

# Is the ‘Living Instrument’ Approach of the European Court of Human Rights Compatible with the ECHR and International Law?

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*The article offers a rebuttal of prominent criticisms directed against the ‘living instrument’ interpretative approach of the European Court of Human Rights. The article initially introduces the basic application of the interpretative approach as adopted by the Court and then considers whether it is compatible with the Convention and broader International Law. The article argues that the Preamble, subsequent State practice and preparatory work offer inconclusive evidence to both critics and supporters of the ‘living instrument’. However, the interpretative approach can claim democratic endorsement through States, while arguments based on the necessity to consider domestic interpretations of the European Convention on Human Rights (ECHR) cannot support a restrictive interpretation as a matter of International Law. The ‘living instrument’ further appears compatible in the context of state sovereignty in International Law, and broader institutional concerns with the role of judges in the adjudication of rights. Ultimately, the ‘living instrument’ interpretative approach therefore appears legal under the Convention and relevant International Law.*

**Key Words:** ECHR; Living Instrument; Human Rights; International Law; VCLT; Legal Interpretation; Travaux Préparatoire; Original Intent; State Sovereignty

## 1 INTRODUCTION

Following comments from the Prime Minister during the recent General Election campaign,<sup>1</sup> the signatory status of the UK to the European Convention on Human Rights (ECHR) once again faces an uncertain future. For the time being, the Human Rights Act 1998 provides the legal basis for the implementation and adjudication of the ECHR in domestic courts, as well as the remedies for incompatibilities between domestic legislation and the Convention. Since its introduction, the Human Rights Act has dramatically altered the legal landscape of the UK. Former Lord Chief Justice Lord Judge, and Deputy President of the UK Supreme Court Lady Hale have described it as the most significant legal development of the

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<sup>1</sup> Theresa May: Human rights laws could change for terror fight’ BBC News (7 June 2017) <<http://www.bbc.co.uk/news/election-2017-40181444>> accessed 20 June 2017

last thirty years,<sup>2</sup> and the Act has even been described as ‘one of the most important pieces of legislation to be enacted in the twentieth century’.<sup>3</sup>

The Government has nonetheless on several occasions raised the prospect of replacing the Human Rights Act 1998 with a British Bill of Rights enabled by primary domestic legislation.<sup>4</sup> Some commentators view these plans with scepticism, as they fear a ploy to limit the human rights protection enjoyed under the ECHR.<sup>5</sup> The Conservative plans fail to outline whether they seek withdrawal from the ECHR, as scrapping the Human Rights Act and introducing a Bill of Rights would not terminate obligations of the UK under International Law.

The reform plans are part of a larger debate within the UK on the obligations and perceived intrusions that judgments of the European Court of Human Rights (ECtHR) represent on for the legislative flexibility of the Westminster Parliament. A comparatively small number of judgments have raised eyebrows in the past, and attracted media controversy in the UK.<sup>6</sup>

Considering the thousands of cases decided by the ECtHR every year,<sup>7</sup> it should perhaps not be a surprise that some judgments are unfavourably received, and attract criticism. However, the odyssey of the ruling in *Hirst v. UK*<sup>8</sup> stands out in two respects.

First, it has come to epitomize a perfect storm: a partially misunderstood and at times wilfully misrepresented ruling that affected a sensitive domestic policy area, combined with a strong opposition of the public towards any legislative changes. Second, *Hirst* also demonstrates the inertia of a political establishment that has to date been unwilling to challenge this public opinion, and instead preferred to flout its obligations under the ECHR and International Law for over a decade since the Court gave its ruling.

<sup>2</sup> Joshua Rozenberg, *Law in Action at 30* (BBC Radio 4 2014), *passim*.

<sup>3</sup> John Stanton, *Parliamentary Sovereignty and the Human Rights Act – By Alison L Young*, 30 *Legal Stud.* 689 (2010).

<sup>4</sup> *Protecting Human Rights in the UK – The Conservatives’ Proposals for Changing Britain’s Human Rights Laws* (2014), [https://www.conservatives.com/~media/Files/Downloadable%20Files/HUMAN\\_RIGHTS.pdf](https://www.conservatives.com/~media/Files/Downloadable%20Files/HUMAN_RIGHTS.pdf) (accessed 20 June 2017).

<sup>5</sup> Joshua Rozenberg, *Tory Plans for European Human Rights Convention Will Take UK Back 50 Years*, *Guardian* (3 Oct. 2014) <http://www.theguardian.com/law/2014/oct/03/tory-plans-european-human-rights-convention-take-uk-back-50-years> (accessed 20 June 2017).

<sup>6</sup> See for instance the baseless claims that the ECtHR found the UK in violation of the Convention in 3 out of 5 cases, Adam Wagner, *No, The Sun, ‘Euro Judges’ Do Not ‘Go Against UK in 3 Out of 5 Cases’. More Like 1 in 100.* (UK Human Rights Blog, 27 Aug. 2014), <http://ukhumanrightsblog.com/2014/08/27/no-the-sun-euro-judges-do-not-go-against-uk-in-3-out-of-5-cases-more-like-1-in-100/#more-24313> (accessed 20 June 2017); Merris Amos, *The UK and the European Court of Human Rights* (UK Constitutional Law Blog, 24 Nov. 2014), <http://ukconstitutionallaw.org/2014/11/24/merris-amos-the-uk-and-the-european-court-of-human-rights/> (accessed 20 June 2017).

<sup>7</sup> *European Court of Human Rights – Annual Report 2016* (2017), [http://www.echr.coe.int/Documents/Annual\\_report\\_2016\\_ENG.pdf](http://www.echr.coe.int/Documents/Annual_report_2016_ENG.pdf) (accessed 20 June 2017).

<sup>8</sup> *Hirst v. United Kingdom*, 74025/01, Grand Chamber, 6 Oct. 2005.

Section 2 will begin by providing some background information on *Hirst*, the 'living instrument' approach adopted by the ECtHR, and the controversy that ensued in the UK.

Section 3 will then examine the legality of the 'living instrument' approach under the Convention and International Law. Many accounts that are critical of the ECtHR make claims that the Court has acted illegally, either generally or in individual judgments.

I will offer a rebuttal to these claims, and argue that the 'living instrument' approach is ultimately lawful and in conformity with the ECHR and International Law. The article does not engage with the broader question of legitimacy, and in particular the relationship and interaction between notions of legality and legitimacy. These questions certainly merit closer attention, but exceed the scope of this article.

## 2 BACKGROUND

### 2.1 THE 'LIVING INSTRUMENT' INTERPRETATIVE APPROACH

The ECtHR views the Convention rights as subject to evolution and change in their understanding over time. What constitutes privacy, a right to life, and freedom of expression must evolve with technological and social developments.<sup>9</sup> This updating approach is, in the mind of the ECtHR, not an overruling, but rather the logical conclusion from the object and purpose of the Convention: to provide effective and meaningful protection of individual rights.

The 'living instrument' has indeed led the ECtHR to adapt and expand the Convention rights to keep pace with modern developments and changes in the prevailing societal attitudes. The ECtHR intends to provide for an interpretation of the Convention that '*upholds individual rights as practical and effective, rather than theoretical and illusory protections*'.<sup>10</sup>

Thus, the Court has proceeded for instance with Article 8.

The ECtHR has interpreted this provision to encompass a wide array of rights covering, *inter alia*, physical and psychological integrity,<sup>11</sup> sexuality,<sup>12</sup> gender,<sup>13</sup>

<sup>9</sup> This is settled case law, see *Mamatkulov and Askarov v. Turkey*, 46827/99, 46951/99, Grand Chamber, 4 Feb. 2005; *Tyrer v. UK*, 5856/72, Court, 25 Mar. 1978; *Marckx v. Belgium*, 6833/74, Plenary, 13 June 1979; *Chassagnou and others v. France*, 25088/94 & 28331/95 & 28443/95, Grand Chamber, 29 Mar. 1999; *Dudgeon v. United Kingdom*, 7525/76, Plenary, 22 Oct. 1981.

<sup>10</sup> *Mamatkulov and Askarov v. Turkey*, 46827/99, 46951/99, at [121].

<sup>11</sup> *Juhnke v. Turkey*, 52515/99, Court, 13 May 2008, at [70]; *Costello-Roberts v. United Kingdom*, 13134/87, Court, 25 Mar. 1993, at [36].

<sup>12</sup> *Van Kück v. Germany*, 35968/97, Court, 12 June 2003, at [69].

<sup>13</sup> *Rees v. United Kingdom*, 9532/81, Court, 17 Oct. 1986; *Goodwin v. United Kingdom*, 28957/95, Grand Chamber, 11 July 2002.

data protection,<sup>14</sup> reputation,<sup>15</sup> and environmental protection.<sup>16</sup> Some rulings have attracted significant controversy.

## 2.2 THE CONTROVERSY IN THE UK

Hirst, a prisoner convicted of manslaughter, had challenged a decision denying him registration for voting<sup>17</sup> taken pursuant to section 3 of the Representation of the People Act 1983. This provision in essence establishes a blanket ban on prisoners voting in any election, regardless of the nature and severity of their offence. The Chamber of the ECtHR took issue with this blanket ban and judged it a violation of Article 3 of Protocol No.1 to the Convention (Right to Vote) in 2004.<sup>18</sup> The Grand Chamber then subsequently upheld the ruling in 2005.<sup>19</sup>

Under less controversial circumstances, the UK may have simply amended domestic legislation pursuant to the established mechanisms of the Human Rights Act 1998 and be done with the matter. This has been the sequence of events in numerous cases following declarations of incompatibility by domestic courts.<sup>20</sup> However, the ruling in *Hirst* was only the starting point of a prolonged debate, which gathered much attention in the media,<sup>21</sup> and from legal scholars and senior judges.<sup>22</sup>

<sup>14</sup> *Rotaru v. Romania*, 28341/95, Grand Chamber, 4 May 2000 [collection of data through public entities]; *Copland v. United Kingdom*, 62617/00, Court, 3 Apr. 2007 [email and internet use in the workplace]; *S & Marper v. United Kingdom*, 30562/04, 30566/04, Grand Chamber, 4 Dec. 2008 [DNA and finger prints].

<sup>15</sup> *Pfeijfer v. Austria*, 12556/03, Court, 15 Nov. 2007 [damage to the reputation of a journalist].

<sup>16</sup> See for instance, *López Ostra v. Spain*, 16798/90, Court, 9 Dec. 1994 [air pollution]; *Hutton and others v. United Kingdom*, 36022/97, Grand Chamber, 8 July 2003 [noise emissions from Heathrow Airport]; *Taskin and others v. Turkey*, 46117/99, Court, 10 Nov. 2004 [cyanide contamination of water].

<sup>17</sup> *Hirst v. HM Attorney General*, [2001] EWHC Admin 239.

<sup>18</sup> *Hirst v. United Kingdom*, 74025/01, Court, 30 Mar. 2004, referred to the Grand Chamber.

<sup>19</sup> *Hirst v. United Kingdom*, 74025/01, *supra* n. 7.

<sup>20</sup> Jeff King, *Parliament's Role Following Declarations of Incompatibility Under the Human Rights Act*, in *Parliaments and Human Rights: Redressing the Democratic Deficit* (M Hunt, H Hooper & P Yowell eds, Bloomsbury Publishing 2015).

<sup>21</sup> See for instance the public calls for defiance from David Davis & Jack Straw, *We Must Defy Strasbourg on Prisoner Votes*, Telegraph (London, 24 May 2012), <http://www.telegraph.co.uk/news/uknews/law-and-order/9287633/We-must-defy-Strasbourg-on-prisoner-votes.html> (accessed 20 June 2017).

<sup>22</sup> Jeff King, *Should Prisoners Have the Right to Vote?* (18 May 2011) <http://ukconstitutionallaw.org/2011/05/18/jeff-king-should-prisoners-have-the-right-to-vote/> (accessed 20 June 2017); Danny Nicol, *Legitimacy of the Commons Debate on Prisoner Voting*, Pub. L. 681 (2011); George Letsas, *In Defense of the European Court of Human Rights* (University College London – Institute for Human Rights, 2011), <http://www.ucl.ac.uk/human-rights/news/documents/prisoners-vote.pdf> (accessed 20 June 2017); Jean-Paul Costa, *On the Legitimacy of the European Court of Human Rights' Judgments*, 7 Eur. Const. L. Rev. 173 (2011); David Mead, *Outcomes Aren't All: Defending Process-Based Review of Public Authority Decisions Under the Human Rights Act*, Pub. L. 61; Lord Irvine of Lairg, *A British Interpretation of Convention Rights*, Pub. L. 237 (2012); Philip Sales, *Strasbourg Jurisprudence and the Human Rights Act: A Response to Lord Irvine*, Pub. L. 253 (2012); Helen Fenwick, *The Human Rights Act or a British Bill of*

More than a decade has passed since the final ruling in *Hirst* and an end to the controversy is still not in sight: the UK has yet to implement the judgment, and draft legislation from as recently as December 2013 has failed to make significant headway.<sup>23</sup> Throughout this process, the ruling in *Hirst* has come to symbolize more than just a matter of criminal justice. The debate no longer revolves around the substantial legal question, but rather focuses on the sovereignty of the UK Parliament in the face of a perceived Strasbourg dictate.<sup>24</sup>

More generally, critics of Strasbourg contend that on ratification States agreed to uphold the rights as stated by the drafters in the original text and did not endorse future developments through an 'activist' court. Thus, they argue the ECtHR has acted in an illegal fashion by attaching *ex post facto* further obligations to the Convention without the express consent of contracting States.<sup>25</sup>

Lord Hoffmann epitomizes this stance in a statement made in the wake of the introduction of the Human Rights Act 1998, which reflects the concerns that still inform the arguments of many critics today:

*When we joined, indeed, took the lead in the negotiation of the European Convention, it was not because we thought it would affect our own law, but because we thought it right to set an example for others and to help to ensure that all the Member States respected those basic human rights which were not culturally determined but reflected our common humanity.*<sup>26</sup>

If that was truly the expectation of the UK in 1950, then it was sorely disappointed indeed.

### 3 DEFENDING THE INTERPRETATIVE APPROACH

The law of the UK was profoundly affected by the ECHR, and this brought with it substantial criticism of the interpretative approach adopted by the ECtHR. Nonetheless, I submit that the 'living instrument' approach is compatible with the

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*Rights: Creating a Down-Grading Recalibration of Rights Against the Counter-Terror Backdrop?*, Pub. L. 468 (2012).

<sup>23</sup> For a summary of the events since 2005, see Isobel White & Alexander Horne, *Prisoners' Voting Rights* (House of Commons Library, 2014) <http://www.parliament.uk/briefing-papers/SN01764.pdf> (accessed 20 June 2017).

<sup>24</sup> Jeff King, *supra* n. 21.

<sup>25</sup> Lord Sumption, *The Limits of Law* (27th Sultan Azlan Shah Lecture, 20 Nov. 2013) <https://www.supremecourt.uk/docs/speech-131120.pdf> (accessed 20 June 2017); Lord Hoffmann, *The Universality of Human Rights*, 125 L.Q. Rev. 416 (2009); echoed by, Michael Pinto-Duschinsky, *Bringing Rights Back Home: Making Human Rights Compatible with Parliamentary Democracy in the UK* (Policy Exchange, 2011); this may, however, not be indicative of the broader, more nuanced views held in the UK judiciary, see Ed Bates, *The Senior Judiciary on 'Strasbourg' – More Supportive Than Some Would Have You Believe*, (UK Constitutional Law Blog, 2015) <http://ukconstitutionallaw.org/2015/05/28/ed-bates-the-senior-judiciary-on-strasbourg-more-supportive-than-some-would-have-you-believe/> (accessed 20 June 2017).

<sup>26</sup> Lord Hoffmann, *Human Rights and the House of Lords*, 62 Mod. L. Rev. 159, 166 (1999).

Convention and the broader context of International Law and will lay out my argument in this section.

### 3.1 COMPATIBILITY WITH THE CONVENTION

Evidence from the Convention text, the Preamble and *travaux préparatoires* is ultimately inconclusive, and States have democratically endorsed the interpretative approach in the past. Critics who insist on an ‘originalist’<sup>27</sup> or strict textual interpretation of the Convention have failed to point to any evidence that the drafters intended to enshrine a specific interpretational approach or understanding of Convention rights. The *travaux préparatoires* do not concern themselves with the method of interpretation, nor do they demonstrate a consensus on the proper boundaries of the Convention. If anything, the object and purpose points towards a broad mandate for the ECtHR to develop the Convention.

#### 3.1[a] *Convention Text*

The Convention itself grants the ECtHR interpretative authority (Article 32 ECHR) and binds the States to the final verdict through Article 46(1) ECHR. These provisions are ultimately binding based on the foundational principle of *pacta sunt servanda*<sup>28</sup> in International Law. Therefore, it is clear that contracting States are obligated to adhere to the interpretation of the Convention as determined by the ECtHR. However, it is unclear what interpretative approach the Court ought to employ, as the ECHR does not appear to advocate or prohibit recourse to an evolutive interpretative approach. One possible reading of Lord Sumption’s lecture is that he is advocating a strict textual interpretation. Under that assumption, however, his argument encounters significant difficulties.<sup>29</sup> The text of the Convention is far from self-executing, and often requires recourse to supplementary means of interpretation in order to be practically adjudicated. For instance, with regard to Article 8 ECHR Lord Sumption states:

*This perfectly straightforward provision was originally devised as a protection against the surveillance state by totalitarian governments. But in the hands of the Strasbourg court it has been extended to cover the legal status of illegitimate children, immigration and deportation, extradition, aspects of criminal sentencing, abortion, homosexuality, assisted suicide, child abduction, the law of landlord and tenant, (...). None of these extensions are warranted by the express language of the Convention, nor in most cases are they necessary implications.*<sup>30</sup>

<sup>27</sup> Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* (A Gutmann ed., Princeton University Press 1997).

<sup>28</sup> Which is reflected in Art. 26 of the Vienna Convention on the Law of Treaties (VCLT).

<sup>29</sup> Sumption, *supra* n. 24, at 9.

<sup>30</sup> *Ibid.*, at 7 et seq.

However, this line of argument does not account for the ambivalent terminology in Article 8 ECHR. The Court itself has acknowledged that a final and complete definition of 'private life' is not possible.<sup>31</sup> Nor does the argument account for the presence of the seemingly clear word 'everyone' in Article 8 ECHR: why 'everyone' should exclude the groups mentioned above remains unclear.<sup>32</sup>

Instead, there appear to be compelling reasons to hold that a broader reading of Article 8 ECHR is necessary to allow the Convention to remain practically relevant in light of modern developments. Threats to Private and Family Life these days do not exclusively arise from totalitarian surveillance States, and it is questionable whether they were ever limited to such threat scenarios, even at the time of the original draft.

### 3.1[b] *Relevance of the Preamble*

Sir Nicolas Bratza has suggested that the Preamble supports a broader, evolutive interpretation of the Convention.<sup>33</sup> Preambles, however, are unlikely to furnish a basis for such a normative claim. They mostly contain aspirations, hopes, and vague commitments to higher ideals, expressed in a celebratory language style that seeks to establish a link to the broader cultural and societal context.<sup>34</sup> On the one hand, preambles are thus not self-executing norms with direct legal effect, but rather normative master plans, that require further specification before rising above '*moral appeal[s] without immediate legal obligations*'.<sup>35</sup> On the other hand, preambles can complement and guide the interpretation of the subsequent legal text and thus there is a significant interaction between preambles and the text proper.<sup>36</sup>

<sup>31</sup> *Van Kück v. Germany*, 35968/97 at [69]; *P.G. and J.H. v. United Kingdom*, 44787/98, Court, 25 Sept. 2001, at [56].

<sup>32</sup> George Letsas, *Lord Sumption's Attack on Strasbourg: More Than Political Rhetoric?* (UK Constitutional Law Blog, 9 Dec. 2013), <http://ukconstitutionallaw.org/2013/12/09/george-letsas-lord-sumptions-attack-on-strasbourg-more-than-political-rhetoric/> (accessed 20 June 2017).

<sup>33</sup> Nicolas Bratza, *Living Instrument or Dead Letter-The Future of the European Convention on Human Rights*, Eur. Hum. Rts. L. Rev. 116, 120 (2014).

<sup>34</sup> Peter Häberle, *Präambeln im Text und Kontext von Verfassungen*, in *Demokratie in Anfechtung und Bewährung – Festschrift für Johannes Broermann* (J Listl & H Schambeck eds, Duncker & Humblot 1982); Stefan Theil, *Three Insights from Peter Häberle's 'Preambles in the Text and Context of Constitutions'* (UK Constitutional Law Blog, 25 Mar. 2015), [ukconstitutionallaw.org/2015/03/25/stefan-theil-three-insights-from-peter-haberles-preambles-in-the-text-and-context-of-constitutions](http://ukconstitutionallaw.org/2015/03/25/stefan-theil-three-insights-from-peter-haberles-preambles-in-the-text-and-context-of-constitutions) (accessed 20 June 2017).

<sup>35</sup> Häberle, *supra* n. 33, at 204, *my translation*; in the context of the ECHR, see Franz C. Mayer, *Präambel*, in *Europäische Menschenrechtskonvention – Kommentar* 34 (U Karpenstein & FC Meyer eds, C. H. Beck 2012).

<sup>36</sup> Häberle, *supra* n. 33.



The Preamble of the ECHR has only featured in a small number of cases, and proved decisive in even fewer.<sup>37</sup> The passage on the ‘*collective enforcement of certain rights stated in the Universal Declaration*’ stands out somewhat from the generally aspirational phrasing of the Preamble. In that vein, the ECtHR has held that it would be ‘*a mistake to see in this reference a merely “more or less rhetorical reference”, devoid of relevance for those interpreting the Convention*’ and consequently derived a firm intention of the contracting States to uphold the Rule of Law from the passage.<sup>38</sup>

One may hence infer from the Preamble that the establishment of an effective protection regime for human rights was a central intention of the parties, but that does necessarily equate to an endorsement of the ‘living instrument’ approach. Neither the reference to the Rule of Law in the Preamble, nor the subsequent text expresses a preference or so much as references guidelines for the interpretation of the Convention. It must therefore remain doubtful whether the general aspirations expressed in the Preamble carry sufficient weight to support an evolutive approach to the interpretation.

### 3.1[c] Democratic Endorsement & State Practice

Critics further allege that ECtHR has incurred a significant democratic deficit through its expansive reading of the Convention.<sup>39</sup> It is true that some Contracting States originally conceived the ECHR to prevent a relapse of European totalitarianism after the Second World War.<sup>40</sup> However, the Convention soon evolved beyond this role and has been remarkably effective in keeping up with modern developments. Crucially, the contracting States, including the UK, have democratically endorsed these developments, including the ‘living instrument’ interpretative approach for decades.

With respect to the UK, the ECHR entered into force in 1953. The UK accepted the then optional jurisdiction of the ECtHR to hear individual petitions in 1966<sup>41</sup> and renewed its consent over the decades until the ratification of

<sup>37</sup> *Soering v. United Kingdom*, 14038/88, Plenary, 7 July 1989 at [88] and *Ilaşcu and others v. Moldova and Russia*, 48787/99, Grand Chamber, 8 July 2004 at [317] [both referencing the common heritage of political traditions, ideals, freedom and the rule of law]; *Sejdić and Finci v. Bosnia and Herzegovina*, 27996/06 & 34836/06, Grand Chamber, 22 Dec. 2009 at [45] [referencing peace].

<sup>38</sup> *Golder v. United Kingdom*, 4451/70, Plenary, 21 Feb. 1975 at [34]; affirmed and referenced subsequently in *Ireland v. United Kingdom*, 5310/71, Plenary, 18 Jan. 1978 at [239] and *Salah v. The Netherlands*, 8196/02, Court, 6 July 2006 at [68].

<sup>39</sup> Sumption, *supra* n. 24, at 9; Lairg, *supra* n. 21, at 245; ; Hoffmann, *supra* n. 24; Pinto-Duschinsky, *supra* n. 24; Lord Judge, *A view from London* (Counsel Magazine, 2014), <http://www.counselmagazine.co.uk/articles/view-london> (accessed 20 June 2017).

<sup>40</sup> Ed Bates, *The Evolution of the European Convention on Human Rights: From Its Inception to the Creation of a Permanent Court of Human Rights* (Oxford University Press 2010).

<sup>41</sup> Vaughne Miller, *The European Convention on Human Rights and the Court of Human Rights: Issues and Reforms* (House of Commons Library, 2011).



Protocol 11 in 1998, which rendered the optional jurisdiction compulsory for all States. While there was often a degree of concern and disagreement over the interpretation of the Convention, successive UK governments democratically legitimized the ECtHR on a rolling basis.<sup>42</sup> Specifically, after the ECtHR established the 'living instrument' approach in 1978 in the case of *Tyrer v. UK*,<sup>43</sup> the Conservative Government under Thatcher renewed the jurisdiction in 1981.<sup>44</sup> This democratic decision and the ones following it were taken in full knowledge of the interpretative approach, and the development of the Convention rights.

Furthermore, following the ratification of Protocol 11 by the UK in 1998, the Government expressly acknowledged as much in the White Paper on the Human Rights Bill. It specifically accepted and endorsed the interpretative approach, expressing the hope that '*in future our judges will be able to contribute to this dynamic and evolving interpretation of the Convention*'.<sup>45</sup>

Even during the height of the domestic debate on judicial overreach in the UK, the declarations following conferences in Interlaken,<sup>46</sup> Izmir,<sup>47</sup> Brighton,<sup>48</sup> and Brussels<sup>49</sup> have not mentioned concerns over the 'living instrument' approach. The insistence on an expansion of the margin of appreciation afforded to States remains the only consistently raised criticism of the Court's case law. In fact, the overwhelming majority of States have not voiced fundamental concerns at an international level. Instead, the focus was on easing the ECtHR's caseload and applauding its contribution to human rights protection.

<sup>42</sup> Ed Bates, *What Was the Point of the European Convention on Human Rights?* (UK Human Rights Blog, 21 Mar. 2011) <http://ukhumanrightsblog.com/2011/03/21/what-was-the-point-of-the-european-convention-on-human-rights-dr-ed-bates/> (accessed 20 June 2017).

<sup>43</sup> *Tyrer v. UK*, 5856/72; *Marckx v. Belgium*, 6833/74; for an assessment, see George Letsas, *The ECHR as a Living Instrument: Its Meaning and Legitimacy*, in *Constituting Europe: The European Court of Human Rights in a National, European and Global Context* (A Føllesdal, B Peters & G Ulfstein eds, Cambridge University Press 2013).

<sup>44</sup> Bates, *supra* n. 41.

<sup>45</sup> *Rights Brought Home: The Human Rights Bill* (CM 3782) (1997).

<sup>46</sup> *Interlaken Declaration – High Level Conference on the Future of the European Court of Human Rights*, 19.2.2010 (2010).

<sup>47</sup> *Izmir Declaration – High Level Conference on the Future of the European Court of Human Rights*, 27.4.2011 (2011).

<sup>48</sup> *Brighton Declaration – High Level Conference on the Future of the European Court of Human Rights*, 20.4.2012 (2012), <https://wcd.coe.int/ViewDoc.jsp?Ref=BrightonDeclaration&Language=lanEnglish&Ver=original&Site=COE&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864> (accessed 20 June 2017).

<sup>49</sup> *Brussels Declaration – High level Conference on the 'Implementation of the European Convention on Human Rights, our shared responsibility'*, 27.03.2015 (2015).

The more recent Protocols to the Convention also reflect a preference for measured reforms. Both Protocol No. 15 and No. 16 to the ECHR are currently in the process of ratification, and no changes to either Article 32 ECHR or amendments to the ‘living instrument’ approach are contemplated.<sup>50</sup> Protocol No. 15 makes symbolic changes to the Preamble of the Convention, and amends the time limit for applications to the ECtHR, while Protocol No. 16 provides for the introduction of a referral mechanism, which will allow the highest courts of Contracting States to request advisory opinions.

There are certainly reasons to criticize the ECtHR with regard to the election procedure for judges and its difficulty in adjudicating cases in a reasonable time span.<sup>51</sup> However, these criticisms are not linked in any meaningful way to the interpretative approach the Court has adopted. The election procedure and candidates are the responsibility of the Council of Europe and its Members, and the caseload is more fundamentally a result of the reforms of Protocol No. 11, which opened up the Court to individual petitions and abolished the Commission. Some go even further in arguing that the entire notion that human rights and the tribunals adjudicating them can undermine democracy is nonsensical.<sup>52</sup>

In any case, there is strong evidence of a democratic endorsement of the interpretative approach and the consistent support of the ECtHR through States. However, this has not dissuaded critics from advocating an originalist interpretation of the Convention, and criticising the ECtHR based on this preference.

### 3.1[d] *The Travaux Préparatoires and Original Intent*

This line of critique is common to the criticisms of both Lords Sumption and Hoffmann. They advocate an apparently ‘originalist’<sup>53</sup> approach to interpretation, one that emphasizes remaining true to the ‘original’ intent of the drafters.<sup>54</sup> The

<sup>50</sup> See Protocol No. 15 Amending the Convention for the Protection of Human Rights and Fundamental Freedoms (Council of Europe), <http://www.conventions.coe.int/Treaty/EN/Treaties/Html/213.htm> (accessed 20 June 2017); Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms (Council of Europe), <http://conventions.coe.int/Treaty/EN/Treaties/Html/214.htm> (accessed 20 June 2017).

<sup>51</sup> Letsas, *supra* n. 42, at 131.

<sup>52</sup> Jamie Mayerfeld, *The Democratic Legitimacy of International Human Rights Law*, 19 Ind. Int'l & Comp. L. Rev. 49, 63 (2009).

<sup>53</sup> Scalia, *supra* n. 26.

<sup>54</sup> Similar concerns were voiced by other senior judges, see Hoffmann, *supra* n. 25; Lord Scott, in *Harrow LBC v. Qazi*, [2003] UKHL 43, [2004] 1 AC 983 at [123]; Sumption, *supra* n. 24, at 7.

problem arises, however, that there is little evidence as to the drafters mind-set regarding treaty interpretation and certainly insufficient evidence to conclude that they sought to codify any specific interpretational approach. Much the same is true with regard to the scope of the rights expressed in the Convention. While there is some evidence that the drafters had a specific understanding in mind for most rights, the wide interpretation mandate given to the ECtHR equally supports the proposition that originalism and textualism are not representative of the common intention of the parties.

The *travaux préparatoires* scarcely engaged with the questions of development and interpretation of the Convention rights. The discussion rather focused on two issues of principle related to interpretation:

- (1) should the Convention contain a list of enumerated rights in general terms (as advocated by the Consultative Assembly), or should it endeavour to define the rights in more detail;
- (2) should a Court be established alongside the already agreed upon Commission, and how should the roles of both be delimited.<sup>55</sup>

Among the advocates of detailed definitions was the UK. Its representative in the Conference of Senior Officials, Samuel Hoare (Deputy Under-Secretary in the Home Office), insisted that '*[the treaty] would create obligations which States would be bound to perform, and they therefore had to know the precise extent of their undertakings*' and that '*exact knowledge of the extent of their undertakings would make it easier for States to accept them*'.<sup>56</sup>

Nonetheless, the UK delegation was equally concerned with ensuring that the rights granted were effective, that they would make a practical difference and not simply form decorative ornaments for the newly established Council of Europe.

Table 1 provides an overview of the negotiating positions taken in the Conference of Senior Officials, which ultimately drafted a compromise using the detailed definition text as its basis, and introducing articles from the enumeration draft, most notably the current Article 8 ECHR (Private and Family Life).<sup>57</sup>

<sup>55</sup> Collected Edition of the '*Travaux préparatoires*' of the European Convention on Human Rights – Committee of Experts, Committee of Ministers, Conference of Senior Officials 30 March–June 1950 vol. IV, 246 et seq. (Martinus Nijhoff 1977).

<sup>56</sup> *Ibid.*, at 106.

<sup>57</sup> *Ibid.*, at 258.

*Table 1 Position Taken by the Representatives of the Negotiating States in the Conference of Senior Officials (8–17 June 1950)*

	<i>Enumeration of rights</i>	<i>Detailed definition of rights</i>
<i>Establish Commission only</i>	Denmark <sup>58</sup> Sweden <sup>59</sup> Turkey	Greece Netherlands Norway United Kingdom
<i>Establish Commission and Court</i>	Belgium <sup>60</sup> France Ireland Italy	Luxemburg <sup>61</sup>

Additionally, an optional clause was included which allowed States to accept the jurisdiction of the Court. The negotiating States accepted the resulting draft Convention without significant revision.

It might therefore perhaps surprise current critics of the ECHR to learn that to a significant extent the position of the UK prevailed in the negotiations. First, the draft Convention eventually agreed upon was widely considered to contain detailed definitions, which were sufficient to allow States to judge accurately the extent of their commitments and obligations.

This explains the lengths to which the ECHR often goes in elaborating circumstances under which a violation of certain articles may be justified, for instance as ‘necessary in a democratic society’. Nonetheless, it appears somewhat bizarre through modern legal eyes, that the draft was considered exceptionally detailed: many of the articles contained in the Convention employ vague terminology and can scarcely be described as self-executing. In my view, this cannot be solely attributed to the elements adopted from the enumeration draft, whose overall influence on the final draft was significant, but not decisive.

Perhaps it was somewhat naïve to believe that rigid and clearly delimited obligations had been adopted which would require only little further elaboration, interpretation or development. Nevertheless, the Convention came close to the negotiating position of the UK, the Netherlands, Greece and Norway in key respects.

<sup>58</sup> Position on enumeration and definition reserved, representative suggested combining both versions of the text.

<sup>59</sup> *Ibid.*

<sup>60</sup> In favour of detailed definition if Court is established, in favour of enumeration if no Court is established.

<sup>61</sup> *Ibid.*; Position reserved on the question of establishing a Court.

Second, the UK also succeeded in persuading a significant bloc of countries to reject the establishment of a Court with mandatory jurisdiction over the Convention. Instead, States were free to accept or reject the jurisdiction of the Court, and the Court would only be established upon acceptance of the jurisdiction through eight States.<sup>62</sup> Those States advocating an enumeration of rights and mandatory jurisdiction of the Court had conceded significant ground, and some openly expressed their dismay.<sup>63</sup>

As to the matter of interpretation, there is little of further substance within the *travaux préparatoires*: negotiators mention interpretation exclusively when expressing their particular understanding of individual articles and do not engage with the limits and scope of future developments, much less mention which interpretational approach they consider preferable. While there was a minority of States that intended the Convention to function primarily as a safeguard against a resurgence of European totalitarianism, this was never a consensus position.<sup>64</sup>

Arguably, the drafters envisioned that the Convention would remain in force for quite some time, much as constitutions are drafted with longer timeframes in mind. Hence, the drafters did not seek to prejudice the interpretation of the Convention, in order to afford the ECtHR a degree of flexibility in reacting to future developments: Articles 46 and 32 ECHR appear consistent with that assumption. Unlike other international treaties, the drafters also intended the ECHR to be bindingly interpreted, if not by a Court, then at least by a Commission.<sup>65</sup>

The strongest rejoinder to calls for an originalist interpretation is thus perhaps the lack of clear evidence on intentions regarding the interpretation and the permissible scope of the Convention rights. If anything, circumstantial evidence points towards a broad mandate for the ECtHR, notwithstanding that preparatory works are at any rate only a supplementary source in the interpretation of treaties under International Law.<sup>66</sup>

<sup>62</sup> Art. 56 of the 1950 Convention text reads: '(1) The first election of the members of the Court shall take place after the declarations by the High Contracting Parties mentioned in Article 46 have reached a total of eight. (2) No case can be brought before the Court before this election.'

<sup>63</sup> *Collected Edition of the 'Travaux préparatoires' of the European Convention on Human Rights – Legal Committee, Ad-hoc Joint Committee, Committee of Ministers, Consultative Assembly 23 June–28 August 1950* vol. V, 272–280 (Martinus Nijhoff 1979) [Representative Norton of Ireland], 282–302, esp. 294–296 [Representative Teitgen of France], 322–324 [Representative O'Higgins of Ireland], 336–340 [Representative Becker of Germany perhaps went furthest with an impassioned plea for European integration].

<sup>64</sup> Danny Nicol, *Original Intent and the European Convention on Human Rights*, Pub. L. 152, 170 (2005).

<sup>65</sup> Contrast with the International Covenant on Civil and Political Rights, where the United Nations Human Rights Committee merely provides its views, which nonetheless have at least a limited legal relevance, see Eckart Klein & Friederike Brinkmaier, *CCPR und EGMR – Der Menschenrechtsausschuß der Vereinten Nationen und der Europäische Gerichtshof für Menschenrechte im Vergleich*, 49 *Vereinte Nationen* 17, 18 (2001).

<sup>66</sup> See Art. 32 VCLT.

It is useful at this juncture to consider the broader context of International Law, as the ECtHR has stated that the Convention ‘*must be interpreted in harmony with other rules of international law of which it forms a part*’.<sup>67</sup> International Law can therefore be directly relevant to determining whether the ‘living instrument’ interpretative approach is permissible, absent a clear indication in the Convention.

### 3.2 COMPATIBILITY WITH INTERNATIONAL LAW

As to International Law, the ‘living instrument’ interpretative approach does not appear at odds with the Vienna Convention on the Law of Treaties (VCLT). The International Court of Justice (ICJ) has adopted a largely similar evolutive interpretation, and the approach can further be defended as an inquiry into the common intention and hence the object and purpose of the parties to the ECHR. As a matter of International Law, the domestic interpretation of the ECHR cannot be decisive to the outcome of rulings by the ECtHR. Regardless of how well objections are reasoned, Parliament cannot legally overrule a judgment from Strasbourg as it has attempted with *Hirst*, and the Human Rights Act 1998 cannot be said to have established a catalogue of rights independent from the interpretation of the ECtHR.

#### 3.2[a] *The ‘Living Instrument’ Under the VCLT*

The central treaty governing the interpretation of treaties under International Law is the VCLT, which codifies ‘*the means of interpretation admissible for ascertaining the intention of the parties*’.<sup>68</sup> It is important to note, that this *intention of parties* is naturally not based solely on the intention of any individual party. Rather the goal is to determine, to the extent possible the common intention of all parties to a treaty.<sup>69</sup> This is also broadly reflective of the approach adopted by the ICJ with regard to treaty interpretation based on the methods codified in the VCLT.<sup>70</sup>

<sup>67</sup> *Hassan v. United Kingdom*, 29750/09, Grand Chamber, 16 Sept. 2014, at [102]; *Al-Adsani v. United Kingdom*, 35763/97, Grand Chamber, 21 Nov. 2001.

<sup>68</sup> *Report of the International Law Commission on the work of Its Eighteenth Session* (ILC Ybk 1966/II, 1966), 218–219.

<sup>69</sup> For a comprehensive overview of the practice of International Courts and Tribunals on evolutive interpretation, see Eirik Bjorge, *The Evolutionary Interpretation of Treaties* 60 (Oxford University Press 2014); see also V. Gowlland-Debbas, *The Role of the International Court of Justice in the Development of the Contemporary Law of Treaties*, in *The Development of International Law by the International Court of Justice* 35–37 (CJ Tams & J Sloan eds, Oxford University Press 2013).

<sup>70</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, ICJ Reports 1971, 16 at [53]; *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)*, ICJ Reports 1992, 351 at [378]; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea*

The VCLT establishes the ordinary meaning of a treaty as a central mode of interpretation (Article 31 (1) VCLT), which also constitutes the first point of reference for the ICJ. However, the ordinary meaning of treaty terms is at times ambiguous, as drafters often do not include detailed definitions or because the meaning has simply changed over time. Therefore, the interpretation often goes further towards a more detailed analysis of the intentions of the parties: the object and purpose interpretation.

Evolutionary treaty interpretation occurs when a term contained in a treaty is capable of evolving, as opposed to being rigid and fixed for all time. Thereby its meaning changes in step with developments, for instance in the law, which may alter the original understanding in the circumstances of a modern case.<sup>71</sup>

### Evolutionary Interpretation and the Living Instrument

International Law scholarship appears to recognize such an evolutive interpretation method, and it has been conceptualized as a subcategory of the object and purpose interpretation under the VCLT.<sup>72</sup> The ICJ has adopted such an interpretative approach in various cases since the advisory opinion on *Namibia*,<sup>73</sup> and more recently in the case of *Navigational Rights*.<sup>74</sup> This evolutive interpretation is seen as an important aspect of determining the object and purpose of an enduring treaty, and especially so with respect to the developing nature of threats to human rights.<sup>75</sup>

However, some aspects of the 'living instrument' approach as practiced by the ECtHR arguably go beyond evolutive interpretation, if this is to be understood as part of a broader inquiry into the object and purpose of the treaty, and the common intention of the drafters as convincingly argued by Eirik Bjørge.<sup>76</sup>

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intervening), [2002] ICJ Rep 303, 346; *Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, ICJ Reports 2009, 213 at [237].

<sup>71</sup> Bjørge, *supra* n. 69, at 59.

<sup>72</sup> James Crawford, *Brownlie's Principles of Public International Law* 379 (Oxford University Press 2012); Matthias Herdegen, *Interpretation in International Law*, in *Max Planck Encyclopedia of Public International Law* 14, 15 (R. Wolfrum ed., Oxford University Press 2015); Bjørge, *supra* n. 69; Rudolf Bernhardt, *Evolutive Treaty Interpretation, Especially of the European Convention on Human Rights*, 42 Ger. Y.B. Int'l L. 11 (1999); David S. Jonas & Thomas N. Saunders, *The Object and Purpose of a Treaty: Three Interpretive Methods*, 43 Vand. J. Transnat'l L. 565 (2010).

<sup>73</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, ICJ Reports 1971, 16 at [53].

<sup>74</sup> *Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, ICJ Reports 2009, 213 at [64]; see also *Aegean Sea Continental Shelf (Greece v. Turkey)*, ICJ Reports 1978 at [77]; *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, ICJ Reports 1997 at [112 and 140].

<sup>75</sup> Bernhardt, *supra* n. 72, at 16, 17.

<sup>76</sup> Bjørge, *supra* n. 69, at 135.



The ECtHR has developed rights that find no express mention in the ECHR,<sup>77</sup> rights that were impossible to anticipate for the drafters,<sup>78</sup> and in some cases even considered rights which the drafters originally rejected.<sup>79</sup> If the parties gave no thought, or even rejected certain rights later developed through the 'living instrument' approach, how can this interpretation represent the common intention of parties ?

### Abstract and Concrete Intentions

Ronald Dworkin in *A Matter of Principle* gives a possible answer to this dilemma within the context of the US Constitution.<sup>80</sup> George Letsas subsequently adapted Dworkin's approach for the purposes of the ECHR.

In simplified terms, the approach holds that drafters may be guided by many separate intentions which may not necessarily be of equal importance for the purposes of the interpretation: abstract intentions, such as the intention to establish an effective human rights protection regime in post war Europe and *concrete* intentions which materialize on the specific understanding of rights at the time. According to Dworkin, abstract intentions ought to be considered as primarily relevant over concrete intentions when establishing the intention of drafters.<sup>81</sup> Hence, applied to the ECHR it could be seen as more important to update the interpretation of human rights interpretation of the ECHR in step with modern developments, and thus remain true to the abstract common intention of the drafters, than uphold the 1950s era understanding of any specific right, which informed the concrete common intention.

It should also be noted in this context, that Dworkin did not content himself with developing the distinction between abstract and concrete considerations: he posed a deeper question, namely why the historical intention of drafters should be relevant at all to the contemporary application of the law.<sup>82</sup> Dworkin's comments are of course made in the context of the US Constitution, but his point carries over into International Law and furnishes an alternative reading of the ECtHR case law which we shall consider below. Initially, we shall consider the distinction and effects of emphasizing different intentions.

<sup>77</sup> *Golder v. United Kingdom*, 4451/70 [Access to court].

<sup>78</sup> *Matthews v. UK*, 24833/94, Grand Chamber, 18 Feb. 1999 [right to vote in EU elections].

<sup>79</sup> *Young, James and Webster v. UK*, 7601/76 & 7806/77, Court, 13 Aug. 1981 [freedom from being compelled to join a trade union].

<sup>80</sup> Ronald Dworkin, *A Matter of Principle* 48–50 (Harvard University Press 1985).

<sup>81</sup> *Ibid.*, at 52–53; George Letsas, *A Theory of Interpretation of the European Convention on Human Rights* 70 (Oxford University Press 2007); Bjorge, *supra* n. 69, at 62.

<sup>82</sup> Dworkin, *supra* n. 80, at 53–55.

To take a specific example, an abstract intention would be to safeguard the freedom of association for citizens, including the right to form and join trade unions, while a concrete intention could be to hold that this protection does not encompass a freedom from compulsory union membership. Both intentions were expressed during the deliberations of the draft Article 11 ECHR and due to significant disagreement, the phrase '*no one may be compelled to belong to an association*', was not included in the Convention.<sup>83</sup> The ECtHR subsequently engaged with the existence of such a protection under Article 11 ECHR in the case of *Young, James and Webster v. UK*.<sup>84</sup> The three applicants had been dismissed from their jobs for failure to join one of three trade unions, which constituted a condition for their employment under a so-called closed shop agreement. In essence, these are agreements between the employer(s) and trade union(s) that employees are required to be or become members of a specific trade union.<sup>85</sup> While the ECtHR did not deem it relevant to rule definitively on whether Article 11 ECHR contained a freedom from forced association, it nonetheless stated that even if an intention to exclude such a protection were represented in the *travaux préparatoires*:

*it does not follow that the negative aspect of a person's freedom of association falls completely outside the ambit of Article 11 (art. 11) and that each and every compulsion to join a particular trade union is compatible with the intention of that provision. To construe Article 11 (art. 11) as permitting every kind of compulsion in the field of trade union membership would strike at the very substance of the freedom it is designed to guarantee.*

This argument can be read as upholding a distinction between abstract and concrete intentions. The 'living instrument' approach could thus indeed be understood as an expression of the drafters abstract common intention: an evolutive interpretational approach, explained by the overall search for the common intention of the parties pursuant to Articles 31–33 VCLT.<sup>86</sup> There are however a few problems with this assertion in the context of the ECHR.<sup>87</sup>

If one holds the view that the common intention of parties is the ultimate goal of any application of Articles 31–33 VCLT,<sup>88</sup> then a clear distinction between abstract and concrete intentions would appear crucial. This endeavour may however run into significant conceptual problems: while it is clear that drafters will more often than not hold both abstract and concrete intentions, it appears doubtful that one can reasonably distinguish the one from the other, especially when there is

<sup>83</sup> *Supra* n. 55, at 262.

<sup>84</sup> *Young, James and Webster v. UK*, 7601/76 & 7806/77.

<sup>85</sup> *Ibid.*, at 13.

<sup>86</sup> This is the conclusion ultimately reached Bjørge, *supra* n. 69, at 135, 139–140.

<sup>87</sup> I do not take a position on the argument in the context of other international courts and tribunals.

<sup>88</sup> Bjørge, *supra* n. 69, at 62.

ambivalent historical evidence and the risk of circular arguments. For instance, can it be said in the context of Article 11 ECHR that the abstract intention of protecting freedom of association was ever distinct from the concrete intentions, i.e. the specific idea of what freedom of association guarantees in practice? If so, which did the drafters intend to be more important: in other words, what was their overarching 'meta-intention'?<sup>89</sup> Dworkin and Letsas rightly point to these pitfalls, which in my view risk reducing the distinction to little more than a framework of convenience, one that permits disregarding those intentions that conflict with the interpretation which one is predisposed to advocate.

Crucially, the ruling in *Young, James and Webster*<sup>90</sup> may also be accounted for without recourse to abstract and concrete intentions. Perhaps the ECtHR did not draw distinctions between these two intentions at all, but rather utilized moral considerations, distinct from any intentions of the drafters, to develop the Convention rights in question. Indeed, that is the conclusion ultimately reached by Dworkin and Letsas in comparable contexts: both argue that introducing outside moral considerations is inevitable in the business of interpretation, be it of constitutions or treaties under International Law, respectively.

Instead of looking to the historical intentions to determine the object and purpose of a treaty pursuant to the VCLT, one might first seek to determine the object and purpose of a treaty with respect to overarching moral values, and then subsequently engage with the intentions of drafters relevant to those moral values. In other words, one can acknowledge that '*any theory of interpretation of the ECHR (or any international treaty) must at some stage stand outside the drafters' intentions and provide a normative justification based on values of political morality. (...) We cannot know whether (and the extent to which) drafters' intentions are relevant unless we settle first on the object and purpose of the treaty*'.<sup>91</sup>

This, contends Letsas, accurately captures the true spirit of the VCLT. It would certainly better account for the development of the Convention, and its efforts to meet unforeseen threat scenarios.

## Conclusion

The approach advocated by Bjørge deems evolutive interpretation as part of an investigation into the object and purpose of a treaty, which itself is part of an inquiry into the common intentions of the drafters under Articles 31–33 VCLT: the decisive factor when it comes to interpretation. Letsas views the matter from a

<sup>89</sup> Letsas, *supra* n. 81, at 70–71; Dworkin, *supra* n. 80, at 53.

<sup>90</sup> It is curious that this case is one of the few where an evolutive interpretation has been alleged that is not considered in Bjørge, *supra* n. 69.

<sup>91</sup> Letsas, *supra* n. 81, at 71–72.

different perspective when he contends that it is futile to seek the relevant common intentions of drafters if one has not determined the underlying moral principles of a given treaty. The latter to him constitute the true object and purpose that must guide any evolutive interpretation of the treaty.

Perhaps it is therefore more convincing to embrace the moral determinations made by the ECtHR in the course of the 'living instrument' approach, and accept that the (historical) intentions of drafters overall ought to have only a secondary bearing on the interpretation of rights, once the relevant moral principles that ground the Convention are established.

The practical differences between these approaches may well prove negligible, as both Bjørge and Letsas ultimately seek out general objective (moral) principles to guide the interpretation of treaties: Bjørge achieves this by inferring, and giving precedence to abstract (i.e. more general and principled) intentions over concrete (i.e. more specific and subjective) intentions. Letsas, for his part, ultimately forgoes this distinction altogether and seeks out a general moral principle as his starting point.

In any case, I do not take a strong view on this question. I would only contend that it is clearly established that international courts and tribunals practice evolutive interpretation in the context of treaties. The for the most part significantly similar 'living instrument' approach does not appear to conflict with the VCLT. However, it may well be the case, that the Court has overstepped the boundaries of what is permissible in other respects. .

### 3.2[b] *Domestic Interpretation of International Law Obligations*

Danny Nicol advanced such an argument by holding that the ECtHR had acted *ultra vires* and that Parliament had thus been right to challenge its interpretative supremacy on the basis of British Constitutional principles.<sup>92</sup> He found that:

*there is a strong normative case for encouraging representative assemblies to challenge the supposed limits of their competence as enunciated by non-representative bodies.*<sup>93</sup>

In a purely domestic setting, Nicol makes a sound point. However, it does not lend itself well to being transferred to the international level. Nicol's view implies that domestic constitutional principles, and the interpretation given to them by Parliament, may supersede or modify the content of international obligations. However, this proposition violates fundamental tenants of International Law. As

<sup>92</sup> Nicol, *supra* n. 21.

<sup>93</sup> *Ibid.*, at 690.

the VCLT expressly states in Article 27, states cannot interpret treaty obligations according to their own domestic law.

This provision is more than a legal rule of convenience, it is a necessary condition for any meaningful international cooperation. If the Convention is intended to have any meaningful effect and attain uniform application, equal obligations for all parties must be ensured. That is not merely a matter of fairness. Domestic caveats would largely defeat the purpose of international agreements, particularly those concerned with human rights. No matter how well reasoned or fundamental, domestic constitutional principles must remain irrelevant to the applicability and scope of freely accepted obligations under International Law.

Specifically with a view to the UK, the Human Rights Act 1998 can therefore not be said to have created a separate set of human rights obligations that are distinct from the ECHR,<sup>94</sup> as Lord Irvine appears to suggest.<sup>95</sup> It would misconstrue the Human Rights Act 1998 to hold that the requirement of '*taking into account*' gave UK courts leeway in determining whether the ECtHR appreciated or correctly assessed the common law. The Human Rights Act 1998 cannot, as a matter of International Law, provide a basis to disregard ECHR case law or an opt out from the Convention at the discretion of domestic courts, even though this appears to be suggested by Lord Philips in the *Homcastle* judgment.<sup>96</sup>

The functioning and intricacies of domestic law can only concern the ECtHR to the extent that they touch upon the rights as interpreted and protected under the Convention. It is not immediately relevant how domestic UK law and principles would conceptualize a threat to rights arising from state action, as the Convention must be interpreted autonomously to provide an objective standard of review for all contracting States.

As Carmen Draghici rightly points out, the Convention itself knows several mechanisms for States to voice their concerns, but domestic disregarding and disapplication of the Convention is not permissible and incurs the International Law responsibility of the UK.<sup>97</sup>

At least from the perspective of International Law the rule is clear. The means of implementation of the ECHR into domestic law is irrelevant, as no implementation action or deviating interpretation through domestic courts can alter the content of international obligations, or afford interpretative supremacy over the Convention. Short of a withdrawal, domestic law cannot intervene and alter the

<sup>94</sup> Carmen Draghici, *The Human Rights Act in the Shadow of the European Convention: Are Copyist's Errors Allowed?*, Eur. Hum. Rts. L. Rev. 154 (2014).

<sup>95</sup> Lairg, *supra* n. 21.

<sup>96</sup> *R v. Homcastle*, [2009] UKSC 14 at [11].

<sup>97</sup> Draghici, *supra* n. 94, at 165.

context of these obligations as they have been agreed upon, and ultimately as interpreted by the ECtHR under the auspices of the Convention.

### 3.3 INSTITUTIONAL CRITICISM

#### 3.3[a] *State Sovereignty and Human Rights*

Finally, there are good reasons to reject institutional criticism levied against the Court, which advocates more deference to States. Specifically, critics misrepresent the nature and role of human rights as a check on State sovereignty. Those who would portray Hersch Lauterpacht as an early critic of the Court overlook the broader context of his statements.

A key difference between Lord Sumption's view and that taken by the ECtHR with its 'living instrument approach' lies in the conception of human rights.<sup>98</sup> Lord Sumption views them primarily as '*claims against the claimant's own community*', which '*[i]n a democracy, (...) depend for their legitimacy on a measure of recognition by that community. To be effective, they require a large measure of public acceptance through an active civil society*'.<sup>99</sup> This statement betrays a fundamental difference of understanding, and supports a view that is at odds with most contemporary accounts of human rights, and is incompatible with the foundation of human rights as essential safeguards for minorities.

There are accounts that hold the recognition and maintenance by governments as a defining feature of human rights. Such a view is put forward, for instance by Rex Martin.<sup>100</sup> However, the majority of the contemporary accounts differ sharply on this point: most authors, including James Nickel, Charles Beitz and Amartya Sen view independence from recognition or enactment as defining features of human rights.<sup>101</sup>

Naturally, such independence from recognition and endorsement brings human rights into conflict with State sovereignty. From the perspective of International Law this is precisely the point of human rights. They seek to check sovereign power of governments over their citizens, notwithstanding the boundaries drawn by *jus cogens*. Ever since the experiences of the Second World War and the rise of regional and global human rights protection regimes, this has been the stated *raison d'être* of human rights. The protection of the individual is clearly the

<sup>98</sup> Letsas, *supra* n. 31.

<sup>99</sup> Sumption, *supra* n. 24, at 14.

<sup>100</sup> Rex Martin, *A System of Rights* 77, 87 (Oxford University Press 1997).

<sup>101</sup> James W. Nickel, *Making Sense of Human Rights* 9 (2d ed., Blackwell Publisher 2007); Charles R. Beitz, *The Idea of Human Rights* 109 (Oxford University Press 2011); Amartya Sen, *Elements of a Theory of Human Rights*, 32 Phil. & Pub. Aff. 315, 329 (2004).

primary consideration: limits on State sovereignty are not the regrettable result of overbearing courts, but logically antecedent to any meaningful protection of human rights.

Those who might be tempted to portray Hersch Lauterpacht as an early defender of State sovereignty against an overreaching ECHR should be mindful of the broader context. Lauterpacht was indeed sceptical whether the ECtHR was the appropriate forum for individual human rights complaints. He predicted with remarkable foresight that it would lead to national resentment towards the Convention system.<sup>102</sup> However, Lauterpacht understood his criticism as part of a broader choice between two competing forums for individual complaints: the – then still existing – European Commission of Human Rights and the ECtHR. He undoubtedly did not seek to make an argument against the idea of human rights checks on State sovereignty, as some may be inclined to suggest in the context of the current debate. In fact, he expressly insisted that on the matter of human rights protection ‘*no achievements of substance can be brought without actual sacrifices in sovereignty*’.<sup>103</sup> This entailed in his mind the power for international entities to ‘*scrutinise and, if need be, to pass judgment upon the conformity of the conduct of the organs of the State with its international obligations*’. He continues that this requires that the State ‘*surrender its freedom of action and its legislative supremacy with regard to a matter relating to the most essential aspect of its law and constitution*’.<sup>104</sup> Thus, Lauterpacht firmly believed in the necessity of curtailing State sovereignty through commitments to human rights.<sup>105</sup>

Without further substantiation and justification for an apparently static concept of rights and the emphasis of State sovereignty, Lord Sumption’s argument remains incomplete.<sup>106</sup> Ultimately, however, it is the unsupported claim that the drafters intended a specific interpretational approach or enshrined a specific understanding of rights that renders the account unconvincing. As demonstrated above, the ‘living instrument’ approach does not overstep acceptable boundaries of legal interpretation of the Convention, nor what is permissible under International Law. Additionally, there is hardly a lack of democratic endorsement through States.

### 3.3[b] Judges and Rights

Critics are further unduly dismissive of the role of judges in the adjudication of human rights.<sup>107</sup> An active role for judges in developing and updating the law is

<sup>102</sup> Hersch Lauterpacht, *International Law and Human Rights* 447 (Stevens 1950).

<sup>103</sup> *Ibid.*, at 452 et seq.

<sup>104</sup> *Ibid.*, at 311 and generally on the ECHR, 453.

<sup>105</sup> Bates, *supra* n. 39, at 106 et seq.

<sup>106</sup> Letsas, *supra* n. 31.

<sup>107</sup> In the context of the ECHR, see Sumption, *supra* n. 24; Hoffmann, *supra* n. 24, at 11; Judge, *supra* n. 38; for an argument critical of the ECHR case law, but based on judicial assertiveness in the context of



commonplace, even in legal systems that are traditionally sceptical towards activist judges.

In my view, the 'living instrument' approach can be defended on both a strong and a sceptical account of the role of judges in determining the contents of human rights. Lord Sumption argues that the '*power to extrapolate or extend by analogy the scope of a written instrument so as to enlarge its subject-matter is not always easy to reconcile with the rule of law. It is a power which no national judge could claim to exercise in relation to a domestic statute, even in a common law system*'.<sup>108</sup> It is this claim and the associated institutional scepticism that shall be scrutinized in this section.

In considering this question, it is helpful here to contrast a more liberal view on judicial interpretation as advocated by Ronald Dworkin, with the more sceptical approach favoured by Jeremy Waldron. Both authors speak to the role of judges in the interpretation and adjudication of rights.

Dworkin encourages judges towards making moral determinations in developing the rights afforded to individuals and is thus arguably sympathetic to the 'living instrument approach'. Waldron would see this as a task primarily for democratic legislatures, provided certain democratic conditions are met, and hence advocate a more limited role for judges, with limited leeway in interpreting and developing rights.

In his seminal book on the interpretation of the American Constitution, Dworkin offers a rebuttal of what he refers to as the majoritarian premise: the idea that whenever the political majority is not permitted to have its way, something morally regrettable has occurred.<sup>109</sup>

Instead, so argues Dworkin, Judges should be encouraged to set aside the majority preference in favour of the fundamental rights of individuals, whilst adhering to principled reasoning,<sup>110</sup> and developing a coherent vision of justice.<sup>111</sup>

The result is an argument for a 'moral reading' of the US Constitution, which has been adapted by George Letsas to the specific context of the ECHR.<sup>112</sup> Letsas defends what he describes as the '*severing of interpretive links*' by the ECtHR through its 'living instrument' interpretative approach with the nature of human rights. He

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rights adjudication, see Lairg, *supra* n. 21, at 252; contrast with the more conciliatory argument of Lady Hale, *Argentoratum Locutum: Is Strasbourg or the Supreme Court Supreme?*, 12 Hum. Rts. L. Rev. 65, 78 (2012); more generally on the role of judges in rights adjudication, see Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 Yale L.J. 1346 (2006); Scalia, *supra* n. 26.

<sup>108</sup> Sumption, *supra* n. 24, at 8.

<sup>109</sup> Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* 15 et seq. (Oxford University Press 1996).

<sup>110</sup> Ronald Dworkin, *Justice in Robes* 53 (Belknap Press 2006).

<sup>111</sup> Ronald Dworkin, *Law's Empire* Ch. 6 (Hart 1998).

<sup>112</sup> Letsas, *supra* n. 42, at 14.

views these rights as checks on the majority preference dominant in democratic legislative bodies. Ultimately, so argues Letsas, by ratifying the Convention:

*states have given the Court jurisdiction to protect whatever human rights people in fact have, and not what human rights domestic authorities or public opinion think people have.*<sup>113</sup>

From this perspective, the ‘living instrument’ approach is a necessary consequence of ensuring that human rights are able to fulfill their primary purpose. Morally developing human rights is thus an act of minority protection, as minorities are often not in a position to effect meaningful legislative change on their own behalf. In this regard, the ‘Dworkinian’ argument also stands for a certain scepticism towards legislatures.

This scepticism is however far from universal. One may instead be inclined to reject a ‘moral reading’ of the Convention as a far-reaching expansion of the authority of judges. Jeremy Waldron has developed such an account in opposition to Dworkin.<sup>114</sup> Taking the view that there is no evidence to support the proposition that judges are better suited to protect rights than democratic legislatures, Waldron argues that expansive judicial review is not democratically legitimate, regardless of the moral soundness of the outcomes it produces.

It is important to note that Waldron advocates an egalitarian understanding of democracy,<sup>115</sup> and his argument can therefore be better understood if it is slightly restated: Waldron believes that expansive judicial review violates the principle equality of citizens. He emphasizes the formally equal democratic participation of citizens, over a moral evaluation of the outputs of the decision-making process through judges.<sup>116</sup>

To Waldron, this deference to legislatures applies, provided that four democratic conditions are met: (1) good working democratic institutions; (2) well-functioning, representative judicial institutions hearing individual lawsuits and upholding the Rule of Law; (3) a commitment by most in society to the idea of individual and minority rights, as well as (4) persistent, substantial, and good faith disagreement about rights.<sup>117</sup> Even assuming that States meet all of these idealistic conditions in practice, I submit that this does not render the ‘living instrument’ approach untenable under Waldron’s account.

First, it is important to note that Waldron is concerned with a domestic setting, where the branches of Government have differences of opinion on the content of rights. He is not primarily concerned with the international level of the

<sup>113</sup> *Ibid.*, at 139, emphasis omitted, citing Letsas, *supra* n. 81, Chs 2 and 3.

<sup>114</sup> Waldron, *supra* n. 109.

<sup>115</sup> *Ibid.*, at 1386 et seq.

<sup>116</sup> *Ibid.*, at 1393.

<sup>117</sup> *Ibid.*, at 1360.

ECHR, where most of his democratic conditions do not readily apply: after all, the Council of Europe scarcely operates as a State. It is primarily an international organization, which promotes co-operation between European countries in the areas of legal standards human rights, democratic development, the Rule of Law and cultural co-operation.<sup>118</sup>

If we are to attempt a transfer of Waldron's argument to the international level, we must go back to the essence of his claims. Waldron alleges that there is no reason to presume that the ECtHR is better suited to protecting rights than the democratic legislatures of States. Waldron's understanding of egalitarian democracy thus becomes the tipping point: when in doubt, give preference to the outcome of the democratic process, over inevitably subjective considerations of morality through judges. This aspect is more difficult to transfer to the ECHR.

The legislature – those enacting the obligations of the ECHR – is comprised of the States who have ratified and accepted the developments of the ECHR, including the 'living instrument' approach. On the one hand, Waldron would urge respect for these democratic decisions, while at the same time questioning the undoubtedly strong role taken by the judges in Strasbourg, especially in controversial cases.

Thus the transfer of Waldron's argument arrives at an impasse. There are democratic arguments on both sides of the ECHR debate: the democratic credentials of the decision to ratify the Convention, and endorse its development, and the valid democratic concerns over activist judges acting as quasi legislatures. Perhaps it is therefore useful to observe what is considered appropriate in a domestic setting. Does the 'living instrument' approach exceed the boundaries of interpretation in a legal system that is generally sympathetic towards Waldron's concerns?

The operation of the legal system in the UK is a good example, as the constitutional relationship between the judiciary and the Parliament leads to considerable scepticism towards rights-based review of government action through judges.

This attitude stands in contrast to legal systems in the continental European legal tradition and those common law jurisdictions with entrenched constitutional rights who are generally more accustomed to what can be described as 'strong form'<sup>119</sup> judicial review. This is the concept of substantively reviewing, striking down or disapplying legislation on the grounds of unconstitutionality or conflict with individual rights through a Supreme Court or Constitutional Court.<sup>120</sup> Major

<sup>118</sup> *Who We Are* (Council of Europe) <http://www.coe.int/en/web/about-us/who-we-are> (accessed 20 June 2017).

<sup>119</sup> Waldron, *supra* n. 109, at 1354.

<sup>120</sup> See for instance the US Supreme Court and the German Federal Constitutional Court.

common law jurisdictions, such as the UK, Australia and New Zealand generally do not adopt such an approach, although the latter has enacted a Bill of Rights and permits limited reviews of legislation through its courts.<sup>121</sup> However, even in common law legal systems, judges consistently update and adapt their interpretation of the law to modern developments.

In his instructive work on legal interpretation, John Bell has argued that an updating approach to the interpretation of statutes is in fact generally suitable. The interpretation given should be the meaning '*which fits its appropriate modern meaning, even if that differs from the original meaning of the text*'.<sup>122</sup> Bell identifies in particular 'general words and open-ended concepts', 'technological developments' and 'policy developments', as prominent instances where courts might consider updating their interpretation of statutes.<sup>123</sup> All of these are abundantly found in the Convention, and ample occasion for updates has arisen throughout the decades of its history.

Bell justifies this updating approach by arguing that legal texts are inextricably imbedded in the legal tradition and thinking in which they were created. Thus, only the current context of a legal text allows us to determine its 'sphere of application' and consequently its appropriate meaning.<sup>124</sup>

Bell provides a particularly strong example of this through the case of *R v. Brittain*.<sup>125</sup> In 1971, Brittain had shown up uninvited to a party and forced his way into the owner's house. However, Brittain had no intention of occupying or claiming any right to the land, which was the defining feature of the Forcible Entry Act of 1381<sup>126</sup> at the time of the Court of Appeal decision. The relevant section of the Act read:

*And also the King defendeth, that none from henceforth make any entry into lands and tenements, but in case where entry is given by the law; and in such case not with strong hand, nor with multitude of people, but only in peaceable and easy manner. And if any man from henceforth do the contrary, and thereof be duly convict, he shall be punished by imprisonment.*

The statute had not been intended, nor had it ever been applied to gate crashing a party. The Court of Appeal nonetheless interpreted the provision to convict Brittain, holding that the underlying policy consideration of the statute was to prevent public disorder.

<sup>121</sup> Waldron, *supra* n. 109, at 1355.

<sup>122</sup> John Bell, *Interpreting Statutes over Time*, in *Time and Law Is It the Nature of Law to Last?* 31 (M van Hoecke & F Ost eds, Bruylant 1998).

<sup>123</sup> *Ibid.*, at 32 et seq.

<sup>124</sup> *Ibid.*, at 52 et seq.

<sup>125</sup> *R v. Brittain*, [1972] 1 QB 357.

<sup>126</sup> Which was repealed through the Criminal Law Act 1977, c. 45.

Thus, even on a sceptical account that broadly speaking shares the concerns of Jeremy Waldron, it is appropriate for judges to interpret, develop and update legal provisions over time. Both ends of the theoretical spectrum on the interpretation of rights through judges do not appear at odds with an approach similar to the 'living instrument'.

#### 4 CONCLUSION

Ultimately, the 'living instrument' interpretative approach appears legal under the Convention and broader International Law. As I have emphasized, this does not conclusively answer the question of whether the approach is legitimate, in the sense of the political and moral authority to update the interpretation of the Convention rights. That is a question beyond the scope of this article.

In the context of legality, invoking State sovereignty and democratic considerations as an argument against human rights protection is problematic. It is true that human rights may at times conflict with the majority preference. However, those who invoke that specific objection with regard to the ECHR and the UK should tread carefully: the ratification and the subsequent rolling endorsement of the jurisdiction of the Court, as well as the Human Rights Act 1998 lay an equally strong claim to democratic endorsement.

Moreover, the textual and originalist interpretation that some would see enforced is blind to modern developments and unduly ignores the altered nature of threats to human dignity, freedom, and equality in the twenty-first century. The advent of the internet and the dramatic changes in societal attitudes regarding sexuality and gender in the decades after 1950 must play their part in the understanding of human rights provisions if they are to remain meaningful safeguards. This is an insight that has been embraced even by those legal systems generally sceptical towards affording judges a strong role in the adjudication of rights.

On a practical level, it is likely that politically sensitive judgments of the ECtHR will continue to provoke domestic criticism, as was the case in the UK with *Hirst*<sup>127</sup> and in Italy with *Lautsi*.<sup>128</sup> At the international level, States are markedly less confrontational: they do not appear to harbour deep reservations

<sup>127</sup> *Hirst v. United Kingdom*, 74025/01, *supra* n. 7.

<sup>128</sup> *Lautsi and others v. Italy*, 30814/06, Grand Chamber, 18 Mar. 2011), particularly troubling due to public death threats against the applicants by a Government Minister after the initial Chamber judgment, see John Hooper, *Human Rights Ruling Against Classroom Crucifixes Angers Italy*, Guardian (3 Nov. 2009), <http://www.theguardian.com/world/2009/nov/03/italy-classroom-crucifixes-human-rights> (accessed 20 June 2017).

or concerns towards the development of the ECHR under the aegis of the Court. Political opportunism, rather than genuine legal concerns, could explain the controversies and threats of withdrawal from the Convention. Overall, most governments still appear committed to the idea of European human rights protection. However, the danger remains that in an effort to 'outflank' nativist and EU sceptical political movements, the political mainstream will inadvertently erode the many achievements of the ECHR : the Court may well become a casualty of the rise of right wing populism . Thus, a sovereign and isolationist State may yet experience a renaissance and reinstate itself as '*the unsurpassable barrier between man and the law of mankind*'.<sup>129</sup>

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<sup>129</sup> Hersch Lauterpacht, *An International Bill of the Rights of Man*, 5 (2nd ed., 2013).