

Motion and Rest

International Law's Responsiveness Towards Terrorism, Mass Surveillance, and Self-Defence

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Abstract

International law aims at bringing certainty and stability in the relations of States. To do so, it must not fall into opportunism, while remaining responsive when necessary. This article portrays the different avenues of how international law might normatively adapt in the face of changed circumstances (responsiveness of the law). It focuses on the two main legal sources, treaties and customary international law, and suggests a dependency between the level of responsiveness and the nature of both, the respective source as well as the specific legal norm in question.

Taking States' reactions to international terrorism as an example, the article analyses how the proliferation of secret mass surveillance has influenced the interpretation of the European Convention for the Protection of Human Rights and Fundamental Freedoms and whether recent military actions of the United States and France have triggered an adaptation of the right to self-defence.

While the lack of an intervening universal legislator might suggest an inevitable opportunism of international law, this article reveals, to the contrary, a system of balanced and gradual possibilities of informal modification. Carefully applied, international law therefore proves to be both, sufficiently resistant towards hasty alterations and adequately responsive towards necessary adaptation.

“Motion or change, and identity or rest, are the first and second secrets of nature: Motion and Rest. The whole code of her laws may be written on the thumbnail, or the signet of a ring.”
— *Ralph Waldo Emerson* (1844)¹

I. Introduction

Law ought to be steady as a rock and reliable in times of uncertainty, while simultaneously adaptable to shifting needs and emerging challenges. Whereas certainty and stability are inherent features of the law, responsiveness has not been considered a particularly strong characteristic of the international legal sphere. In contrast to domestic systems, international law lacks a universal legislator that could react swiftly to new developments.

¹ *R. W. Emerson*, Nature, in: J. Slater/A. R. Ferguson/J. F. Carr, *Collected Works of Ralph Waldo Emerson*, Vol. III: *Essays: 2nd Series*, 1983, 97 et seq., 105.

International law-making is, instead, a cumbersome process. Formal treaty adoption or the creation of customary law as well as their revision are often slow, time-consuming endeavours that might be obstructed or even prevented by individual States.² Nevertheless, international law is a dynamic system that has largely been determined by historic events, changing realities, and, as the International Court of Justice (ICJ) put it, “the requirements of international life”.³ It has to accommodate change – be it novel circumstances that threaten the effectiveness of a norm or altered behaviour of States. Yet, the international rule of law equally requires legal certainty and persistence. This need to accommodate change is countered by the fundamental need for stability.⁴

In this context, we understand “responsiveness” as an attribute of law, which enables its normative adaption as a reaction to changed circumstances. The responsive nature of the international legal system permits its adjustment if the law no longer seems to fit.⁵ This is not limited to political demands of States, but equally captures the influence of technological, economic, societal, or other relevant developments.

This article aims to distil observations on the fine line between, on the one hand, reasonable and necessary responsiveness and, on the other, premature opportunism that threatens to jeopardise the integrity of specific rules as well as the international rule of law altogether.

For this purpose, we proceed in three steps. The first part detects notions of responsiveness within the two most important sources of international law: treaties and custom (II.). Whereas the formal amendment of existing treaties is rare in practice, informal interpretation can serve as an engine of change. Evolutive interpretation as well as the notion of subsequent State practice offer ways to informally adapt a treaty to new developments by facilitating “court-driven” or “State-driven” evolution. Custom, in contrast, is *per definitionem* constantly in motion. The requirements for its formation and modification are inherently linked to the current understanding of the law and thereby imperative for the level of its responsiveness. Yet, the approach of the International Court of Justice in particular deserves close at-

² H. Lauterpacht, *The Function of Law in the International Community*, 1933, 249 et seq.

³ *Reparation for Injuries Suffered in the Service of the United Nations (Advisory Opinion)*, ICJ Reports 1949, 174 et seq., 178.

⁴ See M. Ambrus/R. A. Wessel, *Between Pragmatism and Predictability: Temporariness in International Law*, NYIL 45 (2014), 3 et seq.; Y. Tanaka, *Reflections on Time Elements in the International Law of the Environment*, HJIL 73 (2013), 139 et seq., 140.

⁵ See H. W. A. Thirkway, *International Customary Law and Codification: An Examination of the Continuing Role of Custom in the Present Period of Codification of International Law*, 1972, 131.

tion, as it authoritatively influences the perception of the state of the law. Its approach to water down the requirements of the creation or modification of customary rules contributes significantly to the responsiveness of customary international law.

Despite the significant difference between formal treaty and informal customary law, the potential for responsiveness in both sources is highly influenced by the nature of the norm in question. We distinguish, following *G. G. Fitzmaurice*⁶ and *J. Arato*,⁷ between reciprocal and integral obligations. Whereas reciprocal obligations entail a mere exchange of rights and duties (*do ut des*), integral norms reflect absolute obligations whose violation cannot be answered by retaliatory breaches. A third in-between category are interdependent norms which comprise obligations of coordination, such as in the case of arms control.⁸ Non-reciprocal norms are owed to all State parties (*erga omnes partes*) or even to the international community as a whole (*erga omnes*), and thus pose a crucial case with regard to their responsiveness. These norms must, on the one hand, accommodate change, as their effectiveness over time is particularly important for the international legal order, while at the same time, precisely because of their significance, resist being overly responsive.

To exemplify our general findings and to outline the particularities of the case of integral norms, the second part of this article proceeds with two case studies on one of the most critical international developments of the last decades: States' responses to international terrorism (III.).

The first study discusses the proliferation of secret surveillance programs and their implications on individual privacy under the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).⁹ Albeit being a regional treaty, the ECHR is arguably the most sophisticated human rights system in the world. The European Court of Human Rights (ECtHR) has developed a highly differentiated case-law on surveillance and its threat to personal privacy, whose level cannot be compared to any other human rights system. Yet, given the continuing great in-

⁶ International Law Commission (ILC), Third Report on the Law of Treaties by *G. G. Fitzmaurice*, Special Rapporteur, 18. 3.1958, A/CN.4/115 and Corr. 1, 27 et seq. See also ILC, Fragmentation of international law: difficulties arising from diversification and expansion of international law, Report of the Study Group, finalized by *M. Koskenniemi*, 13.4.2006, A/CN.4/L.682, at para. 493 (1) (b).

⁷ *J. Arato*, Accounting for Difference in Treaty Interpretation Over Time, in: A. Bianchi/D. Peat/M. Windsor, Interpretation in International Law, 2015, 205 et seq., 208.

⁸ *J. Arato* (note 7), 208.

⁹ Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended), 4.11.1950, 213 UNTS 221 (ECHR).

fluence the ECtHR has on other regional as well as universal human rights treaties,¹⁰ the European Court is likely to inform the interpretation of these regimes. Due to these probable spill-over effects, the study's limited perspective on the regional level does not preclude generalising our findings to the case of human rights treaties as such.

The second study analyses another response of States to the threat of terrorists, namely the use of military force against the perpetrators of terrorist attacks. It thus concerns one of the most fundamental rules of the international legal order, the prohibition of the use of force. The recent development of States to treat large-scale terrorist attacks as triggers for the right to self-defence under Art. 51 of the Charter of the United Nations (UN Charter)¹¹ as well as customary international law has been the subject of much legal debate. Due to the dual nature of the right to self defence, the case study is able to point out modalities of responsiveness in both treaty and customary law and their complicated relationship.

The two case studies explore the responsiveness of the law driven by different actors, namely courts and States, and by different legal approaches. They offer the basis for the article's conclusion on the tension and necessary balance between flux and stability, between motion and rest in international law (IV.).

II. Responsiveness of International Law

The modalities of responsiveness depend on the legal source in question: Treaties, seem cast in stone, their letters rarely changing over time.¹² However, as the understanding of those same letters might be open to change, treaties often develop by way of interpretation.¹³ In contrast, the development of customary law is inherently receptive to change. The formation process of custom, in the words of *G. Nolte*, "continues over time and makes the given rule an object of constant reaffirmation or pressure to

¹⁰ See, e.g., *S. Walker*, International Human Rights Law: Towards Pluralism or Harmony? The Opportunities and Challenges of Coexistence: The View from the UN Treaty Bodies, in: C. Buckley /A. Donald/P. Leach, *Towards Convergence in International Human Rights Law: Approaches of Regional and International Systems*, 2016, 493 et seq.

¹¹ Charter of the United Nations, 24.10.1945, 1 UNTS XVI (UN Charter).

¹² See, e.g., *S. D. Murphy*, The Relevance of Subsequent Agreement and Subsequent Practice for the Interpretation of Treaties, in: *G. Nolte*, *Treaties and Subsequent Practice*, 2013, 82 et seq., 87 (contending that "[t]reaties are cumbersome devices that cannot change quickly, and thus may become increasingly less responsive to complex realities").

¹³ See *H. Lauterpacht* (note 2), 344.

change”. Thus, he continues, “subsequent acts, events and developments are in principle part of, and not different from, the process of formation of customary law itself”.¹⁴ Contemporary views on how custom is formed, shaped, and reshaped are thus decisive for its potential responsiveness.

We will address treaties (1.) and customary law (2.) and conclude on their respective ways of accommodating change as well as their possible combined effects in a third step (3.).

1. Treaties: A Case of Interpretive Responsiveness?

Responsiveness in treaties is inextricably linked to the fundamental tension between stability and change. Treaties must facilitate legal certainty between the parties and preserve the integrity of the agreement, as *pacta sunt servanda* weighs particularly heavy in uncertain times. Since formal treaty amendment procedures are rarely practically available, the treaty itself, in order to remain effective over time, must “adapt to new situations ... [and] evolve according to the social needs of the international community”.¹⁵ This evolution can mainly be achieved by way of interpretation that gives effect to either the inherent dynamics of the treaty or the external dynamics as reflected by the changed practice of its parties.

According to Art. 31 (1) of the Vienna Convention on the Law of Treaties (VCLT),¹⁶ a treaty is interpreted “in good faith 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”.¹⁷ As interpretation aims at giving effect to the intention of the parties,¹⁸ either their *original* intention to pro-

¹⁴ ILC, Treaties over time, in particular: Subsequent Agreement and Practice (*Georg Nolte*), in: ILCYB 2008, Vol. II (Part Two), Annex I, 152 et seq., at para. 4.

¹⁵ ILC (note 14), para. 1. See also *Anglo-Iranian Oil Co. (UK v. Iran)*, Dissenting Opinion of Judge A. Alvarez, ICJ Reports 1952, 124 et seq., at 126 (“A legal institution, a convention, once established, acquires a life of its own and evolves not in accordance with the ideas or the will of those who drafted its provisions, but in accordance with the changing conditions of the life of peoples.”).

¹⁶ Vienna Convention on the Law of Treaties, 23.5.1969, 1155 UNTS 331 (VCLT).

¹⁷ Although, pursuant to Art. 4, the VCLT is not retroactive, Art. 31 VCLT reflects customary law and is applicable as such to treaties that entered into force prior to the VCLT. For the same reason, the customary rule as reflected by Art. 31 VCLT applies also in relation to States not party to the VCLT. See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)*, ICJ Reports 2004, 136 et seq., para. 94.

¹⁸ *U. Linderfalk*, Is Treaty Interpretation an Art or a Science? International Law and Rational Decision Making, EJIL 26 (2015), 169 et seq., 171 (with further references); *A. Clapham*, Brierly’s Law of Nations: An Introduction to the Role of International Law in International Relations, 7th ed. 2012, at 349.

vide a treaty with evolutionary features or their *later* intention, as expressed by subsequent practice, can be the root for interpretive change and treaty responsiveness.¹⁹ Both, evolutive interpretation and the element of subsequent State practice, are entrenched in the rules on interpretation²⁰ and have been used in international jurisprudence.²¹

In order to deliver a comprehensive picture, we will, first, address evolutive interpretation (a) and subsequent practice (b) separately, and then, compare the two with regard to their potential and limits *vis-à-vis* treaty responsiveness (c).

a) Responsiveness Through Evolutive Interpretation

Under the principle of contemporaneity, both the meaning as well as the circumstances prevailing at the time of a treaty's conclusion are decisive for its interpretation.²² If the parties, however, intended for the treaty to be capable of adapting over time, evolutive (or dynamic) interpretation allows the inclusion of contemporary meanings and circumstances.²³ Provisions then have “the meaning they bear on each occasion on which the [t]reaty is to be applied, and not necessarily their original meaning”.²⁴

¹⁹ J. Arato, Subsequent Practice and Evolutive Interpretation: Techniques of Treaty Interpretation over Time and Their Diverse Consequences, *The Law and Practice of International Courts and Tribunals* 9 (2010), 443 et seq., 445.

²⁰ J. Arato (note 19), 446. See also J. d'Aspremont, Formalism Versus Flexibility in the Law of Treaties, in: C. J. Tams/A. Tzanakopoulos/A. Zimmermann, *Research Handbook on the Law of Treaties*, 2014, 257 et seq., 275 et seq.

²¹ See, e.g., *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970) (Advisory Opinion)*, ICJ Reports 1971, 16 et seq., para. 22 (relying on subsequent State practice) and para. 53 (employing evolutive interpretation). For an overview of the case-law, see ILC (note 14).

²² O. Dörr, Article 31, in: O. Dörr/K. Schmalenbach, *Vienna Convention on the Law of Treaties: A Commentary*, 2012, 521 et seq., paras. 23-24; J. Crawford, *Brownlie's Principles of Public International Law*, 7th ed. 2009, at 381-82. See also E.E. Triantafylou, Contemporaneity and Evolutive Interpretation under the Vienna Convention on the Law of Treaties, *ICSID Review* 32 (2017), 138 et seq. (cautioning that the principle does not apply by default, but only where the temporal context of the treaty renders its application appropriate).

²³ J. Arato (note 19), 466; ILC, 872nd meeting, Law of Treaties, Item 1 of the agenda: Arts. 69-71 (Interpretation of treaties) (continued), in: ILCYB 1966, Vol. I (Part Two), 198 et seq., 199 (para. 9).

²⁴ *Navigational and Related Rights (Costa Rica v. Nicaragua)*, ICJ Reports 2009, 213 et seq., para. 70.

Evolutionary interpretation rests on two distinct interpretive steps:²⁵ At first, it must be determined whether the treaty provision at hand was, in general, intended to evolve (aa). If the answer is in the affirmative, at a second stage, the term is to be interpreted in the particular context, the outcome of which might be a dynamic understanding (bb).

aa) First Step: Determining the Evolutionary Nature of a Term

Determining whether a treaty term was actually intended to evolve is a rather difficult task. The drafters' intention might be impossible to reconstruct or it might prove unrevealing if developments were not foreseen.²⁶ In the absence of clear evidence, the ICJ as well as other courts and tribunals solve the dilemma by *presuming* the parties' wish to accord a term an evolving meaning, if that term is of a generic nature and if the treaty in question was concluded for an undetermined time.²⁷ Unless there is evidence to the contrary, generic terms are thus understood as being open to evolution.²⁸

This presumption-based approach has received criticism for it allegedly degenerates reference to the original intention of the parties into fiction.²⁹ This objection is, however, unfounded. Not only does a lack of evidence of the drafters' intention render presumptions practically necessary, the approach is also methodologically coherent. The purpose of interpretation is not to identify the historical, subjective intention of the parties,³⁰ but rather "the intentions of the authors *as reflected* by the text of the treaty and the other relevant factors".³¹ The search for such an objectivised intention³²

²⁵ O. Dörr (note 22), para. 26; J. Arato (note 19), 466 et seq.

²⁶ Y. Tanaka (note 4), 147 et seq.; R. Bernhardt, *Evolutionary Treaty Interpretation*, *Especially of the European Convention on Human Rights*, GYIL 42 (1999), 11 et seq., 14.

²⁷ E.g. *Navigational and Related Rights* (note 24), paras. 66-70; *South West Africa Opinion* (note 21), para. 53; *Aegean Sea Continental Shelf (Greece v. Turkey)*, ICJ Reports 1978, 3 et seq., para. 77; *Appellate Body Report, United States – Import Prohibition of Certain Shrimp and Shrimp Products*, 6.11.1998, WT/DS58/AB/R, para. 130.

²⁸ P. Palchetti, *Interpreting "Generic Terms": Between Respect for the Parties' Original Intention and the Identification of the Ordinary Meaning*, in: N. Boschiero/T. Scovazzi/C. Pitea/C. Ragni (eds.), *International Courts and the Development of International Law: Essays in Honour of Tullio Treves*, 2013, 91 et seq.; O. Dörr (note 22), para. 25; J. Arato (note 19), 468 et seq.

²⁹ See, e.g., *Navigational and Related Rights (Costa Rica v. Nicaragua)*, Separate Opinion of Judge L. Skotnikov, ICJ Reports 2009, 283 et seq., para. 5. See also S. T. Helmersen, *Evolutionary Treaty Interpretation: Legality, Semantics and Distinctions*, *European Journal of Legal Studies* 6 (2013), 161 et seq., 169 (with further references).

³⁰ *Case No. A/18 concerning the Question of Jurisdiction over Claims of Persons with Dual Nationality*, Iran-US Claims Tribunal, 6.4.1984, reproduced in: 23 ILM 489 (1984), 497.

³¹ *Navigational and Related Rights* (note 24), para. 48 (emphasis added). See also A. D. McNair, *The Law of Treaties*, 1961, 365.

must accordingly be determined by objective factors, which renders the recourse to certain presumptions indispensable.³³ The result of this process may accurately speak against a static and in favour of an evolutive interpretation.

Determining the evolutive potential of a term must, however, not rely on its generic nature alone, but has to take into account the remaining elements of treaty interpretation, most notably the object and purpose.³⁴ For example, a boundary treaty with the purpose of drawing permanent borders may prevent an evolutive interpretation of generic terms.³⁵ In reverse, a purposive impetus may also be directed towards evolution, even without the use of generic terms. Technical developments, for instance, may render a dynamic understanding necessary to secure the treaty's effectiveness irrespective of a term's non-generic nature.³⁶

The evolutionary potential of treaties and treaty norms thus differs according to their nature, object and purpose. For example, a bilateral treaty with a short life, limited substantial scope, and mere reciprocal obligations is less likely to evolve than an instrument with an undetermined time of operation that establishes rules that go beyond a mere exchange of rights and duties.³⁷ Thus, the International Law Commission (ILC) held that concepts used in treaties can evolve not only if they are of a very general nature, but

³² E. Bjorge, *The Evolutionary Interpretation of Treaties*, 2014, 3.

³³ Assumptions are indeed generally necessary for interpretation, see *U. Linderfalk* (note 18), 172 et seq.

³⁴ See ILC, Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties adopted by the Commission, 2016, in: Report of the ILC, Sixty-eighth session (2.5.-10.6. and 4.7.-12.8.2016), GAOR Seventy-first session, Suppl. No. 10, A/71/10, 120 et seq., 183 (para. 8 of the commentaries to draft Conclusion 8); *P. Palchetti* (note 28), 104; *Y. Tanaka* (note 4), 153 et seq. See also *E. Bjorge* (note 32), 2; *R. K. Gardiner*, *Treaty Interpretation*, 2nd ed. 2015, 467.

³⁵ See *Territorial Dispute (Libyan Arab Jamahiriya v. Chad)*, ICJ Reports 1994, 6 et seq., para. 72; *Y. Tanaka* (note 4), 154 et seq.

³⁶ See, e.g., *Iron Rhine ("Ijzeren Rijn") Railway (Belgium v. the Netherlands)*, 24.5.2005, XXVII Reports of International Arbitral Awards (RIAA) 35, para. 80 ("In the present case it is not a conceptual or generic term that is in issue, but rather new technical developments relating to the operation and capacity of the railway. But here, too, it seems that an evolutive interpretation, which would ensure an application of the treaty that would be effective in terms of its object and purpose, will be preferred to a strict application of the intertemporal rule.").

³⁷ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion)*, Dissenting Opinion of Judge A. Alvarez, ICJ Reports 1951, 49 et seq., 51 et seq. (naming certain types of multilateral treaties which acquire "a life of their own", and, were like "ships which leave the yards in which they have been built, and sail away independently, no longer attached to the dockyard.").

also if they imply taking into account subsequent developments or if they create obligations for further progressive development.³⁸

Human rights treaties as well as constitutive treaties of international organisations form the prime examples of treaties possessing the highest potential of responsiveness through evolutive interpretation.³⁹ Both, human rights obligations as well as the rules of an international organisation fulfil all three of the ILC's criteria. They are notoriously phrased generically and their object and purpose as well as their nature as integral norms exponentiate their evolutionary potential.

The special nature of human rights therefore influences their interpretation decisively.⁴⁰ The ECHR indicates an inherent dynamic already in its preamble by declaring one of its goals the "further realisation" of the enshrined rights and freedoms. Accordingly, the ECtHR famously treats the Convention as a "living instrument which ... must be interpreted in the light of present-day conditions".⁴¹ Together with the principle of effectiveness (*effet utile*), the Court's approach renders the Convention a highly dynamic treaty for the sake of the "practical and effective, not theoretical and illusory"⁴² protection of individual rights and freedoms.

Constitutive treaties of international organisations are similarly susceptible to dynamic interpretation. Above all, the UN Charter, likewise a "living instrument" and arguably the very foundation of the international legal or-

³⁸ ILC, Fragmentation of international law: Difficulties arising from the diversification and expansion of international law, Conclusions of the work of the Study Group, in: ILCYB 2006, Vol. II (Part Two), 177 et seq., 181 (para. 23).

³⁹ See *Y. Tanaka* (note 4), 143 et seq.; *M. E. Villiger*, Commentary on the 1969 Vienna Convention on the Law of Treaties, 2009, 427 et seq.; *R. Bernhardt* (note 26), 21.

⁴⁰ See, e.g., *Loizidou v. Turkey (Preliminary Objections)*, 23.3.1995, ECtHR Series A No. 310, para. 84; UN Human Rights Committee (CCPR), General comment No. 24: General comment on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under Article 41 of the Covenant, 11.11.1994, CCPR/C/21/Rev.1/Add.6, para. 17; *The Effect of Reservations on the Entry Into Force of the American Convention on Human Rights (Arts. 74 and 75) (Advisory Opinion OC-2/82)*, 24.9.1982, IACtHR Series A No. 2, para. 29. This does, however, not necessitate distinct rules of interpretation, see *B. Çali*, Specialized Rules of Treaty Interpretation: Human Rights, in: D. B. Hollis, The Oxford Guide to Treaties, 2012, 525 et seq.; ILC, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law: Report of the Study Group of the ILC, 18.7.2006, A/CN.4/L.702, para. 12 (holding that the VCLT constitutes a "unifying frame" for all treaties).

⁴¹ *Loizidou v. Turkey (Preliminary Objections)* (note 40), para. 71; *Tyrer v. UK*, 25.4.1978, ECtHR Series A No. 26, para. 31. See also *Judge v. Canada*, 13.8.2003, CCPR/C/78/D/829/1998, 10.3.

⁴² E.g. *Scoppola v. Italy (No. 2) (Grand Chamber)*, 17.9.2009, (2010) 51 EHRR 12, para. 104.

der,⁴³ has to evolve and incorporate developments so that it can assure the functioning of the UN and fulfil its purpose of safeguarding global peace.⁴⁴ This need is amplified by the fact that highly controversial and politically charged formal amendments of the Charter are virtually impossible.⁴⁵ The Security Council, for instance, has shown a particularly dynamic understanding of Chapter VII's key term "threat to peace". In order to tackle novel challenges, its interpretive practice has shifted from a negative to a positive peace concept that includes human rights violations, acts of terrorism, and the plight of refugees as threats to peace.⁴⁶

bb) Second Step: Realising the Evolutive Nature of a Term

The rather low requirements of the first step provide the interpreter with significant power: While the origin of evolutive interpretation is the (presumed) common will of the parties, its results might be unpredictable and move beyond their influence or control.⁴⁷ This is particularly true if not the parties, but an independent body interprets the treaty. The second step sets a limit to this power of the interpreter. The mere fact that a term can be dynamically interpreted does by itself indicate neither that such an interpretation is mandatory nor which precise meaning of the term is adequate. The interpretation of a term capable of evolution still needs to adhere to the

⁴³ See *N. J. Schrijver*, *The Future of the Charter of the United Nations*, Max Planck UN-YB 10 (2006), 1 et seq., 5; *R. St. J. Macdonald*, *The Charter of the United Nations as a World Constitution*, in: M. N. Schmitt/L. C. Green, *International Law Across the Spectrum of Conflict: Essays in Honour of Professor L. C. Green on the Occasion of His Eightieth Birthday*, 2000, 263 et seq.; *B. Sloane*, *The United Nations Charter as a Constitution*, Pace Y.B. Int'l L. 1 (1989), 61 et seq. (all classifying the Charter as an international constitution).

⁴⁴ See, e.g., *S. Kadelbach*, *Interpretation of the Charter*, in: B. Simma/D.-E. Khan/G. Nolte/A. Paulus, *The Charter of the United Nations: A Commentary*, Vol. I, 3rd ed. 2012, 71 et seq., 86; *J. Liang*, *Modifying the UN Charter Through Subsequent Practice: Prospects for the Charter's Revitalisation*, NJIL 81 (2012), 1 et seq.; *Competence of the General Assembly for the Admission of a State to the United Nations*, Dissenting Opinion of Judge *P. Azevedo*, ICJ Reports 1950, 22 et seq., 23 ("The Charter is a means and not an end. To comply with its aims one must seek the methods of interpretation most likely to serve the natural evolution of the needs of mankind.").

This relates closely to the doctrine of "implied powers", which this article, due to space constraints, does not address further. According to the doctrine, an organisation "can be recognized as having powers which the Member States did not intentionally confer upon it". *J. Klabbers*, *Treaties, Amendment and Revision*, in: R. Wolfrum, MPEPIL Online Ed., 2006, para. 15.

⁴⁵ So far, only procedural or composition-related provisions have been revised, see *J. Liang* (note 44), 3.

⁴⁶ See *S. Kadelbach* (note 44), 93 et seq.; *N. J. Schrijver* (note 43), 16 et seq. (with references); *R. Bernhardt* (note 26), 21.

⁴⁷ See *S. T. Helmersen* (note 29), 171 et seq. See also *S. D. Murphy* (note 12), 87.

usual steps of interpretation. Accordingly, in *Pretty v. UK*, while recalling that it had to take “a dynamic and flexible approach to the interpretation of the Convention”, the ECtHR emphasised that its interpretation equally had to respect the ordinary meaning of the term, harmonise with the ECHR’s other provisions, and “accord with the fundamental objectives of the Convention”.⁴⁸

For one, the range of a term’s ordinary meanings is not unlimited.⁴⁹ The ECtHR’s decision that *public* activities do not fall within the protection of *private* life might serve as one example;⁵⁰ the ICJ’s ruling that “commerce” does not include the performance of governmental activities as another.⁵¹

The context of the treaty must equally not be neglected. For example, the ECtHR pointed out that it could not “derive ... a right which was not included [in the ECHR] at the outset” and that “[t]his is particularly so ..., where the omission was deliberate”.⁵² Accordingly, it dismissed a claim to derive a right to divorce from the right to marry and found a family under Art. 12 ECHR.⁵³ In contrast, deriving a human right to water under the International Covenant on Economic, Social and Cultural Rights (ICESCR)⁵⁴ was arguably within the limits of the interpretation of the non-exhaustive Art. 11 ICESCR (“including”).⁵⁵

Lastly, the object and purpose of a treaty, as the very reason of dynamic interpretation, might pose a limit to the treaty’s evolutionary potential. The necessity to interpret a term dynamically must be critically assessed,⁵⁶ as excessive evolution must be avoided for the sake of legal certainty.⁵⁷ In particular, dynamic interpretation is not necessary, if it would move beyond the

⁴⁸ *Pretty v. UK*, 29.04.2002, Reports of Judgments and Decisions ECtHR 2002-III, 155, para. 54.

⁴⁹ *B. B. Hale*, in: ECtHR/Council of Europe, Dialogue Between Judges 2011: “What Are the Limits to the Evolutive Interpretation of the Convention?”, 2011, 11 et seq., 14; *J. Arato* (note 19), 476.

⁵⁰ *B. B. Hale* (note 49), 14, referring to *Friend and Others v. UK*, Appl. Nos. 16072/06, 27809/08, 24.11.2009, para. 43, available at <www.echr.coe.int>.

⁵¹ *Navigational and Related Rights* (note 24), para. 71.

⁵² *Johnston and Others v. Ireland*, 18.12.1986, ECtHR Series A No. 112, para. 53. See also *Emonet and Others v. Switzerland*, 13.12.2007, (2009) 49 EHRR 11, para. 66.

⁵³ *Johnston and Others v. Ireland* (note 52), para. 53.

⁵⁴ International Covenant on Economic, Social and Cultural Rights, 16.12.1966, 993 UNTS 3.

⁵⁵ UN Committee on Economic, Social and Cultural Rights, General Comment No. 15: The Right to Water (Arts. 11 and 12), 20.1.2003, E/C.12/2002/11. See *P. Thielbörger*, Re-Conceptualizing the Human Right to Water: A Pledge for a Hybrid Approach, HRLR 15 (2015), 225 et seq., 231 et seq. (with further references).

⁵⁶ *J. Arato* (note 19), 476 et seq.

⁵⁷ See *J. Arato* (note 19), 487.

treaty's object and purpose. For example, in *N v. UK*, the ECtHR rejected an interpretation in favour of economic and social rights, arguing, albeit not entirely convincingly, that the purpose of the ECHR is the protection of civil and political rights only.⁵⁸

If these doctrinal limits are observed, however, a term that is generally capable of evolving can be interpreted as to accommodate changing realities. For example, the notion of "private life", as a dynamic term *par excellence*, has been interpreted by the ECtHR to encompass a duty to recognise post-operation transsexuals' new gender status, as "changing conditions" rendered such an interpretation necessary to ensure the concerned individual's rights.⁵⁹

b) Responsiveness Through Subsequent State Practice

The inherent evolutive nature of a treaty term is not the only way to introduce responsiveness into a treaty. The subsequent application of the treaty by its parties can serve as a treaty-external measure of change.⁶⁰ Such practice might give strong indication of whether a term was indeed intended to be understood dynamically or not.⁶¹ The ECtHR, for example, has used the notion of "European consensus" to corroborate its evolutive interpretations.⁶² The potential of subsequent practice for a treaty's responsiveness is, however, not limited to substantiating an evolutive interpretation. Subsequent practice evidences the parties' own contemporary understanding of the agreement and may reflect reinterpretations or arguably even modifica-

⁵⁸ *N v. UK (Grand Chamber)*, 27.5.2008, Reports of Judgments and Decisions ECtHR 2008-III, 227, para. 44. But see *N v. UK (Grand Chamber)*, Joint Dissenting Opinion of Judges *F. Tulkens/G. Bonello/D. Spielmann*, 27.5.2008, Reports of Judgments and Decisions ECtHR 2008-III, 251, para. 6 (criticising the majority's decision for ignoring the social dimension of the ECHR).

⁵⁹ *Goodwin v. UK (Grand Chamber)*, 11.7.2002, Reports of Judgments and Decisions ECtHR 2002-VI, 1, para. 74.

⁶⁰ *A. Glashauser*, What We Must Never Forget When It Is A Treaty We Are Expounding, *U. Cin. L. Rev.* 73 (2005), 1243 et seq., 1336.

⁶¹ See ILC (note 34), 184 (para. 10 of the commentaries to draft Conclusion 8); ILC, First report on subsequent agreements and subsequent practice in relation to treaty interpretation (by *Georg Nolte*, Special Rapporteur), 19.3.2013, A/CN.4/660, para. 60; *O. Dörr* (note 22), para. 28. On the other hand, State practice may also hint at a non-dynamic understanding, see *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)*, ICJ Reports 1996, 226 et seq., para. 55.

⁶² E.g. *Goodwin v. UK* (note 59), para. 84. See *F. Tulkens*, in: ECtHR/Council of Europe (note 49), 6 et seq., 9; *K. Dzehtsiarou*, European Consensus and the Evolutive Interpretation of the European Convention on Human Rights, *GLJ* 12 (2011), 1730 et seq.

tions of the treaty. The next sections outline the requirements of subsequent practice (aa) and address its potential range of effects on the treaty (bb).

aa) The Requirements of Subsequent State Practice

Art. 31 (3) (b) VCLT declares that interpretation shall take into account “[a]ny subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation”.⁶³ Accordingly, the threshold of subsequent practice is threefold: First, intentional State practice must exist “in the application” of the treaty, requiring that the conduct in question must be linked to a belief of the State to act under the agreement.⁶⁴ The requirement for this equivalent to the customary law element of *opinio juris* is not too strict, as (implicit) reference to the treaty in general suffices.⁶⁵ Some even argue that the element should play a negative role so that “only obvious acts of political expediency should be disregarded”.⁶⁶

The practice must, second, establish “the agreement of the parties”. This does not mean that the practice must be *exercised* by all parties. Rather, it is enough that those not participating in the practice endorse or even only acquiesce in it.⁶⁷ Approval is thus inferable from silence or inactivity, effectively shifting the burden on States “to scrutinize the conduct of other parties and to vocalize their disapproval” of unwanted interpretive practice.⁶⁸ This clearly lowers the threshold and makes subsequent practice a more feasible element, particularly in the context of treaties with higher numbers of parties.

Third and last, isolated action will not be enough to constitute subsequent practice, but will only be considerable as a subsidiary means of interpretation under Art. 32 VCLT.⁶⁹ Instead, some degree of frequency is required. According to the ILC, the convergence of the level of practice to a “concordant, common and consistent” pattern is not a minimum threshold,

⁶³ The provision reflects customary international law, e.g. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, ICJ Reports 2007, 43 et seq., para. 160.

⁶⁴ *Kasikili/Sedudu Island (Botswana v. Namibia)*, ICJ Reports 1999, 1045 et seq., paras. 73-74; *J. Arato* (note 19), 461.

⁶⁵ See ILC, Second report on subsequent agreements and subsequent practice in relation to the interpretation of treaties (by *Georg Nolte*, Special Rapporteur), 26.3.2014, A/CN.4/671, at para. 4; *O. Dörr* (note 22), para. 80.

⁶⁶ *G. P. McGinley*, Practice as a Guide to Treaty Interpretation, *Fletcher Forum of World Affairs* 9 (1985), 211 et seq., 218.

⁶⁷ ILC (note 34), 197 (para. 13 of the commentaries to draft Conclusion 10); *O. Dörr* (note 22), paras. 86-87; *J. Arato* (note 19), 460.

⁶⁸ *G. P. McGinley* (note 66), 214 et seq.

⁶⁹ ILC (note 34), 121 (draft Conclusion 4 (3)).

but may serve as an indication “for determining the weight of subsequent practice in a particular case”.⁷⁰ This means that no specific requirement exists with regard to the duration of that practice.

The ICJ has shown a rather liberal understanding of these requirements.⁷¹ In particular, the Court’s heavy reliance on the practice of the UN and its organs, and not the UN member States as such,⁷² has remarkably affected the threshold of subsequent practice in the context of the UN Charter. It seems indeed reasonable and a good faith argument to demand from States a high level of interest and participation within an international organisation and the UN, in particular.⁷³ If some or even all member States remain silent in the face of a consistent organ practice, acquiescence may be inferred and establish a subsequent practice.⁷⁴

However, the ICJ further lowered the requirements in conflict with the requirement of consent. In *Certain Expenses*⁷⁵ as well as in *Wall*,⁷⁶ the ICJ relied on General Assembly resolutions to confirm a subsequent practice, although these resolutions had not been adopted unanimously. Judge *P. Spender* rejected this approach and warned that a treaty

“cannot be altered by the will of the majority of the member states, no matter how often that will is expressed or asserted against a protesting minority and no matter how large be the majority – or how small be the minority”.⁷⁷

Still, two reasons can be brought forward in defence of the ICJ’s approach. First, a negative vote on a resolution as such cannot be equated with

⁷⁰ ILC (note 34), 191 (paras. 10-11 to draft Conclusion 9). See also *I. Sinclair*, *The Vienna Convention on the Law of Treaties*, 2nd ed. 1984, 137. But see Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, 4.10.1996, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, 13. The details of the threshold remain disputed, see *O. Dörr* (note 22), para. 79; *M. E. Villiger* (note 39), 431.

⁷¹ See *C. Peters*, *Subsequent Practice and Established Practice of International Organizations: Two Sides of the Same Coin?*, *GoJIL* 3 (2011), 617 et seq., 640; *G. P. McGinley* (note 66), 217.

⁷² *Certain Expenses of the United Nations (Article 72, Paragraph 2, of the Charter) (Advisory Opinion)*, ICJ Reports 1962, 151 et seq., 157; *South West Africa Opinion* (note 21), para. 22; *Wall Opinion* (note 17), para. 25.

⁷³ *C. Peters* (note 71), 638.

⁷⁴ *C. Peters* (note 71), 638; ILC, *Third report on subsequent agreements and subsequent practice in relation to the interpretation of treaties* (by *Georg Nolte*, Special Rapporteur), 7.4.2015, A/CN.4/683, paras. 79-80; *O. Dörr* (note 22), para. 86.

⁷⁵ E.g. *Certain Expenses Opinion* (note 72), 174. See *J. Arato*, *Treaty Interpretation and Constitutional Transformation: Informal Change in International Organizations*, *Yale J. Int’l L.* 38 (2013), 289 et seq., 320.

⁷⁶ *Wall Opinion* (note 17), para. 27. See *J. Arato* (note 75), 325.

⁷⁷ *Certain Expenses of the United Nations (Article 72, Paragraph 2, of the Charter) (Advisory Opinion)*, Separate Opinion of Judge *P. Spender*, ICJ Reports 1962, 182 et seq., 196.

objection to a certain interpretive practice entailed in that resolution, as other reasons may be at the basis of disagreement – the ICJ thus demands explicit protest to rebut the interpretation brought forward by a majority vote.⁷⁸ Second, even if one sees negative votes as opposing practice, disregarding such practice may be explained by the necessity to focus on the “formal result of the political process” when establishing the organisation’s own interpretation of its constitutive treaty.⁷⁹ Otherwise, the effectivity of the organisation might be in jeopardy, incapacitated by a minority however slight it may be. Although in contradiction to the traditional reading, the ICJ’s approach may be brought in line with Art. 31 (3) (b) VCLT by reading “agreement” not as unanimous consensus, but as an agreement reached by majority decision. This may be particularly apt for the case of autonomous organs of an international organisation, such as the UN.⁸⁰ In more recent decisions, the ICJ indeed seems to implicitly acknowledge that its liberal approach is limited to such specialised cases. There, the ICJ held that resolutions adopted by the World Health Organization and the International Whaling Commission, respectively, did not amount to subsequent practice, as they were not adopted with the support of all States.⁸¹

bb) The Effects and Limits of Subsequent State Practice

The ICJ’s case law not only gives rise to discussions not only of the requirements of subsequent practice, but also of its potential effects. States, as the masters of their treaties, are, in principle, unhindered to alter their interpretation of their agreements to their liking.⁸² Thus, subsequent practice has the potential to significantly develop a treaty and adopt it to changing needs.

It is, however, crucial to recall that Art. 31 (3) (b) VCLT only speaks of taking subsequent practice into account. The practice is best understood as *evidence* of the treaty’s sound meaning.⁸³ A subsequent practice may consti-

⁷⁸ J. Arato (note 75), 322 et seq.

⁷⁹ G. P. McGinley (note 66), 216.

⁸⁰ J. Arato, Subsequent Practice in the Whaling Case, and What the ICJ Implies about Treaty Interpretation in International Organizations, EJIL: Talk!, 31.3.2014, <www.ejiltalk.org>.

⁸¹ *Legality of the Use by a State of Nuclear Weapons in Armed Conflict (Advisory Opinion)*, ICJ Reports 1996, 66 et seq., para. 27; *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)*, ICJ Reports 2014, 226 et seq., para. 83. See J. Arato (note 80).

⁸² J. Arato (note 19), 465 (arguing that state practice’s “expansive potential has no limit in the abstract” and is only “limited by the extent of the actual practice of the parties and acquiescence being identifiable, but not clearly by much else.”); C. Peters (note 71), 618.

⁸³ See, e.g., ILC (note 34), 120 (draft Conclusion 3); *International Status of South-West Africa (Advisory Opinion)*, ICJ Reports 1950, 128 et seq., 135 et seq.

tute a strong indication of a term's meaning, but it is nevertheless only one of the elements of interpretation and as such not binding upon the interpreter.⁸⁴ Still, strong reasons must exist to justify rebutting this evidence and disregarding States' own interpretation. These reasons can only lie in the other elements of the interpretation canon.⁸⁵

However, the wording of the treaty does not seem to establish a limit to subsequent practice. This does not suggest that subsequent practice necessarily or even regularly stands in tension with the ordinary meaning of the text.⁸⁶ Nevertheless, the possibility of *modifying* a treaty through subsequent practice has been debated since the 1960s. The ILC, when elaborating on the law of treaties, suggested an Article according to which treaty modification was indeed a possible outcome of subsequent practice.⁸⁷ At the Vienna Conference, States eventually rejected this provision, arguing that it would undermine legal stability and conflict with domestic constitutions.⁸⁸ Some commentators have accordingly viewed this deletion as a rejection of the notion of State practice with modifying effects.⁸⁹ Most authors, however, argue that States merely felt uncertain about the consequences of the draft Article and that the opposition towards inclusion in the VCLT did not challenge that modification through subsequent State practice is recognised under customary law.⁹⁰ The discussion at the Vienna Conference indeed reflects States' reluctance to consider the issue in greater detail and their rather shallow reasons for deleting the draft norm.⁹¹ Today, international jurisprudence and most scholars accept that subsequent practice might also modify

⁸⁴ ILC (note 34), 133 (para. 4 of the commentaries to draft Conclusion 3).

⁸⁵ See also *R. Mollo*, When Actions Speak Louder Than Words: The Relevance of Subsequent Party Conduct to Treaty Interpretation, *Berkeley J. Int'l L.* 31 (2013), 39 et seq., 74.

⁸⁶ See *M.E. Villiger*, Customary International Law and Treaties: A Manual on the Theory and Practice of the Interrelation of Sources, 2nd ed. 1997, 213.

⁸⁷ ILC, Draft articles on the law of treaties with commentaries, in: *ILCYB 1966*, Vol. II, 187 et seq., 236 (draft Art. 38).

⁸⁸ UN Conference on the Law of Treaties, Official Records, Summary records of the plenary meetings and of the meetings of the Committee of the Whole, First session (Vienna, 23.-24.5.1968), 215 (53 votes to 15, with 26 abstentions).

⁸⁹ E.g. *R. Mollo* (note 85), 86; *A. Glashauser* (note 60), 1261.

⁹⁰ E.g. *P. Sands*, Article 39 VCLT, in: O. Corten/P. Klein, *The Vienna Convention on the Law of Treaties*, Vol. II, 2011, 973 et seq. (para. 39); *F. G. Jacobs*, Varieties of Approach to Treaty Interpretation: With Special Reference to the Draft Convention on the Law of Treaties Before the Vienna Diplomatic Conference, *ICLQ* 18 (1969), 318 et seq., 332.

⁹¹ See UN Conference on the Law of Treaties (note 88), 210 et seq. For a critical evaluation of these reasons, see, e.g., *A. M. Feldman*, Evolving Treaty Obligations: A Proposal for Analyzing Subsequent Practice Derived from WTO Dispute Settlement, *N. Y. U. J. Int'l L. & Pol. L. & Pol.* 41 (2009), 665 et seq., 671 et seq.

a treaty, although this effect must not be presumed and reach a higher threshold to prove States' agreement to do so.⁹²

Although the text itself does therefore not constitute a limit to subsequent practice, the nature of the norm in question and its object and purpose might. Practice that opposes the object of the treaty generally cannot be accorded significance. Judge *P. Azevedo*, for instance, underlined that “even long practice, usually a good guide in interpretation, cannot frustrate a pressing teleological requirement”.⁹³ This is particularly true for integral norms through which States create resilient “obligations meant to withstand violations and the changing whims of the parties”.⁹⁴ Their nature weighs heavily against practice that restricts their object and purpose.⁹⁵ Practice carrying evidence of a sound meaning of the text must thus be distinguished from State action driven by expediency.⁹⁶ For example, the object and purpose of the prohibition of torture clearly outweighed ultimately abandoned US initiatives to reinterpret it restrictively in the aftermath of 9/11.⁹⁷ And while the ECtHR has considered State practice to expand Convention rights,⁹⁸ it has arguably not done so to restrict them substantially.⁹⁹

⁹² See, e.g., *Öcalan v. Turkey (Grand Chamber)*, 12.5.2005, Reports of Judgments and Decisions ECtHR 2005-IV, 47, para. 163; *Soering v. UK*, 7.7.1989, ECtHR Series A No. 161, para. 103; ILC (note 65), para. 4; *J. Liang* (note 44), 7; *J. Arato* (note 19), 456 et seq.; *M. E. Villiger* (note 86), 200 et seq. See also *South West Africa Opinion* (note 21), para. 22; *Wall Opinion* (note 17), paras. 27-28 (arguably also constituting modifications of the UN Charter). The ILC remained reluctant to accept the modifying effects of subsequent practice, see ILC (note 34), 180 (para. 38 of the commentaries to draft Conclusion 7 (3)).

⁹³ *Competence of the General Assembly for the Admission of a State to the United Nations (Advisory Opinion)*, Dissenting Opinion of Judge *P. Azevedo*, ICJ Reports 1950, 22 et seq., 24.

⁹⁴ *J. Arato* (note 7), 223.

⁹⁵ *J. Arato* (note 7), 223; *M. Fitzmaurice*, Interpretation of Human Rights Treaties, in: D. Shelton, The Oxford Handbook of International Human Rights Law, 2013, 739 et seq., 742; *A. Roberts*, Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States, AJIL 104 (2010), 179 et seq., 205.

⁹⁶ See *G. P. McGinley* (note 66), 230.

⁹⁷ See *P. V. Kessing*, Terrorism and Human Rights, in: S. Lagoutte/H.-O. Sano/P. S. Smith, Human Rights in Turmoil: Facing Threats, Consolidating Achievements, 2007, 133 et seq., 160.

⁹⁸ See, e.g., *Demir and Baykara v. Turkey (Grand Chamber)*, 12.11.2008, Reports of Judgments and Decisions ECtHR 2008-V, 333, para. 85; *Öcalan v. Turkey* (note 92), para. 163. See also *C. Djeffal*, Static and Evolutive Treaty Interpretation: A Functional Reconstruction, 2016, 328 et seq.; *M. Forowicz*, The Reception of International Law in the European Court of Human Rights, 2010, 37 et seq.

⁹⁹ In *Banković*, the ECtHR rejected, *inter alia* based on subsequent practice, an application of the Convention to extraterritorial military operations. While restrictive, this interpretation does certainly not go against the object and purpose of the ECHR. See *Banković and*

Even practice that generally conforms to the object and purpose of integral norms must be critically assessed. A re-interpretation or arguably modification of fundamental norms of the UN Charter will, for example, be harder to establish than the alteration of a less essential, mere reciprocal norm and require to fulfil a higher burden to prove an agreement between the parties.¹⁰⁰ Similarly, treaties that confer rights on third parties, such as human rights and arguably investment protection treaties, are and must be less susceptible to subsequent practice.¹⁰¹ That is, however, not to say that an automatism is at order. Any interpretation must, without rejecting the significance of State practice *a priori* and, conversely, without following it blindly, consider all relevant factors involved.¹⁰²

c) The Potential and Limits of Responsiveness in Treaties

Evolutionary interpretation and subsequent practice are two informal ways of achieving a significant degree of responsiveness in a treaty. Thereby, the former is the result of a two-step interpretation, whereas the latter constitutes merely one element, albeit with a high value, within the interpretative process. The two notions can overlap, as the parties may adopt in their practice a dynamic understanding of a term, but they must be understood as separate features of treaty interpretation.

A dynamic interpretation aims at closing gaps and updating the treaty. It is necessarily text-based and cannot disregard the wording of the term, although some deviation from its ordinary meaning might be possible.¹⁰³ The need for evolution is particularly prominent if the treaty is concluded for an undetermined time and exceeds a mere reciprocal exchange of obligations and rights. In these cases, the argumentative efforts to arrive at an *ad hoc* evolutionary interpretation are relatively small¹⁰⁴ – yet, the possible outcomes may be severe. The case of the ECtHR and other human rights bodies shows how the necessary emphasis of a treaty's object and purpose, togeth-

Others v. Belgium and Others (Grand Chamber), 12.12.2001, Reports of Judgments and Decisions ECtHR 2001-XII, 333, para. 62.

¹⁰⁰ See *J. Liang* (note 44), 18 et seq.

¹⁰¹ *R. Moloo* (note 85), 74 et seq.; *A. Roberts* (note 95), 212 et seq. See, e.g., *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, 28.9.2007, <www.italaw.com>, para. 386.

¹⁰² *A. Roberts* (note 95), 207.

¹⁰³ See *E.E. Triantafylou* (note 22), 157; *R. K. Gardiner* (note 34), 275; *B. B. Hale* (note 49), 18.

¹⁰⁴ See *J. Arato* (note 19), 476.

er with its inherent dynamics, can lead to far-reaching developments over time. Evolutive interpretation can thus empower the interpreter, especially courts and tribunals, and lead to what may be labelled “court-driven responsiveness” of a treaty.

Subsequent practice, in turn, leads to “State-driven responsiveness”, as it accommodates the parties’ own contemporary understanding of the treaty. Although the requirement of an agreement between all parties is high and seems almost insurmountable in the case of a multilateral treaty, courts and tribunals have played a major role in making the element of subsequent practice feasible. The degree to which they rely on the practice of the parties is, however, inconsistent. The Appellate Body of the World Trade Organization (WTO), for instance, has taken a restrictive view on subsequent practice, holding, *inter alia*, that a mere lack of protest cannot, as such, establish an agreement between the parties, but that active practice of a substantial number of parties is required.¹⁰⁵ Its meticulous emphasis on the consensus among the parties stands in contrast to the approaches of the ICJ and the ECtHR. In the special context of the UN Charter, the ICJ has watered down the requirements of subsequent practice significantly and thereby accommodated substantial change, arguably even modifications of the UN Charter. Parallel observations can be made with regard to the ECtHR and its notion of “European consensus”, through which the ECtHR relied on the practice of merely a majority or even on emerging trends in State practice to back up evolutionary interpretations and expressly even modifications of the ECHR.¹⁰⁶

The different approaches may be explained by the nature of the respective treaties.¹⁰⁷ While the ECtHR perhaps sometimes tends to overemphasise the special nature of human rights and stretch the Vienna rules, the WTO Appellate Body’s static interpretation may be explained by two factors. First, the specific rule of interpretation in the WTO, stating that the Appellate Body cannot “add to or diminish the rights and obligations” of the WTO agreements, may be reason for its reluctance to acknowledge dynamic developments.¹⁰⁸ Second, the interpretation of these agreements

¹⁰⁵ Appellate Body Report, *European Communities – Customs Classifications of Frozen Boneless Chicken Cuts*, 12.9.2005, WT/DS269/AB/R, WT/DS286/AB/R, paras. 259, 272. See *J. Arato* (note 75), 311 et seq.

¹⁰⁶ *Loizidou v. Turkey (Preliminary Objections)* (note 40), paras. 75-79; *Goodwin v. UK* (note 59), para. 84. See *J. Arato* (note 75), 337 et seq.

¹⁰⁷ See *J. Arato* (note 75), 352.

¹⁰⁸ Art. 3 (2) of the Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 15.4.1994, 1869 UNTS 401.

largely relates to technical trade regulations that are mostly reciprocal in nature and depend to a higher degree on legal stability.¹⁰⁹ In contrast, the special cases of the UN Charter and the ECHR have functions that largely depend on necessary evolution.

Thus, while our analysis has demonstrated that treaties can indeed be responsive, the degree of that responsiveness depends largely on their respective nature. As to the legal limitations, the potential for responsiveness of evolutive interpretation and subsequent practice are naturally determined by their respective requirements. The boundaries of evolutive interpretation are rooted deeper in the plain text of the agreement,¹¹⁰ whereas subsequent practice is mainly constrained by the factual need of the agreement of all parties.

2. Customary International Law: A Case of Perpetual Responsiveness?

An examination of the second main source of international law, custom, will bring to light a different approach towards responsiveness. In contrast to treaties, custom is *per definitionem* in a constant state of flux. As its formation process neither has a clear starting point nor is it ever permanently completed, determining a customary norm is particularly challenging “in the face of diverse states’ preferences and changed circumstances over time”.¹¹¹ Yet, the unifying elements of State conduct and intent as well as their treatment in international jurisprudence unfold similar patterns of how the responsiveness of the law can increase.

Art. 38 (1) (b) of the Statute of the ICJ¹¹² defines international custom as “evidence of a general practice accepted as law”,¹¹³ reflecting the long-established doctrine, according to which practice (*consuetudo*) and *opinio juris* form the two constitutive elements of a customary rule.¹¹⁴ The two

¹⁰⁹ See J. Pauwelyn, A Typology of Multilateral Treaty Obligations: Are WTO Obligations Bilateral or Collective in Nature?, EJIL 14 (2003), 907 et seq.

¹¹⁰ *Feldbrugge v. Netherlands*, Joint Dissenting Opinion of Judges R. Ryssdal et al., 29.5.1986, ECtHR Series A No. 99, paras. 23-24; R. K. Gardiner (note 34), 275.

¹¹¹ V. Fon/E. Parisi, Stability and Change In International Customary Law, Supreme Court Economic Review 17 (2009), 279 et seq., 280.

¹¹² Statute of the International Court of Justice, 24.10.1945, 59 Stat. 1031.

¹¹³ See also Statute of the Permanent Court of International Justice, 16.12.1920, 6 LNTS 390.

¹¹⁴ See *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. USA) (Merits)*, ICJ Reports 1986, 14 et seq., para. 207; *Continental Shelf (Libya v. Malta)*, ICJ Re-

elements are part of an adjustment process that enables constant development attached to States' current conceptions of legality.

Extensive international case law as well as literature provide various attempts at distinguishing and defining the two elements. For example, *R. Higgins* assumes the emergence of a customary rule of law, "where there has grown up a clear and continuous habit of performing certain actions in the conviction that they are obligatory under international law".¹¹⁵ *A. A. D'Amato* considers State practice and *opinio juris* to be the articulation of a rule complemented by the commitment to act consistent with the articulated act.¹¹⁶ *T. Treves*, among many others, distinguishes between an objective and a subjective sphere,¹¹⁷ *A. Pellet* between a material and a psychological element.¹¹⁸

The great variety of definitions reflects a degree of uncertainty among jurists. International legal academia is still divided when it comes to clearly defining the rules of formation and modification of customary law.¹¹⁹ There even seems to be an ongoing turf battle between those who, given the significant rise of international treaties, declare customary law dead¹²⁰ and others who emphasise custom's inherent flexibility as the only tool to respond to current political and military enmeshments.¹²¹

The uncertainty of custom's composition and influence, indeed, should not be mistaken as an indication of its declining relevance in the interna-

ports 1985, 13 et seq., para. 27; *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. USA)*, ICJ Reports 1984, 246 et seq., para. 111; *North Sea Continental Shelf (Germany v. Denmark; Germany v. Netherlands)*, ICJ Reports 1969, 3 et seq., para. 77; *S.S. Lotus (France v. Turkey)*, 7.9.1927, PCIJ Series A No. 10, 28. See also *Prosecutor v. Hadhihasanović*, ICTY-01-47-AR72, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, 16.7.2003, para. 12.

¹¹⁵ *R. Higgins*, *The Development of International Law Through Political Organs of the United Nations*, 1963, 1 et seq.

¹¹⁶ *A. A. D'Amato*, *The Concept of Custom in International Law*, 1971, 88.

¹¹⁷ *T. Treves*, *Customary International Law*, in: R. Wolfrum (note 44), paras. 8-9, <<http://opil.ouplaw.com>>.

¹¹⁸ *A. Pellet*, Article 38, in: A. Zimmermann/K. Oellers-Frahm/C. To, uschat/C. J. Tams, *The Statute of the International Court of Justice: A Commentary*, 2nd ed. 2012, 731 et seq., paras. 210, 217.

¹¹⁹ *M. Byers*, *Custom, Power and the Power of Rules: International Relations and Customary International Law*, 1999, 129 et seq.

¹²⁰ See, e.g., *J. P. Trachtman*, *Reports of the Death of Treaty Are Premature, But Customary International Law May Have Outlived Its Usefulness*, *AJIL Unbound*, 29.4.2014, <www.asil.org>; *J. I. Charney*, *Universal International Law*, *AJIL* 87 (1993), 529 et seq., 543; *G. J. H. van Hoof*, *Rethinking the Sources of International Law*, 1983, 107 et seq., 114.

¹²¹ See, e.g., *B. M. Szewczyk*, *Custom and Treaties as Interchangeable Instruments of National Policy*, *AJIL Unbound*, 30.4.2014, <www.asil.org>; *M. N. Shaw*, *International Law*, 7th ed. 2014, 52 et seq.; *M. E. Villiger* (note 86), 61; *A. A. D'Amato* (note 116), 12.

tional legal sphere.¹²² Quite the opposite, its responsiveness derives precisely from its fluid and impalpable nature.¹²³ Flexible approaches towards the determination of the two constitutive prerequisites by international courts and tribunals enable the establishment or modification of rules as responses to changed factual circumstances.

In the following sections, we will re-examine the individual components of State practice (a) and its interaction with the requirement of *opinio juris* (b). The third section then assesses custom's suitability to adapt to contemporary challenges and emerging needs based on its two components (c).

a) Responsiveness Through Preselected State Practice

General State practice may be defined as the continuation and repetition of a certain behaviour with reference to a specific type of situation.¹²⁴ Such behaviour comprises, *inter alia*, administrative acts, legislation, acts of the judiciary or even the conclusion of treaties.¹²⁵

Linking the creation of law to mere conduct, as opposed to a legislative procedure, leads to what *G. Jellinek* described as the "normative power of the factual".¹²⁶ Since law in this case follows facts, a change of policy-driven facts might ultimately provoke a change of law. Yet, not every behavioural pattern evidences the amendment of a customary rule or the creation of a new one.

In order to detect State practice relevant to the formation of custom, the ICJ has relied on two criteria, namely uniformity and consistency.¹²⁷ Although both elements initially served as strict requirements to identify State practice, the subsequent jurisprudence of the Court has watered them down

¹²² See *T. Treves* (note 117), para. 90.

¹²³ See *H. Thirlway*, *The Sources of International Law*, 2014, 9; *A. Roberts*, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, *AJIL* 95 (2001), 757 et seq., 784; *M. E. Villiger* (note 86), 61.

¹²⁴ ILC, Working Paper: Ways and means for making the evidence of customary international law more readily available, *Manley O. Hudson*, 3.3.1950, A/CN.4/16, para. 11.

¹²⁵ See *M. N. Shaw* (note 121), 58. As examples from case law, see, e.g., *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, ICJ Reports 2002, 3 et seq., 56, 58; *Right of Passage over Indian Territory (Portugal v. India)*, ICJ Reports 1960, 6 et seq., 39 et seq.; *Interhandel (Switzerland v. USA)*, ICJ Reports 1959, 6 et seq., 27; *Nottebohm (Liechtenstein v. Guatemala)*, ICJ Reports 1955, 4 et seq., 22 et seq.; *Fisheries (UK v. Norway)*, ICJ Reports 1951, 116 et seq., 131; *S.S. Lotus (France v. Turkey)* (note 114), 28.

¹²⁶ *G. Jellinek/W. Jellinek*, *Allgemeine Staatslehre*, 3rd ed. 1921, 333 et seq. See also *A. An-ter*, *Die normative Kraft des Faktischen: Das Staatsverständnis Georg Jellineks*, 2004.

¹²⁷ *Asylum (Colombia v. Peru)*, ICJ Reports 1950, 266 et seq., 276 et seq. See also *North Sea Continental Shelf* (note 114), para. 74; *M. E. Villiger* (note 86), 42.

significantly and thereby extended the scope of relevant State behaviour. As a result, the requirements for an evolving customary norm have been lowered, thereby increasing custom's adaptive capability. The following sections will analyse the ICJ's interpretation of the criterion of uniformity (aa) and shed light on whether the creation of custom depends on a certain time frame (bb), tracing in the ICJ's jurisprudence a process of slowly alleviating the required level of uniform and consistent State practice.

aa) The Criterion of Uniformity

Every day, numerous States create practice, which could potentially hint at the emergence of new customary rules. Inaction might equally amount to relevant practice, if it constitutes acquiescence in an emerging rule or compliance with a newly established prohibition.¹²⁸ The sheer quantity of States and the limited research capacity of the ICJ – as well as any other jurist in search of the state of the law – render a detailed analysis of every single State act simply impossible.¹²⁹ In the light of these practical constraints, the Court announced that, in order to prove uniform State practice, it was not necessary to establish absolute conformity.¹³⁰ This, of course, begs the question how much State practice suffices to meet the uniformity standard.

At a second glance, it becomes clear that it is not so much the number of States, but rather their (military or political) influence¹³¹ that accelerates the emergence of an established practice and a customary rule. *Y. Dinstein* clearly points at this bias by stating that “the most powerful states carry the greatest weight” in the formation process.¹³² It is thus unsurprising that international courts and tribunals show a preference for Western countries in

¹²⁸ See *M. N. Shaw* (note 121), 60 et seq. On acquiescence, see *Gulf of Maine* (note 114), para. 130.

¹²⁹ See *S. Talmon*, Determining Customary International Law: The ICJ's Methodology between Induction, Deduction and Assertion, *EJIL* 26 (2015), 417 et seq., 432.

¹³⁰ *Nicaragua (Merits)* (note 114), para. 186. See also *J. Rehman*, International Human Rights Law, 2nd ed. 2010, at 22; *J. Crawford* (note 22), 7.

¹³¹ *M. Byers*, Introduction: Power, Obligation, and Customary International Law, *Duke J. Comp. & Int'l L.* 11 (2001), 81 et seq., 84 (considering it “difficult to regard disparities of wealth and military power as irrelevant in the formation of customary rules”).

¹³² *Y. Dinstein*, The Conduct of Hostilities Under the Law of International Armed Conflict, 3rd ed. 2016, 6. See also *O. Schachter*, New Custom: Power, *Opinio Juris* and Contrary Practice, in: *J. Makarczyk*, Theory of International Law at the Threshold of the 21st Century: Essays in Honour of Krzysztof Skubiszewski, 1996, 531 et seq., 536 et seq.; *A. A. D'Amato* (note 116), 96.

their analysis¹³³ and often rely on fewer than a dozen States when examining the existence of a uniform State practice.¹³⁴ The ICJ further acknowledged that the practice of States “specially affected” by the potential rule in question might be of particular weight in certain cases.¹³⁵ The deduction of a customary rule is consequently often based on the analysis of a preselected practice of a limited number of States.¹³⁶ The sometimes impossible distinction between acquiescence and mere lack of opposition adds to this effect.¹³⁷ In the end, the ICJ itself, arguably constituting the source of statements on customary norms that are taken most seriously by scholars as well as States, determines whether the criterion of uniformity is met. The Court’s liberal approach towards the selection process of the relevant State practice turns the determination of a customary rule into “a matter of appreciation”.¹³⁸

Although this finding reveals a somewhat undemocratic¹³⁹ and hegemonic¹⁴⁰ nature of the determination of customary law,¹⁴¹ it also highlights a significant potential for the responsiveness of custom: A change in the behaviour of just a few (preselected) States may lead to an established State practice and ultimately the adjustment of customary law. Such altered behavioural pattern alone is however not sufficient to fulfil the requirement of State practice. The practice must additionally be consistent in its application. A high level of “fluctuations in behaviour”¹⁴² prevents the formation of consistent State practice and as such indicates a lack of coherent reaction to newly emerging circumstances.

Even though the question of how much State practice is needed in order to establish a new rule of custom seems to indicate a need for a particular

¹³³ M. Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument*, 2005, 355; J. P. Kelly, *The Twilight of Customary International Law*, Va. J. Int’l L. 40 (2000), 449 et seq., 469.

¹³⁴ See O. Schachter (note 132), 536; J. I. Charney (note 120), 537; A. M. Weisburd, *Customary International Law: The Problem of Treaties*, Vand. J. Transnat’l L. 21 (1988), 1 et seq., 6; A. Roberts (note 123), 767. For an example, see *S.S. “Wimbledon” (UK/France/Italy/Japan v. Germany)*, 17.8.1923, PCIJ Series A No. 1, 25 et seq.

¹³⁵ *North Sea Continental Shelf* (note 114), para. 73. See M. Byers (note 119), 37 et seq.; K. Wolfke, *Custom in Present International Law*, 2nd ed. 1993, 78.

¹³⁶ J. L. Goldsmith/E. A. Posner, *The Limits of International Law*, 2005, 24; J. I. Charney (note 120), 537.

¹³⁷ See J. I. Charney (note 120), 537, 544.

¹³⁸ M. E. Villiger (note 86), 43.

¹³⁹ M. Koskenniemi (note 133), 355; O. Schachter (note 132), 536; L. Henkin, *How Nations Behave: Law and Foreign Policy*, 2nd ed. 1979, 121.

¹⁴⁰ A. Roberts (note 123), 768.

¹⁴¹ For further criticism of the custom formation process, see J. Tasioulas, *In Defence of Relative Normativity: Communitarian Values and the Nicaragua Case*, Oxford J. Legal Stud. 16 (1996), 85 et seq., 123; A. A. D’Amato (note 116), 191 et seq.

¹⁴² *V. Fon/F. Parisi* (note 111), 282.

duration of such practice, the fulfilment of a time frame requirement is not *per se* necessary.

bb) Is There a Time Frame Criterion?

Initially, a “considerable period of time” was indispensable for the creation of admissible State practice,¹⁴³ as custom was seen as the result of an evolutionary process.¹⁴⁴ Nowadays, however, some suggest that even a single event suffices for the adaption of the law.¹⁴⁵ While the notion of “instant custom” is disputed,¹⁴⁶ the ICJ has significantly mitigated any strict temporal prerequisite. According to its judgment in the *North Sea Continental Shelf* case, the duration of State practice may be irrelevant as long as the practice is “both extensive and virtually uniform”.¹⁴⁷ The Court consequently emphasises the element of consistency rather than insisting on a specific duration. The time frame element therefore fades into the background as solely a relative requirement.¹⁴⁸

Accordingly, not only a long-standing conduct that evolves into a uniform practice over time, but also a short and intense pattern of behaviour can fulfil the *consuetudo* element. Of course, even the emergence of an “extensive and virtually uniform” practice as well as its subsequent acknowledgement necessarily requires the lapse of a certain amount of time.¹⁴⁹ Subsequently, conduct as evidence of customary rule will automatically increase over time and confirm the State practice. The time frame as such, however, does not constitute any additional threshold to the creation of customary law.¹⁵⁰

This observation adds to the apparent tendency towards lowering the requirements of the State practice criterion. While there are strong arguments

¹⁴³ ILC (note 124), para. 11. See also *M. P. Scharf*, Customary International Law in Times of Fundamental Change: Recognizing Grotian Moments, 2013, 6 et seq.; *J. F. Murphy*, The Evolving Dimensions of International Law: Hard Choices for the World Community, 2010, 16 et seq.; *M. E. Villiger* (note 86), 45; *A. A. D’Amato* (note 116), 56 et seq.

¹⁴⁴ *T. Treves* (note 117), para. 4; *A. Clapham* (note 18), 62.

¹⁴⁵ See e.g., *B. Cheng*, United Nations Resolutions on Outer Space: “Instant” International Customary Law?, I.J.I.L. 5 (1965), 23 et seq.

¹⁴⁶ See *M. N. Shaw* (note 121), 56; *M. Byers* (note 119), 161.

¹⁴⁷ *North Sea Continental Shelf* (note 114), para. 74.

¹⁴⁸ *M. E. Villiger* (note 86), 45. See also ILC, Draft conclusions on identification of customary international law adopted by the Commission, 2016, in: Report of the ILC, Sixty-eighth session (2.5.-10.6. and 4.7.-12.8.2016), GAOR Seventy-first session, Suppl. No. 10, A/71/10, 76 et seq., at 77 (draft Conclusion 8 (2)).

¹⁴⁹ *R. Piotrowicz*, The Time Factor in the Creation of Rules of Customary International Law, Polish Y.B. Int’l L. 21 (1994), 69 et seq.

¹⁵⁰ *J. Crawford* (note 22), 24; *R. Piotrowicz* (note 149).

against the ICJ's preselected screening process, a rule of custom may develop rather quickly under the prevailing approach. If only the practice of a few States suffices and if – at least when the practice is sufficiently extensive – no additional period of time is required, the formation of customary law accelerates and increases its adaptive capability significantly.

b) Responsiveness Through Flexible Interaction of Practice and *Opinio Juris*

The second constitutive element of customary law adds a psychological component to the formation process. *Opinio juris sive necessitates* refers to “the belief by a state that behaved in a certain way that it was under a legal obligation to act that way”.¹⁵¹ The ICJ defines it as requiring States to “feel that they are conforming to what amounts to a legal obligation”.¹⁵² Proving such a feeling is naturally difficult. Merely deriving it from the existence of practice alone is not sufficient, as a rule of custom must be distinguished from acts led by other motifs, such as courtesy or tradition.¹⁵³

During the past decades, the ICJ increasingly relied on resolutions adopted by the General Assembly in order to prove the existence of *opinio juris*.¹⁵⁴ In the *Nuclear Weapons Opinion*, the Court held that these resolutions “can, in certain circumstances, provide evidence important for establishing the existence of a [customary] rule”.¹⁵⁵

Yet, recourse must be held with “due caution”.¹⁵⁶ Not every resolution qualifies as a trigger for the formation of customary law. The ICJ heavily relies on factors such as the degree of support¹⁵⁷ as well as the existence of

¹⁵¹ *M. N. Shaw* (note 121), 53.

¹⁵² *North Sea Continental Shelf* (note 114), para. 77 (emphasis added).

¹⁵³ *M. N. Shaw* (note 121), 62–63. Evidence may be found in, *inter alia*, public statements or opinions of a State's executive, court decisions, or diplomatic correspondence, see ILC (note 148), Draft Conclusion 10(2). It may take the form of express recognition or acquiescence and tacit recognition, see ILC, Second report on identification of customary international law (*Michael Wood*, Special Rapporteur), 22.5.2014, A/CN.4/672, para. 77.

¹⁵⁴ See *N. Petersen*, The International Court of Justice and the Judicial Politics of Identifying Customary International Law, Preprints of the Max Planck Institute for Research on Collective Goods Bonn No. 2016/19, <<https://ssrn.com/abstract=2876543>> (forthcoming in *EJIL* 28 (2017)), 12 (identifying UN General Assembly resolutions as one of the main identification mechanism for customary law by the ICJ). See also *S. J. Choi/M. Gulati*, Customary International Law: How Do Courts Do It?, in: C. A. Bradley, *Custom's Future: International Law in a Changing World*, 2016, 117 et seq., 131 et seq.

¹⁵⁵ *Nuclear Weapons Opinion* (note 61), para. 70.

¹⁵⁶ *Nicaragua (Merits)* (note 114), para. 188.

¹⁵⁷ *Nuclear Weapons Opinion* (note 61), para. 71.

follow-up or implementation measures.¹⁵⁸ Unanimously adopted resolutions may in particular qualify as evidence of a general legal belief.¹⁵⁹ By referring to such resolutions, the ICJ chose a resource-efficient way to detect *opinio juris*: General Assembly resolutions pool the UN member States' attitudes toward a behavioural regularity and present a portrayal of the current legal understanding. *A. Pellet* therefore labelled them "judicial jokers".¹⁶⁰

Although the threshold for assuming the existence of *opinio juris* remains rather high in the ICJ's case-law,¹⁶¹ the reference to General Assembly resolutions simplifies the identification of the *opinio juris* element. This reliance on General Assembly resolutions for conclusively proving the existence of an *opinio juris*¹⁶² also has a significant effect on the potential of custom's responsiveness. If the adoption of resolutions can replace the process of slowly evolving legal conviction, the creation of a customary rule can be presumed much faster.

Yet, it is not the determination of the individual components of customary law which creates custom's flexible nature. It is rather the ICJ's flexible – or put more critically: inconsistent – jurisprudence regarding the relation of the two elements and its method of detecting a customary norm, which turns custom into a responsive source of international law. For when determining the existence of a customary rule, the Court has alternated between different methodological approaches.

Initially, the ICJ followed an inductive¹⁶³ approach, deriving law from practice and inferring a generally applicable norm from the individual case.¹⁶⁴ The Court thus went from the specific to the general.¹⁶⁵ The collec-

¹⁵⁸ *B. D. Leppard*, Customary International Law: A New Theory With Practical Applications, 2010, 212.

¹⁵⁹ ILC (note 153), para. 76(g).

¹⁶⁰ *A. Pellet* (note 118), para. 233.

¹⁶¹ See *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, ICJ Reports 2012, 99 et seq., para. 55; *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo) (Preliminary Objections)*, ICJ Reports 2007, 582 et seq., para. 90.

¹⁶² See e.g. *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo (Advisory Opinion)*, ICJ Reports 2010, 403 et seq., para. 80.

¹⁶³ See also *W. T. Worster*, The Inductive and Deductive Methods in Customary International Law Analysis: Traditional and Modern Approaches, *Geo. J. Int' l L.* 45 (2014), 445 et seq., 448 (describing induction as "drawing inferences from specific observable phenomena to general rules").

¹⁶⁴ *A. Roberts* (note 123), 762. See, e.g., *Nottebohm* (note 125), 22; *S.S. Lotus (France v. Turkey)* (note 114), 18, 23, 25.

¹⁶⁵ *S. Talmon* (note 129), 420.

tion of a “pattern of empirically observable individual instances”¹⁶⁶ was considered the focal point in the process of identifying a customary rule.¹⁶⁷ In *Gulf of Maine*, the ICJ expressly held that a customary norm “can be tested by induction based on the analysis of a sufficiently extensive and convincing practice”.¹⁶⁸ *Opinio juris* only played an inferior and reaffirming role in this traditional form of identifying customary law.¹⁶⁹ The Court did not stop following this approach entirely. More recently, in *Jurisdictional Immunities*, the ICJ again employed the inductive method.¹⁷⁰

The 1986 *Nicaragua* judgment, however, marked the ICJ’s temporary departure from that approach. In that case, the Court relied exclusively on *opinio juris*, whereas it did not examine State practice in order to verify the alleged customary nature of the rules reflected in the General Assembly’s *Friendly Relations Declaration*.¹⁷¹ This deductive approach was reapplied in *Armed Activities*, where the Court exclusively relied on three General Assembly resolutions to conclude that the principle of permanent sovereignty over natural resources constitutes customary international law.¹⁷² Not only did the ICJ shift its focus from the factual to the psychological element,¹⁷³ it also inverted its method of determination. Instead of inferring a general rule from behavioural patterns, it now deduced the existence of a normative standard, which it subsequently substantiated with States’ belief to act out of a legal obligation.¹⁷⁴

¹⁶⁶ S. Talmon (note 129), 420. See also N. Petersen (note 154), 6; N. Petersen, Rational Choice or Deliberation? – Customary International Law between Coordination and Constitutionalization, JITE 165 (2009), 71 et seq., 72.

¹⁶⁷ N. Petersen, Customary Law without Custom? Rules, Principles, and the Role of State Practice in International Norm Creation, Am. U. Int’l L. Rev. 23 (2008), 275 et seq., 278.

¹⁶⁸ *Gulf of Maine* (note 114), para. 111.

¹⁶⁹ A. Roberts (note 123), 758.

¹⁷⁰ See *Jurisdictional Immunities* (note 161), paras. 55-56.

¹⁷¹ *Nicaragua (Merits)* (note 114), paras. 188-189. For the declaration, see UN General Assembly (UNGA), Resolution 2625 (XXV): Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, 24.10.1970, A/8028, 121 et seq.

¹⁷² *Armed Activities on the Territory of the Congo (Congo v. Uganda)*, ICJ Reports 2005, 168 et seq., para. 244. See also *Nuclear Weapons Opinion* (note 61), para. 70.

¹⁷³ N. Petersen (note 154), 6.

¹⁷⁴ A. Roberts (note 123), 759. See also S. Talmon (note 129), 420; W. T. Worster (note 163), 447 et seq., 455 et seq.; J. Kammerhofer, Uncertainty in the Formal Sources of International Law: Customary International Law and Some of Its Problems, EJIL 15 (2004), 523 et seq., 542.

The ICJ's "modern" approach¹⁷⁵ accordingly attaches significantly more importance to the "sense of legal obligation".¹⁷⁶ By relying heavily on General Assembly resolutions, the Court vests a quasi-legislative power in the body, linking the formation of custom to a consensus between States and thus enhances the democratic legitimacy of customary law, possibly counterbalancing the undemocratic nature of State practice. It is for the benefit of smaller and less influential States to extend the forum of discussion to the General Assembly with equal voting rights as opposed to leaving the decision to a low number of preselected policymakers. Reliance on such resolutions, in the end, further reduces the duration of the formation process of a customary norm, accelerating the law-making process.¹⁷⁷

Despite almost 70 years of jurisprudence, the ICJ still lacks a clear and consistent method of detecting a customary rule.¹⁷⁸ *S. Talmon* therefore criticises that

"[t]he main method employed by the Court is not induction or deduction but assertion. In the large majority of cases, the Court does not offer any (inductive or deductive) reasoning but simply asserts the law as it sees fit."¹⁷⁹

A statistical analysis of 175 determinations of customary international law by the ICJ as well as other international tribunals conducted by *S. J. Choi* and *M. Gulatti* points into a similar direction: The authors come to the conclusion that

"international courts do not come anywhere close to engaging in the type of analysis the officially stated two-part rule for the evolution of [customary international law] sets up".¹⁸⁰

It is this uncertainty regarding the applied method as well as the used means of evidence, which turns the detection of a customary rule into an almost unpredictable and largely subjective matter of appreciation. It is hard, if not impossible, to anticipate whether international courts, most prominently the ICJ, accepts a certain practice or specific statements as suf-

¹⁷⁵ *Roberts* distinguishes between "modern" and "traditional" custom, see *A. Roberts* (note 123). The two terms can also be equated with the inductive and deductive approach, see *W. T. Worster* (note 163).

¹⁷⁶ *A. Roberts* (note 123), 758; *B. Cheng* (note 145). See also *N. Petersen* (note 154), 6; *P. Thielbörger* (note 55), 235.

¹⁷⁷ *S. Talmon* (note 129), 429; *C. A. Bradley/J. L. Goldsmith*, Customary International Law as Federal Common Law: A Critique of the Modern Position, *Harv. L. Rev.* 110 (1997), 815 et seq., 840.

¹⁷⁸ See *S. Talmon* (note 129), 431.

¹⁷⁹ *S. Talmon* (note 129), 434.

¹⁸⁰ *S. J. Choi/M. Gulati* (note 154), 147.

ficient to establish a customary norm. In the end, it will always boil down to a “mixture of induction, deduction and assertion”¹⁸¹ based on the availability of adequate evidence. Yet, this flexible interaction of the two constitutive elements also bears the great advantage of creating some leeway, which allows the Court to respond to new developments and to operate within the limits of the law. The formation process of a customary norm – or rather the identification thereof – is therefore highly flexible.

c) The Potential and Limits of Responsiveness in Customary Law

Examining the ICJ’s jurisprudence has shown that both elements, State practice and *opinio juris*, have been watered down to some extent. As observed by *M. N. Shaw*, “the duration and generality of a practice may take second place to the relative importance of the states precipitating the formation of a new customary rule”.¹⁸² With regard to *opinio juris*, increased reference to General Assembly resolutions as “judicial jokers” somewhat replaces an assessment of the subjective element of the States concerned.

The ICJ consequently seems to have softened the constitutive elements of the formation and modification of a customary law norm to a degree that makes it hard to detect clear limits. The fluctuating methodology in its jurisprudence renders reliable predictions of the existence of a customary rule rather difficult. In the light of the lacking consistent doctrinal approach, the Court preserves its *de facto* monopoly on the final determination of customary norms. The tension between legal stability and flexibility thereby appears to have been resolved in favour of the latter. As commendable as this development might be for the adaptive capability of law, as threatening it may prove for the legitimacy of custom. The validity of customary international law has frequently been contested in academia,¹⁸³ based, *inter alia*, on the lack of a clear and formal formation process.¹⁸⁴ The observed leniency of the Court certainly fuels this criticism. Indeed, many scholars are reluctant to the Court’s modern approach and fear the emergence of a single-element theory.¹⁸⁵ *A. A. D’Amato* even considered this development as a “trashing” of customary law due to an alleged misunderstanding of the no-

¹⁸¹ *S. Talmon* (note 129), 441.

¹⁸² *M. N. Shaw* (note 121), 58.

¹⁸³ *A. A. D’Amato* (note 116), 170; *J. P. Kelly* (note 133), 459; *N. Roughan*, Democratic Custom v. International Customary Law, *V.U.W. L. Rev.* 38 (2007), 403 et seq.

¹⁸⁴ *J. P. Kelly* (note 133), 460.

¹⁸⁵ *H. Thirlway* (note 123), 53; *J. Beckett*, The End of Customary International Law? A Purposive Analysis of Structural Indeterminacy, 2008, 114 et seq.

tion of *opinio juris*.¹⁸⁶ Others qualify the Court's methodological approach as a mere justification of its own authority to find and interpret rules of customary law.¹⁸⁷

The Court's choice of methodology may be explained by the varying practical availability of evidence for State practice or *opinio juris*. Recognising this divergence of available proof, *F. Kirgis* developed the idea of a "sliding scale": Practice and *opinio juris* are, according to him, interchangeable in the sense that the required level of frequent and consistent State practice depends on the degree of provable *opinio juris*, and *vice versa*.¹⁸⁸ The method of inferring a customary rule might thus be based on factual rather than doctrinal reasons.

While the ICJ's motives for its varying approach may be numerous and hard to reconstruct, its impact on custom's potential responsiveness is clear. The lowering of hurdles for the formation process, combined with the shifting focus towards General Assembly resolutions as evidence for *opinio juris*, renders quick responses through customary law possible.

3. The Responsiveness of Treaties and Custom between Violation and Progress

The foregoing analysis has revealed that the two main sources of international law provide different modalities of achieving responsiveness. A treaty may be adapted informally through dynamic interpretation or through the incorporation of the later practice of its parties. A rule of customary law inherently depends on the conduct of States and their belief of what is the law, which renders their creation and modification a process that is potentially always in motion.

The patterns of how a legal rule might respond to changing circumstances does, however, not only relate to its source, but also to the actor facilitating this response. Evolutive interpretation is, for the most part, applied by courts, tribunals and other bodies, leading to court-driven responsiveness of a treaty. Subsequent practice as well as the formation of custom, in turn, accommodates State-driven responsiveness. It provides States with the necessary flexibility to address change under an existing treaty regime or under

¹⁸⁶ A. A. D'Amato, Trashing Customary International Law, *American Journal of International Law* 81 (1987), 101 et seq.

¹⁸⁷ H. G. Cohen, Methodology and Misdirection: Custom and the ICJ, *EJIL: Talk!*, 1.12.2015, <www.ejiltalk.org>.

¹⁸⁸ *F. Kirgis*, Custom on a Sliding Scale, *AJIL* 81 (1987), 146 et seq.

customary law in an informal consensus-building exercise, without the need for formal negotiations and cumbersome drafting processes.¹⁸⁹

Yet, the extent to which change is to be accommodated is a delicate issue. Diverging practice in the context of an established rule may, albeit not necessarily, constitute a *prima facie* violation of that rule. It is therefore crucial to distinguish between acts contributing to the establishment of a (new) practice on the one hand and mere violations of a rule on the other. The determination of the turning point at which the act in question loses its “violative nature”¹⁹⁰ and starts to deploy a modifying effect is a highly difficult issue. *H. W. A. Thirlway*, for example, argued that “an accumulation of acts contrary to existing law abrogate[s] that law and give[s] rise to a new rule”.¹⁹¹ The legal value of such acts thus largely depends on the reaction of other States: If the “subsequent objector” is confronted with general opposition by other States, its conduct constitutes a violation of the rule;¹⁹² if other States, however, accept this altered behavior, a modified law may emerge.¹⁹³ Urgency may call for a fast adaption of the law and may therefore accelerate the process of modification.¹⁹⁴ A “momentum of widespread defection” followed by general approval or acquiescence may thus fastly create a new rule of international law.¹⁹⁵ The initial breach of a norm can thus trigger the alteration of the pre-existing law.

Change may, however, not only occur through the modification of the law but equally through re-interpretations.¹⁹⁶ Yet, adapted interpretations do not formally alter a rule, but merely adjust its understanding.¹⁹⁷

In the case of treaties, it is important to distinguish between the non-modifying interpretation of a norm and the informal modification of the treaty terms through subsequent practice.¹⁹⁸ The letter of the law and the

¹⁸⁹ *W. J. Aceves*, The Economic Analysis of International Law: Transaction Cost Economics and the Concept of State Practice, *University of Pennsylvania Journal of International Economic Law* 17 (1996), 995 et seq., 1005, 1056.

¹⁹⁰ *M. E. Villiger* (note 86), 220.

¹⁹¹ *H. W. A. Thirlway* (note 5), 131. See also *A. A. D’Amato* (note 116), 93.

¹⁹² *V. Fon/F. Parisi* (note 111), 293.

¹⁹³ See *V. Fon/F. Parisi* (note 111), 294; *R. Crootof*, Change Without Consent: How Customary International Law Modifies Treaties, *Yale J. Int’l L.* 41 (2016), 237 et seq., 288 et seq.

¹⁹⁴ *M. E. Villiger* (note 86), 220.

¹⁹⁵ See *V. Fon/F. Parisi* (note 111), 293.

¹⁹⁶ See also *M. E. Villiger* (note 86), 213.

¹⁹⁷ See *T. Ruys*, “Armed Attack” and Article 51 of the UN Charter: Evolutions in Customary Law and Practice, 2010, 22.

¹⁹⁸ *Öcalan v. Turkey* (note 92), para. 163; *Soering v. UK* (note 92), para. 103; *T. Ruys* (note 197), 24; *M. E. Villiger* (note 86), 55; *J. Klabbers* (note 44), para. 14. It seems unclear whether the notion of modifying subsequent practice is distinct from the subsequent development of a rule of custom that modifies a treaty rule. *R. Crootof* suggests that there is a qualitative differ-

meaning of the treaty term thereby constitute the demarcation line. Readings, which contradict the “letter and spirit”¹⁹⁹ of a provision cross the limits of interpretation and consequently amount to a modification of the law.²⁰⁰ Arguably, the ICJ overstepped this line when the Court approved treaty “interpretations” by States, which clearly overstretched the reasonable understanding of the terms in question.²⁰¹ The Court’s reluctance to reveal these “pseudo-interpretations” as amendments and correctly refer to them as modifications demonstrates that both States and courts quite intentionally contribute to the blurriness of the distinction. Indeed, as acknowledged by the ILC, “States and courts prefer to make every effort to conceive of an agreed subsequent practice of the parties as an effort to interpret the treaty in a particular way”, arguably for fears of adverse ramifications for legal stability and political legitimacy.²⁰² The fact that altered interpretations are easier to prove and justify than modifications of the pre-existing law might add to this effect; this burden even increases the more that amendment deviates from the rationale of the original rule.²⁰³

While the distinction remains blurry,²⁰⁴ it is an important distinction to be made. To recall, subsequent practice constitutes only one element of interpretation which may be disregarded if it contradicts, *inter alia*, the object and purpose of the treaty. The possible trump of teleological considerations over the parties’ interpretation is, in contrast, not possible in case of an in-

ence insofar as subsequent practice required the universal approval of all States, whereas a customary rule would come into existence even without such universal consent, but with a “supermajority of members of the international legal order. This distinction is surely based on a strict reading of Art. 31 (3) (b) VCLT. Yet, at least when considering the liberal understanding of the agreement of the parties as displayed by international courts and tribunals, these doctrinal differences disappear. *R. Crootof* (note 193), 278.

¹⁹⁹ *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (Advisory Opinion)*, ICJ Reports 1950, 221 at 229.

²⁰⁰ See also *T. Ruys* (note 197), 23; *R. Moloo* (note 85), 83; *U. Linderfalk*, *On the Interpretation of Treaties: The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties*, 2007, 169.

²⁰¹ See *South West Africa Opinion* (note 21), para. 22; *Wall Opinion* (note 17), paras. 27-28. See *J. Arato* (note 75), 326 et seq.; *P. Sands* (note 90), 974 (para. 40); *G. P. McGinley* (note 66), 224; *Temple of Preah Vihear (Cambodia v. Thailand)*, Dissenting Opinion Sir P. Spender, ICJ Reports 1962, 134: “This, in my view, is not treaty interpretation.”; *Oil Platforms (Iran v. USA)*, Separate Opinion of Judge P. Kooijmans, ICJ Reports 2003, 246 et seq., para. 46; *Oil Platforms (Iran v. USA)*, Separate Opinion of Judge B. Simma, ICJ Reports 2003, 324 et seq., para. 9.

²⁰² ILC (note 34), 180 (para. 38 of the commentaries to draft Conclusion 7).

²⁰³ See *R. Crootof* (note 193), 262 et seq.

²⁰⁴ See, e.g., ILC, Third Report on the law of treaties, by *Sir Humphrey Waldock*, Special Rapporteur, in: ILCYB 1964, Vol. II, 5 et seq., 60 (para. 25). See ILC (note 87), 236 (para. 1 of the commentaries to draft Art. 38).

formal treaty amendment. Such an amendment becomes part of the treaty and thus binding upon the member States.²⁰⁵ This could, in theory, lead to the peculiar result that the interpreter could legitimately disregard an interpretation that contradicts the treaty's rationale, but that he is bound by an amendment that conflicts even stronger with the original agreement.²⁰⁶

It is ultimately the threshold for the modification of the law, which prevents the hasty adjustment of a norm as a result of altered State behaviour. The nature of the norm thereby sets the standard, as divergence from integral norms must not be presumed as steps towards reinterpretations or amendments, but as violations. Yet, the distinction between violations on the one hand and (re-)interpretations or modifications on the other cannot be drawn in the abstract but depends on the individual actors involved, the specific circumstances, and the nature of the rule in question.

Courts and tribunals overall play a crucial role in determining and facilitating the responsiveness of the law. They define the requirements and appreciate the existence or non-existence of an established practice and *opinio juris*.²⁰⁷ The most striking example is the treatment of the element of State practice in both sources of law by the ICJ. Not only did the Court infer approval from silence, it also favored certain States while disregarding opposing practice by others. In the case of the interpretation of the UN Charter as well as the identification of customary law, the ICJ has significantly empowered the General Assembly as well as the Security Council by putting particular weight on their (majority) decisions.²⁰⁸ Although the ICJ thereby watered down the requirements for establishing a consistent and uniform State practice, it equally enhanced the responsiveness of the two sources.

Yet, the liberal understanding of the requirements for a consensus (under custom and under a treaty) as well as the stretching of the limits of interpretation also raise concerns.²⁰⁹ The ECtHR, for example, is regularly accused of overstepping its mandate.²¹⁰ In the worst case, accommodating too much

²⁰⁵ U. Linderfalk (note 200), 168.

²⁰⁶ Unless in the rare case of a *jus cogens* provision.

²⁰⁷ See S. Talmon (note 129), 433

²⁰⁸ J. Arato (note 75), 350.

²⁰⁹ E.g., M. Bossuyt, Should the Strasbourg Court Exercise More Self-Restraint? On the Extension of the Jurisdiction of the European Court of Human Rights to Social Security Regulations, HRLJ 28 (2007), 321 et seq. See also Y. Tanaka (note 4), 159; R. Bernhardt (note 26), 23.

²¹⁰ See, e.g., B. B. Hale (note 49), 17; L. Hoffmann, The Universality of Human Rights, L.Q.R. 125 (2009), 416 et seq.; I. Sinclair (note 70), 137. On the claim of "judicial activism", see in particular F. Zarbiyev, Judicial Activism in International Law – A Conceptual Framework for Analysis, Journal of International Dispute Settlement (2012), 247 et seq. The ECtHR's margin of appreciation may be seen as a respond to such criticism, see C. Djefal (note

change could thus threaten both the authority of the interpreting body as well as the authority of the rule itself. In the best case, these approaches fulfil the needs of international life, caused by its inertia to formally develop the law and demanded by the very mandate of international courts, tribunals, and other treaty bodies.²¹¹

The following two case studies will illustrate how States, international organisations and courts utilise and apply the modalities of achieving responsiveness of the law in practice. They will show how the pre-existing legal framework accommodated change resulting from altered State behavior in response to the threats of terrorism.

III. International Law's Response to Contemporary Challenges

In the history of international law, a few major events have significantly impacted the existing legal order by shifting the balance of power, by creating new fundamental norms, or by questioning the appropriateness of hitherto incontrovertible rules. The atrocities committed on 11.9.2001 in the US ("9/11") and the subsequent reactions to global terrorism by States certainly qualify as what *M. P. Scharf* labels "Grotian Moments" of international law.²¹² The international community has been struggling to respond to such crimes and to address continuing threats. *H. Duffy* urges in this context that "the impact of such attacks depends on the responses to them".²¹³ The list of reactions is long, ranging from international military operations to the adoption of new domestic legislation. Two of the most prominent examples are the increasing proliferation of mass surveillance (1.) and military operations allegedly justified by a right to self-defence against terrorist groups (2.). Whereas the former touches upon the scope and limits of the human right to privacy, the latter challenges the traditional interpretation of the

98), 306 et seq.; *M. Saul*, The European Court of Human Rights' Margin of Appreciation and the Processes of National Parliaments, HRLR 15 (2015), 745 et seq. Similarly, the Security Council was criticised for allegedly acting *ultra vires* by adopting certain quasi-legislative measures, see *E. Rosand*, The Security Council as "Global Legislator": *Ultra Vires* or *Ultra Innovative?*, Fordham Int'l L. J. 28 (2005), 542 et seq.

²¹¹ See, e.g., *E. Rosand* (note 210); *A. M. Danner*, When Courts Make Law: How the International Criminal Tribunals Recast the Laws of War, Vand. L. Rev. 59 (2006), 1 et seq., 50; *H. Lauterpacht* (note 2), 256; *F. Zarbiyev* (note 210), 269 et seq.

²¹² *M. P. Scharf* (note 143).

²¹³ *H. Duffy*, The "War on Terror" and the Framework of International Law, 2nd ed. 2015, 1.

right to self-defence and the prohibition of the use of force. Both cases have introduced altered perspectives on the pre-existing understanding of the legal framework, thus confronting existing law with new realities. Further, both cases are of a particular nature as they concern integral norms, i.e. human rights on the one and the prohibition of the use of force under the UN Charter and customary international law on the other hand. Consequently, a caveat is in order: The subsequent case studies are not indicative of the international legal order as such. Rather, they concern a set of norms to which the question of responsiveness is of particular importance.

It is most crucial to develop a deeper understanding of the responsiveness of the right to self-defence as well as the human rights system, as both regimes demonstrate an increased need for evolution. At the same time, their fundamental importance for the international legal order calls for precaution towards premature adaption to current political trends. The following two case studies will therefore examine how States, international organisations, as well as courts have addressed emerging realities that seem to contradict the traditional readings of integral norms. They will shed light on the question of which degree of responsiveness is necessary and appropriate to tackle terrorism without jeopardising the integrity of the law.

1. Secret Surveillance and the Human Right to Privacy: Responsiveness Through Interpretation by the European Court of Human Rights

In the fight against international terrorist threats, States increasingly rely on digital surveillance techniques to prevent atrocities and to capture and punish those planning or committing terrorist attacks. Over the last years, States have gained, expanded, and perfected their abilities to collect and store, process and transfer meta- and content data of digital communications at home and abroad.²¹⁴ *E. Snowden's* revelations have painted an Orwellian picture of mass surveillance by the “Five Eyes”, namely Australia, Canada, New Zealand, the UK, and the US. Even more States seem to be involved in these activities, while many others have installed surveillance

²¹⁴ On the legality of foreign surveillance, see *I. Georgieva*, The Right to Privacy under Fire – Foreign Surveillance under the NSA and the GCHQ and Its Compatibility with Art. 17 ICCPR and Art. 8 ECHR, *Utrecht Journal of International and European Law* 31 (2015), 104 et seq.; *M. Milanović*, Human Rights Treaties and Foreign Surveillance: Privacy in the Digital Age, *Harv. Int'l. L.J.* 56 (2015), 81 et seq.

programmes of their own.²¹⁵ Modern surveillance techniques²¹⁶ have empowered intelligence agencies to potentially create detailed profiles of everyone, everywhere, at any time. The retention and use of metadata alone, as the Court of Justice of the European Union (CJEU) put it, “may allow very precise conclusions to be drawn concerning the private lives of the persons [affected]”.²¹⁷

As a response, many stress the crucial importance of the human right to privacy in shielding one’s private life and autonomy against excessive interference through surveillance.²¹⁸ Although the right was codified long before today’s technology was even conceivable, the existing framework is applicable in the digital age without meeting definitional obstacles.²¹⁹ An exhaustive, overarching definition of the term “privacy” is, in fact, non-existent.²²⁰ The UN Human Rights Committee and the ECtHR have addressed issues of privacy on a case-by-case basis.²²¹ The vagueness of the term and corresponding lack of constraints have subsequently led privacy to be associated

²¹⁵ See, e.g., C. M. Wong, Internet at a Crossroads: How Government Surveillance Threatens How We Communicate, in: Human Rights Watch, World Report 2015, 2015, 14 et seq.; Reporters Without Borders, Enemies of the Internet, 2014, <<http://12mars.rsf.org>>.

²¹⁶ We understand “surveillance” as a non-technical umbrella term covering all sorts of data collection, storage, processing, transfer, etc. See M. Milanović (note 214), 86.

²¹⁷ *Joined Cases C-293/12 & C-594/12, Digital Rights Ireland Ltd. v. Minister for Communications and Others*, 8.4.2014, para. 27, available at <<http://curia.europa.eu>>. For a discussion of that judgment, see F. Fabbrini, Human Rights in the Digital Age: The European Court of Justice Ruling in the Data Retention Case and Its Lessons for Privacy and Surveillance in the United States, Harvard Human Rights Journal 28 (2015), 65 et seq.

²¹⁸ E.g., A. Preston, The Death of Privacy, The Guardian, 3.8.2014, <www.theguardian.com>; J. C. York, The Chilling Effects of Surveillance, Al Jazeera, 25.6.2013, <www.aljazeera.com>.

²¹⁹ See UNGA, Resolution 68/167: The right to privacy in the digital age, 21.1.2014, A/RES/68/167, para. 3.

²²⁰ See UN Human Rights Council (UNHRC), Report of the Special Rapporteur on the right to privacy (*Joseph A. Cannataci*), 8.3.2016, A/HRC/31/64, para. 20; O. Diggelmann/M. N. Cleis, How the Right to Privacy Became a Human Right, HRLR 14 (2014), 441 et seq.; M. Nowak, U.N. Covenant on Civil and Political Rights: CCPR Commentary, 2nd ed. 2005, 385. On different conceptions and definitions of privacy, see D. J. Solove, Conceptualizing Privacy, Cal. L. Rev. 90 (2002), 1087 et seq., 1099 et seq.; A. D. Moore, Defining Privacy, Journal of Social Philosophy 39 (2008), 411 et seq., 425; W. A. Parent, A New Definition of Privacy for the Law, Law and Philosophy 2 (1983), 305 et seq., 306; S. D. Warren/L. D. Brandeis, The Right to Privacy, Harv L. Rev. 4 (1890), 193 et seq.

²²¹ D. J. Harris/M. O’Boyle/E. P. Bates/C.M. Buckley, Law of the European Convention on Human Rights, 3rd ed. 2014, 36; I. Roagna, Protecting the Right to Respect for Private and Family Life Under the European Convention on Human Rights, Council of Europe, Human Rights Handbooks, 2012, <www.coe.int>, 12. See, e.g., *Pretty v. UK* (note 48), para. 61; CCPR, General comment No. 16: Art. 17 (Right to privacy), 8.4.1988, reprinted in: HRI/GEN/1/Rev.9 (Vol I) (2008), 191 et seq.

with human autonomy and liberty in increasing variations.²²² Indeed, its susceptibility to change renders “privacy” a perfect example of a term open to evolution. Applied to the digital context, one manifestation of the right is undoubtedly the protection of personal data against access, storage, or process by others, especially governmental agencies.²²³ Accordingly, surveillance activities constitute clear interferences with the right to privacy.²²⁴ These interferences, of course, are being largely justified by the protection of national security, especially in the face of terrorism. The increasing practice of States to seemingly value security above individual freedom has become a crucial issue for human rights law. The appointment of a Special Rapporteur on the right to privacy in the digital age within the UN framework²²⁵ is indicative of growing concerns of the human rights community, but also of increasing awareness on the side of States.

The particularities of the response of human rights law, especially the ECHR, form the essence of the following case study. The propagation of secret digital surveillance does not only threaten the enforcement and judicial control of human rights standards, but also questions how far the Convention should accommodate trends in favour of surveillance. Accordingly, we will point out a few considerations as to how responsiveness is introduced into the human right to privacy in the face of secret surveillance measures.

The European Convention is arguably the most sophisticated human rights system which regularly informs the interpretation of universal as well as other regional human rights instruments.²²⁶ This is likely to be the case

²²² See *O. Diggelmann/M. N. Cleis* (note 220), 458; *I. Georgieva* (note 214), 104. See also *H. T. Gómez-Arostegui*, *Defining Private Life Under the European Convention on Human Rights by Referring to Reasonable Expectations*, *Cal. W. Int'l L. J.* 35 (2005), 153 et seq., 160; *C. Grabenwarter*, *European Convention on Human Rights: Commentary*, 2014, 187. But see *J. Griffin*, *The Human Right to Privacy*, *San Diego Law Review* 44 (2007), 697 et seq., 717 (arguing that many aspects fall under the notion of liberty, not privacy).

²²³ See *Liberty and Others v. UK*, 01.07.2008, (2009) 48 EHRR 1, para. 56; *M. N. Schmitt* (ed.), *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations*, 2017, 191 (para. 12); *C. Grabenwarter* (note 222), 189; *J. Griffin* (note 222), 702 et seq.; *M. Nowak* (note 220), 200.

²²⁴ See CCPR, *Concluding observations on the fourth periodic report of the United States of America*, 23.4.2014, CCPR/C/USA/CO/4, para. 22; UNHRC, *The right to privacy in the digital age* (Report of the Office of the United Nations High Commissioner for Human Rights), 30.6.2014, A/HRC/27/37, para. 20; *I. Georgieva* (note 214), 117.

²²⁵ See, e.g., UNGA (note 219), para. 1; UNGA, *Resolution 69/166: The right to privacy in the digital age*, 10.2.2015, A/RES/69/166, para. 1 (both reaffirming the right to privacy in the digital age); Human Rights Council Res. 28/16, 1.4.2015, para. 4 (appointing a special rapporteur on the right to privacy).

²²⁶ See *S. Walker* (note 10).

for the issue at hand as well, as the wording and interpretation of the substantive privacy protections under other human rights treaties are comparable to those of the ECHR.²²⁷ From a practical consideration, the ECtHR has established elaborate case-law on the human right to privacy in the context of surveillance, which is widely absent with regard to other human rights treaties. Our conclusions can, however, be used to analyse other human rights systems, as the issue of mass surveillance does not constitute a European particularity.

The ECtHR's case law on surveillance, in particular the landmark Grand Chamber judgment in *Zakharov v. Russia*,²²⁸ will serve as an example of how human rights law may be adjusted, through evolutive and purposive interpretation, in order to tackle new challenges. First, we will depict how the Court opened and broadened access to its jurisdiction *ratione personae* through evolutive interpretation. The ECtHR thereby responded to the secrecy of surveillance and the resulting difficulty to prove interferences (a). Second, we will inquire whether the proliferation of surveillance triggered a response by the Court with regard to substantial human rights standards. The overall approach of the ECtHR to uphold high human rights standards seems to contrast the practice of many States. The case study thus closes with addressing how much responsiveness is needed in the case of human rights and to what extent interpreters can conceive restrictive conduct as violations and not as trends towards reinterpretation (b).

a) The Applicant's Victim Status in the Surveillance Context

Under Art. 34 ECHR, applicants before the ECtHR have to claim to be "the victim of a violation" of their human rights by a State party. However, the clandestine nature of surveillance renders this requirement particularly problematic. The victimhood criterion aims to prevent submissions of *actiones populares*, i.e. abstract challenges of a State's measure in the public interest.²²⁹ Accordingly, the Court demands the applicant to be, in concert

²²⁷ See, e.g., Art. 11 of the American Convention on Human Rights, 22.11.1969, 1144 UNTS 123; Art. 17 of the International Covenant on Civil and Political Rights, 16.12.1966, 999 UNTS 171 (ICCPR); Art. 12 of UNGA, Resolution 217A (III): Universal Declaration of Human Rights, 12.12.1948, A/810, 71 et seq.; Art. 21 of Association of Southeast Asian Nations (ASEAN), Human Rights Declaration, 19.11.2012, <www.asean.org>.

²²⁸ *Zakharov v. Russia (Grand Chamber)*, 4.12.2015, (2016) 63 EHRR 17.

²²⁹ *Sejdić and Finci v. Bosnia and Herzegovina (Grand Chamber)*, 22.12.2009, Reports of Judgments and Decisions ECtHR 2009-VI, 273, para. 28; W. A. Schabas, *The European Convention on Human Rights: A Commentary*, 2015, 737 et seq.

with its ordinary meaning,²³⁰ “directly affected” by the measure in question.²³¹ In the case of secret surveillance, targeted individuals will, however, have either no knowledge of any interference with their privacy or difficulties proving such interference. Remedies for judicial control, where available, are therefore often not exhausted. The ECtHR already acknowledged this conundrum in its early case law on surveillance and, as a response, altered its approach to the victimhood criterion.²³²

Hence, the Court exceptionally accepts mere abstract challenges of surveillance legislation, without proof that the complainant was “directly affected”. The requirements depend on the availability of effective safeguards at the domestic level. If appropriate remedies exist, the applicant must prove that “due to his personal situation, he is potentially at risk of being subjected to such measures”.²³³ This already lowers the burden for the applicant, as he merely has to prove an individual risk. Additionally, the *Zakharov* judgment seems to cut the threshold even further down by merely demanding a potential risk, compared to previous cases which still required “reasonable likelihood” of such a risk.²³⁴ If adequate safeguards do not exist, on the other hand, the threshold for being considered a “victim” is lowered even further. In such cases, a “widespread suspicion and concern ... that secret surveillance powers are being abused cannot be said to be unjustified”.²³⁵ The fear of abusive surveillance can trigger a “chilling effect”, inciting individuals to refrain from certain political, religious, social, or other activities. This effect could occur regardless of whether an individual has actually been targeted.²³⁶ For this reason, the ECtHR exceptionally accepts complaints based solely on an abstract potential of being affected.²³⁷ This potential already unfolds if the applicant falls within the, possibly all-

²³⁰ See Oxford Dictionaries, Definition of Victim, 2016, <www.oxforddictionaries.com>.

²³¹ E.g., *Monnat v. Switzerland*, 21.9.2006, Reports of Judgments and Decisions ECtHR 2006-X, 159, para. 31.

²³² *Klass and Others v. Germany*, 6.9.1978, ECtHR Series A No. 28, para. 36. In *Zakharov*, the Court further refined this approach, see *Zakharov v. Russia* (note 228), paras. 170-172.

²³³ *Zakharov v. Russia* (note 228), para. 171.

²³⁴ E.g., *Kennedy v. UK*, 18.5.2010, (2011) 52 EHRR 4, para. 122. See L. Woods, ECtHR Case Report and Comment – Roman Zakharov v. Russia (Grand Chamber), Info Law Centre Blog, 15.12.2015, <<http://bit.ly/1YhNcjR>>.

²³⁵ *Zakharov v. Russia* (note 228), para. 171. Cf. also *Digital Rights Ireland* (note 217), para. 37.

²³⁶ See also UNHRC (note 224), para. 20; *Klass and Others v. Germany* (note 232), paras. 34-35; *I. Georgieva* (note 214), 117.

²³⁷ *Szabó and Vissy v. Hungary*, 12.1.2016, (2016) 63 EHRR 3, para. 38; *Zakharov v. Russia* (note 228), paras. 170 et seq.

embrasive, scope of legislation in question. “In such circumstances”, the Court reasons

“the menace of surveillance can be claimed in itself to restrict free communication ..., thereby constituting for all users or potential users a direct interference with the right guaranteed by Article 8”.²³⁸

The ECtHR thus exceptionally permits “general challenges to the relevant legislative regime in the sphere of secret surveillance.”²³⁹ It achieves this result by dynamically adjusting the interpretation of the term “victim” in Art. 34 ECHR. A permanent fear of abusive and constant surveillance is equated with a direct interference with the right to privacy. Digressing to a certain extent from the ordinary meaning, the ECtHR thus seems to follow its earlier dictum that the requirement for standing “is not to be applied in a rigid, mechanical and inflexible way”²⁴⁰ and that the term “victim” is to be “interpreted in an evolutive manner in the light of conditions in contemporary society”.²⁴¹ In broadening the scope of the notion, the Court paid regard to “the particular features of secret surveillance measures”,²⁴² thus adapting its interpretation to changed technical possibilities. It further justified its interpretation by “the importance of ensuring effective control and supervision”.²⁴³ The principle of effectiveness (*l’effet utile*) implied that Art. 34 ECHR must “be applied in a manner which serves to make the system of individual applications efficacious”.²⁴⁴

b) The ECtHR’s Assessment of Surveillance Activities

When assessing the conformity of surveillance activities with the ECHR, the ECtHR has partly reacted to increasing surveillance practices in an accommodating manner. Given the technological development and the rise of international terrorism, it has generally accepted that secret surveillance can,

²³⁸ *Zakharov v. Russia* (note 228), para. 171.

²³⁹ *Zakharov v. Russia* (note 228), para. 165. See also *Szabó and Vissy v. Hungary* (note 237), para. 33.

²⁴⁰ *Micallef v. Malta (Grand Chamber)*, 15.10.2009, Reports of Judgments and Decisions ECtHR 2009-V, 289, para. 45.

²⁴¹ *Gorraiz Lizarraga and Others v. Spain*, 27.4.2004, Reports of Judgments and Decisions ECtHR 2004-III, 225, para. 38.

²⁴² *Zakharov v. Russia* (note 228), para. 165. See also *Szabó and Vissy v. Hungary* (note 237), para. 33.

²⁴³ *Zakharov v. Russia* (note 228), para. 165. See also *Szabó and Vissy v. Hungary* (note 237), para. 33.

²⁴⁴ *Klass and Others v. Germany* (note 232), para. 34.

under exceptional conditions, be necessary.²⁴⁵ Specifically, the Court has adapted its standards of review with regard to foreseeability,²⁴⁶ secrecy,²⁴⁷ necessity,²⁴⁸ as well as prior authorisation²⁴⁹ of surveillance operations. In *Szabó and Vissy v. Hungary*, the Court seems to have gone even further by stating that widespread use of “cutting-edge technologies” was “a natural consequence of the forms taken by present-day terrorism”.²⁵⁰

Importantly, however, the ECtHR has not concluded from these new circumstances that human rights standards have to be lowered. Instead, it specified the need for effective and independent safeguards and emphasised their high thresholds.²⁵¹ In *Szabó and Vissy*, the Court required surveillance, for the first time,²⁵² to be *strictly* necessary in the individual case.²⁵³ This refined interpretation of the dynamically understood²⁵⁴ necessity requirement is emblematic of the Court’s reaction to the surveillance context.

Although not yet conclusively decided, the insistence on individualised surveillance²⁵⁵ indicates that the Court is likely to declare mass surveillance programmes, which operate without reasonable suspicion²⁵⁶ in the individ-

²⁴⁵ *Klass and Others v. Germany* (note 232), para. 48.

²⁴⁶ *Zakharov v. Russia* (note 228), para. 229; *Weber and Saravia v. Germany*, 29.6.2006, Reports of Judgments and Decisions ECtHR 2006-XI, 309, para. 93 (acknowledging that “foreseeability” of the law “cannot mean that an individual should be able to foresee when the authorities are likely to intercept his communications so that he can adapt his conduct accordingly”).

²⁴⁷ *Özel v. Turkey*, Appl. No. 19602/06, 7.6.2016, para. 34, available at <www.echr.coe.int>; *Zakharov v. Russia* (note 228), para. 287; *C. Grabenwarter* (note 222), 205 et seq.

²⁴⁸ *Szabó and Vissy v. Hungary* (note 237), para. 57; *Zakharov v. Russia* (note 228), para. 232; *Zakharov v. Russia* (note 228), para. 232; *Kennedy v. UK* (note 234), para. 154 (acknowledging a “certain margin of appreciation”).

²⁴⁹ *Szabó and Vissy v. Hungary* (note 237), para. 80 (acknowledging that prior judicial authorisation may not be feasible in emergencies).

²⁵⁰ *Szabó and Vissy v. Hungary* (note 237), para. 68 (emphasis added).

²⁵¹ See, e.g., *Versini-Campinchi and Crasnianski v. France*, Appl. No. 49176/11, 16.6.2016, para. 60, available at <www.echr.coe.int>; *Szabó and Vissy v. Hungary* (note 237), para. 70; *Zakharov v. Russia* (note 228), para. 231.

²⁵² See *Kennedy v. UK* (note 234), para. 153 (only naming the first, general aspect of strict necessity). See *S. St. Vincent*, Did the European Court of Human Rights Just Outlaw “Massive Monitoring of Communications” in Europe?, Center for Democracy & Technology, 13.1.2016, <https://cdt.org/blog>.

²⁵³ *Szabó and Vissy v. Hungary* (note 237), para. 73.

²⁵⁴ See *R. Bernhardt* (note 26), 12.

²⁵⁵ *Szabó and Vissy v. Hungary* (note 237), paras. 67, 71, 73

²⁵⁶ *Zakharov v. Russia* (note 228), paras. 260, 262, 263. The majority opinion in *Szabó and Vissy* has been criticised for allegedly diverging from the “reasonable suspicion” language, see *Szabó and Vissy v. Hungary*, Concurring Opinion of Judge *P. Pinto de Albuquerque*, 12.01.2016, (2016) 63 EHRR 3, para. 20. Whether this critique is right in assuming a significant divergence is, however, doubtful, see *C. Nyst*, The European Court of Human Rights Constrains Mass Surveillance (Again), Just Security, 22.1.2016, <www.justsecurity.org>.

ual case, illegal.²⁵⁷ Most observers as well as UN reports, indeed, deem unlimited surveillance “just in case” unnecessary and disproportionate.²⁵⁸

A probable rejection of mass surveillance *per se* may, however, cause trouble. Certain member States, *inter alia* Russia²⁵⁹ or the UK,²⁶⁰ are already rather critical of the Court. As multiple cases concerning the UK’s surveillance programmes are pending before the ECtHR,²⁶¹ a categorical rejection of mass surveillance will certainly deepen existing frictions. Human rights law could jeopardise its credibility with States, which tend to consider entirely renouncing mass surveillance an unrealisable demand.²⁶² Perhaps the ECtHR should consider allowing the retention of data in principle, but uphold and possibly increase thresholds for transparency, data access, and supervision.²⁶³ Such an approach would, indeed, go in line with

²⁵⁷ See, e.g., *C. Nyst* (note 256) (“the penultimate nail in the coffin ... for mass surveillance”). See also *M. Milanović*, Human Rights Treaties and Foreign Surveillance, EJIL: Talk!, 28.9.2015, <www.ejiltalk.org>.

²⁵⁸ *I. Georgieva* (note 214), 123 et seq.; UNHRC (note 224), paras. 25-27; UNGA, Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, *Ben Emmerson*, 23.9.2014, A/69/397, para. 52; *G. A. Sinha*, NSA Surveillance Since 9/11 and the Human Right to Privacy, *Loy. L. Rev.* 59 (2013), 861 et seq. But see *P. Margulies*, The NSA in Global Perspective: Surveillance, Human Rights, and International Counterterrorism, *Fordham L. Rev.* 82 (2014), 2137 et seq. (defending NSA surveillance activities).

²⁵⁹ Russia passed a law enabling its Constitutional Court to deem ECtHR judgments non-executable if they contradict Russia’s constitution. See *N. Chaeva*, The Russian Constitutional Court and Its Actual Control Over the ECtHR Judgement in Anchugov and Gladkov, EJIL: Talk!, 26.4.2016, <www.ejiltalk.org>.

²⁶⁰ The new British Prime Minister, *Theresa May*, has, however, decided not to pursue previously expressed wishes to leave the ECHR, see *J. Elgot*, What Does Britain’s Next Prime Minister Theresa May Believe?, *The Guardian*, 11.7.2016, <www.theguardian.com>.

²⁶¹ E.g. *Bureau of Investigative Journalism and Alice Ross v. UK*, App. No. 62322/14, communicated 5.1.2015; *Big Brother Watch and Others v. UK*, Appl. No. 58170/13, communicated 9.1.2014.

²⁶² *A. Deeks*, An International Legal Framework for Surveillance, *Va. J. Int’l L.* 55 (2015), 291 et seq., 295. On the international plain, this is complicated further by the US, among others, that take the stance for a lower threshold for privacy interferences under the ICCPR as established by the Human Rights Committee, see Office of the High Commissioner for Human Rights, US Response to OHCHR Questionnaire on “The Right to Privacy in the Digital Age”, 2014, <www.ohchr.org>, 1.

²⁶³ See *Tele2 Sverige AB v. Post-och telestyrelsen, Secretary of State for the Home Department v. Tom Watson and Others*, Joined Cases C-203/15, C-698/15, Opinion of Advocate General, 19.7.2016, Doc. 62015CC020. Note, however, that the CJEU has decided more categorically against mass surveillance in that case, see *Tele2 Sverige AB v. Post-och telestyrelsen, Secretary of State for the Home Department v. Tom Watson and Others*, Joined Cases C-203/15, C-698/15, Judgment (Grand Chamber), 21.12.2016, <http://curia.europa.eu>.

calls for reform as opposed to demanding the abolishment of all mass surveillance practices altogether.²⁶⁴

Whatever the Court will decide in future cases, it is right to generally not overemphasise recent State practice. Surveillance that contradicts human rights law must not be considered as steps towards a reinterpretation of the Convention. Even if one, hypothetically, assumed that an authentic interpretation under Art. 31 (3) (c) VCLT in favour of mass surveillance was established, it would still not be decisive for the interpretation of human rights treaties. By committing to human rights obligations, States have to a large extent waived their interpretive authority²⁶⁵ and created rules resilient towards shifts in State practice.²⁶⁶ What is more, with the installation of international courts or other monitoring bodies, States have created autonomous fora and delegated the task of monitoring compliance and interpreting the underlying treaties. These bodies themselves contribute, with the (tacit) approval of the parties, to the creation of State practice.²⁶⁷

It would thus contradict the very concept of human rights, if States could informally restrict their human rights obligations by violating them *en masse*.²⁶⁸ As a rule, divergence from established human rights standards, including widespread divergence that is not challenged by other State parties, must thus be understood as breaches of these standards and not as indications for their reinterpretation.²⁶⁹ As States indeed “have every incentive to interpret their obligations restrictively”,²⁷⁰ the interpretation of States cannot be relied upon when not in line with the overarching object and purpose of human rights treaties. “Apparent disagreement with the interpretive conduct of the treaty bodies will not, and should not, trump what is

²⁶⁴ See UNHRC (note 224), para. 50; UNHRC, Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, *Frank La Rue*, 17.4.2013, A/HRC/23/40, at paras. 91-94; UNGA (note 258), para. 60; Necessary and Proportionate, International Principles on the Application of Human Rights to Communications Surveillance, 2014, <<https://necessaryandproportionate.org/>>; *F. Fabbrini* (note 217); *P. Margulies* (note 258), 2165 et seq.; *I. Georgieva* (note 214), 126 et seq.; *G. A. Sinha* (note 258), 944.

²⁶⁵ See *A. Roberts* (note 95), 202 et seq.

²⁶⁶ *J. Arato* (note 7), 218 (proposing that the “critical piece of this interpretive puzzle is the nature of the norm”).

²⁶⁷ International Law Association, Final Report on the Impact of Findings of the United Nations Human Rights Treaty Bodies, Berlin Conference, 2004, <<http://www.ila-hq.org/>>, at paras. 21-23; *D. McGrogan*, On the Interpretation of Human Rights Treaties and Subsequent Practice, NQHR 32 (2014), 347 et seq., 353.

²⁶⁸ See *D. J. Solove* (note 220), 1142; *D. McGrogan* (note 267), 363, 370.

²⁶⁹ See *J. Arato* (note 19), 487; *S. D. Murphy* (note 12), 92.

²⁷⁰ *D. McGrogan* (note 267), 352.

obvious from a common sense reading of the treaty text.”²⁷¹ Insofar, human rights law must not confuse necessary evolution with fatal opportunism.

2. Terrorist Attacks and the Response of States Under the Right to Self-Defence

Combating terrorism is not only a matter of domestic legislation, but equally a matter of international law and politics. Military action against terrorists has tragically regained topicality after the Paris attacks of 13.11.2015 and France’s military response thereto in Syria and Iraq.²⁷² Until then, the “war on terror” was predominantly linked to the US-led responses to the atrocious 9/11 attacks of 2001, in particular the Afghanistan war, and associated with drone strikes in the borderland between Afghanistan and Pakistan or detainees at Guantanamo Bay. Initiated by then US President *G. W. Bush* in 2001 and partially perpetuated by the *Obama* administration, the “war on terror” has been a constant in US foreign policy over the past 15 years.

The French reaction to the Paris terrorist attacks 14 years after 9/11, supported by most European States, the European Union, and arguably even the Security Council, appears to confirm what was previously considered a US prerogative in an isolated case. The “right of self-defence against terrorists” has been the predominant means of choice to legally justify the victim States’ military response to terrorist attacks on the territory of a foreign State. As the traditional conception of the right to self-defence is State-centric, the signs pointing to a changing understanding of the customary right and its treaty equivalent in Art. 51 UN Charter are therefore continually increasing.

The high density of State practice allows a comprehensive analysis of the current understanding of the right to self-defence and permits the identification of potentially new developments. The open wording of Art. 51 UN Charter and the lack of clear definitions render the right to self-defence a perfect example for a potential normative evolution. Further, as the study will reveal, the fundamental importance of the prohibition of the use of

²⁷¹ *D. McGrogan* (note 267), 375.

²⁷² Al Jazeera, France Launches Strikes Against ISIL in Iraq and Syria, 23.11.2015, <www.aljazeera.com>; *B. Doherty*, France Launches “Massive” Airstrike on Isis Stronghold of Raqqa, The Guardian, 16.11.2015, <www.theguardian.com>; *T. Lister/N. P. Walsh/C. E. Shoichet*, French Jets Bomb Syria in the ISIS Stronghold of Raqqa, CNN, 16.11.2015, <<http://edition.cnn.com>>.

force for the entire legal order influences the norm's level of responsiveness towards the threat of terrorism.

Accordingly, the following sections will, first, outline the traditional understanding of the legal framework governing the right to self-defence (a), second, depict State's reactions to the terrorist attacks and evaluate their legal implications (b). Finally, we will determine what legal conclusions can be drawn from the State conduct analysed with regard to possible responses of the law (c).

a) The Traditional Conception of the Right to Self-Defence

The State's inherent right to self-defence constitutes an indispensable and long-established cornerstone of the international legal order.²⁷³ Art. 51 UN Charter ensures "the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations". It is an integral norm with peremptory quality. The prohibition of the use of force, as enshrined in Art. 2 (4) UN Charter is considered a "conspicuous example" of a *jus cogens* norm.²⁷⁴ It is therefore logically necessary that the right to self-defence as an exception thereto shares this non-derogable nature.²⁷⁵ The right to self-defence consequently assumes considerable importance in the international legal framework. Yet, its scope and content, to the present day, remains rather unclear.

The right to self-defence manifests a further peculiarity, as it is simultaneously part of customary law and enshrined in Art. 51 UN Charter.²⁷⁶ The ICJ, on several occasions, recognised the possibility of identical rules co-

²⁷³ C. Greenwood, Self-Defence, in: R. Wolfrum (note 44), Online Ed., 2016, para. 1, <<http://opil.ouplaw.com/home/epil>>; M. C. Alder, The Origin in International Law of the Inherent Right to Self-Defence, *The Western Australian Jurist* 2 (2011), 107 et seq., 109 et seq.

²⁷⁴ ILC (note 87), 247 (para. 1 of the commentaries to draft Art. 50). See also *Nicaragua (Merits)* (note 114), para. 190; *Oil Platforms (Iran v. USA)*, Dissenting Opinion of Judge N. Elaraby, ICJ Reports 2003, 290 et seq., 291; *Oil Platforms (Iran v. USA)*, Separate Opinion of Judge P. Kooijmans, ICJ Reports 2003, 246 et seq., para. 46; *Oil Platforms (Iran v. USA)*, Separate Opinion of Judge B. Simma (note 201), 324 et seq., para. 9; I. Brownlie, *Principles of Public International Law*, 7th ed. 2008, 511.

²⁷⁵ T. Ruys (note 197), 27; A. Orakhelashvili, *Peremptory Norms in International Law*, 2006, 51; C. Kahgan, *Jus Cogens and the Inherent Right to Self Defense*, *ILSA J. Int'l & Comp. L.* 3 (1997), 767 et seq., 789.

²⁷⁶ *Nicaragua (Merits)* (note 114), para. 176; R. van Steenberghe, *Self-Defence in Response to Attacks by Non-State Actors in the Light of Recent State Practice: A Step Forward?*, *LJIL* 23 (2010), 183 et seq., 185.

existing in international treaties and customary law.²⁷⁷ The dual nature of such a norm might result from the fact that the conventional rule was “regarded as reflecting, or as crystallising, received or at least emergent rules of customary international law”.²⁷⁸

However, in *Nicaragua*, the ICJ clarified that the customary right to self-defence and Art. 51 UN Charter do not “completely overlap” and are thus not identical in their scope.²⁷⁹ Most importantly, the conventional right to self-defence, as enshrined in the UN Charter, does not “regulate directly all aspects of its content”.²⁸⁰ The codification in the UN Charter does therefore not render the customary right obsolete; rather, both norms “retain a separate existence”.²⁸¹ In particular, the definition of the notion of “armed attack” is not included in the Charter²⁸² and must therefore be derived from custom.²⁸³

While the ICJ’s *Nicaragua* judgement clearly confirmed the non-identical co-existence of a customary and a treaty-based right to self-defence, it did not conclusively answer the question of potential discrepancies between the two norms. The Court merely stated that the customary rule has developed under the influence of the Charter.²⁸⁴ *H. Waldock*, however, reported, some 50 years ago to the ILC, that

“the great majority of international lawyers today unhesitatingly hold that Art. 2, para. 4, together with other provisions of the Charter, authoritatively declares the modern customary law regarding the threat or use of force”.²⁸⁵

Although the two rights might not be identical in scope, they did converge over the course of time.²⁸⁶ Consequently, both sources need to be considered when examining the existence of an alleged right to self-defence against terrorists.

²⁷⁷ *Nicaragua (Merits)* (note 114), para. 177; *North Sea Continental Shelf* (note 114), para. 63.

²⁷⁸ *Nicaragua (Merits)* (note 114), para. 177; *North Sea Continental Shelf* (note 114), para. 63.

²⁷⁹ *Nicaragua (Merits)* (note 114), paras. 175, 177.

²⁸⁰ *Nicaragua (Merits)* (note 114), para. 176.

²⁸¹ *Nicaragua (Merits)* (note 114), para. 178.

²⁸² *Nicaragua (Merits)* (note 114), para. 176.

²⁸³ *T. Ruys* (note 197), 8.

²⁸⁴ *Nicaragua (Merits)* (note 114), paras. 176, 181.

²⁸⁵ ILC, Fifth Report on the Law of Treaties, by *Sir Humphrey Waldock*, Special Rapporteur, in: ILCYB 1966, Vol. II, 1 et seq., 20 (para. 7 of the commentaries to draft Art. 36).

²⁸⁶ *Y. Dinstein*, *War, Aggression and Self-Defence*, 5th ed. 2012, 96; *T. Ruys* (note 197), 10.

Just as public international law in its entirety,²⁸⁷ the right to self-defence has traditionally been governed by a State-dominated understanding.²⁸⁸ Accordingly, the right was envisioned as an inter-State tool to respond to an armed attack conducted by one State against another.²⁸⁹ Attacks by non-State actors, not attributable to a State, traditionally do not fall within the concept of self-defence.²⁹⁰ The emergence of transnational terrorist organisations and their horrific attacks against States and their civilian populations have, however, led to an unanticipated situation challenging this traditional approach.

Although the traditional reading of the Charter may have “been the generally accepted interpretation for more than 50 years”, the wording itself does not limit an armed attack to violent acts conducted by a State.²⁹¹ Art. 51 UN Charter only defines the *victim* of the armed attack as “a Member of the United Nations”, a State.²⁹² The authorship of the attack is, however, not defined. This lacuna opens the door to argue that an armed attack might very well be conducted by a non-State actor.²⁹³

Yet, the ICJ has insisted on the traditional reading of Art. 51 UN Charter on several occasions and limited the scope of the right to self-defence to “case[s] of armed attack[s] by one State against another State.”²⁹⁴ As Judge *R. Higgins* pointed out correctly, this traditional qualification is not a legal necessity, but “rather a result of the Court so determining in [*Nicaragua*]”

²⁸⁷ *M. Noortmann*, Non-State Actors: International Law’s Problematic Case, in: *M. Noortmann/A. Reinisch/C. Ryngaert*, Non-State Actors in International Law, 2015, 1 et seq.; *M. N. Shaw* (note 121), 63.

²⁸⁸ See *M. N. Shaw* (note 121), 823; *C. Gray*, The Use of Force and the International Legal Order, in: *M. D. Evans*, International Law, 4th ed. 2014, 618 et seq., 632.

²⁸⁹ *Wall Opinion* (note 17), para. 139.

²⁹⁰ See *Armed Activities* (note 172), para. 146; *Wall Opinion* (note 17), para. 139; *Nicaragua (Merits)* (note 114), para. 51; *T. Ruys* (note 197), 383; *A. Randelzhofer/G. Nolte*, Article 51, in: *B. Simma/D.-E. Khan/G. Nolte/A. Paulus* (note 44), 1397 et seq., para. 37; *C. Antonopoulos*, Force by Armed Groups as Armed Attack and the Broadening of Self-Defence, NILR 55 (2008), 159 et seq., 169 et seq. See also *R. van Steenberghe* (note 276), 198; *Y. Arai-Takahashi*, Shifting Boundaries of the Right of Self-Defence – Appraising the Impact of the September 11 Attacks on *Jus Ad Bellum*, Int’l Law. 36 (2002), 1081 et seq., 1086 et seq.; *N. J. Schrijver*, Responding to International Terrorism: Moving the Frontiers of International Law for “Enduring Freedom”?, NILR 48 (2001), 271 et seq., 284 et seq.

²⁹¹ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)*, Separate Opinion of Judge *P. Kooijmans*, ICJ Reports 2004, 219 et seq., para. 35.

²⁹² See Art. 4 (1) UN Charter.

²⁹³ See, e.g., *C. Greenwood* (note 273), paras. 15-18.

²⁹⁴ *Wall Opinion* (note 17), para. 139. See also *Oil Platforms (Iran v. USA)*, ICJ Reports 2003, 161 et seq., para. 51.

back in 1986.²⁹⁵ Nonetheless, the Court upheld its State-centric line of reasoning²⁹⁶ and unfortunately²⁹⁷ shied away from answering the question “whether and under what conditions contemporary international law provides for a right of self-defence against large-scale attacks by irregular forces” in the 2005 *Armed Activities* judgment.²⁹⁸ This question comprises two aspects: the qualification of non-State conduct as armed attacks under the right to self-defence and, second, the possibility of the victim State to use force against a possibly impartial and non-involved host State.

The following section will outline how the US and France justified their responses to the terrorist attacks of 2001 and 2015 and potentially answered these questions. Their military actions as well as the international community’s reaction will help to identify and assess whether and how an altered interpretation has emerged to counter terrorist threats and attacks.

b) Redefining the Right to Self-Defence?

As the traditional view on the right to self-defence does not encompass reactions to terrorist attacks non-attributable to a State, the military responses by the US and France could only fall within the notion of self-defence if that view had been altered. Due to its dual legal base, reshaping the right could have occurred through subsequent practice under Art. 31 (3) (b) VCLT and/or through an alteration in State practice modifying the content of the customary right. Resolutions of international as well as regional organisations thereby serve as strong indicators for such an altered legal understanding. US actions in the aftermath of 9/11 will serve as the first object of study (aa). The more recent response to the Paris attacks constitutes the second example for the invocation of the right to self-defence against a terrorist group (bb). The review of other State practice (cc.) will then allow for a broad analysis of the legal implications for the right to self-defence (dd.).

²⁹⁵ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)*, Separate Opinion of Judge R. Higgins, ICJ Reports 2004, 207 et seq., para. 33.

²⁹⁶ See P. Stanski, Right to Self-Defence, Attribution and the Non-State Actor – Birth of the “Unable and Unwilling” Standard?, HJIL 75 (2015), 455 et seq., 461 et seq.

²⁹⁷ See *Armed Activities on the Territory of the Congo (Congo v. Uganda)*, Separate Opinion of Judge P. Kooijmans, ICJ Reports 2005, 306 et seq., para. 25; *Armed Activities on the Territory of the Congo (Congo v. Uganda)*, Separate Opinion of Judge B. Simma, ICJ Reports 2005, 334 et seq., paras. 9-11.

²⁹⁸ *Armed Activities* (note 172), para. 147.

aa) 9/11 and the *Bush* Doctrine

The debate about the right to self-defence against a terrorist group on the territory of a third (host) State gained topicality²⁹⁹ after *G. W. Bush* introduced the so-called “safe haven doctrine” as a response to 9/11.³⁰⁰ The then US president phrased his intention to combat the perpetrators regardless of their State or non-State character when he announced that there would be “no distinction [made] between the terrorists who committed the[se] acts and those who harbor them”.³⁰¹

This view was arguably shared by the Security Council and the General Assembly. On 12.9.2001, both UN bodies approved the US undertaking and equally called on States to bring the perpetrators of the 9/11 attacks and those harbouring them to justice.³⁰² The two resolutions were adopted unanimously. Against this backdrop and recalling the lowered requirements for the emergence of custom, the importance of these resolutions must not be underestimated.

Less than a month later, the US went from rhetoric to military action and launched “Operation Enduring Freedom” in Afghanistan.³⁰³ The US justified this intervention explicitly with their “inherent right to self-defense”.³⁰⁴ The Security Council seems to have tolerated this reasoning, although it never explicitly permitted or mandated the intervention.³⁰⁵

²⁹⁹ The legal debate is much older than the 9/11 terrorist attacks, but gained broader prominence after 2001. For earlier discussions, see, e.g., *R. Higgins*, The General International Law of Terrorism, in: *R. Higgins/M. Flory*, Terrorism and International Law, 1997, 13 et seq.; *C. Kreß*, Gewaltverbot und Selbstverteidigungsrecht nach der Satzung der Vereinten Nationen bei staatlicher Verwicklung in Gewaltakte Privater, 1995.

³⁰⁰ On that day, four coordinated terrorist attacks led to the destruction of the twin towers in New York City, severe damage of the Pentagon in Arlington County, Virginia, and the death of 2,977 civilians. See generally CNN, September 11 Fast Facts, 7.9.2015, <<http://edition.cnn.com>>.

³⁰¹ *G. W. Bush*, Statement by the President in His Address to the Nation, 11.9.2001, <<http://georgewbush-whitehouse.archives.gov>>.

³⁰² UN Security Council (UNSC), Resolution 1368, 12.9.2001, S/RES/1368, para. 3; UNGA, Resolution 56/1: Condemnation of terrorist attacks in the United States of America, 12.9.2001, A/RES/56/1, para. 3.

³⁰³ For an overview, see CNN, Operation Enduring Freedom Fast Facts, 30.9.2015, <<http://edition.cnn.com>>.

³⁰⁴ See UNSC, Letter from the Permanent Representative of the U.S. to the U.N. Addressed to the President of the Security Council, 7.10.2001, S/2001/946.

³⁰⁵ *S. A. Shah*, War on Terrorism: Self Defense, Operation Enduring Freedom, and the Legality of U.S. Drone Attacks in Pakistan, *Washington University Global Studies Law Review* 9 (2010), 77 et seq., 95 et seq.; *C. J. Tams*, The Use of Force Against Terrorists, *EJIL* 20 (2009), 359 et seq., 377.

The US's invocation of the right to self-defence also received great support outside of the UN. Most prominently, the North Atlantic Treaty Organization (NATO), for the first time in its history, considered Art. 5 of the North Atlantic Treaty³⁰⁶ to be applicable,³⁰⁷ thus recognising the collective right to self-defence. The same holds true for the Organization of American States.³⁰⁸ Moreover, a great number of individual States offered their support and acknowledged the US's right to a military response.³⁰⁹

Despite this wave of almost homogenous support,³¹⁰ it bears a certain risk to assume a modification of the pre-existing legal framework based on one single incidence. The particularities of the unprecedented circumstances³¹¹ might have led to an exceptional reaction rather than a generally applicable change of the law. Yet, the French reaction to the 2015 attacks has demonstrated a similar pattern of conduct that could potentially elevate the right to self-defence against terrorists to the level of a general rule.

bb) France 2015

During the night of 13.11.2015, Paris became the target of coordinated terrorist attacks leaving 130 people murdered and 350 injured.³¹² The so-called "Islamic State" (usually referred to under the acronyms IS, ISIL, or "Daesh") assumed responsibility for these attacks.³¹³ Three days later, on November 16, President *F. Hollande* addressed the French Congress and declared that France was at war with the IS and that it would "lead a war, which would be pitiless".³¹⁴ In reaction to the "acts of war"³¹⁵ committed by *Daesh* and based on France's right to self-defence, he furthermore an-

³⁰⁶ North Atlantic Treaty, 4.4.1949, 34 UNTS 243.

³⁰⁷ North Atlantic Council, Press Release No. (2001)124, 12.9.2001, <www.nato.int>.

³⁰⁸ Organisation of American States, Meeting of Consultation of Ministers of Foreign Affairs, Strengthening Hemispheric Cooperation to Prevent, Combat, and Eliminate Terrorism, 21.9.2001, OEA/Ser.F/II.23, RC.23/RES.1/01, <www.oas.org>.

³⁰⁹ See *B. Langille*, It's "Instant Custom": How the Bush Doctrine Became Law After the Terrorist Attacks of September 11, 2001, *B. C. Int'l & Comp. L. Rev.* 26 (2003), 145 et seq., 146.

³¹⁰ The US-American approach was however strongly contested by Iraq, North Korea, and the Sudan, and criticized by Cuba and Iran, see *S. R. Ratner*, *Ius ad Bellum* and *Ius in Bello* After September 11, *AJIL* 96 (2002), 905 et seq., 910.

³¹¹ *A. Addis*, "Informal" Suspension of Normal Processes: The "War on Terror" as an Autoimmunity Crisis, *B. U. L. Rev.* 87 (2007), 323 et seq., 324.

³¹² CNN, 2015 Paris Terror Attacks Fast Facts, 13.4.2016, <<http://edition.cnn.com>>.

³¹³ *R. Callimachi*, ISIS Claims Responsibility, Calling Paris Attacks "First of the Storm", *New York Times*, 14.11.2015, <www.nytimes.com>.

³¹⁴ *Le Monde*, Hollande maintient sa position: "La France est en guerre", 16.11.2015, <www.lemonde.fr>.

³¹⁵ *Le Monde* (note 314).

nounced the launch of retaliatory airstrikes on Syrian soil.³¹⁶ By employing this terminology, the French Head of State consciously echoed the US post-9/11 rhetoric. The identical phrasing by the French President not only suggests a similar political approach but, more importantly, the adaption of the same line of legal reasoning. Unlike the US, however, France did not invoke Art. 5 of the North Atlantic Treaty but requested aid and assistance in accordance with the hitherto hardly known Art. 42 (7) of the Treaty on European Union³¹⁷ on November 17.³¹⁸ Yet, both articles create a system of collective support within the scope of Art. 51 UN Charter. They thus impose the same requirements upon the assistance seeking State: the existence of an armed attack. Germany³¹⁹ as well as the UK³²⁰ both relied on Art. 51 UN Charter when authorising military support to fight the IS on Syrian soil in early December 2015. Accordingly, they considered a terrorist attack by a non-State actor to be sufficient in order to trigger the right to self-defence.

The German Parliament further relied on the highly disputed “unwilling and unable” doctrine in order to establish the Syrian obligation to tolerate the military intervention on its soil, otherwise principally in violation of Art. 2 (4) UN Charter.³²¹ According to this doctrine, a State must tolerate the interference with its territorial integrity, as long as it is unwilling or unable to stop a terrorist group from attacking third States and thus fails to comply with its obligation to prevent hostile activities executed from its own soil.³²² The US invoked this line of argument even before the terrorist attacks in Paris in a letter to the UN from 23.9.2014 when informing about

³¹⁶ B. Doherty (note 272).

³¹⁷ Consolidated Version of the Treaty on European Union, OJ 2010/C 83/01 (2010).

³¹⁸ European External Action Service, Remarques introductives de la Haute Représentante et Vice-Présidente *Federica Mogherini* lors de la conférence de presse avec *Jean Yves Le Drian*, Ministre de la Défense Français, 17.11.2015, <www.eeas.europa.eu>.

³¹⁹ German Bundestag, 1.12.2015, Drucksache 18/6866, 3.

³²⁰ UNSC, Letter from the Permanent Representative of the U.K. to the U.N. Addressed to the President of the Security Council, 3.12.2015, S/2015/928.

³²¹ German Bundestag (note 319), 3.

³²² A. Deeks, “Unwilling or Unable”: Toward a Normative Framework for Extraterritorial Self-Defense, *Va. J. Int’l L.* 52 (2012), 483 et seq. (offering a comprehensive review of State practice and deriving test factors indicating the failure to comply with the obligation); UN-HRC, Report of the Special Rapporteur on extrajudicial, summary or arbitrary Executions, Philip Alston, Addendum: Study on targeted killings, 28.5.2010, A/HRC/14/24/Add.6, para. 35; C. Stahn, Terrorist Acts as “Armed Attack”: The Right to Self-Defense, Article 51(1/2) of the UN Charter, and International Terrorism, *Fletcher Forum of World Affairs* 27 (2003), 35 et seq., 47.

“necessary and proportionate military actions in Syria in order to eliminate the ongoing ISIL threat to Iraq”.³²³

The Security Council pronounced itself on the issue on 20.11.2015 with Resolution 2249.³²⁴ By then, the UN body was well aware of the US reference to Art. 51 UN Charter and the unwilling and unable doctrine, whereas the German and British confirmation thereof was still a matter of the future. Yet, the Security Council remained silent on the legality of the use of force based on the right to self-defence. In addition to bypassing the issue of Art. 51 UN Charter, the Resolution is particularly ambiguous in its operative part.³²⁵ As opposed to the commonly utilised language by the Council, it neither “authorised” States to take measures nor did it explicitly “act under Chapter VII”.³²⁶ Instead, the Council

“call[ed] upon Member States [...] to take all necessary measures, in compliance with international law, in particular with the United Nations Charter [...] to redouble and coordinate their efforts to prevent and suppress terrorist acts committed specifically by ISIL”.³²⁷

This “constructed ambiguity”³²⁸ of the document created more questions than it actually answered. Nonetheless, it allowed the military intervention without invoking any specific doctrine or legal substantiation.

cc) Other State Practice

In addition to the French and the US examples, a number of other States equally accepted the right to self-defence in response to an armed attack conducted by a non-State actor.

Australia, after joining the US-led coalition on Syrian soil against the IS, justified its military intervention by referring to the unwilling and unable doctrine. It argued that

“States must be able to act in self-defense when the Government of the State where the threat is located is unwilling or unable to prevent attacks originating from its territory”.³²⁹

³²³ UNSC, Letter from the Permanent Representative of the U.S. to the U.N. Addressed to the Secretary-General, 23.9.2014, S/2014/695.

³²⁴ UNSC, Resolution 2249, 20.11.2015, S/RES/2249.

³²⁵ See *D. Akande/M. Milanović*, The Constructive Ambiguity of the Security Council’s ISIS Resolution, EJIL: Talk!, 21.11.2015, <www.ejiltalk.org>.

³²⁶ The terms are considered code for the use of force, see Security Council Report, Security Council Action Under Chapter VII: Myths and Realities, Security Council Special Research Report No. 1, 2008, <www.securitycouncilreport.org>, 5 et seq.

³²⁷ UNSC (note 324), para. 5 (italics omitted).

³²⁸ *D. Akande/M. Milanović* (note 325).

The UK joined Australia in their line of argument and equally relied on that doctrine in order to establish a right to self-defence against the IS. Then British Prime Minister *D. Cameron* explained that Syria “is unwilling and/or unable to take action necessary to prevent ISIL’s continuing attack on Iraq – or indeed attack on us” and

“that ISIL’s campaign against the UK and our allies has reached the level of an ‘armed attack’ such that force may lawfully be used in self-defence to prevent further atrocities being committed by ISIL”.³³⁰

Turkey also submitted that “Syria is neither capable of nor willing to prevent these threats emanating from its territory” and invoked its right to self-defence to justify “necessary and proportionate military actions against *Daesh* in Syria”.³³¹ The Czech Republic argued that “[a] state must be prepared to limit its own sovereignty in order to allow a victim state to redress the situation [of a terrorist attack]”.³³² It further argued “that state sovereignty should not serve as a protection of a State if such [a] state is unable or unwilling to exercise its sovereignty within its territory”.³³³ Finally, Canada suggested that it is “in accordance with the inherent rights of individual and collective self-defence reflected in Art. 51 of the United Nations Charter” if the victim State acts against the State “where a threat is located is unwilling or unable to prevent attacks emanating from its territory”.³³⁴

Yet, the intervention in Syria has not been unaminously embraced. Among others, Venezuela,³³⁵ Iran³³⁶ and Cuba,³³⁷ voiced reservations re-

³²⁹ UNSC, Letter dated 9.9.2015 from the Permanent Representative of Australia to the United Nations addressed to the President of the Security Council, 9.9.2015, S/2015/693.

³³⁰ The Telegraph, *David Cameron’s full statement calling for UK involvement in Syria air strikes*, 26.11.2015, <<http://www.telegraph.co.uk>>.

³³¹ UNSC, Letter dated 24.7.2015 from the Chargé d’affaires a.i. of the Permanent Mission of Turkey to the United Nations addressed to the President of the Security Council, 24.7.2015, S/2015/563.

³³² Official response of the Czech Ministry of Defense to a questionnaire disseminated in the framework of a study by *J. Dorsey* and *C. Paulussen*, quoted in *J. Dorsey/C. Paulussen*, *Towards a European Position on Armed Drones and Targeted Killing: Surveying EU Counterterrorism Perspectives*, ICCT Research Paper No. April 2015, <<https://www.icct.nl>>, 12.

³³³ Quoted in *J. Dorsey/C. Paulussen* (note 332), 12.

³³⁴ UNSC, Letter dated 31.3.2015 from the Chargé d’affaires a.i. of the Permanent Mission of Canada to the United Nations addressed to the President of the Security Council, 31.3.2015, S/2015/221.

³³⁵ See UNSC, 7504th meeting: The situation in the Middle East, 17.8.2015, S/PV.7504, 3 et seq.

³³⁶ See *H. Saul*, *Syria Air Strikes: Iran “Says US Attacks on Isis Are Illegal”*, *The Independent*, 23.9.2014, <<http://www.independent.co.uk>>.

garding the military actions against *Daesh* without the explicit consent by the Syrian government. These States reiterated the principle of State sovereignty. Although they did not explicitly contest the unwilling and unable doctrine itself, they opposed the general legality of the military actions conducted on the territory of Syria.³³⁸

Outside the Syrian context, two other, equally controversial references to the right to self-defence against terrorist organisations, located in the territory of a third State, have been provided by Israel and Russia. The former relied on the unwilling and unable doctrine in order to justify its military actions on the territory of Lebanon in 1978,³³⁹ long before the events of 2001 and 2015. Russia invoked a similar line of argument when fighting Chechen rebels in Georgia during the Russo-Georgian war.³⁴⁰

dd) Legal Implications of Military Responses to Terrorist Attacks

The terrorist attacks of 2001 and 2015 abruptly generated a considerable amount of State practice: Not only the victim States, but also regional and international organisations as well as other individual States felt the need to respond. The ensuing political statements and military actions have created facts possibly indicating a development of the present understanding of the right to self-defence.

Whether the State behaviour has actually caused the convention-based or the customary right to self-defence to change, depends on its legal relevance. Both sources of international law are generally adaptable to new developments and open for changes through (subsequent) State practice. Yet, the double-embedded nature of the right to self-defence leads to the ques-

³³⁷ See Ahora, Cuba Advocates Political Solution to Crisis in Syria, not dated, <<http://www.ahora.cu>> (quoting the Cuban permanent representative before the UNHRC, R. Reye: "Taking into account recent cases in which we have seen a manipulation of the U.N. Charter as well as the double standard of the United States and other NATO members, we reject any attempt to undermine the sovereignty, independence, and territorial integrity of Syria.").

³³⁸ See also the State practice collected by O. Corten, The "Unwilling or Unable" Test: Has it Been, and Could it Be, Accepted?, *LJIL* 29 (2016), 777 et seq., 785 et seq. (submitting that the unwilling and unable test lacks general acceptance); E. Chachko/A. Deeks, Who Is On Board with "Unwilling or Unable"?, *Lawfare*, 10.10.2016, <<https://www.lawfareblog.com>>.

³³⁹ UNSC, Letter dated 17.3.1978 from the Permanent Representative of Israel to the United Nations addressed to the President of the Security Council (S/12607), 17.3.1978, in: UN SCOR, 33rd Year, 2071st Meeting, 1 et seq., para. 53.

³⁴⁰ UNSC, Annex to the letter dated 11.9.2002 from the Permanent Representative of the Russian Federation to the United Nations addressed to the Secretary-General: Statement by Russian Federation President V. V. Putin, 11.9.2002, S/2002/1012, annex.

tion how the identified State practice could have affected the two co-existing norms. While the two rights remain separate in their nature and do not exactly overlap in their content,³⁴¹ the conventional and the customary right have been converging³⁴² and are interdependent in their interpretation. Accordingly, the “relevant custom may be used for the (evolutive) interpretation of the Charter provisions on the use of force”.³⁴³ Furthermore, the emergence of a new customary rule might arguably even alter the pre-existing conventional rule.³⁴⁴ As such, (subsequent) State practice may cause the parallel adjustment of the two co-existing rights.

A separate or independent interpretation of the two norms, in contrast, is only necessary, if they contained an independent rationale.³⁴⁵ The differences between the conventional right to self-defence enshrined in Art. 51 UN Charter and the corresponding inherent customary right to self-defence are, however, not substantive in nature. Their distinctive features rather derive from the open wording of Art. 51 UN Charter and thus the lack of clearly defined requirements. Consequently, the convention-based right to self-defence calls for further interpretation of its legal prerequisites based on its customary counterpart. Since the two norms do thus not contradict but complete each other, their underlying rationales are similar and clearly not entirely independent. The recently generated (subsequent) State practice is consequently of equal importance to both the conventional and the customary right.

Yet, the *jus cogens* character of the right to self-defence further complicates the assessment of the State practice’s legal effect. The modification of a *jus cogens* norm cannot be assumed easily.³⁴⁶ “Simple” State practice is not enough to alter the content of a peremptory norm,³⁴⁷ as such a norm is something more than a usual legal rule. It has even been suggested that the modification of the prohibition of the use of force is generally impossible.³⁴⁸ Art. 53 VCLT establishes that a peremptory rule “can be modified only by a subsequent norm of general international law having the same character”.

³⁴¹ *Nicaragua (Merits)* (note 114), para. 175.

³⁴² *Y. Dinstein* (note 286), 96; *T. Ruys* (note 197), 10.

³⁴³ *T. Ruys* (note 197), 22.

³⁴⁴ *T. Ruys* (note 197), 23; *M. E. Villiger* (note 86), 203; *H. W. A. Thirlway* (note 5), 131 et seq.

³⁴⁵ *A. Orakhelashvili*, *The Interpretation of Acts and Rules in Public International Law*, 2008, 497.

³⁴⁶ *G. J. H. van Hoof* (note 120), 166 et seq.

³⁴⁷ *A. Orakhelashvili* (note 275), 129.

³⁴⁸ *G. Abi-Saab*, *The Concept of “International Crimes” and Its Place in Contemporary International Law*, in: J. H. H. Weiler/A. Cassese/M. Spinedi, *International Crimes of State: A Critical Analysis of the ILC’s Draft Article 19 on State Responsibility*, 1989, 141 et seq., 146.

This process of modification includes the “development of new aspects of the existing peremptory norms, which is in essence an enlargement of the scope a peremptory norm rather than its abrogation”.³⁴⁹ Consequently, the amendment of the double-embedded and peremptory right to self-defence is subject to strict legal requirements, which exceed the normal preconditions for the modification of an international source of law, as the international community as a whole needs to approve the change of law.³⁵⁰

However, it should be noted that the amended understanding of the right to self-defence does in fact not require an amendment of Art. 51 UN Charter or its customary equivalent. The UN Charter itself does not provide a clear definition of the term “armed attack”. Its broad wording therefore permits and even calls for further interpretation. State practice in the context of the co-existing customary right of self-defence contributes to the establishment of a subsequent practice within the meaning of Art. 31 (3) (b) VCLT, which heavily influences the interpretation of the conventional provision.

The international community of States has not abandoned the State-dominated concept of armed attacks in the context of Art. 51 UN Charter. It would thus be incorrect to deduce a complete departure from the traditional understanding of the notion of self-defence based on the US and French military responses to the respective terrorist attacks. On closer inspection, it rather suggests an alternative way to circumvent the involvement of non-State actors. The unwilling and unable test as well as the harbouring doctrine aim at solving the legal dilemma resulting from the involvement of a third State, to which the terrorist attack is not attributable. The legal concepts both aim at creating a link between the conduct of the terrorist organisation and the host State, justifying the victim State’s use of force against that State’s territorial integrity.³⁵¹ Whereas the harbouring doctrine relies on the host State’s active housing and support of the terrorist group, the unwilling and unable test connects to the host State’s (passive) omission to crack down on the terrorist organisation.³⁵² Both concepts thus refer to the host State’s own due diligence to fight terrorism on its soil.³⁵³

³⁴⁹ A. Orakhelashvili (note 275), 130.

³⁵⁰ K. Schmalenbach, Article 53, in: O. Dörr/K. Schmalenbach (note 22), 897 et seq., para. 42; A. Orakhelashvili (note 275), 128 et seq.

³⁵¹ See P. Starski (note 296), 464 et seq.; C. Stahn (note 322), 42.

³⁵² P. Starski (note 296), 473.

³⁵³ P.-M. Dupuy/C. Hoss, *Trail Smelter and Terrorism: International Mechanisms to Combat Transboundary Harm*, in: R. M. Bratspies/R. A. Miller, *Transboundary Harm in International Law: Lessons from the Trail Smelter Arbitration*, 2006, 225 et seq., 236. See also

A failure to comply with this duty would, according to the respective doctrines, create the necessary nexus between the non-State actor and the State.³⁵⁴ Consequently, both concepts derive the right to a military intervention in the host State from the non-fulfilment of that obligation. Despite the distinct legal nature of attribution of an international wrongful act and compliance with an international obligation, the ILC seems to agree with this connection as it stated that there is a “close link between the basis of attribution and the particular obligation said to have been breached”.³⁵⁵

Contrary to the Commission’s view on this connection, it has been argued that the failure to prevent or fight terrorism cannot automatically lead to the attribution of the terrorist act as such.³⁵⁶ It might however establish a duty to tolerate an ensuing military response by the victim State, rendering a reaction within the limits of Art. 51 UN Charter lawful.³⁵⁷ Still others even argued that the omission to combat terrorist organisation amounts to a tacit acknowledgment of the organisation’s acts.³⁵⁸ And, yet, none of the concepts convincingly clarifies the relation between the breach of the obligation to fight terrorism and the (possibly resulting) attribution of the terrorist act to the host State.³⁵⁹

Despite these doctrinal inconsistencies and the lack of legal clarity,³⁶⁰ both doctrines merely interpret the broad wording of Art. 51 UN Charter. They all operate within the textual framework of the provision and exploit the absence of clear conventional definitions. The doctrines therefore provide an answer to the ICJ’s State-centric understanding of Art. 51 UN Charter, without openly contradicting it.

P. Starski (note 296), 484 et seq. (even considering a State unwilling to prevent terrorism a harbouring State).

³⁵⁴ *P.-M. Dupuy/C. Hoss* (note 353), 236; *Armed Activities on the Territory of the Congo (Congo v. Uganda)*, Oral Pleadings, Statement of *I. Brownlie* on behalf of Uganda, CR 2005/7 18.04.2005, 8 et seq., 30 (para. 80).

³⁵⁵ ILC, Draft Articles on Responsibility of States for Internationally Wrongful Acts, With Commentaries, in: ILCYB 2001, Vol. II (Part Two), 31 et seq., 39 (para. 4 of the commentaries to Chapter II).

³⁵⁶ *P. Starski* (note 296), 485.

³⁵⁷ *C. Greenwood* (note 273), para. 18.

³⁵⁸ *A. Randelzhofer/G. Nolte* (note 290), para. 38; *T. Reinhold*, State Weakness, Irregular Warfare, and the Right to Self-Defense Post-9/11, *AJIL* 105 (2011), 244 et seq., 245; *D. Jinks*, State Responsibility for the Acts of Private Armed Groups, *Chi. J. Int’l L.* 4 (2003), 83 et seq., at 90.

³⁵⁹ See *F. I. Padden*, Use of Force Against Non-State Actors and the Circumstance Precluding Wrongfulness of Self-Defence, *LJIL* 30 (2017), 93 et seq., 107 et seq. (criticising the existing “[i]nsufficiency of the mainstream approaches”).

³⁶⁰ *D. I. Ahmed*, Defending Weak States Against the “Unwilling or Unable” Doctrine of Self-Defense, *Journal of International Law and International Relations* 9 (2013), 1 et seq., 14.

The current reading of the term “armed attack” is thus still consistent with the wording of the UN Charter and does therefore not alter the legal rights or obligations enshrined in Art. 51 UN Charter.³⁶¹ The recently generated State practice therefore only amounts to a redefined interpretation of the right to self-defence and not a modification of the law.³⁶² The right to self-defence has not been altered.

c) A New Perspective on an Old Problem

The international community seems to agree that an armed attack is no longer restricted to be conducted by a State, but can actually be executed by non-State actors. Terrorist attacks do not fall short in terms of intensity or gravity in comparison to attacks of State origin. There is no linguistic or teleological reason to limit the term “armed attack” to State-driven behaviour. Yet, the question against whom the right to self-defence can be exercised, remains a matter of State-centric attribution. Here, States still feel the need to justify the violation of another State’s territorial integrity even in response to a terrorist attack. They thus adhere to the traditional understanding of State sovereignty in the context of the use of force. By establishing the host State’s obligation to tolerate such military intervention, the newly established doctrines provide one possibility to comply with the prohibition of the use of force when faced with the involvement of a third State.

Whether this reading of Art. 51 UN Charter will prevail in future instances of terrorism, particularly outside the Western hemisphere, remains unclear. While it is true that cases of mass tragedies cause governments to react in unpredictable and often legally questionable ways – “blurring [...] the distinction between normalcy and emergency”³⁶³ – the right to self-defence seems to be the international community’s accepted means of choice to respond to large-scale terrorist attacks. The reasonable criticism put forward by some cannot detract from the considerable amount of supportive State practice and *opinio juris*. Although A. Cassese might be right to point out that emotional reactions should not be mistaken as State practice or *opinio juris*,³⁶⁴ President F. Hollande’s almost identical line of argument and his statements reiterating former US President G. W. Bush indicate the opposite. The issue of self-defence remains a politically sensitive area of law.

³⁶¹ See *T. Ruys* (note 197), 22.

³⁶² See *O. Corten* (note 338), 799; *F. Zarbiyev* (note 210), 270.

³⁶³ *A. Addis* (note 311), 324.

³⁶⁴ *A. Cassese*, *International Law*, 2nd ed. 2005, 475. See also *T. Ruys* (note 197), 442.

Legal considerations and doctrinal arguments will therefore always be governed by geopolitical and practical concerns. The political and emotional dimension of this issue warp the allegedly neutral legal assessment.

Yet, it seems that the international community, with the use of (subsequent) State practice, has found a legal way to react to international terrorism and adjust the law to its needs. Even the law of self-defence as an integral legal norm has proven to be sufficiently responsive and States seem to have succeeded in designing a justified solution to a political and legal dilemma.

IV. Concluding Remarks

This article has illuminated the various avenues of how international law may accommodate changing realities. It has identified different modalities of responsiveness and revealed the actors behind the process of normative adaption. It has also shed light on the scope and the limits of legal alterations.

The analysis has shown that (subsequent) State practice dominates the process of responsiveness. The behaviour of States thereby functions as the motor of adaption, as the engine of legal change. Subsequent State practice serves as an indicating factor in the context of treaty interpretation. It may equally operate as one of the two constitutive elements in the development of a customary norm. As such, it bears the potential of either redirecting the previous reading of a legal provision or of amending the pre-existing normative framework. State practice therefore not only triggers the need for normative adaption, it also determines the direction and the speed of legal alterations. The behaviour of States thus deploys both a factual and a legal effect. It links the two dimensions, which culminates in the responsiveness of international law. Furthermore, it harmonises the development of the two sources of international law. While a treaty and a customary norm may exist independently from each other, subsequent State practice allows the consistent development of the two sources where they overlap. The high relevance of State practice in the process of normative adaption leads to a State-driven responsiveness of international law.

The second type of responsiveness derives from the increasing importance of international and regional courts and tribunals. Although courts themselves are not able to create law, their methods of deriving customary norms or conventional interpretations significantly shape the international legal corpus. Their decisions establish legal realities based on political facts.

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While their role is inherently legal, the judgments of international courts and tribunals always contain a political layer. They decide whether the level of State practice suffices to reinterpret or modify the current legal framework; and they choose which State behaviour they consider and which they neglect. Their inevitably subjective evaluation of facts necessarily leads to biased legal results. The lack of a clear and consistent methodology of deriving a legal norm adds to this effect and produces a certain degree of unpredictability. The considerable scope of judicial action, on the other hand, creates deeply needed court-driven responsiveness.

The courts' method of deriving an international norm has furthermore strengthened the role of organs of international organisations. By increasingly relying on resolutions of, *inter alia*, the General Assembly and the Security Council, the ICJ in particular empowered these organs and enhanced their position in the development of international law. As such, they form and influence the advancement of the international legal sources through their own practice. These organs provide the platform for political exchange, thereby accumulating both State practice and *opinio juris* of numerous States. The importance of the decisions of these organs leads to organ-driven responsiveness of international law as the final avenue of normative adaption.

The two analysed legal sources – customary and treaty law – have thereby both proven to be equally susceptible to change. Their respective degree of responsiveness is not predominantly determined by the nature of their source but rather by the nature of the specific norm in question. While reciprocal obligations are generally open to adjustments by States, integral norms are much less responsive to such change – irrespective of their conventional or customary nature. The different level of adaptability results from the status of the norm within the international legal order. Integral norms form a normative essence and legally underpin international law. Human rights obligations and the prohibition of the use of force constitute such integral and thus steady norms. While their open and unclear wording allows or even calls for further evolutive interpretation, their very essence is not open to restrictive modification. It is therefore not surprising that the altered realities resulting from the imminent threat of terror have not led to a modification of the human right to privacy or the States' right to self-defence. The international community rather chooses to reinterpret the content and the scope of the obligation while preserving the actual letter and spirit of the norms.

As the line between an (evolutive) interpretation of a norm and its substantive modification is blurry and imprecise, States as well as courts are

reluctant to admit if their current reading of a norm stretches the limits of interpretation. It is this shying away from an objective assessment, which leads to “pseudo-interpretations”, legal uncertainty, and a lack of legal debate on the boundaries and effects of informal amendment. Distinguishing interpretations from modifications and emerging modifications from violations thus leaves room for further research.

Here, too, the nature of the norm determines the legal thresholds that have to be reached before contrary practice can be legitimised as emerging modification or reinterpretation. In case of integral norms, such practice is presumed to be illegal. The nature of the norm therefore determines its potential responsiveness towards altered realities. It works as a balance to the factual requirements of responsiveness, preventing overly quick alterations of law and functioning as a legal bastion of rest in a world in motion.

