appellate Body of the WTO implied that treaties can have multiple objects and purposes, and indeed different provisions in a treaty may have different objects and purposes.¹⁰⁸ According to this Tribunal, different provisions are included for different reasons, and these reasons should not be subsumed into the general goals of the treaty. On the other hand, Jan Klabbers insists that a treaty only has one object and purpose, properly understood. Klabbers states that "much of the point of the notion would be lost if various different objects and purposes could be identified, as this would result in different yardsticks under the same treaty" for measuring whether a reservation or modification is permissible, or whether the treaty may be considered evolutive.¹⁰⁹

A related problem is the level of abstraction at which to state the object and purpose of a treaty. For example, the treaty at issue in *Iron Rhine* was a boundary treaty incorporating cross-border rights regarding a railway, and containing an obligation on the Netherlands to maintain the Railway. The object and purpose of this treaty could be stated as "establishing a stable border" or "demarcating the border while maintaining Belgium's most efficient rail-access to Germany in order effect a stable boundary without undermining the economic capacity of either State." The latter could be read into the former, broadly construed. However, it only becomes clear that the treaty must be read as

¹⁰⁶ This doctrine is connected to the venerable principle of effectiveness, or "*effet utile*," according to which a treaty may be interpreted expansively in order to make sure all of its provisions have an independent, and according to some non-superfluous, meaning. See G. Fitzmaurice, *supra* note 69, at 211. According to the ECtHR, *effet utile* entails a temporal dimension when conditions and attitudes in member-states change potentially hamstringing a Convention right. See *Scoppola v. Italy* (no. 2). Eur. Ct. H.R. ¶ 104 ("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."). Indeed according to Sir Gerald Fitzmaurice, the principle of effectiveness is the *only* doctrine according to which it may be legitimately assumed that the parties intended their treaty to be capable of evolving over time. See G. Fitzmaurice, *supra* note 69, at 223.

¹⁰⁷ Jan Klabbers, *Treaties, Object and Purpose* ¶¶ 1, 6–7, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW.

¹⁰⁸ WTO AB, *Shrimp-Turtle*, *supra* note 11, ¶ 114.

¹⁰⁹ Klabbers, *supra* note 107, at ¶¶ 6–7.

evolutive if its object and purpose is construed in the latter complex form. In other words, if necessary maintenance is not considered part of the treaty's object and purpose, Belgium could lose its efficient rail link to Germany, its most important gain from the treaty, thereby undermining the future stability of the boundary settlement.¹¹⁰ No bright line rule can realistically resolve this question of at what level of abstraction the object and purpose of a treaty should be construed; tribunals must try to determine the full meaning of the object and purpose of a treaty on a case-by-case basis.

For the foregoing reasons familiar to most analyses of object and purpose, it is complicated enough to determine any kind of clear rule for determining on this basis whether a treaty has an evolutive character. A further problem is determining whether and in what way multiple objects and purposes, or the various strands of a single complex object and purpose might push toward different ways of substantiating an evolutive term. Where a treaty's object and purpose is complex – say a boundary treaty mandating mutual respect for the environment – the question of substantiating the evolutive obligations will be affected by the relative emphasis on boundary stability and the environment. In most cases, there are no clear standards for deciding what trumps what. Again, this is an issue best settled case-by-case, by the usual means of interpreting a treaty on the basis of its object and purpose. A tribunal should look at the preamble and broader treaty text, as well as its context, in order to make a determination on whether and in what way a particular treaty should evolve.¹¹¹

The most important evidentiary standard for evolutive interpretation concerns the relationship between a treaty's object and purpose, on the one hand, and a determination of both a treaty's evolutive capacity and how it should be reinterpreted on the other. *Iron Rhine* suggests that a treaty can be considered evolutive on the basis of its object and purpose only if such a determination is *necessary* to give effect to its object and purpose.¹¹² Likewise, the substance of its reinterpretation must be similarly necessary.¹¹³ Mere convenience would be insufficient. Given the fluidity of defining and determining object and purpose outlined above, the requirement of a “necessary relation” constitutes the most important limit on superfluous application of evolutive interpretation on the basis of object and purpose. Any lower standard would dramatically broaden the import of evolutive interpretation, and seriously undermine certainty in the law of treaties, since anything could be judged to be evolutive.

3.3.3. Conclusions on Evolutive Interpretation

¹¹⁰ *Iron Rhine Arbitration*, *supra* note 13, ¶¶ 80–84.

¹¹¹ VCLT 31(1).

¹¹² *Iron Rhine Arbitration*, *supra* note 13, ¶¶ 80–84.

¹¹³ *Id.*

In terms of judging a treaty evolutive, the evidentiary standard is quite low. It is highest for evolutive terminology, where the term must be susceptible of an evolutive reading and its new content must be based on some tangible external standard – yet even with this evolutive mode, recent international judicial practice has made apparent the breadth of terms that would support imputing an evolutive intent to the parties, and the breadth of possible evidence by which to substantiate a new interpretation. The evidentiary standards for judging a treaty evolutive and substantiating the new interpretation become progressively lower when based on object and purpose¹¹⁴

On the other hand, the expansive potential of evolutive interpretation may be somewhat limited.¹¹⁵ The expansive potential of evolutive interpretation based on terminology is limited by the range of available external meanings (which, if not necessarily enshrined in law opposable to all the parties, must at least be legitimate, justifiable meanings, as in *Marckx*).¹¹⁶ Evolutive interpretation based on object and purpose at least appears to be limited by a relationship of necessity between evolution and giving effect to the treaty's object and purpose. These boundaries may be more or less flexible, but on the whole evolutive interpretation seems to entail standards that at least somewhat limit its expansive scope.

¹¹⁴ Indeed the assessment of what extent of dynamic change “is necessary” to retain the effectiveness of a provision may depend more on the outlook, or hermeneutic perspective, of the interpreting tribunal than on stable international rules of interpretation. *See e.g.*, M. Fitzmaurice, Malgosia Fitzmaurice, *Dynamic (Evolutive) Interpretation of Treaties*, Part II, 2009 HAGUE YRBK INT'L L., Part II, at text accompanying note 216 (forthcoming 2010) (comparing the approaches of the WTO AB to that of the ECtHR).

¹¹⁵ *See* GARDINER, *supra* note 12, at 243.

¹¹⁶ ECtHR, *Marckx*, *supra* note 101, ¶ 41.

4. Comparative Consequences of Applying the Techniques

Both subsequent practice and evolutive interpretation can support, in different circumstances, dramatic and expansive changes to treaties, occasionally flying in the face of the plain text. What's more, the evidentiary standards for the various forms of evolutive interpretation are quite low and in practice the evidence may well both demonstrate relevant subsequent practice and support a finding of evolutive intention. In cases where both techniques are arguably applicable, an interpretive problem can arise. Though the choice of interpretive techniques can have dramatic consequences for the present and future content of a treaty, it is difficult to determine in practice whether to apply one, the other, neither or both. I suggest that an informed choice must take into consideration three kinds of consequences: potential divergence in the immediate results of applying the techniques; vertical consequences with respect to future interpretations of the same treaty; and horizontal consequences regarding the interpretation of other treaties.

It is important to note at the outset that I am not arguing for an interpretive free-for-all. I do not want to suggest that an interpreter should flesh out the consequences of the various techniques that seem applicable, and choose the one whose effects he prefers based on purely moral or political preferences. Rather I am arguing that the proper application of the Vienna Rule requires taking consequences into consideration – that such consideration is necessary to getting the meaning of an agreement right under the international law of treaties. The VCLT requires taking several factors into account, including text, context, object and purpose,¹¹⁷ subsequent agreement and practice,¹¹⁸ other law applicable between the parties,¹¹⁹ special meanings,¹²⁰ and the possibility that a part or the whole of the agreement was intended to evolve over time.¹²¹ The crucial point is that subsequent practice and indications that the treaty is evolutive cannot be adequately weighed and balanced against text, context, object and purpose, and the rest of the Vienna Rule, without properly taking into consideration the full short and long-term effects of applying the developmental techniques.

In brief, when choosing to apply either technique it is important to take into consideration their immediate and long-term consequences *in light of* the other factors of the Vienna Rule – most importantly the treaty's text, context, and object and purpose.¹²²

¹¹⁷ VCLT art. 31(1).

¹¹⁸ *Id.*, arts. 31(3)(a) & 31(3)(b).

¹¹⁹ *Id.*, art. 31(3)(c).

¹²⁰ *Id.*, art. 31(4).

¹²¹ As derived from *Id.*, arts. 31(1) & 31(3)(c).

¹²² Also potentially relevant, and arguably worthy of informing the consideration of the short and long-term consequences of these developmental techniques, are the number of parties, whether or not the treaty was meant to be a "law-making" instrument, whether it declares or establishes rights of individuals, and whether the norms under interpretation are reciprocal, interdependent, or integral. I'll argue in a future piece that the type of norm incorporated in the treaty (reciprocal, interdependent, or integral) is a crucial element of the calculus regarding whether and how to reinterpret a treaty over time. On the importance of these

4.1. Immediate Consequences of applying subsequent practice and evolutive interpretation

In cases where both subsequent practice and evolutive interpretation seem applicable to a treaty, it is important to consider the immediate results of their application. Can they be applied harmoniously? If not, what would be the difference in result of applying one or the other? These questions must be considered case-by-case, and balanced against the other aspects of the Vienna rule.

The question of which technique will support the more extensive development of a treaty cannot be answered in the abstract. The full contours of each technique are difficult to define, and are by some accounts very much in flux.¹²³ The question should be conceived as an empirical matter: the degree of change supportable by either technique in any particular case depends upon the specific evidence confronting the interpreter in that case.¹²⁴

considerations for treaty interpretation in general, see G. Fitzmaurice, Third Report on the Law of Treaties, U.N. Doc. A/CN.4/115 and Corr.1 (1958), 27, arts. 18–19 para. 2. In more watered down form the ILC Commentary to the DALT affirms that “Some jurists in their exposition of the principles of treaty interpretation distinguish between law-making and other treaties, and it is true that the character of a treaty may affect the question whether the application of a particular principle, maxim, or method of interpretation is suitable in a particular case.” ILC DALT, *supra* note 34, at 219. See further, *Ireland v. The United Kingdom*, 2 Eur. H.R. Rep. 25, ¶ 239 (1978) (“Unlike international treaties of the classical 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’”); *Loizidou v. Turkey*, (preliminary objections) 20 Eur. H.R. Rep. 99 ¶ 75 (1995) [hereinafter ECtHR, *Loizidou* (preliminary objections)] (suggesting that interpretation of the ECHR must be based upon that treaty’s object and purpose as a “constitutional instrument of European public order”).¹²³ M. Fitzmaurice, Part I, *supra* note 5, at 153. See also Linderfalk, *supra* note 82. There is quite a bit of uncertainty as to the expansive potentials of these techniques and the evidentiary standards restricting their use, especially regarding evolutive interpretation. Compare, e.g., the statements of the seven-member dissent of the ECtHR in *Feldbrugge* and of the Court in *Johnston*, that evolutive interpretation cannot mean modification, with that Court’s decisions in *López-Ostra* and *Guerra* in which the Court interpreted the right to a clean environment into the right to a private life. ECtHR, *López-Ostra*, *supra* note 45, ¶¶ 51, 58 (1994)). See also M. Fitzmaurice, Part I, *supra* note 5. The ILC project “Treaties over time” promises to bring some organization to this area of treaty interpretation – it will at least address subsequent practice in depth, and will hopefully also speak to evolutive interpretation. See ILC 60th Report, Annex A, *supra* note 1. Such an analysis will carry with it a certain authority, and may thereby firm up the evidentiary standards of these techniques of change, or at least make explicit their relative expansive potentialities. However as of yet there remains a lacuna in the literature and in contemporary approaches to codifying the temporal aspects of treaty interpretation regarding the situation where a treaty may be permissibly adapted to new circumstances through interpretation by either subsequent practice or evolutive interpretation – the situation facing the ICJ in *Costa Rica*.

¹²⁴ Gardiner, for example, briefly compares subsequent practice and evolutive interpretation, and states that in the abstract subsequent practice can support a greater degree of change than evolutive interpretation. GARDINER, *supra* note 12, at 243. Following prevailing opinion, he argues that subsequent practice can support a modification in direct conflict with the plain meaning of the treaty’s text. Evolutive interpretation, in contrast, has certain inherent limits. Gardiner cites the a seven-member dissent of the ECtHR in *Feldbrugge v. Netherlands* (considered authoritative on this point): “An evolutive interpretation allows variable and

In concrete cases the results of applying the doctrines may vary. Subsequent practice can only support as much change as can be established by the relevant practice of the parties. Although evolutive interpretation may have an outer limit on its expansive potential, it may nevertheless support greater change than would be available under subsequent practice.¹²⁵ In one instance, there may be limited subsequent practice supporting only a modest reinterpretation while evolutive interpretation supports a significantly more dynamic change; in another case the subsequent practice of the parties may support a broader change than would be permissible under evolutive interpretation, for example a wholesale modification. Thus the question of which technique of interpretation is more immediately expansive cannot be presumed in the abstract, but must be considered case-by-base.

Yet even if, in a particular case, both techniques would yield precisely the same result, the choice between the two is significant because it has the potential to give rise to long-term effects, both vertically (regarding the future development of the same treaty) and horizontally (regarding other treaties with similar terminology, or objects and purposes). In all cases these vertical and horizontal effects should be considered alongside the consideration of the immediate consequences of a choice of interpretive techniques.

4.2. *Vertical Consequences of Evolutive Interpretation and Subsequent Practice.*

By vertical consequences of interpretation, I mean the rippling effects of one instance of interpretation on future interpretations of that treaty. A critical difference between evolutive interpretation and subsequent practice is that the former entails vertical consequences while the latter normally does not. Where an interpretation is based on subsequent practice, future interpretations or reinterpretations will depend on new conduct evidencing the parties' new understanding – that is to say, new subsequent practice. It remains within the parties' control whether or not they apply the treaty in such a way as to establish a future reinterpretation. By contrast, the determination that a treaty or treaty provision is evolutive entails the claim that it will remain evolutionary in the future – the treaty will remain dynamic, its meaning depending on the development of legal

changing concepts already contained in the Convention to be construed in the light of modern-day conditions...but it does not allow entirely new concepts or spheres of application to be introduced into the Convention" ECtHR, *Feldbrugge*, *supra* note 45, Joint Dissenting Opinion, ¶¶ 23–24. *Aff'd* by ECtHR, *Johnston*, *supra* note 45, ¶ 53; ECtHR, *Öcalan*, *supra* note 11. Comparing the two techniques in the abstract, there is something compelling about this picture. Yet under an empirical lens, Gardiner's view appears somewhat stylized – it asks which doctrine has the greater expansive potential on the assumption that its evidentiary standards have been met.

¹²⁵ See *Costa Rica v. Nicaragua*, *supra* note 17. The converse could of course have been true, if the subsequent practice of the parties had made clear that there were *no* substantive restrictions on what Costa Rica could do on the river, thereby granting Costa Rica further rights than could be supported by even the broadest definition of commerce available.

and factual circumstances generally extrinsic to the will of the parties. In choosing between applying subsequent practice and evolutive interpretation, then, their vertical effects should be taken into consideration, and assessed in each case in light of the text, context, and object and purpose of the treaty.

The determination by a tribunal that a treaty is inherently evolutive will have a significant effect on future interpretations of that agreement. In cases where the parties have not explicitly stated that their treaty is evolutive in the text or elsewhere (that is to say, in most cases), an evolutive interpretation will reveal both that the treaty has always been capable of evolving over time and that it will remain so in the future. The specific ways in which the tribunal grounds its evolutive interpretation will help shape the vertical effects – for example, in performing successive evolutive interpretations a tribunal will look at what circumstances it considered sufficient to trigger adaptation in the past, and upon what evidence it had relied in determining how to reinterpret the treaty.¹²⁶

Where a tribunal determines a treaty term to be inherently evolutive, the provision will evolve in light of changes in circumstances often external to the practice of the parties. Future interpretations of the term will depend on the autonomous evolution of the meaning of the term because this mode of interpretation assumes that the parties meant to follow the meaning of the term as it develops in international law rather than giving it a special fixed meaning.¹²⁷ Similarly, evolutive interpretation on the basis of the object and purpose of a treaty entails the idea that the treaty will continue to adapt whenever it is deemed necessary for achieving its object and purpose – a necessity that may arise as factual and legal circumstances change. For both of these sub-types of evolutive interpretation, the treaty will likely be all the more dynamic in the future the lower the evidentiary standards used to determine when evolution is triggered, or the looser the standards for determining how the treaty shall evolve.

By contrast to evolutive interpretation, subsequent practice normally entails no vertical effects outside of the parties' control. This is because under the latter doctrine the interpretation and reinterpretation of a treaty is based on the conduct of the parties evidencing their subsequent agreement to interpret or reinterpret a treaty in a specific way. Normally, this says nothing about whether or how they will agree to reinterpret the treaty in the future. A determination that they have reinterpreted the treaty again, at a later date, would require new practice subsequent to the last interpretation. There are,

¹²⁶ It is never certain that where a tribunal determines a treaty to have an evolutionary nature, it will continue to adapt and evolve the treaty in the future. Nor is it clear, in the cases where multiple tribunals interpret the same treaty, that a second tribunal will follow the determination of the first that the agreement is inherently evolutionary. However the initial determination of the evolutive intention of the parties will at the very least have a persuasive effect on future interpretations. Likewise, a tribunal will likely take into account the circumstances and sources considered relevant in prior reinterpretations.

¹²⁷ Evolutive interpretation on the basis of “evolutive terminology” assumes that the parties did not choose to give the term a fixed special meaning under VCLT 31(4).

nevertheless, two kinds of cases in which subsequent practice may entail vertical consequences.

First, interpretation on the basis of subsequent practice may have vertical effects related to the evidentiary standards used in the particular case. This is especially relevant in the context of international organizations and treaty regimes constituting their own tribunals, where judicial or quasi-judicial bodies are more likely to rely on their previous decisions on how to apply the doctrine. For example, the decision by the ICJ in *Certain Expenses* that the practice of the organs of an international organization constitutes subsequent practice had the vertical consequence that from then on, at least in the ICJ, the practice of the UN organs could establish a reinterpretation of the Charter.¹²⁸

Second, interpretation on the basis subsequent practice may have vertical effects when the interpretive issue concerns the evolutive nature of a treaty. As noted above, the expansive potential of evolutive interpretation is often limited by a treaty's text. For example, if article A of a treaty prohibits inhuman and degrading treatment, and article B explicitly permits capital punishment, it would usually be impermissible to interpret article A as prohibiting the death penalty. However in some cases the subsequent practice of the parties may evidence their agreement to remove a textual limit on the evolutionary potential of the treaty. As the ECtHR states in *Öcalan*, "subsequent practice...in the form of a generalized abolition of capital punishment could be taken as establishing the agreement of the contracting States to abrogate the exception [permitting capital punishment] under Article 2§1 and hence remove a textual limit on the scope for evolutive interpretation of Article 3" prohibiting inhuman and degrading treatment.¹²⁹

Finally it might be argued that subsequent practice could establish the subsequent agreement of the parties to henceforth treat their agreement as evolutionary. It is relatively easy to accept that the parties may reinterpret their treaty as evolutive by explicit subsequent agreement under VCLT 31(3)(a). However, subsequent practice depends upon *inferring* subsequent agreement based on the conduct of the parties in applying a treaty. It is difficult to see how it can be inferred from the practice of the parties in applying a treaty that they intend the treaty to be capable of future development in the absence of further explicit or implicit agreement.

The situations in which subsequent practice has vertical effects beyond the control of the parties are exceptional – normally this mode of interpretation has only the consequence of leaving the possibility of developing the treaty through interpretation in

¹²⁸ *Certain Expenses*, *supra* note 35, at 157. The ICJ has reinterpreted the Charter on the basis of the practice of the organs several times since *Certain Expenses*. See *Namibia*, *supra* note 8, ¶¶ 21–22; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136, ¶¶ 27–28 (July 9).

¹²⁹ ECtHR, *Öcalan*, *supra* note 11, ¶ 163. This logic makes sense at least insofar as subsequent practice is understood as capable of establishing a modification.

the hands of the States Parties. Evolutive interpretation, meanwhile, inherently entails vertical effects that extend beyond the parties' control.

In different circumstances, the vertical effects of either technique may be more or less appropriate. Where a tribunal has to choose between reinterpreting a treaty on the basis of subsequent practice or evolutive interpretation, it must take their vertical consequences into consideration in light of the treaty's text, context, and object and purpose.¹³⁰ The importance of considering vertical consequences can be illustrated by a few examples of interpretation concerning different kinds of treaties.

Imagine, first, a border treaty between two States containing provisions on delimitation, and on several use-rights and mutual obligations. It is generally accepted that when it comes to territorial borders, stability is of fundamental importance.¹³¹ Especially with regard to border treaties with delimitation provisions, it may be readily assumed that border stability is an essential element of the agreement's object and purpose. With this concern in mind, arguments have been raised that treaties establishing such borders should not change over time at all, except through formal amendment.¹³² Nevertheless several international tribunals have interpreted such border treaties as having changed over time, over the objection of one or more parties to the dispute.¹³³ Given that it appears that the developmental interpretation of border treaties is permissible under some conditions, the importance of border stability at least gives rise to strong reasons to consider carefully whether and how, in a particular case, a border treaty should be developed or changed over time through interpretation – especially with regard to the provisions on delimitation. In light of the special importance of the stability of borders, then, the difference in vertical effects of subsequent practice and evolutive interpretation appears quite significant.

Insofar as a provision on border delimitation may change through interpretation at all, it seems important that where a choice of techniques is available the treaty's development be accomplished on the most finite grounds possible. In its controversial decision on border delimitation between Ethiopia and Eritrea in 2002, the ad hoc Tribunal

¹³⁰ To reiterate the position of the ILC in the commentaries to the DALT, "the character of a treaty may affect the question whether the application of a particular principle, maxim, or method of interpretation is suitable in a particular case." ILC DALT, *supra* note 34, at 219. In other words, when deciding upon the propriety of applying either subsequent practice, evolutive interpretation, or both, the vertical consequences of those techniques should be considered in light of the character of the treaty.

¹³¹ Shaw, *supra* note 73, at 761 (Boundary treaties "constitute a special kind of treaty in that they establish an objective territorial regime valid *erga omnes*...The reason for this exceptional approach is to be found in the need for the stability of boundaries.") See Case concerning the Temple of Preah Vihear (Cambodia v. Thai) 1962 I.C.J. 6, 34; Territorial Dispute (Libya v. Chad) 1994 I.C.J. 6, 37. See also, Kohen, *supra* note 24.

¹³² See e.g., Kohen, *supra* note 24, at 772–73 (arguing that modification or expansive reinterpretation on the basis of subsequent practice are inappropriate in the context of boundary-delimitation treaties, because such an interpretation undermines the presumptions in favor of "title" over *effectivites*, and of the finality of boundaries).

¹³³ See, e.g., *Ethiopia/Eritrea*, *supra* note 41, ¶ 4.60 (regarding the border); *Costa Rica v. Nicaragua*, *supra* note 17 (regarding evolving use-rights).

reinterpreted the old colonial border treaties delineating the border between those countries: the Tribunal reasoned that the subsequent practice of the parties established their mutual understanding that the border had shifted at several points. Marcelo Kohen has roundly criticized the tribunal for this aspect of its decision – he argues that in the special case of border treaties, where the treaty confers title over a territory to a sovereign State, such title should not be put into question by the practice of the parties. This may encourage States to try to attain by adverse practice what they could not acquire by treaty, leading to potentially violent border disputes. It would additionally require States to exercise constant vigilance in order to protest and repel any unauthorized activity at their borders lest they be divested of title through supposed acquiescence in the practice of the other State. Yet if a boundary provision is to change over time, by Kohen's line of reasoning it seems at least preferable that it be developed on a case-by-case basis, each time in light of new evidence of the intention of the parties (even if this intention is implied). It may appear problematic to interpret the subsequent practice of the parties as more relevant than their original intention as expressed in the text of a boundary delimitation provision, but it seems like it would be a much greater blow to stability and legal certainty to declare such a treaty to be evolutive, and thereby capable of development on the basis of factors external to the later intentions of the parties.

Even in the context of use-rights in boundary treaties, there should be a strong preference for stability. Where an interpreter considers it necessary to develop the treaty through interpretation, care should be taken to do so in as finite a way as possible. Again, as Judge Skotnikov argues, it appears preferable to rely upon the subsequent practice of the parties in such cases than to declare these provisions evolutionary by nature.¹³⁴ It is unclear why a border treaty should be considered evolutive merely on the basis of the broad terminology employed in its provisions, as this would render the content of the rights capable of further evolution in the future, dependent on shifts in linguistic usages. If the treaty could be just as well reinterpreted on the basis of subsequent practice without any further effects on the stability of the treaty, such a grounds appears preferable to labeling the provision inherently evolutive. The exception would appear to be those cases where a use-right is such an important part of a boundary delimitation that its restriction would undermine the stability of the treaty – such as the ad hoc Tribunal's judgment in *Iron Rhine*. In such cases, it may make sense to interpret a use-right as evolutive on the basis of the treaty's object and purpose, but this must be done strictly in accordance with the principle of *effet utile* – that the provision only evolve as far as is absolutely necessary for the right to maintain meaning.

¹³⁴ *Costa Rica v. Nicaragua*, *supra* note 17 (Separate Opinion of Judge Skotnikov) (emphasizing the old canon of interpretation, *in dubio mitus*, and suggesting that unlike evolutive interpretation, reliance upon subsequent practice would not cut against this venerable doctrine precisely because it is based on evidence of the sovereign's current mutual understanding of the treaty derived from their conduct).

By contrast to border treaties, the need for human rights treaties to adapt to new circumstances over time is much less controversial, and indeed fairly well established in the practice of international tribunals.¹³⁵ Commentators have considered human rights treaties as being inherently evolutive for several reasons, for example on the grounds that they concern the fundamental rights of individuals, or that they represent standards of civilization or even constitutional documents in international law.¹³⁶ The same arguably holds for human rights provisions in more general treaties. Less frequently, tribunals have reinterpreted such treaties on the basis of subsequent practice.¹³⁷ As noted above, in at least one case, *Öcalan*, the ECtHR has applied both techniques together, symbiotically, to achieve a maximally dynamic result (arguing that the subsequent practice of the parties established a modification of the ECHR removing a textual limit on the evolutive potential of Article 3 banning inhuman and degrading punishment).

However, upon consideration of its vertical effects, reinterpretation on the basis of subsequent practice appears less appropriate in the context of human rights treaties/provisions than in other circumstances. Human rights treaties incorporate integral obligations, meant to protect the rights of individuals against, *inter alia*, the action of the very same signatory States. In cases like *Öcalan*, tribunals have relied upon the subsequent practice of the parties to expand the content and protection of the rights enshrined in the treaty. However, these same States often engage in practices intended to avoid, narrow, or violate their human rights obligations. (One need only appeal to the enormous case-load of the ECHR to demonstrate the frequency). If courts and tribunals rely on the subsequent practice of the States Parties to reinterpret a human rights treaty over time, it may become very difficult to separate violations from actions intended to narrow the interpretation of a certain provision (especially in light of silence/acquiescence on the part of the other parties). Moreover, it seems improper to allow States the possibility to informally renege upon their commitments to establish and protect integral human rights norms by permitting their executive branches to establish, by common subsequent practice, narrow reinterpretations or even modifications of these treaties.¹³⁸

In the context of human rights treaties, relying on evolutive interpretation in the interest of updating, gap-filling, and even expanding rights may bear with it the usual problems of legal certainty and should thus be used with caution – even if this argument has less force than it does in the case of boundary treaties where the destabilizing effect of border disputes, and with it the possibility of violence, could be much greater. However

¹³⁵ See e.g., ECtHR, *Johnston*, *supra* note 45, ¶53; IACtHR, *Information on Consular Assistance*, *supra* note 12, ¶ 114.

¹³⁶ See, e.g., R. Higgins, *Some Observations on the Inter-Temporal Rule in International Law*, in *THEORY OF INTERNATIONAL LAW AT THE THRESHOLD OF THE 21ST CENTURY* 174 (J. Makarczyk, ed., 1996); Rietiker, *supra* note 12, at 245.

¹³⁷ See, e.g., ECtHR, *Öcalan*, *supra* note 11, ¶ 163.

¹³⁸ It should be recalled that the ECtHR, for one, considers subsequent practice sufficient to establish a modification. See ECtHR, *Soering*, *supra* note 66, ¶ 103; ECtHR, *Öcalan*, *supra* note 11, ¶ 163.

even greater caution should be exercised in relying upon subsequent practice to develop the treaty. To the extent that such practice may be relied upon at all for the interpretation of human rights treaties/provisions, it should be carefully distinguished from violations and heavily weighed against the object and purpose of the treaty which, I would suggest, should always be given precedence over state practice in the context of integral norms.

Thus the vertical effects of developmental interpretation on the basis of either evolutive interpretation or the subsequent practice of the parties should be taken into consideration in light of the other features of the treaty, at the very least including the other factors of the Vienna rule - especially the object and purpose of the treaty. Also relevant, and arguably worthy of consideration, would be the number of parties, whether or not the treaty was meant to be a "law-making" instrument, whether it declares or establishes rights of individuals, and whether the norms under interpretation are reciprocal, interdependent, or integral.¹³⁹ The above examples go to show that failure to consider the vertical effects of employing an interpretive technique for developing a treaty over time can lead to perverse effects in the future application and interpretation of the treaty.

4.3. *Horizontal Consequences of Evolutive Interpretation and Subsequent Practice.*

In some cases the interpretation of one treaty on certain grounds may affect the interpretation of other, completely distinct treaties in the future. These effects, which I call "horizontal consequences" of interpretation, are more amorphous than the vertical effects described above. An interpretation (I_1) has horizontal effects in one of two ways: either when a tribunal relies upon its earlier reasoning in I_1 in interpreting another treaty (I_2); or where a different tribunal relies upon I_1 in interpreting a different treaty (I_2). In either scenario horizontal effects at I_2 do not quite have a causal relationship to I_1 . Rather the original interpretation influences the latter one. Nevertheless, the possibility that the application of a certain interpretive technique may have horizontal effects should be taken into consideration – especially in the context of the proliferation of international tribunals, which frequently rely upon one another's reasoning.¹⁴⁰

As with their vertical consequences, evolutive interpretation and subsequent practice differ too in their horizontal effects. Interpretation of a treaty on the basis of subsequent practice is in principle based on the practice of the parties in applying that treaty, evidencing their specific intention to reinterpret the agreement; it would hardly be

¹³⁹ See *supra*, note 122.

¹⁴⁰ See Ruti Teitel & Rob Howse, *Cross-Judging: Tribunalization in a Fragmented but Interconnected Global Order*, 41 N.Y.U. J. INT'L L. & POL. 951 (2009). See further J. Alvarez, *A (BIT) on Custom*, 42 N.Y.U. J. INT'L L. & POL. 17, 45 *et seq.* (2009) (noting the particularly dramatic frequency of such borrowing among ad hoc tribunals in the context of investor-state arbitration).

persuasive to rely on such particularized practice to interpret other treaties, even with similar wording, where the parties have not engaged in relevant subsequent practice. Evolutive interpretation, however, is based on word choice, or the goals of a treaty – it entails imputing an intention to the parties on the basis of the terminology employed, or assessments about the treaty's object and purpose which are necessarily somewhat abstract, and can be generalized. Thus by contrast to subsequent practice, the determination that certain terms may be presumed to be evolutive, or that certain objects and purposes justify or even necessitate evolutive interpretation over time, may have rippling horizontal effects on treaty interpretation in general.

Tribunals may feel the pull of an earlier judgment that treaties with certain terms or objects and purposes are inherently evolutive in a number of ways: standing tribunals charged with interpreting various treaties may be called upon to follow their previous logic once they've labeled a certain treaty type as evolutive on the basis of its object and purpose, or labeled a certain term inherently evolutive; similarly the judgment to that effect by one tribunal may be considered persuasive by another tribunal interpreting the same treaty, or even another treaty (which or may not be of the same type). These examples get increasingly attenuated, but none of the possibilities are totally outlandish. As Professors Howse and Teitel have recently demonstrated, international tribunals engage in a great deal of interpretive dialogue, relying on one another's interpretations even across different kinds of regimes.¹⁴¹ Therefore I suggest that, as with the immediate and vertical effects of interpretation, a judicial interpreter should consider the possibility of horizontal effects when relying upon evolutive interpretation, especially when it is possible to rely on subsequent practice instead.

The practice of international tribunals in the sphere of human rights demonstrates the real possibility of horizontal effects of evolutive interpretation on the basis of object and purpose.¹⁴² For example, the ECtHR has long held that the ECHR is evolutive in light of its object and purpose as an agreement enshrining human rights, as well as the means for their protection.¹⁴³ The Court has justified this interpretive approach on the basis of the "object and purpose of the Convention as an instrument for the protection of individual human beings, [which] requires that its provisions be interpreted and applied so as to

¹⁴¹ Teitel & Howse, *supra* note 140, at 988–989 (arguing that international tribunals rely upon one another's judgments with relative frequency, even though such "cross-judging" is occasionally punctuated by stark reminders of the (not necessarily undesirable) possibility of fragmentation – such as the "flashpoint" of the conflict between the ICJ and the ICTY over the proper test for attributing an armed attack in *Nicaragua* and *Tadic*).

¹⁴² This possibility is not without criticism. See Rietiker, *supra* note 12, at 247 (who argues that "the mere label of 'human rights' instrument is, as such, not relevant to justify special treatment" with regard to interpreting a treaty as evolutive. Rietiker does not object to the ECHR being interpreted as evolutive as such, but rather the reasoning that such an interpretation is warranted for the interpretation of human rights treaties *per se*).

¹⁴³ See, e.g., ECtHR, *Johnston*, *supra* note 45, ¶53; ECtHR, *Loizidou* (preliminary objections), *supra* note 122, ¶75; and ECtHR, *Marckx*, *supra* note 101, ¶41.

make its safeguards practical and effective.”¹⁴⁴ The Inter-American Court of Human Rights (IACtHR) has relied upon the ECtHR’s reasoning in adjudging the Charter of the Organization of American States (OAS Charter) as evolutive on the basis of its similar object and purpose – in spite of the fact that it is a completely separate tribunal from the ECtHR, responsible for interpreting a different treaty with completely distinct parties. In the words of the IACtHR: “The European Court of Human Rights...has held that human rights treaties are living instruments whose interpretation must consider the changes over time and present-day conditions.”¹⁴⁵

Even though the ECtHR spoke in general terms about the European Convention’s character as a human rights treaty, it was strictly interpreting the ECHR as evolutive in light of *that instrument’s* object and purpose. Nevertheless, in spite of the fact that the OAS Charter and ECHR are completely distinct treaties with many important differences, the IACtHR drew from the ECtHR’s reasoning that the OAS Charter may also be interpreted as evolutive in light of its similar object and purpose, being a human rights instrument for the protection of individual human beings.¹⁴⁶ The IACtHR went so far as to extend this reasoning to the ICCPR, interpreting that UN Convention as inherently evolutive even though the Court has no formal interpretive authority over that instrument.¹⁴⁷ Without suggesting a direct causal relationship between the two judgments, or that the IACtHR felt somehow bound to follow the judgment of the ECtHR, it would appear that the former was strongly influenced by the latter’s reasoning. The persistent rulings of the European Court interpreting the ECHR in an evolutionary manner thus appear to have had horizontal consequences, insofar as they influenced the IACtHR. Taken together, the rulings of the two courts will likely have even stronger horizontal ripples across human rights regimes.

Horizontal effects of evolutive interpretation on the basis of “evolutive terminology” are also conceivable, and would appear to be significantly more problematic. This technique of interpretation entails the imputation of the intention of the parties that a treaty provision is evolutive based on the determination that one or more of the terms employed is particularly general, technical, or scientific.¹⁴⁸ The judgment by a tribunal that a certain term is inherently evolutive may have a number of horizontal ripples. Where a tribunal of general jurisdiction, like the ICJ, declares a treaty provision evolutive by

¹⁴⁴ ECtHR, *Loizidou* (preliminary objections), *supra* note 122, ¶ 75.

¹⁴⁵ IACtHR, *Information on Consular Assistance*, *supra* note 12, ¶ 114.

¹⁴⁶ The IACtHR basically interpreted, and relied upon, the ECtHR’s approach. Beyond referencing the judgments of the latter Court, the IACtHR merely added that the “dynamic evolution” of international human rights law “has had a positive impact on international law in affirming and building up the latter’s faculty for regulating relations between States and the human beings within their respective jurisdictions.” IACtHR, *Information on Consular Assistance*, *supra* note 12, ¶ 115.

¹⁴⁷ IACtHR, *Information on Consular Assistance*, *supra* note 12, ¶¶ 113–115. For criticism of the practice by some international tribunals of interpreting international conventions over which they have been given no formal interpretive authority, *See* Tobias Lock, *The ECJ and the ECtHR: The Future Relationship between the Two European Courts*, 8 LPICT 375 (2009).

¹⁴⁸ *See supra*, § 3.3.1.

reference to a general, technical, or scientific term, future litigants may try to seek advantage by litigating over other treaties with similar terms – even where the treaties concern different subject-matters. Such a situation could arise, as noted above, regarding the term “commerce” before the ICJ, which had initially refused to construe the term broadly in the *Oil Platforms* case, but had given it an evolutive reading more recently in *Costa Rica v. Nicaragua* on the basis of its “general” nature.¹⁴⁹ Though the Court is not officially bound by its prior jurisprudence, its judgment on “commerce” will doubtless constitute persuasive evidence in future litigation over different treaties, like FCN’s. Similarly, different tribunals may rely upon one another’s judgment that certain terms are inherently evolutive. Evidently, the more tribunals sign on to the idea that a certain term is evolutive, the more influence these judgments will have in future interpretations.

At least two issues arise with regard to the horizontal effects of evolutive interpretation on the basis of terminology: (1) it would seem that as more terms are labeled sufficiently scientific, technical, or general so as to merit a presumption of the evolutive intent of the parties, legal certainty in treaty regimes may be gradually brought into question; and (2) it is not clear whether the horizontal effects of labeling a term evolutive in one type of treaty regime will be limited to treaty regimes concerning the same or similar subject matters.

With regard to the first issue, I would argue that tribunals should be cautious in labeling terms evolutive, especially on the grounds of their generality. Doing so marks out a term that by its mere use constitutes evidence of the intention of the parties that the treaty be capable of evolving. It thus puts the tribunal’s weight behind the notion that a particular term will, in the absence of other evidence to the contrary, be interpreted as having an evolutionary nature – potentially influencing other tribunals, and future treaty negotiators in their choice of words. It is not unrealistic to imagine tribunals relying on one another’s judgments about the evolutive nature of terms, even when interpreting different treaties – the statement that a treaty is evolutive by virtue of its terminology is an imputation on the basis of language, not necessarily in consideration of subject-matter, context, or object and purpose. Thus it seems in the interest of legal certainty that the set of terms considered presumptively evolutive remains relatively contained. Likewise it seems important that the standards for adjudging a term evolutive be relatively strict. Tribunals should consider the possibility that the more liberally they go about adjudging terms evolutive, the more others may follow, potentially undermining stability and certainty in treaty relations. If the criteria laid out in the Fragmentation Report are to be any guide for determining when a term should be considered presumptively evolutive, namely when the term is scientific, technical, or highly general, these criteria should be construed restrictively to stave of a proliferation of dynamic terminology – especially the elusive category of “generality.”

¹⁴⁹ *Oil Platforms*, *supra* note 31, ¶¶ 4.48–4.50; *Costa Rica v. Nicaragua*, *supra* note 17, ¶ 67.

The potentially negative effects on legal certainty of labeling terms evolutive may be somewhat neutralized if the horizontal effects were limited to the interpretation of treaties concerning similar subject-matters, with similar objects and purposes. Thus, however, arises the second issue: it would appear that there is nothing to cordon off the horizontal effects of evolutive interpretation according to treaty type.

It should first be noted that even within one area of international law, it is not necessary that Courts treat a term in one treaty as evolutive just because it was considered evolutive in another treaty. In the *OSPAR arbitration* the tribunal accurately stated that “the application of international law rules on interpretation of treaties to identical or similar provisions of different treaties may not yield the same results, having regard to, inter alia, differences in the respective contexts, objects and purposes, subsequent practice of the parties and *travaux préparatoires*.”¹⁵⁰

Nevertheless, it is it is relatively easy to imagine that within one field of international law, treaty terms will be interpreted similarly. If the ECtHR adjudges the term “degrading treatment”¹⁵¹ in Article 3 of the ECHR to be evolutive, it is easy enough to imagine the IACtHR taking inspiration from that judgment and determining that “degrading punishment and treatment” in Article 5 of the American Convention on Human Rights is also evolutive. Such interpretive practice is even encouraged by VCLT 31(3)(c) and the Fragmentation Report,¹⁵² which taken together suggest that interpreters should strive for some coherency in their construction of terms in treaties with similar objects and purposes. However there is no reason to assume that the effects of labeling a term inherently evolutive would be cabined off by treaty type. The concern becomes greater the more a tribunal, or different tribunals, reaffirm that a certain term – by its mere use – is enough to impute the intention to the parties that the treaty or treaty provision be capable of evolving.

¹⁵⁰ *Access to Information under Article 9 of the OSPAR Convention (Ir. v. U.K.)*, 42 I.L.M. 1118, 1144, ¶ 141 (2003).

¹⁵¹ ECHR, art. 3.

¹⁵² These horizontal effects may be encouraged under the VCLT and the Fragmentation Report, insofar as article 31(3)(c) is understood as a tool for promoting systemic integration. The Fragmentation Report suggests that the article, stating that treaty terms should be interpreted in light of other international law applicable to the relations between the parties, be understood as establishing a preference or presumption under international law that terms should be construed similarly. FRAGMENTATION REPORT, *supra* note 7, ¶ 443, 478 *et seq.* This presumption may be understood as including the judgments of international courts, and may or may not be interpreted as encouraging “systemic integration” of interpretation among different treaties with the same subject-matter. However the report cautions against extending such integration uncritically across totally different regimes with different subject-matters.

5. Conclusion: Taking Consequences into Consideration.

I've argued in this paper that evolutive interpretation and interpretation on the basis of subsequent practice differ in terms of their immediate and long-term effects. Further, these differences should be taken into consideration in light of the other characteristics of the treaty under the Vienna rule, in determining whether to rely on one or the other technique – especially when it is possible to apply one or the other, but not both.

To summarize: in terms of immediate effects it would appear that subsequent practice has the potential to permit greater treaty development in theory, but in many empirical situations, as in *Costa Rica v. Nicaragua*, the available evidence of subsequent practice will support less expansion than would be permissible by an evolutive interpretation. Yet irrespective of which technique has the broader expansive potential in any particular instance of interpretation, evolutive interpretation has more lingering effects on a treaty in the long term.

Regarding vertical effects, once a term or a treaty is considered evolutive, i.e. inherently susceptible of dynamic interpretation, it is to be reinterpreted in light of the circumstances contemporary to *every successive application*. A reinterpretation based on subsequent practice, by contrast, implies nothing as to further reinterpretations – future interpretations on this basis would depend upon further conduct meeting the criteria for relevant subsequent practice (except, perhaps, in a case where the subsequent practice concerns the evolutive nature of the treaty – either establishing, expanding, or reducing it).

Evolutive interpretation, unlike subsequent practice, also has potential horizontal effects. Labeling a treaty evolutive on the basis of its special object and purpose may influence the decisions of other tribunals charged with interpreting similar treaties; likewise labeling a term evolutive in light of its scientific nature, technicality, or high generality may influence other tribunals faced with interpreting the same term in similar or even completely different treaties.

In conclusion, the short and long term consequences of evolutive interpretation and interpretation based on subsequent practice should be taken into consideration in light of the usual factors of the Vienna rule. In choosing whether to apply one or the other technique, the following questions should be considered: whether application of one or the other technique will have a different expansive potential; whether they favor the subsequent intentions of the parties or put the development of the treaty somewhat beyond the parties' grasp; and whether the interpretation will carry with it horizontal consequences. These considerations should be taken in light of the intention of the parties to the extent that this is expressed in the plain text, in light of the object and purpose of the treaty and with regard to its context.

Of course the story does not end here. In this paper I have tried to problematize what factors should be taken into consideration when deciding whether or not to apply

certain techniques of interpretation in a given case. As indicated above, in my next article I hope to problematize the other side of the equation: in light of what should these considerations be taken into account? What considerations are most important to the object and purpose analysis for determining whether one or another doctrine should apply? How should an interpreter approach the question of whether and why certain kinds of treaties should be interpreted differently than others? By hypothesis, I hope to show that a crucial step in this interpretive analysis will be to take into account the nature of the norms incorporated therein, in the sense of whether these are simply reciprocal, or whether they may be understood as integral - connoting obligations meant to retain their force in spite of the wavering attitudes of the States Parties.