

Chapter ____

Treaties as ‘Living Instruments’

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1. Use of the ‘Living Instrument’ Metaphor

To describe a legal instrument as a living organism is a metaphor that is common in many national legal systems, especially in constitutional law.¹ In a case concerning the question of whether women were ‘qualified persons’ who could serve as members of the Canadian Senate, the Privy Council remarked that the constitution of Canada should be viewed as ‘a living tree capable of growth and expansion within its natural limits.’² While recognising that women’s exclusion from public office had a long history, the Privy Council asserted that this could not justify the practice as it did ‘not think it right to apply rigidly to Canada of to-day the decisions and the reasonings therefor which commended themselves, probably rightly, to those who had to apply the law in different circumstances, in different centuries to countries in different stages of development.’³ In the United States, the perhaps most important battle in constitutional scholarship pitches the ‘living constitution’, which can evolve and adapt to changes in social conditions through interpretation,⁴ against the ‘originalist constitution’, whose meaning was fixed by its drafters and is immune to changes through judicial interpretation.⁵ Similarly, it has been argued that the German *Grundgesetz* should be understood as a ‘*lebende Verfassung*’.⁶

Given the origin of the ‘living instrument’ metaphor in constitutional law, it is not surprising that, in international law, it has been used with regard to, first of all, those treaties that Arnold McNair characterised as ‘treaties creating constitutional international law’, particularly constituent treaties of international organisations.⁷ The prime example of a constitutional

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¹ V.C. Jackson, ‘Constitutions as “Living Trees”? Comparative Constitutional Law and Interpretive Metaphors’, *Fordham L. Rev.*, 75 (2006), 921-960.

² *Edwards v. Attorney-General of Canada* [1930] AC 124, at p. 136.

³ *Ibid.*, at pp. 134-135.

⁴ See, e.g., D.A. Strauss, *The Living Constitution* (New York: Oxford University Press, 2010); A. Winkler, ‘A Revolution Too Soon: Woman Suffragists and the “Living Constitution”’, *N.Y. Univ. L. Rev.*, 76 (2001), 1456-1526 and H.L. McBain, *The Living Constitution: A Consideration of the Realities and Legends of Our Fundamental Law* (New York: Workers Bureau Education Press, 1927).

⁵ See, e.g., A. Scalia, ‘Originalism: The Lesser Evil’, *Univ. Cincinnati L. Rev.*, 57 (1989), 849-865.

⁶ W. Heun, *Die Verfassungsordnung der Bundesrepublik Deutschland* (Tübingen: Mohr Siebeck, 2012), p. 26.

⁷ A.D. McNair, ‘The Functions and Differing Legal Character of Treaties’, *British YbIL*, 11 (1930), 100-118, at 112.

treaty commonly described as a ‘living instrument’ is the UN Charter, dealt with in Section 2 of this chapter; another one is the WTO Agreement.⁸

However, the ‘living instrument’ metaphor is not confined to treaties constitutive of international organisations but has been used with regard to a range of further ‘law-making treaties’⁹ in many areas of international law, such as international environmental law and international humanitarian law. Treaties as diverse as the Treaty of Waitangi of 1840,¹⁰ the Treaty on the Construction and Operation of the Gabčíkovo-Nagymaros Barrage System of 1977¹¹ and the TRIPS Agreement of 1994¹² have been explicitly described as ‘living instruments’. The most important category of ‘law-making treaties’ that are frequently characterised as ‘living instruments’ are, however, human rights treaties.¹³ They are considered in detail in Section 3. It will be seen in the course of this analysis that the term ‘living instrument’ is no longer simply a straightforward metaphor deployed to show that treaties might grow but has become, itself, an evolving concept in the law of treaties. While the metaphor could be developed to the extent of identifying the ‘signs of life’ that make a treaty a ‘living instrument’, the concept of ‘living instrument’ is of greater significance because it embodies a legal understanding of a treaty in terms of its characterisation, interpretation and evolution.

Aside from constitutional and law-making treaties, the remaining bulk of treaties, including all ‘contractual treaties’, have not typically been described as ‘living instruments’. The chapter aims to explore whether the ‘living instrument’ concept could usefully be applied to some of these treaties as well, making it of broad appeal. Section 4 therefore considers arms control law, an area of treaty provision that, at first sight, might appear to be the very antithesis of the ‘living instrument’ notion. While human rights treaties can be depicted as ‘living instruments’ in a conceptual sense, in arms control law the metaphor is not even deployed. However, the chapter will show that it may be appropriate to also think of arms control treaties in terms of the ‘living instrument’ metaphor.

While it is tempting to draw together all practice across treaties where the ‘living instrument’ characterisation has been used, this chapter focuses on treaties within the two areas of human rights law and arms control law in order to explore the understandings of ‘living instrument’ in greater depth. However, the chapter starts with a brief excursion into what is often viewed as the paradigmatic ‘living instrument’—the UN Charter.

⁸ See the chapter by Pauwelyn and Van Damme in this volume at pp. ____-____. See, also, M.E. Footer, ‘The WTO as a “Living Instrument”: the Contribution of Consensus Decision-Making and Informality to Institutional Norms and Practices’ in T. Cottier and M. Elsig (eds.), *Governing the World Trade Organization: Past, Present and Beyond Doha* (Cambridge: Cambridge University Press, 2011), pp. 217-240.

⁹ On the different categories of treaties, see the chapter by Brölmann in this volume at pp. ____-____.

¹⁰ *New Zealand Maori Council and Latimer v. Attorney-General and Others* [1987] 1 NZLR 641, at p. 663.

¹¹ *Case Concerning Gabčíkovo-Nagymaros Project: Hungary v. Slovakia* (1997) ICJ Rep. 7, at pp. 114-115 (Separate Opinion of Vice-President Weeramantry).

¹² ‘Commission report is food for thought on intellectual property—Supachai’, *WTO News*, 17 Sept. 2002.

¹³ See the chapter by Chinkin in this volume at pp. ____-____.

2. United Nations Charter

Constituent treaties of international organisations, which establish an organisation and lay down rules, are the paradigmatic example of ‘living instruments’. They adapt to changing social conditions, not automatically but through the ciphers of purposive interpretation by the organs of the organisation. In the case of the United Nations, these consist mainly of states (in the Security Council, the General Assembly and the Economic and Social Council) but also of individuals (the Secretariat headed by the Secretary-General), including judges (in the International Court of Justice).

Thus the UN Charter, already as originally agreed in 1945 and before it was developed further, was a move away from the formalist position of the nineteenth century of the text being the sole source of information about the rights and duties of states. The Charter does contain statements on rights and duties of member states, for example in Article 2, but it also contains statements about the powers and responsibilities of the organs of the United Nations (for example in Chapters VI and VII in relation to the Security Council). Indeed, it was clear in 1945 that the political organs could add to the rights and duties of states by means of resolutions, interpreting wide phrases such as ‘threat to the peace’ (in Article 39) and ‘measures not involving the use of armed force’ (in Article 41). Thus, the Security Council can impose binding obligations on states in relation to matters of peace and security (Article 25) and the General Assembly in relation to matters of financing (Article 17).

It is clear that the development of the Charter as a ‘living instrument’ has pushed to the limit the rules on interpretation of treaties in Articles 31-33 of the 1969 Vienna Convention on the Law of Treaties (VCLT).¹⁴ Those provisions supplement the textual approach with context (including subsequent agreement and practice) and purposes. In reality what this means is that while the text is the starting point, the changing understanding of that text is primarily driven by the practice, not of all the member states, but of majorities in political organs, or by individuals working for the Secretariat (for instance in interpreting the Charter’s provisions on privileges and immunities),¹⁵ or by the International Court of Justice (for instance in interpreting the Charter to include the capacity to bring claims against states or the power of both the General Assembly and the Security Council to create peacekeeping forces).¹⁶

Edvard Hambro (writing as Pollux) recognised this as early as in 1946:

The Charter, like every written Constitution, will be a living instrument. It will be applied daily; and every application of the Charter, every use of an Article, implies an

¹⁴ 1155 UNTS 331.

¹⁵ For instance when negotiating a Status of Force Agreement (SOFA) with a host state. The model SOFA contains a number of clauses on privileges and immunities, though these may be modified for a particular operation: see U.N. Doc. A/45/594 (1990).

¹⁶ *Reparation For Injuries Suffered in the Service of the United Nations* (Advisory Opinion) (1949) ICJ Rep. 174 and *Certain Expenses of the United Nations (Article 17, Paragraph 2 of the Charter)* (Advisory Opinion) [1962] ICJ Rep. 151.

interpretation; on each occasion a decision is involved which may change the existing law and start a new constitutional development. A constitutional customary law will grow up and the Charter itself will merely form the framework of the Organization which will be filled in by the practice of the different organs.¹⁷

Christian Tomuschat supports this depiction by describing the United Nations as an ‘entire system which is in constant movement, not unlike a national constitution whose original texture will be unavoidably modified by thick layers of political practice and jurisprudence’.¹⁸ Rosalyn Higgins states further that ‘the Charter is an extraordinary instrument, and a huge variety of possibilities are possible under it’.¹⁹

Subsequent practice is therefore a significant means of interpreting and developing the Charter. Nevertheless, sole reliance on practice as the test for legality is not acceptable,²⁰ since practice must be accompanied by normative intent and must be constrained by the purposes and principles of the Charter, which are broad but not unlimited. As stated by the International Court of Justice in the *Expenses* opinion in 1962, the purposes of the United Nations ‘are broad indeed, but neither they nor the powers conferred to effectuate them are unlimited’.²¹ It further held that ‘when the Organization takes action which warrants the assertion that it was appropriate for the fulfilment of one of the stated purposes of the United Nations, the presumption is that such action is not *ultra vires* the Organization’.²²

As well as the purposes, the text of the Charter will also provide limitations on its evolution. Perhaps the most important explicit limitation derives from Article 2(7) regarding intervention in the domestic affairs of states, but even the effect of this limitation has been restricted by a dynamic interpretation of what is domestic.²³ The amount of practice required to give a text a radically different meaning would have to be significant in terms of volume and support, amounting to virtual agreement amongst the whole membership.²⁴ Nevertheless, any number of examples could be given for this, from the principles contained in Article 2, to the understanding of the General Assembly’s powers under Chapter IV (to mandate peacekeeping forces, for instance), to those of the Security Council under Chapter VII (to massively expand the concept of threat to the peace in Article 39, to create *ad hoc* criminal tribunals, post-conflict administrations and legislation on terrorism and weapons of mass destruction under

¹⁷ Pollux, ‘The Interpretation of the Charter’, *British YbIL*, 23 (1946), 54-82.

¹⁸ C. Tomuschat, ‘Obligations Arising for States Without or Against Their Will’, *Hague Recueil*, 241 (1993-IV), 195-374, at 251-252.

¹⁹ R. Higgins, *Problems and Process: International Law and How We Use It* (Oxford: Clarendon Press, 1994), p. 184.

²⁰ S. Rosenne, *Developments in the Law of Treaties, 1945-1986* (Cambridge: Cambridge University Press, 1989), p. 244.

²¹ *Certain Expenses of the United Nations*, *supra* n. 16, at p. 168.

²² *Ibid.*

²³ N.D. White, *Law of International Organisations* (Manchester: Manchester University Press, 2nd ed., 2005), pp. 89-98.

²⁴ C.F. Amerasinghe, *Principles of the Institutional Law of International Organizations* (Cambridge: Cambridge University Press, 2nd ed., 2005), pp. 49-61.

Article 41, to develop a military option that is not based on special agreement under Article 43 or a Military Staff Committee under Article 47), and to those of the Secretary General under Articles 97-99 (where he has long ceased to be simply the Chief Administrative Officer of the organisation but has become the embodiment of diplomacy and initiative within the UN system).²⁵

A simple example can be given where an interpretation by practice within the Security Council has been accepted by the wider membership and the International Court of Justice, and this relates to the understanding of the veto and when it operates under Article 27(3) of the Charter. In its *Namibia* opinion of 1971 the International Court of Justice considered South African objections to the validity of the Security Council resolution which requested the opinion of the Court on the legality of the continued presence of South Africa in Namibia. Two permanent members had abstained on the resolution which, according to South Africa, therefore did not comply with the stipulations of Article 27(3) of the Charter that such decisions 'shall be made by an affirmative vote of nine members including the concurring votes of the permanent members'. After the Court had examined the proceedings of the Security Council, extending over a long period of time, it concluded that the 'practice of voluntary abstention by a permanent member' did not prevent the adoption of a valid resolution, so that only a negative vote by a permanent member constituted a veto preventing the adoption of a resolution. Although primarily relying on the practice of the Security Council, the Court also noted that there was support for this interpretation among the wider membership of the United Nations.²⁶ Although the practice did not produce an understanding that was contrary to the textual meaning (in particular the power of veto was not diminished by this practice), it did move the text a considerable way from its (admittedly rather ambiguous) literal meaning and it also served the purposes of the United Nations by allowing its executive organ to take action in a greater number of situations than would have been possible had abstentions been treated as vetoes.²⁷

Furthermore, despite some equivocation by the International Court in the *Namibia* opinion, within the UN system it is not the practice of member states that breathes life into the Charter but rather it is the practice of *the organs*.²⁸ This was recognised in an earlier opinion of the International Court of Justice on the practice of dealing with applications for membership in the political organs of the United Nations, when it stated that '[t]he organs to which Article 4 entrusts the judgment of the Organization in matters of admission have consistently interpreted the text ...'.²⁹ However, in an earlier opinion of 1948 on membership the Court

²⁵ B.E. Urquhart, 'The Evolution of the Secretary-General' in S. Chesterman (ed.), *Secretary or General?: The UN Secretary-General in World Politics* (Cambridge: Cambridge University Press, 2007), pp. 15-32.

²⁶ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)* (Advisory Opinion) (1971) ICJ Rep. 16, at p. 22.

²⁷ See, further, A. Zimmermann, 'Article 27' in B. Simma, D.-E. Khan, G. Nolte, A. Paulus (eds.), *The Charter of the United Nations: A Commentary* (Vol. I) (Oxford: Oxford University Press, 3rd ed., 2012), pp. 912-916.

²⁸ B. Fassbender, 'The United Nations Charter as Constitution of the International Community', *Columbia JTL*, 36 (1998), 529-619.

²⁹ *Competence of the General Assembly for the Admission of a State to the United Nations* (Advisory Opinion) (1950) ICJ Rep. 4, at p. 9 (emphasis added).

had made it absolutely clear that such decisions still had to be exercised within the confines of the Charter:

The political character of an organ cannot release it from the observance of the treaty provisions established by the Charter when they constitute limitations on its powers or criteria for its judgment.³⁰

Thus, from an early stage, it was recognised that the Charter was a ‘living’ constitution that both allowed for freedom to develop its open-ended provisions but still provided limitations to prevent unrestricted growth. The growth has been provided primarily by the political organs of the United Nations in developing the broad purposes and powers given to them by the Charter, although the International Court of Justice has also made some significant contributions. In contrast, in the case of human rights treaties, it has been (quasi-)judicial organs created by these treaties that have breathed life into their provisions by interpreting them by reference to changing social mores and changing norms of international law.

3. Human Rights Treaties

A category of ‘law-making treaties’ that have been characterised as ‘living instruments’ from early on, are human rights treaties. Judge Álvarez of the International Court of Justice thought already in 1951 that the Genocide Convention belongs to a category of ‘multilateral conventions of a special character’,³¹ which ‘must be interpreted without regard to the past, and only with regard to the future.’³² According to him, such conventions are distinct from the preparatory work which preceded them: they ‘have acquired a life of their own; they can be compared to ships which leave the yards in which they have been built, and sail away independently, no longer attached to the dockyard.’³³

However, it was the European Court of Human Rights that gave real substance to the notion of an evolutive interpretation of human rights treaties and developed the idea that such treaties should be understood as ‘living instruments’. The Court characterised the European Convention on Human Rights (ECHR)³⁴ as a ‘living instrument’ for the first time in 1978 and this notion has now become one of the central features of its approach to the interpretation of the Convention.³⁵ Although it took two more decades until the bodies supervising implementation of other human rights treaties started to take up the ‘living instrument’ idea,

³⁰ *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter)* (Advisory Opinion) [1948] ICJ Rep. 57, at p. 64.

³¹ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (Advisory Opinion) [1951] ICJ Rep. 15, at p. 51 (Dissenting Opinion of Judge Álvarez).

³² *Ibid.*, at p. 53.

³³ *Ibid.*

³⁴ 213 UNTS 222.

³⁵ See, further, G. Letsas, ‘The ECHR as a Living Instrument: Its Meaning and Legitimacy’ in A. Føllesdal, B. Peters and G. Ulfstein (eds.), *Constituting Europe: The European Court of Human Rights in a National, European and Global Context* (Cambridge: Cambridge University Press, 2013), pp. 106-141.

by today the ‘living instrument’ label tends to be attached to the category of human rights treaties as a whole.

3.1. ECHR

The first mention of ‘living instrument’ in Strasbourg’s case law can be found in the judgment of *Tyrer v. United Kingdom*, handed down in 1978.³⁶ Anthony Tyrer was fifteen years old when a juvenile court sentenced him to three strokes of the birch in accordance with the legislation then in force on the Isle of Man. He was taken to a police station where he had to take down his trousers and underpants and bend over a table. He was held by two police officers whilst a third executed the punishment.³⁷ The European Court had to decide whether such judicially imposed corporal punishment amounted to ‘degrading punishment’ in breach of Article 3 ECHR. The Attorney-General for the Isle of Man argued that it did not, ‘since it did not outrage public opinion in the Island.’³⁸ The Court rejected this argument, pointing out that the reason why the inhabitants of the island support corporal punishment may be precisely that they believe it to be degrading and thus an effective deterrent. In a passage that has since become one of the Court’s standard formulations (at least its first part), it then went on to state:

The Court must also recall that the Convention is a living instrument which, as the Commission rightly stressed, must be interpreted in the light of present-day conditions. In the case now before it the Court cannot but be influenced by the developments and commonly accepted standards in the penal policy of the member States of the Council of Europe in this field.³⁹

The background and meaning of this passage is rather mysterious. In its decision in *Tyrer*, the European Commission of Human Rights had, in fact, neither described the Convention as a ‘living instrument’ nor referred to ‘present-day conditions’. In addition, despite its insistence on this point, the Court did not explain what ‘the developments and commonly accepted standards in the penal policy’ of European states were. While it remarked rather incidentally—in a passage not relating to Article 3—that corporal punishment was not used ‘in the great majority of the member States of the Council of Europe’,⁴⁰ there is no review of the legislation or legal developments in these states. Even more problematically, the Court did not give any reasons for its characterisation of the ECHR as a ‘living instrument’, which has now become one of its most important interpretive approaches: it did not explain why and in how far it matters that there are ‘commonly accepted standards’ and why the ECHR should be

³⁶ *Tyrer v. United Kingdom*, No. 5856/72, Judgment of 25 April 1978, Series A, No. 26.

³⁷ *Ibid.* (paragraphs 9-10).

³⁸ *Ibid.* (paragraph 31).

³⁹ *Ibid.*

⁴⁰ *Ibid.* (paragraph 38).

interpreted in the light of them.⁴¹ In fact, it is clear from the Court's reasoning that the decisive factor for reaching its decision that Article 3 had been violated was not the development of common European standards at all. Instead, it was '[t]he very nature of judicial corporal punishment' that made it degrading, since 'it involves one human being inflicting physical violence on another human being.'⁴²

A year later, in *Marckx v. Belgium*, the Court, although not explicitly describing the ECHR as a 'living instrument', referred to its judgment in *Tyrer* and repeated that the Convention 'must be interpreted in the light of present-day conditions.'⁴³ Accordingly, the Court attached no weight to the fact that 'at the time when the Convention of 4 November 1950 was drafted, it was regarded as permissible and normal in many European countries to draw a distinction in this area between the "illegitimate" and the "legitimate" family.'⁴⁴ In the meantime, the Court pointed out, the domestic law of the great majority of the Council of Europe member states had evolved and continued to evolve towards full recognition of maternal affiliation by birth alone with respect to 'illegitimate children'. While the Court admitted that two conventions aiming at establishing equality between 'legitimate' and 'illegitimate' children had only been ratified by a small number of members states, it thought it sufficient that there were signs of an 'evolution of rules and attitudes' 'amongst modern societies'.⁴⁵

One of the Court's most famous invocations of the 'living instrument' notion was that in *Selmouni v. France* where it made it clear that what qualifies as 'torture' within the meaning of Article 3 ECHR may well change over the years:

[H]aving regard to the fact that the Convention is a 'living instrument which must be interpreted in the light of present-day conditions' ... the Court considers that certain acts which were classified in the past as 'inhuman and degrading treatment' as opposed to 'torture' could be classified differently in future. It takes the view that the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies.⁴⁶

Accordingly, the Court found the kind of ill-treatment that had occurred in this case to amount to torture, even though on application of the standards established in its previous case law it probably would have had to be classified as inhuman treatment.⁴⁷ This finding is a good

⁴¹ See, also, A. Mowbray, 'The Creativity of the European Court of Human Rights', HRLR, 5 (2005), 57-79, at 61.

⁴² *Tyrer v. United Kingdom*, *supra* n. 36 (paragraph 33).

⁴³ *Marckx v. Belgium*, No. 6833/74, Judgment of 13 June 1979, Series A No. 31 (paragraph 41).

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*

⁴⁶ *Selmouni v. France*, No. 25803/94, Judgment of 28 July 1999, Reports 1999-V (paragraph 101).

⁴⁷ See *Ireland v. United Kingdom*, No. 5310/71, Judgment of 18 Jan. 1978, Series A No. 25 (paragraph 167).

illustration of the Court's use of the 'living instrument' notion insofar as it is typically invoked to support an extension of the Convention's protective scope.

By the time of writing, the ECHR has been described as a 'living instrument' in 91 judgments and decisions (55 times the term appears in the majority's judgment/decision, 26 times in a separate opinion, 10 times in both). The equivalent French term 'instrument vivant' was used in a further 23 judgements and decisions (12 times in the majority's judgment/decision, 11 times in a separate opinion). In addition, not counting the judgments and decisions containing an explicit reference to 'living instrument' just referred to, the Court (or one of its members), has stated that the Convention must be interpreted in the light of 'present-day conditions' an additional 36 times (24 judgments/decisions, 12 separate opinions), while the equivalent reference to 'conditions de vie actuelles' appears in two separate opinions. In total, therefore, the 'living instrument' idea has been invoked in 152 judgments and decisions.

The Court has used the 'living instrument' notion, for example, to characterise the death penalty as inhuman and degrading treatment in the sense of Article 3;⁴⁸ to qualify human trafficking as falling within the prohibition of slavery and forced labour of Article 4;⁴⁹ to limit the role of the executive branch in deciding on the release of prisoners under Article 5;⁵⁰ to read a right not to be compelled to join an association into Article 11;⁵¹ and to qualify the rejection of a lesbian woman's application to adopt a child as discriminatory and thus in violation of Article 14.⁵²

The Court has relied on the 'living instrument' approach to interpret not only the substantive but also the procedural guarantees of the ECHR, such as those concerning interim measures⁵³ and the territorial jurisdiction of the Court.⁵⁴ In *Loizidou v. Turkey (Preliminary Objections)* it explained that, just as the substantive guarantees, the procedural provisions 'cannot be interpreted solely in accordance with the intentions of their authors as expressed more than forty years ago.'⁵⁵

The 'present-day conditions' that may influence the Court's interpretation of the Convention may consist of legal developments within the respondent state such as legislative reforms or changes in the case law of the domestic courts.⁵⁶ More often, however, the Court refers, as in *Tyrer and Marckx*, to the situation in other member states or sometimes, as in *Christine*

⁴⁸ *Al-Saadoon and Mufdhi v. United Kingdom*, No. 61498/08, Judgment of 2 March 2010, Reports 2010 (paragraph 119-120).

⁴⁹ *Rantsev v. Cyprus and Russia*, No. 25965/04, Judgment of 7 Jan. 2010, Reports 2010.

⁵⁰ *Stafford v. United Kingdom*, No. 46295/99, Judgment of 28 May 2002, Reports 2002-IV.

⁵¹ *Sigurður A. Sigurjónsson v. Iceland*, No. 16130/90, Judgment of 30 June 1993, Series A, No. 264.

⁵² *E.B. v. France* [GC], No. 43546/02, Judgment of 22 Jan. 2008.

⁵³ *Mamatkulov and Askarov v. Turkey*, Nos. 46827/99 and 46951/99, Judgment of 4 Feb. 2005, Reports 2005-I.

⁵⁴ *Loizidou v. Turkey (Preliminary Objections)*, No. 15318/89, Judgment of 23 March 1995, Series A No. 310.

⁵⁵ *Ibid.* (paragraph 71).

⁵⁶ *Stafford v. United Kingdom*, *supra* n. 50 (paragraphs 69-80).

Goodwin v. United Kingdom,⁵⁷ even to that in non-member states. In the latter case, the Court explicitly recognised that there was no ‘common European approach’ regarding the legal recognition of the new sexual identity of post-operative transsexuals, but, based on a review of the legal situation in a number of non-European states, attached more importance to ‘the clear and uncontested evidence of a continuing international trend’ than to the lack of a common European standard.⁵⁸

In recent years, the Court has also given increased weight to developments in international law.⁵⁹ In *Demir and Baykara v. Turkey* it expanded the ‘living instrument’ formula accordingly:

[T]he Convention is a living instrument which must be interpreted in the light of present-day conditions, *and in accordance with developments in international law*, so as to reflect the increasingly high standard being required in the area of the protection of human rights, thus necessitating greater firmness in assessing breaches of the fundamental values of democratic societies.⁶⁰

In this case, concerning the right of civil servants to form trade unions, the Court referred very extensively to various international instruments, including ILO Conventions and the European Social Charter, to interpret Article 11 ECHR. The Turkish government objected that it had not ratified the respective provisions of the European Social Charter and that the Court was not entitled to create, by way of interpretation, new obligations not provided for in the ECHR. The Court stated that it had ‘never considered the provisions of the Convention as the sole framework of reference for the interpretation of the rights and freedoms enshrined therein’ but had also ‘taken account of evolving norms of national and international law’,⁶¹ which ‘show, in a precise area, that there is common ground in modern societies.’⁶² Thus, it was ‘not necessary for the respondent State to have ratified the entire collection of instruments that are applicable in respect of the precise subject matter of the case concerned.’⁶³ Similarly, in *Rantsev v. Cyprus and Russia* the Court drew upon the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children and the Council of Europe Convention on Action against Trafficking in Human Beings to support its conclusion that trafficking in human beings falls within the scope of Article 4 ECHR, even though these instruments had not yet been in force at the relevant time.⁶⁴

⁵⁷ *Christine Goodwin v. United Kingdom*, No. 28957/95, Judgment of 11 July 2002, Reports 2002-VI.

⁵⁸ *Ibid.* (paragraphs 56 and 84-85).

⁵⁹ See, already, *Golder v. United Kingdom*, No. 4451/70, Judgment of 21 Feb. 1975, Series A No. 18, (paragraph 29) and *Loizidou v. Turkey (Merits)*, No. 15318/89, Judgment of 18 Dec. 1996, Reports 1996-VI (paragraph 43).

⁶⁰ *Demir and Baykara v. Turkey* [GC], No. 34503/97, Judgment of 12 Nov. 2008, Reports 2008 (paragraph 146) (emphasis added).

⁶¹ *Ibid.* (paragraphs 67-68).

⁶² *Ibid.* (paragraph 86).

⁶³ *Ibid.*

However, the Court has also made it clear that there are limits as to what the ‘living instrument’ method can achieve. In *Johnston v. Ireland*, it had to decide whether a right to divorce could be derived from Article 12 ECHR, guaranteeing the right to marry.⁶⁵ The Court recognised ‘that the Convention and its Protocols must be interpreted in the light of present-day conditions’, but held that it ‘cannot, by means of an evolutive interpretation, derive from these instruments a right that was not included therein at the outset’, particularly where the omission was deliberate.⁶⁶

The ‘living instrument’ approach may also reach its limits where it conflicts with a systematic interpretation of the ECHR. In *Pretty v. United Kingdom*, the applicant, who suffered from a terrible, irreversible disease in its final stages, argued that Article 3 ECHR imposed a positive obligation on the state to sanction the assisted suicide of a terminally ill person.⁶⁷ The Court held otherwise, stating that while it ‘must take a dynamic and flexible approach to the interpretation of the Convention, which is a living instrument, any interpretation must also accord with the fundamental objectives of the Convention and its coherence as a system of human rights protection.’ Therefore, Article 3 had to be construed in harmony with Article 2, the right to life.⁶⁸

Finally, the Court will be reluctant to rely on the ‘living instrument’ method where the member states have taken it upon themselves to further develop and define the ECHR standards. *Soering v. United Kingdom* raised the question of whether imposition of the death penalty would amount to a violation of Article 3 ECHR.⁶⁹ While reaffirming that the Convention is a ‘living instrument’, the Court pointed out that Protocol No. 6 to the ECHR concerning the Abolition of the Death Penalty of 1983 showed that the intention of the state parties was to adopt the normal method of amendment of the text through a subsequent written and, in addition, optional instrument. Therefore, notwithstanding the special character of the Convention, Article 3 could not be interpreted as generally prohibiting the death penalty.⁷⁰

As the Court has recently summarised its case law, the ‘living instrument’ approach ‘does not ... mean that to respond to present-day needs, conditions, views or standards the Court can create a new right apart from those recognised by the Convention ... or that it can whittle down an existing right or create a new “exception” or “justification” which is not expressly recognised in the Convention.’⁷¹ What qualifies as a ‘new’ right or exception is, however, a

⁶⁴ *Rantsev v. Cyprus and Russia*, *supra* n. 49 (paragraph 282).

⁶⁵ *Johnston v. Ireland*, No. 9697/82, Judgment of 18 Dec. 1986, Series A, No. 112.

⁶⁶ *Ibid.* (paragraph 53).

⁶⁷ *Pretty v. United Kingdom*, No. 2346/02, Judgment of 29 April 2002, Reports 2002-III.

⁶⁸ *Ibid.* (paragraph 54).

⁶⁹ *Soering v. United Kingdom*, No. 14038/88, Judgment of 7 July 1989, Series A, No. 161.

⁷⁰ *Ibid.* (paragraph 103).

⁷¹ *Austin and others v. United Kingdom*, Nos. 39692/09, 40713/09 and 41008/09, Judgment of 15 March 2012, Reports 2012 (paragraph 53).

question of interpretation. Thus, some authors⁷² have argued that the Court has, in fact, engaged in the creation of a new right that had been deliberately omitted from the Convention, when it held that the guarantee of freedom of association of Article 11 includes a ‘negative right’ not to be compelled to join an association.⁷³

3.2. Inter-American instruments

The ‘living instrument’ method developed by the European Court of Human Rights has clearly influenced the interpretive approach of the Inter-American human rights bodies. Nevertheless, when the Inter-American Court of Human Rights, in 1989, for the first time emphasised the need for an evolutive interpretation of human rights instruments, this was backed up, not by a reference to the European Court’s case law, but to the *Namibia* opinion of the International Court of Justice, according to which ‘an international instrument must be interpreted and applied within the overall framework of the juridical system in force at the time of the interpretation.’⁷⁴ Therefore, the Inter-American Court thought that, to determine the legal status of the American Declaration of Human Rights, it had to ‘look to the inter-American system of today in the light of the evolution it has undergone since the adoption of the Declaration, rather than to examine the normative value and significance which that instrument was believed to have had in 1948.’⁷⁵

In 1999, however, the Court did cite the European Court’s judgments in *Tyrer, Marckx* and *Loizidou* to support its observation that ‘human rights treaties are living instruments whose interpretation must consider the changes over time and present-day conditions.’⁷⁶ The Court held that such an evolutive interpretation is consistent with the general rules of treaty interpretation established in the VCLT and that international human rights law ‘has made great headway thanks to an evolutive interpretation of international instruments of protection.’⁷⁷ Since then, the Inter-American Court has repeatedly made the following—or some similar—observation, mainly having in mind the 1969 American Convention on Human

⁷² G. Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (Oxford: Oxford University Press, 2007), p. 65 and Baroness Hale of Richmond, ‘Beanstalk or Living Instrument? How Tall Can the ECHR Grow?’, Barnard’s Inn Reading 2011 (www.supremecourt.gov.uk/docs/speech_110616.pdf).

⁷³ *Young, James and Webster v. United Kingdom*, Nos. 7601/76 and 7806/77, Judgment of 13 Aug. 1981, Series A No. 44 (paragraph 53); *Sigurdur A. Sigurjónsson v. Iceland*, *supra* n. 51.

⁷⁴ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)*, *supra* n. 26, at p. 31.

⁷⁵ OC-10/89, *Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights*, IACtHR Advisory Opinion of 14 July 1989, Series A, No. 10 (paragraph 37).

⁷⁶ OC-16/99, *The Right to Information on Consular Assistance in the Framework of Guarantees for Due Legal Process*, IACtHR Advisory Opinion of 1 Oct. 1999, Series A No. 16 (paragraph 114). See, also, *ibid.* (paragraphs 7 and 10-11) (Concurring Opinion of Judge Cançado Trindade).

⁷⁷ *Ibid.* (paragraph 114).

Rights (ACHR)⁷⁸ but, also, in one case,⁷⁹ the 1989 Convention on the Rights of the Child (CRC):⁸⁰ ‘The Court has pointed out, as the European Court of Human Rights has too, that human rights treaties are live instruments, whose interpretation must go hand in hand with evolving times and current living conditions.’⁸¹

The Inter-American Commission on Human Rights, for its part, referred to the ‘living instrument’ concept for the first time in 2000. In a case concerning the mandatory imposition of the death penalty for certain offences, the petitioners had argued that, just as the ECHR, ‘the American Convention is a living, breathing and developing instrument reflecting contemporary standards of morality, justice and decency.’⁸² The Commission, referring in a footnote to the European Court’s ‘living instrument’ approach and citing *Tyrer*, held that ‘a principle of law has developed common to those democratic jurisdictions that have retained the death penalty, according to which the death penalty should only be implemented through “individualized” sentencing.’⁸³ Exactly the same formulation and footnote can be found in a number of similar cases decided on the same day⁸⁴ and in 2001.⁸⁵ In 2002, the Commission, asserting that it was ‘well-accepted’ that ‘human rights treaties are living instruments whose interpretation must consider changes over time and present-day conditions’, held that the prohibition of executing persons below the age of eighteen had evolved into a norm of *jus cogens*.⁸⁶ As the European Court has done for the ECHR, the Inter-American Commission has suggested that the ‘living instrument’ concept is applicable not only with regard to substantive guarantees of human rights but also the procedural provisions of the ACHR.⁸⁷

⁷⁸ 1144 UNTS 123.

⁷⁹ “*Street Children*” (*Villagrán Morales et al.*) *v. Guatemala*, IACtHR Judgment of 19 Nov. 1999, Series C, No. 63 (paragraph 193).

⁸⁰ 1577 UNTS 3.

⁸¹ *Mapiripan Massacre v. Colombia*, IACtHR Judgment of 15 Sept. 2005, Series C, No. 35 (paragraph 106). See, also, *Yakye Axa Indigenous Community v. Paraguay*, IACtHR Judgment of 17 June 2005, Series C, No. 125 (paragraph 125); *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, IACtHR Judgment of 31 Aug. 2001, Series C, No. 66 (paragraph 146) and “*Street Children*” (*Villagrán Morales et al.*) *v. Guatemala*, *supra* n. 79 (paragraph 193).

⁸² Case 11.743, *Baptiste v. Grenada*, IACoHR Report 38/00 of 13 April 2000, Annual Report 2000 (paragraph 31).

⁸³ *Ibid.* (paragraph 95 and fn 59).

⁸⁴ Cases 12.023 and Others, *McKenzie et al. v. Jamaica*, IACoHR Report 41/00 of 13 April 2000, Annual Report 2000 (paragraph 209, fn 87).

⁸⁵ Cases 11.826 and Others, *Lamey et al. v. Jamaica*, IACoHR Report 49/01 of 4 April 2001, Annual Report 2001 (paragraphs 140-141, fn 52); Case 12.028, *Knights v. Grenada*, IACoHR Report 47/01 of 4 April 2001, Annual Report 2001 (paragraph 87, fn 58); Cases 12.067 and Others, *Edwards et al. v. Bahamas*, IACoHR Report 48/01 of 4 April 2001, Annual Report 2000 (paragraph 152, fn 80).

⁸⁶ Case 12.285, *Domingues v. Unites States*, IACoHR Report 62/02 of 22 Oct. 2002, Annual Report 2002 (paragraph 103, fn 104). See, also, *ibid.* (paragraph 44 and fn 30) (referring to the need to interpret the American Declaration in the light of present-day conditions and citing *Tyrer*, *Marckx* and *Loizidou*).

⁸⁷ Interstate Case 01/06, *Nicaragua v. Costa Rica*, IACoHR Report 11/07 of 8 March 2007, Annual Report 2007 (paragraph 205).

3.3. UN instruments

Among the bodies supervising implementation of the *universal* human rights treaties, the UN Human Rights Committee was the first, in 2002, to apply the ‘living instrument’ method. In the landmark case of *Judge v. Canada* it had to decide whether Canada violated the author’s right to life under Article 6 of the International Covenant on Civil and Political Rights (ICCPR)⁸⁸ by deporting him to the United States, where he had been sentenced to the death penalty.⁸⁹ Nine years earlier the Committee had held that the deportation of a person from a country which has abolished the death penalty to a country where he or she faces capital punishment, does not *per se* amount to a violation of Article 6.⁹⁰ In *Judge*, the Committee recognised that it ‘should ensure both consistency and coherence of its jurisprudence’, but noted that in exceptional situations it may be necessary to review the scope of application of the rights protected in the ICCPR, ‘in particular if there have been notable factual and legal developments and changes in international opinion in respect of the issue raised.’⁹¹ The Committee observed that, since its earlier decision, there had been ‘a broadening international consensus in favour of abolition of the death penalty, and in states which have retained the death penalty, a broadening consensus not to carry it out.’ The Committee thought it significant that Canada’s own practice reflected this consensus: the Supreme Court of Canada had held that in such cases of removal the government must, as a general rule, seek assurances that the death penalty will not be applied. Considering ‘that the Covenant should be interpreted as a living instrument and the rights protected under it should be applied in context and in the light of present-day conditions’,⁹² the Committee departed from its previous findings and found a violation of Article 6.⁹³

The Human Rights Committee has addressed similar interpretive issues in a series of cases concerning conscientious objection to compulsory military service. In *Yoon and Choi v. Republic of Korea*,⁹⁴ it deviated from its previous jurisprudence⁹⁵ and recognised that Article 18 ICCPR (guaranteeing freedom of conscience) implies a right to conscientious objection. To support this change in interpretation it argued that the understanding of Article 18, as that of any right guaranteed by the Covenant, evolved over time⁹⁶ and observed that ‘an increasing number’ of those states parties which had retained compulsory military service had introduced

⁸⁸ 999 UNTS 171.

⁸⁹ *Judge v. Canada*, Communication No. 829/1998 of 5 Aug. 2002, U.N. Doc. CCPR/C/78/D/829/1998.

⁹⁰ *Kindler v. Canada*, Communication No. 470/1991 of 30 July 1993, U.N. Doc. CCPR/C/48/D/470/1991.

⁹¹ *Judge v. Canada*, *supra* n. 89 (paragraph 10.3).

⁹² *Ibid.*

⁹³ *Ibid.* (paragraph 10.6).

⁹⁴ *Yoon and Choi v. Republic of Korea*, Communications Nos. 1321/2004 and 1322/2004 of 3 Nov. 2006, U.N. Doc. CCPR/C/88/D/1321-1322/2004.

⁹⁵ See, e.g., *L.T.K. v. Finland*, Communication No. 185/1984 of 9 July 1985, U.N. Doc. CCPR/C/OP/2, (paragraph 5.2.) (‘The Covenant does not provide for the right to conscientious objection; neither article 18 nor article 19 of the Covenant, especially taking into account paragraph 3 (c) (ii) of [Art.] 8, can be construed as implying that right.’)

⁹⁶ *Yoon and Choi v. Republic of Korea*, *supra* n. 94 (paragraph 8.2.).

alternatives to that service.⁹⁷ In *Atasoy and Sarkut v. Turkey*, the state party argued that there were limits to evolutive interpretation: ‘interpretation cannot go beyond the letter and spirit of the treaty or what the States parties initially and explicitly so intended.’⁹⁸ Nevertheless, the Committee reaffirmed its view that a right of conscientious objection, even though not explicitly referred to in Article 18, derives from this provision,⁹⁹ with one Committee member stressing in his individual opinion that the Committee ‘must apply and interpret the Covenant as a living instrument.’¹⁰⁰

The Committee on the Elimination of Racial Discrimination invoked the ‘living instrument’ concept in 2003 to support its conclusion that use of a term that was not considered offensive some time ago may be considered offensive today and thus violate the 1965 International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).¹⁰¹ In *Hagan v. Australia*, the petitioner had taken offence at the sign ‘E.S. “Nigger” Brown Stand’, which had been displayed since 1960 on a stand of a sporting ground in honour of a sporting personality who was neither black nor of aboriginal descent.¹⁰² The Committee held

that use and maintenance of the offending term can at the present time be considered offensive and insulting, even if for an extended period it may not have necessarily been so regarded. The Committee considers, in fact, that the Convention, as a living instrument, must be interpreted and applied taking into [sic!] the circumstances of contemporary society. In this context, the Committee considers it to be its duty to recall the increased sensitivities in respect of words such as the offending term appertaining today.¹⁰³

The Committee has since reaffirmed in its General Recommendation 32 that ‘[t]he Convention, as the Committee has observed on many occasions, is a living instrument that must be interpreted and applied taking into account the circumstances of contemporary society’, which made it imperative to read its text in a context-sensitive manner.¹⁰⁴

The Committee on the Rights of the Child has equally invoked the ‘living instrument’ concept in a general comment. In its General Comment 8 concerning the right of the child to protection from corporal punishment it has explained that, while the *travaux préparatoires* for the CRC did not record any discussion of corporal punishment during the drafting sessions,

⁹⁷ *Ibid.* (paragraph 8.4.).

⁹⁸ *Atasoy and Sarkut v. Turkey*, Communications Nos. 1853/2008 and 1854/2008 of 29 March 2012, U.N. Doc. CCPR/C/104/D/1853-1854/2008 (paragraph 7.13).

⁹⁹ *Ibid.* (paragraph 10.4.).

¹⁰⁰ *Ibid.*, paragraph 4 (Individual Opinion Salvioli).

¹⁰¹ 660 UNTS 195.

¹⁰² *Hagan v. Australia*, Communication No. 26/2002 of 20 March 2003, U.N. Doc. CERD/C/62/D/26/2002.

¹⁰³ *Ibid.* (paragraph 7.3.).

¹⁰⁴ Committee on the Elimination of Racial Discrimination, General Recommendation No. 32 of 24 Sept. 2009, U.N. Doc. CERD/C/GC/32 (paragraph 5).

‘the Convention, like all human rights instruments, must be regarded as a living instrument, whose interpretation develops over time’ and that in the seventeen years since the CRC was adopted, the prevalence of corporal punishment had become more visible.¹⁰⁵

3.4. Assessment

As the review above demonstrates, in international human rights law the ‘living instrument’ notion is used in a similar way as with regard to the UN Charter, namely primarily as a metaphor to justify a dynamic or evolutive interpretation.¹⁰⁶ Often it is invoked, as in *Marckx*, to support an interpretation that arguably deviates from the understanding that the drafters of the treaty had or, as in *Selmouni* and *Judge*, to explain a change in the case law.

One may question whether the ‘living instrument’ metaphor is a completely accurate description of this method of interpretation. The metaphor suggests that, similar to living organisms, legal instruments change their shape by themselves, when it is in fact the external social conditions that change, and the legal instruments are adapted to them.

Be that as it may, what is more important is the question as to the legality and legitimacy of this method of interpretation. When it comes to human rights treaties, international and regional courts or quasi-judicial bodies assume to a large extent the interpretive role that is played by states (or organs composed of states) with regard to other treaties. Where member states entrust a (quasi-)judicial body with supervising implementation of the treaty, they thereby also cede to it the interpretive authority over the treaty. The European Court of Human Rights,¹⁰⁷ the Inter-American Court of Human Rights¹⁰⁸ and the international human rights bodies¹⁰⁹ have all accepted that they are bound, to the same extent as states, to apply the rules of treaty interpretation codified in Articles 31 and 32 VCLT when interpreting the human rights conventions they are charged with supervising. In principle, it seems clear that the ‘living instrument’ method may be covered, and indeed required, by these rules. Article 31(1) VCLT requires a treaty to be interpreted ‘in accordance with the ordinary meaning to be given to the terms of the treaty *in their context* and *in the light of its object and purpose*’. According to Article 31(3)(b) VCLT ‘any *subsequent practice* in the application of the treaty

¹⁰⁵ Committee on the Rights of the Child, General Comment No. 8 of 2 March 2007, U.N. Doc. CRC/C/GC/8 (paragraph 20).

¹⁰⁶ On dynamic or evolutive interpretation, see M. Fitzmaurice, ‘Dynamic (Evolutive) Interpretation of Treaties: Part I’, Hague YbIL, 21 (2008), 101-153; M. Fitzmaurice, ‘Dynamic (Evolutive) Interpretation of Treaties: Part II’, Hague YbIL, 22 (2009), 3-31 and R. Bernhardt, ‘Evolutive Treaty Interpretation, Especially of the European Convention on Human Rights’, German YbIL, 42 (1999), 11-25.

¹⁰⁷ *Golder v. United Kingdom*, *supra* n. 59 (paragraph 29). For an overview, see M.E. Villiger, ‘Articles 31 and 32 of the Vienna Convention on the Law of Treaties in the Case-Law of the European Court of Human Rights’ in J. Bröhmer, R. Bieber, C. Calliess, S. Langenfeld, C. Weber and J. Wolf (eds.), *Internationale Gemeinschaft und Menschenrechte: Festschrift für Georg Ress* (Köln: Carl Heymanns Verlag, 2005), pp. 317-330.

¹⁰⁸ E.g. OC-16/99, *The Right to Information on Consular Assistance in the Framework of Guarantees for Due Legal Process*, IACtHR Advisory Opinion of 1 Oct. 1999, Series A No 16 (paragraph 58).

¹⁰⁹ See K. Mechlem, ‘Treaty Bodies and the Interpretation of Human Rights’, *Vanderbilt JTL*, 42 (2009), 905-947, at 919.

which establishes the agreement of the parties regarding its interpretation' must be taken into account. That subsequent practice may include state practice as well as the practice of supervisory bodies and may be used to establish original or changing intent.¹¹⁰ Finally, Article 31(3)(c) VCLT provides that 'any relevant *rules of international law applicable* in the relations between the parties' are relevant for clarification of the meaning of that treaty.¹¹¹

Application of the 'living instrument' method is rather unproblematic in cases where there have been obvious changes in state practice or relevant rules of international law and it is inevitable to interpret a given treaty in light of these changes. A good illustration of this is *Matthews v. United Kingdom*, which raised the question of whether elections to the European Parliament fall within the right to vote guaranteed by Article 3 of Protocol No. 1 to the ECHR. The European Court of Human Rights held that they did. Invoking the 'living instrument' metaphor, it stated that '[t]he mere fact that a body was not envisaged by the drafters of the Convention cannot prevent that body from falling within the scope of the Convention' and that it had to take into account structural changes mutually agreed by the contracting states.¹¹²

At the same time, the relevant human rights bodies have accepted that the requirements of state consensus and legal certainty impose limits on the use of the 'living instrument' method. As explained above, the European Court has explicitly recognised that it may not engage in law-making by, for example, creating rights not intended by the original drafters of the ECHR¹¹³ or engaging in creative interpretation in areas that have been singled out by the contracting states for reform by way of treaty amendment.¹¹⁴ The Human Rights Committee has asserted that evolutive interpretation needs to be balanced against the need to 'ensure both consistency and coherence of ... jurisprudence'.¹¹⁵ In a similar vein, the European Court has acknowledged that, despite its 'living instrument' approach, 'in the interests of legal certainty and foreseeability it should not depart, without good reason, from its own precedents.'¹¹⁶

Despite these assertions, the above review of case law of relevant supervisory bodies reveals that it is, at the very least, questionable whether they can be said to have always complied with these restrictions. First, although there are frequent references to the alleged practice of states (be it the respondent state, other states parties or even non-states parties), only very rarely is evidence for that practice or its uniformity adduced. As explained above, this already held true for *Tyrer*, where the 'living instrument' concept was established, and it equally applies to many of the subsequent cases. Second, in some of the cases the respective human

¹¹⁰ See the chapter by Buga in this volume at pp. ____ - ____.

¹¹¹ Emphases added.

¹¹² *Matthews v. United Kingdom*, No. 24833/94, Judgment of 18 Feb. 1999, Reports 1999-I (paragraph 39).

¹¹³ *Johnston v. Ireland*, *supra* n. 65 (paragraph 53) and *Austin and others v. United Kingdom*, *supra* n. 71 (paragraph 53).

¹¹⁴ *Soering v. United Kingdom*, *supra* n. 69 (paragraph 103).

¹¹⁵ *Judge v. Canada*, *supra* n. 89 (paragraph 10.3.).

¹¹⁶ *Mamatkulov and Askarov v. Turkey*, *supra* n. 53 (paragraph 121).

rights body did, in fact, not even *claim* that the state practice concerned was uniform, despite the fact that Article 31(3)(b) VCLT requires the state practice to reflect *agreement* regarding a particular interpretation. The practice must be actively shared by at least some states parties and acquiesced in by the others.¹¹⁷ Nevertheless, in *Christine Goodwin*, for example, the European Court explicitly recognised that there was *no* common European approach supporting its interpretation; it thought that it was sufficient that there was evidence of a ‘continuing international trend’ in non-European states. In *Marckx*, it satisfied itself with signs of an ‘evolution of rules and attitudes’ ‘amongst modern societies’. The Human Rights Committee, in *Judge*, referred to a ‘broadening international consensus’ to justify a deviation from its previous jurisprudence and, in *Yoon and Choi*, to an ‘increasing number’ of states parties to read a right to conscientious objection into Article 18 ICCPR. Third, with regard to interpretation in the light of ‘relevant rules of international law’, the International Court of Justice allows, in certain cases, the consideration of rules that came into force after the conclusion of the treaty at issue.¹¹⁸ However, Article 31(3)(c) VCLT states that the rules must be ‘applicable in the relations between the parties’, which also suggests that non-binding rules cannot be relied upon.¹¹⁹ Nevertheless, the European Court has not only taken into account, as in *Demir and Baykara*, treaties that had not been ratified by the respondent state and, as in *Marckx*, treaties that had only been ratified by a very small number of states parties to the ECHR, but also, as in *Rantsev*, even treaties that were not in force at the time the relevant facts occurred. Moreover, the Court regularly takes into consideration international materials that are not legally binding.¹²⁰

This is not to argue that non-uniform state practice or non-binding rules may not be taken into consideration (they may still serve as supplementary means of interpretation according to Article 32 VCLT), but merely to point out that the weight given to these means of interpretation is rather extraordinary when it comes to human rights treaties. Such a special interpretive approach may be justified on the basis that human rights treaties have a special nature, calling for specialised rules of treaty interpretation, perhaps even ‘interpretive rules that are beyond the VCLT paradigm’.¹²¹ That human rights treaties fundamentally differ from other treaties, in that they create obligations of states towards individuals rather than between states, is beyond dispute today.¹²² The Inter-American Court, for example, has explained:

¹¹⁷ M.E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Leiden: Nijhoff, 2009), p. 431.

¹¹⁸ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)*, *supra* n. 26, at p. 31; *Case Concerning Gabčíkovo-Nagymaros Project*, *supra* note 11, at pp. 67-68.

¹¹⁹ Villiger, *supra* n. 117, at p. 433 and R.K. Gardiner, *Treaty Interpretation* (Oxford: Oxford University Press, 2008), pp. 268-269.

¹²⁰ E.g. *Russian Conservative Party of Entrepreneurs and Others v. Russia*, Nos. 55066/00 and 55638/00, Judgment of 11 Jan. 2007 (referring to a resolution of the Parliamentary Assembly and a code of good practice adopted by the Venice Commission) and *Bekos and Koutropoulos v. Greece*, No. 15250/02, Judgment of 13 Dec. 2005 (referring to a report of the European Commission Against Racism).

¹²¹ B. Çali, ‘Specialized Rules of Treaty Interpretation: Human Rights’, in D.B. Hollis (ed.), *The Oxford Guide to Treaties* (Oxford: Oxford University Press, 2012), pp. 525-548.

Since its first cases, the Court has based its jurisprudence on the special nature of the American Convention in the framework of International Human Rights Law. Said Convention, like other human rights treaties, is inspired by higher shared values (focusing on protection of the human being), they have specific oversight mechanisms, they are applied according to the concept of collective guarantees, they embody obligations that are essentially objective, and their nature is special vis-à-vis other treaties that regulate reciprocal interests among the States Parties.¹²³

It may be added to the list above that, unlike most other types of treaties, human rights treaties are typically formulated in very general wording,¹²⁴ that they give effect to important moral principles¹²⁵ and that, especially regional ones, are in many respects similar to constitutions.¹²⁶

Given the special object and purpose—and, as a consequence, character—of human rights treaties, it is indeed inevitable that their interpretation differs from that of other treaties, especially in that state consent can only play a limited role. Most importantly, whether the respondent state agrees with a given interpretation of a human rights treaty cannot be a decisive factor. Therefore, it is correct to conclude that it does not matter whether an evolutive interpretation is supported by the subsequent practice of the respondent state or its ratification of other treaties. The more difficult question is to what extent the ‘present-day conditions’ or standards that give rise to a particular interpretation must be shared among the states parties. The supervisory bodies have been very lenient in this regard, sometimes explicitly rejecting the notion that there must be a common approach supporting a change in interpretation. A good illustration—and at the same time justification—of this interpretive approach may be found in a separate opinion of Judge Garlicki of the European Court of Human Rights. Pointing out that the ECHR ‘represents a very distinct form of international instrument’ whose ‘substance and process of application are more akin to those of national constitutions than to those of “typical” international treaties’, he invoked the Court’s ‘living instrument’ approach and observed that ‘[t]his may result (and, in fact, has on numerous occasions resulted) in judicial modifications of the original meaning of the Convention.’ He went on to state:

From this perspective, the role of our Court is not very different from the role of national Constitutional Courts, whose mandate is not only to defend constitutional provisions on human rights, but also to develop them ... Thus, it is legitimate to assume that, as long as the member States have not clearly rejected a particular judicial interpretation of the Convention ... the Court has the power to determine

¹²² See e.g. M. Craven, ‘Legal Differentiation and the Concept of the Human Rights Treaty in International Law’, *EJIL*, 11 (2000), 489-519.

¹²³ *Mapiripán Massacre v. Colombia*, *supra* n. 81 (paragraph 104).

¹²⁴ See Çali, *supra* n. 121, at p. 530.

¹²⁵ See Letsas, *supra* n. 72, at p. 79.

¹²⁶ See *Loizidou v. Turkey (Preliminary Objections)*, *supra* n. 54 (paragraph 75) (describing the ECHR as ‘a constitutional instrument of European public order’).

the actual meaning of words and phrases which were inserted into the text of the Convention more than fifty years ago.¹²⁷

However, what Judge Garlicki failed to mention is that there are also important differences between constitutions and the ECHR, not the least of which concerns the legitimacy of an evolutive or dynamic approach to interpretation. In the case of a constitution, an evolutive interpretation by the constitutional court can be limited or corrected through the democratic process of amending the constitution. In the case of the ECHR as a multilateral treaty, in contrast, a state that objects to a particular interpretation may only withdraw from the Convention, which is normally a politically unrealistic option. An evolutive interpretation of a human rights treaty may thus not draw its legitimacy from the availability of a democratic corrective; it can only draw it from the consent of as many states parties as possible.

The supervisory bodies must be—and clearly are—aware that they must balance dynamic interpretation against the need for state support and expectations regarding legal certainty. Seen from this perspective, it becomes clear that invocations of the ‘living instrument’ notion are frequently intended precisely to garner state support for a particular interpretation. In *Tyner*, for instance, there was no other reason for the Court to characterise the ECHR as a ‘living instrument’: its finding clearly suggests that all corporal punishment is inherently degrading, regardless of how many states have abolished it or what the public opinion on the matter is. The only reason for the Court to highlight developments in the member states, which, after all, needed to be taken into account when interpreting the Convention as a ‘living instrument’, was to generate support for its interpretation of Article 3. The same can be observed with regard to many of the other cases discussed above: the ‘living instrument’ notion is not instrumental to the respective supervisory body’s holding, but added as a kind of side-note to show that a particular understanding of the treaty is, in any event, reflected in state practice or international legal instruments or that there are, at least, signs of a trend towards such an understanding.

While such use of the ‘living instrument’ method is understandable, it often confuses things more than to contribute anything. Where, as in *Tyner*, there are compelling reasons for a given interpretation, there is no need to invoke the ‘living instrument’ character of a treaty: if it is true that human rights give effect to ‘higher shared values’, it cannot matter whether states think a given treatment is degrading or not. When it *is* invoked, the respective supervisory bodies should, at the very least, take care to explain why and in how far exactly subsequent state practice or developments in international law matter and, of course, back up the alleged practice with evidence. It is not sufficient for them to merely cite the European Court’s judgment in *Tyner*: as explained above, that judgment lacks any explanation of the ‘living instrument’ method of interpretation.

4. Arms Control Treaties

¹²⁷ *Öcalan v. Turkey* [GC], No. 46221/99, Judgment of 12 May 2005, ECHR 2005-IV, partly concurring, partly dissenting opinion of Judge Garlicki (paragraph 4).

In the case of human rights treaties, the concept of ‘living instrument’ is used to explain (quasi-)judicial development of the relevant treaty, development which may well be ahead of state consensus. In the case of the UN Charter, interpretive development is in the hands of political organs and therefore puts the state back at centre stage, except that organs operate by way of majorities. The understandings of those majorities, for example as to what are the current threats to international peace, give the UN Charter life. The question remains as to whether treaties that do not have institutions (either judicial or political) at their heart can still be viewed as ‘living instruments’. With regard to these treaties, the metaphor might not be invoked, but if they exhibit signs of life that allow them to develop to reflect wider changes then they are, to all intents and purposes, also ‘living instruments’.

The argument in this section is that the concept of ‘living instrument’ is a metaphor that can be applied to a range of different types of treaties, so that it is untrue to say that this form of interpretive technique and understanding is confined to, say, human rights treaties or the UN Charter. Variation in interpretive techniques, and hence the amount of vitality within a treaty, is explicable on the basis of the different nature of the treaty being considered, whether they are contractual, law-making or constitutional. In general terms, this section illustrates the contention that, although the language of ‘living instruments’ is not used in relation to arms control treaties, the ideas and interpretive techniques involved are present in some of these treaties, although not in others.

In the modern era, treaty law purports to cover a range of different types of conventions. At the one end of the spectrum there is the bilateral, contractual treaty. In the area of arms control this is embodied by the now defunct Anti-Ballistic Missile (ABM) Treaty¹²⁸ and the Strategic Arms Reduction Treaties (START)¹²⁹ between the US and the USSR/Russia.¹³⁰ In these treaties there is greater certainty in the text as the terms were hammered out on a take-it-or-leave-it basis by the two parties. The rights and duties are relatively clear and, therefore, the text dominates the life of the treaty unless both parties agree on changes, or, as with the 1972 ABM Treaty between the US and USSR/Russia, one party withdraws. This is not to state that the ABM Treaty was not an important treaty, it was the ‘cornerstone of strategic stability’ during the Cold War,¹³¹ but it reflected the bilateral and bipolar nature of the Cold War. At the other end of the spectrum there is a multiparty constitutional treaty that is both conventional and institutional,¹³² laying down rules but also creating institutions and organs, paradigmatically the UN Charter discussed above. However, as has been established when looking at human rights treaties, the metaphor of a ‘living instrument’ is not confined to those constitutional-type treaties, but is also used with

¹²⁸ 944 UNTS 13.

¹²⁹ 2264 UNTS 63.

¹³⁰ The analysis in this section draws on N.D. White, ‘Interpretation of Non-Proliferation Treaties’ in D.H. Joyner and M. Roscini (eds.), *Non-Proliferation Law as a Special Regime: A Contribution to Fragmentation Theory in International Law* (Cambridge: Cambridge University Press, 2012), pp. 87-118.

¹³¹ J.B. Rhinelander, ‘The ABM Treaty—Past, Present and Future (Part I)’, *J. Conflict & Sec. L.*, 6 (2001), 91-114, at 92.

¹³² The International Court of Justice has stated that the ‘constituent instruments of international organizations are also treaties of a particular type ... Such treaties can raise specific problems of interpretation owing, *inter alia*, to their character which is conventional and at the same time institutional’: *Legality of the Use By a State of Nuclear Weapons in Armed Conflict* (Advisory Opinion) (1996) ICJ Rep. 66, at p. 75.

regard to certain law-making treaties that have an in-built dynamic, such as an expert committee or court, which can interpret the treaty in the light of changes in social conditions.

The question is whether there is any room for the idea of ‘living instrument’ in an area of law that is heavily state-dominated, where clarity and certainty are important for the states parties. In these conditions we might expect to find the opposite of ‘living instruments’—lifeless, more accurately timeless, treaties under which states can operate in confidence, knowing that the obligations within them are not subject to change. However, as shall be seen, even arms control treaties can be, indeed have to be, ‘living instruments’, otherwise technological change would outstrip their normative reach. For instance, a prohibition on chemical weapons only works if we constantly re-evaluate our understanding of what chemical weapons are.

Unfortunately, arms control law is not populated with courts sitting in judgment, and thereby simultaneously applying and developing the rules contained in the three non-proliferation treaties to be considered in this section—the 1968 Nuclear Non-Proliferation Treaty (NPT),¹³³ the 1972 Biological Weapons Convention (BWC)¹³⁴ and the 1993 Chemical Weapons Convention (CWC).¹³⁵ They are all multilateral treaties, though the CWC is institutional as well as conventional, establishing the Organization for the Prohibition of Chemical Weapons (OPCW). This does not necessarily mean that only the CWC is a ‘living instrument’, we have to go deeper to try and understand the nature of these treaties. In general terms, the overall purpose of these treaties is to address the ‘horizontal proliferation of WMD’ (weapons of mass destruction) with provisions ‘proscribing possession, development, and transfer of both single-use WMD-related materials (i.e. those items and technologies primarily suited for use in WMD development programs) as well as dual-use WMD-related materials (i.e. items and technologies which have both civilian and military applications)’.¹³⁶ As well as aiming to prevent the proliferation of WMDs among a wider group of states, the treaties also aim to prevent the proliferation of weapons within states already possessing them (‘vertical proliferation’).¹³⁷

In the seminal article written at the time of the NPT, Mason Willrich is clear about the significance of the treaty for achieving the ‘goal of overriding importance in the nuclear era ... the avoidance of nuclear war’.¹³⁸ The NPT was agreed in the Cold War period, when both superpowers desired to draw back from mutually assured destruction, and not only constituted a bargain between the superpowers on the possession and development of both nuclear weapons and nuclear power, but was also law-making for the rest of the international community.

¹³³ 729 UNTS 161.

¹³⁴ 1015 UNTS 163.

¹³⁵ 1974 UNTS 45.

¹³⁶ D.H. Joyner, *International Law and the Proliferation of Weapons of Mass Destruction* (Oxford: Oxford University Press, 2009), p. xv.

¹³⁷ *Ibid.*

¹³⁸ M. Willrich, ‘The Treaty on Non-Proliferation of Nuclear Weapons: Nuclear Technology Confronts World Politics’, *Yale Law J.*, 77 (1968), 1447-1519, at 1449.

It is common to describe the NPT of 1968 as a ‘grand bargain’ between nuclear weapon states (NWS) and non-nuclear weapon states (NNWS). This suggests some sort of exchange between these two different groupings of states, thereby creating a static set of obligations and rights. Essentially, NWS were obliged not to provide WMD to NNWS, and not to proliferate their own; indeed the obligation is to ‘eventually disarm themselves of nuclear weapons’.¹³⁹ NNWS, on their side, agreed not to acquire nuclear weapons or to develop them themselves. ‘In exchange for their commitment to forgo what would otherwise be their right, equal to that’ of NWS, NNWS insisted on the recognition of not only their right to acquire ‘nuclear technologies for the purpose of civilian power generation’, but also on an obligation on NWS to help in the development of their civilian nuclear programmes.¹⁴⁰ In crude terms, the deal was for NWS to retain their right to nuclear weapons, while NNWS gave up any right to have them. In exchange for this deviation from sovereign equality, NWS promised to gradually disarm and to help develop peaceful uses of nuclear technology in NNWS. This bargain, according to Daniel Joyner, distinguishes the NPT as a contractual treaty from ‘most other large multilateral treaties’, for example, the Genocide Convention and the Law of the Sea Convention, which are law-making treaties where ‘there is no consideration given between the states in exchange for the undertaking of obligations’.¹⁴¹

This suggests that the NPT is paradigmatically contractual, creating a certain (and static) set of rights and duties for both NWS and NNWS, a conception which does not seem to leave much room for the notion of ‘living instrument’. While an understandable argument, Joyner may be failing to distinguish between different forms of contract, in particular ‘social contracts’, which are much more profound than a contractual transaction whereby one party agrees to give up weapons if the other party does (as in the START). A social contract at the international level is found in the UN Charter, whereby the five Great Powers agreed to act as the world’s police force in exchange for voting rights that no other member would possess. It is no coincidence that those five permanent members are the NWS at the heart of the NPT ‘grand bargain’, thus suggesting that the NPT is something more profound than an ordinary *traité-contrat*; indeed, it may be more constitutional than a *traité-loi* since it develops the ‘grand bargain’ found in the UN Charter by extending the inequality between the P5 and other members of the UN to the possession of nuclear weapons.¹⁴² This suggests that although the NPT may be less dynamic than treaties that include within them modes for change (political, judicial or quasi-judicial organs), such foundational treaties will be adaptable to changing conditions if they are to keep their relevance; the question is how.

Of the five nuclear weapons states at the time of the NPT, three were original parties in 1968 (US, USSR, UK), while two only became parties in 1992 (China and France). Further, though the treaty was originally adopted for 25 years, it was renewed indefinitely by consensus at the

¹³⁹ Joyner, *supra* n. 136, at p. 8.

¹⁴⁰ *Ibid.*, at p. 9.

¹⁴¹ *Ibid.*

¹⁴² See, further, T.M. Franck, *The Power of Legitimacy Among Nations* (Oxford: Oxford University Press, 1990), pp. 176-177.

Review Conference in New York in 1995. This indicates that, despite the presence of a right of withdrawal (in Article X), in one sense the ‘grand bargain’ has become even stronger over the decades, though the spread of nuclear weapons to states outside the five indicates the strain it is under.¹⁴³ The essence of the NPT is that a handful of states have the right to nuclear weapons, while others do not; but despite that inequality, the ‘grand bargain’, taken as a whole, is a constitutional treaty, and not only in an ‘originalist’ sense but in a ‘living’ sense. The NPT, like the CWC, has an institutional element (in the form of the IAEA) which assists in the development of the treaty by interpreting and applying it (especially Article III). As Richard Williamson states, the potential ‘dual-use’ capability of both nuclear materials and chemicals requires a ‘high degree of intrusiveness’ by the OPCW and the IAEA.¹⁴⁴ This dynamic interpretive element keeps the treaty alive, but this is perhaps not as important as the fluctuations in the ‘grand bargain’ underlying the NPT.

Thus, it is contended that the NPT forms part of the ‘grand bargain’ or social contract at the heart of the international legal and political order, alongside the UN Charter, and should be interpreted as a constitutional text, not a contractual one;¹⁴⁵ thereby placing equal emphasis on the purposes of the treaty, the practice of parties, as well as the words of the provisions themselves. This is not the orthodox position, which portrays the ‘grand bargain’ in the NPT being a relatively straightforward exchange between two groups of states, which has remained static since 1968.¹⁴⁶ Under an ‘originalist’ interpretation of the NPT, all the elements of the bargain remain in place and in full force—that is, the obligations on NWS not to proliferate to NNWS (in Article I) and to negotiate nuclear disarmament (in Article VI), and in return the obligations on NNWS not to acquire nuclear weapons (in Article II), to develop peaceful uses of nuclear energy in accordance with Articles I and II (in Article IV), and to submit to safeguards agreements negotiated with the IAEA to prevent peaceful uses of nuclear energy being diverted to nuclear weapons programmes (in Article III).

Joyner argues that this balance cannot be disturbed by subsequent interpretation and development. In fact, he argues that subsequent statements (after 1998, more vociferously after 11 September 2001) by some NWS (especially the US) emphasising non-proliferation obligations, and downplaying or eroding their disarmament obligations,¹⁴⁷ are incompatible with the NPT.¹⁴⁸ However, while it may be argued that in 1968 all the elements of the ‘grand bargain’ carried equal weight, as that was what was necessary to achieve the bargain, it is much more difficult to sustain that original understanding if that bargain is part of the international constitutional order, which should be open to development by the subsequent agreement and

¹⁴³ E. Louka, *Nuclear Weapons, Justice and the Law* (Cheltenham: Edward Elgar, 2011), pp. 98-122.

¹⁴⁴ R.L. Williamson, Jr., ‘Hard Law, Soft Law, and Non-Law in Multilateral Arms Control: Some Compliance Hypotheses’, *Chicago JIL*, 4 (2003), 59-82, at 72.

¹⁴⁵ But see M.J. Glennon, *The Fog of Law: Pragmatism, Security and International Law* (Stanford, CA: Stanford University Press, 2010), pp. 136-139, who argues strongly against ‘entrenchment’ of the NPT, and instead argues for a more coercive counter-proliferation regime.

¹⁴⁶ Joyner, *supra* n. 136, at pp. 10-11.

¹⁴⁷ *Ibid.*, at pp. 37-45.

¹⁴⁸ *Ibid.*, at p. 108.

practice of states parties in accordance with changes in international relations. The avoidance of nuclear war by limiting the spread of nuclear weapons can be seen as the bottom-line for the NPT, and this in itself would permit the prioritisation of non-proliferation over disarmament. However, the interpretation of constitutional treaties is not simply driven by a pragmatic understanding of the changing nature of international relations, but by the changing understanding of states parties. Subsequent practice as a means of interpretation means that changes in emphasis within a constitutional regime must be supported by states parties. There is little indication from the five-yearly NPT Review Conferences that NNWS agree with NWS interpretations,¹⁴⁹ hence overall practice does not point to a changed understanding of the NPT. In fact, as Joyner points out, a purposive analysis of the NPT supports the original ‘grand bargain’ under which equal weight was to be given to all the elements,¹⁵⁰ including non-proliferation and disarmament. Thus, a constitutional approach to interpretation, which has regard to subsequent practice of the parties as well as the purposes of the treaty rather than just the text, produces a stronger reaffirmation of the ‘grand bargain’ than a textual approach.

Indeed, under a textual approach it is possible to read the non-proliferation provisions of Articles I and II NPT as embodying much firmer obligations on states parties (each NWS and NNWS ‘undertakes not to ...’), than the disarmament obligation in Article VI (in which states parties ‘undertake to pursue negotiations in good faith on effective measures relating to the cessation of the nuclear arms race at an early date and to nuclear disarmament’). The latter provision has been interpreted very narrowly indeed by one US representative on nuclear non-proliferation to mean that it contains no legal requirement to conclude negotiations,¹⁵¹ disagreeing with the International Court of Justice in its advisory opinion of July 1996, which stated that ‘there exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control’.¹⁵²

Thus, applying a constitutional approach to interpretation opens the NPT up to subsequent (re)interpretation by the parties. In fact, the consistent statements by NNWS (which are the vast majority of states parties to the NPT) that the different elements of the ‘grand bargain’ have equal weight in the treaty¹⁵³ are the key element in maintaining that interpretation. Focus has been on the states parties coming together in review conferences, differentiating the NPT from other constitutional treaties, such as the UN Charter where subsequent interpretation is undertaken by the political organs of the United Nations: the General Assembly, where all members are present, and the Security Council, where only 15 members are present, including the P5. A difficult question in relation to the NPT is whether a constitutional approach to interpretation opens up the NPT for (re)interpretation by institutions which have responsibilities towards it. The IAEA can undoubtedly have an influence on the development of peaceful uses of

¹⁴⁹ *Ibid.*, at pp. 45-46.

¹⁵⁰ *Ibid.*, at pp. 31-32 and 34.

¹⁵¹ C.A. Ford, ‘Debating Disarmament: Interpreting Article VI of the Treaty on Non-Proliferation of Nuclear Weapons’, *Nonproliferation Rev.*, 14 (2007), 401-428, at 408.

¹⁵² *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) (1996) ICJ Rep. 226, at pp. 263-264 (paragraph 99).

¹⁵³ D.H. Joyner, *Interpreting the Nuclear Non-Proliferation Treaty* (Oxford: Oxford University Press, 2011), p. 73.

nuclear power by NNWS through the development of safeguards agreements with NNWS under Article III NPT.¹⁵⁴ But can the Security Council have an influence on the non-proliferation elements in the exercise of its security functions? To admit this could be seen as allowing the NWS under the NPT (via their position as the P5 in the Security Council) to have an undue influence on the understanding of the obligations under the NPT. Security Council Resolution 1887 on nuclear non-proliferation and nuclear disarmament, adopted unanimously in September 2009, shows, as the title suggests, an emphasis on both non-proliferation and disarmament. The only equivocation in this regard is that while the resolution potentially regards violation of the non-proliferation provisions as a threat to international peace and security (and subject to Security Council competence and presumably measures), the obligation to disarm on NWS is not such a matter, though the resolution does call upon states to negotiate in good faith under Article VI NPT. But this simply reflects the very nature of the inequality at the heart of the post-1945 international legal order, whereby the Great Powers (as NWS and as P5 members) are not subject to Security Council censure or measures. The resolution calls upon ‘all States Parties to the NPT to cooperate so that the 2010 NPT Review Conference can successfully strengthen the Treaty and set realistic and achievable goals in all the Treaty’s three pillars: non-proliferation, the peaceful uses of nuclear energy, and disarmament’.¹⁵⁵ Thus the three pillars remain intact even when interpreted by the Security Council.

Equal emphasis on the three pillars of the NPT is also found in the final document of the 2010 NPT Review Conference,¹⁵⁶ which witnessed a return to consensus under the influence of President Obama and in light of a new START agreement between the US and Russia. Thus, in 2009-2010 there was strong subsequent practice to support the continuation of the ‘grand bargain’ of the NPT, understood in a constitutional sense.

While the NPT can thus be characterised as a constitutional treaty, the BWC and CWC are ‘merely’ law-making treaties—though we still have to consider whether the presence of the OPCW makes a difference to the latter. The NPT is ‘elevated’ above the other arms control treaties for two reasons: first, the presence of the ‘grand bargain’ and, second, the fact that nuclear weapons are the most destructive and, paradoxically, are seen as the most legitimate of the WMD. This legitimacy is enhanced by the NPT itself,¹⁵⁷ which, unlike the other treaties, does not prohibit the WMD in question but just limits their proliferation. Nuclear weapons are allowed, but only in the hands of the Great Powers, thereby recognising their central role in the international legal order.¹⁵⁸

The BWC is a law-making treaty establishing a universal prohibition on the possession of such weapons, but, because of the absence of institutional machinery, its implementation and its

¹⁵⁴ *Ibid.*, at pp. 92-93 on IAEA’s role under Article III NPT. See, further, L. Rockwood, ‘The IAEA’s Strengthened Safeguard System’, *J. Conflict & Sec. L.* 7 (2002), 123-136.

¹⁵⁵ At paragraph 6.

¹⁵⁶ Joyner, *supra* n. 153, at pp. 121-122.

¹⁵⁷ Joyner, *supra* n. 136, at p. 69.

¹⁵⁸ See further G. Simpson, *Great Powers and Outlaw States* (Cambridge: Cambridge University Press, 2004).

development has stagnated—it is not a ‘living instrument’.¹⁵⁹ This is not untypical of law-making treaties agreed during the Cold War-era and can be contrasted with the CWC agreed in 1993, which, as well as containing a clear ban on chemical weapons, constituted the OPCW. Undoubtedly, it is important to have a ban on biological weapons, but, in the absence of similar machinery, there is the obvious problem that non-proliferation depends solely on each state party accepting and implementing its obligations. Even under the later CWC, where there *is* oversight machinery, the lack of usage of the system that allows one state to challenge another¹⁶⁰ suggests that states are not always willing to look behind the veil of *pacta sunt servanda*.¹⁶¹ However, dynamics are built into the CWC in other ways, with regular reviews of the operation of the convention by the conference of the parties, empowered ‘to take into account any relevant scientific and technological developments’.¹⁶² An Executive Council of the OPCW ensures the effective implementation of the CWC by, *inter alia*, supervising the Technical Secretariat.¹⁶³ This arm of the OPCW carries out inspections in states parties’ territories on the basis of agreement between the organisation and the state party,¹⁶⁴ and in so doing is constantly interpreting the treaty. In addition, the treaty is kept up-to-date with changes in technology and scientific developments by any state party being allowed to propose amendments,¹⁶⁵ including to the Annex on Chemicals (which lists toxic chemicals and precursors).¹⁶⁶ Amendments, if accepted by the Executive Council, shall be made to the Annex if no state party objects. If there are objections the proposal shall be considered at the next session of the Conference of the Parties and a decision shall be taken as a matter of substance,¹⁶⁷ which means by consensus if possible, if not by two-thirds majority.¹⁶⁸ As can be seen there is a dynamism built into the CWC, which is largely state-led but also driven by technical expertise on the ground.

5. Conclusion

The notion of ‘living instrument’ has an intuitive appeal—as William Rehnquist once observed, only a necrophile would disagree that a living constitution is better than what must be its counterpart, a dead constitution.¹⁶⁹ The ‘living instrument’ metaphor may not be a

¹⁵⁹ Joyner, *supra* n. 136, at p. 123.

¹⁶⁰ Art. IX(9) CWC.

¹⁶¹ Joyner, *supra* n. 136, at p. 115.

¹⁶² Art. VIII B(22) CWC.

¹⁶³ Art. VIII C(31) CWC.

¹⁶⁴ Art. VIII D(39) CWC.

¹⁶⁵ Art. XV(1) CWC.

¹⁶⁶ Art. II(2)-(3) CWC.

¹⁶⁷ Art. XV(5) CWC.

¹⁶⁸ Art. VIII B(18) CWC.

¹⁶⁹ W.H. Rehnquist, ‘The Notion of a Living Constitution’, *Texas L. Rev.*, 54 (1976), 693-706.

completely accurate description for a legal instrument such as a treaty: it suggests that the treaty is alive when it is in fact the external social conditions that are changing. However, those changing conditions may act to breathe life into treaties through the understandings and interpretations of organs (political, (quasi-)judicial or technical) and states parties. Thus, it is true to say that a treaty may have a 'living' element: namely, some internal features that allow interpretive actors (be they states or organs created by the treaty) to legitimately contribute to a developing understanding of its provisions, often as a result of external stimuli. Social change triggers change in the treaty through the medium of interpretive agents.

Thus, a treaty may indeed change in relation to changing social conditions and therefore justifiably be described as a 'living instrument'. However, this is only possible if the following two elements are present: first, it is a predominantly constitutional or law-making, rather than contractual, treaty; second, it has an inbuilt dynamic for change in the form of a court, a quasi-judicial body, a political organ, a technical body (such as the OPCW or the IAEA) or a regular (and active) conference of the state parties. It is the understanding of this body as a collective in relation to changed social conditions (and not the social conditions *per se*) that is the determinative factor. Under classical international law only a 'living instrument' that is driven by the collective understandings of all the states parties could be seen as fully respecting the principle of consent. However, it is reasonable to conclude that, by agreeing to the establishment of a political organ of limited membership or one that adopts decisions by majority vote, states have accepted an erosion of their consent. This holds all the more true for a treaty that establishes a judicial or quasi-judicial organ, since the states parties have thereby accepted that the treaty will be developed by (quasi-)judicial interpretation.

Treaties with courts or quasi-judicial bodies are likely to have more 'life' than treaties that rely on a review conference of the state parties. However, the latter will more accurately reflect the views of states as to changing social conditions, so that any slight change in understanding will not only be indicative of signs of 'life' within a treaty but will *reflect* a change in state behaviour, something that is not guaranteed by dynamic judicial interpretation. Dynamic judicial interpretation of a treaty is an attempt to *influence* state behaviour to conform to changing social conditions. Courts employ the 'living instrument' notion as a legal concept to lend support to an interpretation of the treaty that may deviate from the original understanding of the state parties. This explains why human rights treaties are frequently described as 'living instruments', while arms control treaties are not. However, the analysis in this chapter shows that, in fact, there are also signs of 'life' in, for example, the NPT. These signs of 'life' are indicative of profound understandings by states of the precarious bargain that prevents mutual nuclear destruction. Even the apparently infertile soil of arms control treaties allows for limited 'life'.