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# Treaty Interpretation and Constitutional Transformation: Informal Change in International Organizations

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# Article

## Treaty Interpretation and Constitutional Transformation: Informal Change in International Organizations

Julian Arato<sup>†</sup>

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*By constitutional amendment, I mean change in the text of the constitution through a purposeful act of will; by constitutional transformation, I mean change that allows the text to remain formally unchanged and is caused by facts that need not be accompanied by an intention or awareness of the change. I need hardly mention that the theory of transformation is much more interesting than that of change.*

—Georg Jellinek<sup>1</sup>

## I. INTRODUCTION

Like all constituted bodies of government, international organizations change over time—sometimes in profound and unexpected ways.<sup>2</sup> Besides developing through the obvious mechanism of formal amendment by the constituent member states, these governance bodies can and do undergo a more autonomous kind of constitutional development—what might be called informal constitutional change or transformation. This type of quiet evolution may occur on different levels—including the reordering of the organization's internal architecture in terms of the relative competences of its various organs, as well as the development of the powers of the organization as a whole vis-à-vis the states parties. Unlike formal amendment, which occurs through the express decision of the member states according to a certain procedure, informal transformation occurs more subtly, through the practice of the organization. Although the latter mode of change may attract less attention than the former, the degree of change involved can be just as dramatic.

This Article is about one particular mode of informal change: the transformation of an organization through the practice of its judicial organ in the interpretation of its constituent instrument—in other words, transformation through constitutional interpretation. Not all international organizations include judicial organs,<sup>3</sup> and not all judicial organs are constituted in the same way.<sup>4</sup> Different institutions have been delegated different powers and different kinds of jurisdiction.<sup>5</sup> Their judges are chosen through widely varying procedures,

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1. GEORG JELLINEK, CONSTITUTIONAL AMENDMENT AND CONSTITUTIONAL TRANSFORMATION (1906), as reprinted in WEIMAR: A JURISPRUDENCE OF CRISIS 54, 54 (Arthur J. Jacobson & Bernhard Schlink eds., Belinda Cooper et al., trans., Univ. of Cal. Press 2000) (footnote omitted).

2. See, e.g., JOSÉ ALVAREZ, INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS (2005). The scope of this Article is limited to the analysis of international organizations established by treaty, and charged with some degree of delegated public power.

3. *Id.* at 415-516; JAN KLABBERS, AN INTRODUCTION TO INTERNATIONAL INSTITUTIONAL LAW 160-61, 230-49 (2d ed. 2009).

4. Benedict Kingsbury, *International Courts: Uneven Judicialization in Global Order* 1 (New York Univ. Sch. of Law, Working Paper No. 259, 2011), [http://lsr.nellco.org/nyu\\_plltwp/259](http://lsr.nellco.org/nyu_plltwp/259); see also Cesare Romano, *The Proliferation of International Judicial Bodies: The Pieces of the Puzzle*, 31 N.Y.U. J. INT'L L. & POL. 709, 711-23 (1999) (mapping the diverse field of international judicial and quasi-judicial bodies).

5. Karen J. Alter, *Delegating to International Courts: Self-Binding vs. Other Binding Delegation*, 71 L. & CONTEMP. PROBS. 37 (2008); Eyal Benvenisti & George W. Downs, *Prospects for the Increased Independence of International Tribunals*, 12 GER. L.J. 1057, 1057-58 (2011).

and entertain very different interpretive outlooks.<sup>6</sup> Yet in the abstract the basic fact remains clear: where they are established, such international courts and tribunals tend to contribute substantially to the development of their larger organizations.<sup>7</sup> Through the interpretation of the formal terms of their constituent instruments, these constituted judicial bodies have proven capable of transforming the material constitutions of the organizations to which they belong.

The focus here will be on international organizations established by treaty, charged with the exercise of certain elements of governmental authority over the states parties—and specifically those with judicial organs. My goal is to expose the transformative potential and effect of certain of these bodies' interpretive practices when engaged in the interpretation of their own constituent instruments. This Article is thus as much about treaty interpretation as it is about constitutional transformation. Under the general law of treaties, all interpretation is supposed to proceed according to a set of positive legal rules, codified in general international law and external to any particular organization.<sup>8</sup> The rules of interpretation provide a legal framework for the interpretation of all treaties, including the constituent instruments of international organizations—as such the rules would appear to constrain judicial bodies' interpretive discretion. Yet in the hands of certain judicial organs engaged in constitutional interpretation, these codified interpretive techniques have sometimes proven more empowering than limiting. In confronting their own constituent instruments, the judicial organs of international organizations have sometimes adopted remarkably broad approaches to interpretation—even in the name of applying more modest interpretive canons. I want to suggest that the use of broad interpretive methods can materially contribute to the constitutional transformation of an international organization: not only in terms of its internal architecture but, even more fundamentally, in terms of its external autonomy and capacities vis-à-vis the states parties.

Despite its justification in the voluntaristic language of the law of treaties, I argue that such judicially driven transformation can fray the threads of state consent binding the organization to its constituent member states. The same informal process that contributes to the autonomy of an organization may at the same time undermine the consensual grounds of its authority. Constitutional interpretation in international organizations thus presents a familiar paradox: on the one hand, in light of the important role of these organizations in supranational governance, there is a perceived need for them to employ a flexible approach to their functions in a changing legal and political

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6. J.H.H. Weiler, *The Interpretation of Treaties—A Reexamination: Preface*, 21 EUR. J. INT'L L. 507, 507 (2010); Kingsbury, *supra* note 4, at 1-2.

7. ALVAREZ, *supra* note 2, at 65-109; Benvenisti & Downs, *supra* note 5, at 2-3; Ingo Venzke, *The Role of International Courts as Interpreters and Developers of the Law: Working Out the Jurisgenerative Practice of Interpretation*, 34 LOYOLA L.A. INT'L & COMP. L. REV. 99 (2011).

8. See Vienna Convention on the Law of Treaties art. 31, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT].

environment. On the other hand, in light of the very same importance and sensitivity of the areas regulated by these treaties, there is a countervailing pressure to stick to the bargain struck. The evolution and adaptation of treaty-based organizations may be desirable under the right conditions. Their amendment procedures are often difficult to engage, making it difficult for these organizations to respond appropriately to manifest changes in international law and politics. Informal change may indeed yield desirable results—any particular such development will have to be judged in its own right, case-by-case. But the specter of consent always lurks in the background: irrespective of its outcome, informal transformation carries in its wake the potential to produce serious problems of legitimacy and accountability.

This Article is both conceptual and comparative in approach. I will examine the interpretive practices of three very different international organizations: the World Trade Organization (WTO) via the Appellate Body (WTO-AB); the United Nations via its principal judicial organ, the International Court of Justice (ICJ); and the Council of Europe (CoE) with a special focus on the European Court of Human Rights (ECtHR). Two types of questions will guide this analysis. On the one hand, much attention will be given to doctrinal exegesis: How do the judicial organs of these organizations approach the rules of interpretation when engaged in the interpretation of their own constituent instruments? How do their approaches contrast with the more general interpretation of treaties by neutral and independent third-party international courts and tribunals? How do the contours of their interpretive techniques compare to one another? On the other hand, the goal shall always be to qualify the *constitutional* meaning of these organization's interpretive practices: What, if any, are the constitutional effects of said judicial bodies' approaches to their own constituent instruments? What effect does interpretation have on the ordering of powers and competences within the organization? What effect does it have on the powers of the organization as a whole, or on its relationship to the parties? And how can their interpretive practices be qualified in terms of state consent—the foundational principle of the law of treaties, and the original basis of their authority?

To better compare the interpretive practices of such varied organizations, I confine the analysis here to the use, by their judicial organs, of one particular technique of interpretation: the interpretation of a treaty in light of the subsequent practice of the parties ("subsequent practice").<sup>9</sup> As codified at Article 31(3)(b) of the Vienna Convention on the Law of Treaties (VCLT), all treaty 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."<sup>10</sup> This basic rule will reemerge throughout this Article as a *leitmotif*. In other words, I employ subsequent practice as an

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9. This venerable technique of interpretation has long been recognized in international law. *Id.* art. 31(3)(b). However, its use significantly predates the Vienna Convention. See, e.g., Russian Claim for Interest on Indemnities (Russ. v. Turk.), 11 R.I.A.A. 421, 433 (Perm. Ct. Arb. 1912); Air Transport Services Agreement Arbitration (U.S. v. Fr.), 38 I.L.R. 182, 248-55 (1963).

10. VCLT, *supra* note 8, art. 31(3)(b).

analytical device, to illuminate patterns of change within the WTO, the United Nations, and the CoE.

The doctrine of subsequent practice is a venerable technique of interpretation oriented above all toward state consent. The traditional idea of the technique is that the interpretation of any treaty should take into account the practice of the parties in applying the agreement. Such practice, properly defined, can be a valuable guide to the meaning of the treaty in the eyes of the parties.<sup>11</sup> Because the goal is establishing the extent of the parties' mutual consent to be bound by an agreement, an authentic practice must entail the consistent practice of *all* of the parties. Although active participation by all is most probative, it is generally recognized that the mere acquiescence of some will suffice.<sup>12</sup> Where it is properly applicable, however, the doctrine has a highly expansive potential. Insofar as it evidences their common intentions, the parties' consistent and concordant practice may establish a far-reaching interpretation, and even successive reinterpretations.<sup>13</sup> Though rooted in the consent of the parties, the doctrine can potentially establish significant treaty change over time.

From the perspective of the law of treaties, scholars often acknowledge that subsequent practice works somewhat differently in international organizations where judicial organs are charged with the interpretation of the organization's charter on a standing (rather than an *ad hoc*) basis.<sup>14</sup> In interpreting their own constituent instruments, these courts and tribunals occasionally resolve questions about the requirements and effects of subsequent practice idiosyncratically.<sup>15</sup> Some have taken radically broad views of subsequent practice, both in terms of evidence (i.e., whose practice is relevant and with what degree of consistency) and expansive potential (i.e., how much change the doctrine can support). These idiosyncrasies tend to be addressed as a problem relating to the much-vaunted consistency of interpretive doctrine in the law of treaties.<sup>16</sup> In general, the issue tends to be bracketed as the province

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11. *Russian Indemnities*, 11 R.I.A.A. at 433.

12. Rec. of the Int'l Law Comm'n, 18th Sess., May 4-July 19, 1966, U.N. Doc. A/6309/Rev.1, reprinted in, 2 Y.B. INT'L L. COMM'N, 187, 222 [hereinafter ILC DALT]; see also MARK E. VILLIGER, COMMENTARY ON THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES 431 (2009) (confirming that this provision requires the active practice of only some of the parties).

13. See ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 191-95 (2000).

14. See RICHARD GARDINER, TREATY INTERPRETATION 11-12 (2008); TETSUO SATO, THE EVOLVING CONSTITUTIONS OF INTERNATIONAL ORGANIZATIONS: A CRITICAL ANALYSIS OF THE INTERPRETIVE FRAMEWORKS OF THE CONSTITUENT INSTRUMENTS OF INTERNATIONAL ORGANIZATIONS xiii (1996); Salo Engel, *Living Constitutions and the World Court (The Subsequent Practice of International Organizations Under Their Constituent Instruments)*, 16 INT'L & COMP. L.Q. 865 (1967). It is worth bearing in mind that some judicial organs enjoy substantially more opportunities to interpret their constituent instruments than do others. The ICJ only hears a handful of cases a year (and even more rarely enjoys the opportunity to interpret the U.N. Charter or the Statute of the Court), a far cry from the overwhelming influx of cases facing the ECtHR (over 50,000 a year, with a backlog of nearly 150,000).

15. See C.F. AMERASINGHE, PRINCIPLES OF THE INSTITUTIONAL LAW OF INTERNATIONAL ORGANIZATIONS 24 (2d rev. ed. 2005); GARDINER, *supra* note 14, at 247..

16. According to the ILC, in its commentaries to the DALT, the various elements of Article 31 constitute a single rule of interpretation. ILC DALT, *supra* note 12, at 219-20 ("All the various elements, as they were present in any given case, would be thrown into the crucible, and their interaction

of special regimes,<sup>17</sup> or addressed case-by-case by appeal to other features of the particular treaty in question.<sup>18</sup>

From the perspective of constitutional theory, however, the liberality of approaches to subsequent practice in certain international organizations takes on a very different color. What matters at this altitude is that these judicial organs expand the contours of the doctrine when interpreting their own constituent treaties. Some organizations, like the WTO, have taken a relatively static approach to the technique. But others have felt less restrained. In the cases of the United Nations and CoE, the expansive use of subsequent practice in the context of constitutional interpretation has had important transformative effects.

In the comparative portion of the Article I trace the use of subsequent practice by the WTO-AB, the ICJ, and the ECtHR. The first body represents a control, as an exemplar of a strict and traditionalistic approach to subsequent practice. The WTO-AB has consistently maintained a rigidly narrow approach to the technique in the interpretation of the complex web of agreements constituting the WTO regime.<sup>19</sup> The second and third have adopted very particular approaches to subsequent practice in the interpretation of their constituent instruments—quite different in their contours, but similar in their remarkable liberality.<sup>20</sup> In broad strokes I argue that in contrast to the WTO-AB, the expansive approaches of the ICJ and ECtHR have materially transformed the constitutions of their respective organizations. The

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would give the legally relevant interpretation.”); see also GARDINER, *supra* note 14, at 9 (invoking the ILC’s “crucible” approach).

17. See, e.g., GARDINER, *supra* note 14, at 247.

18. Some explain certain differences in approach by appeal to the substantive law of the treaties or treaty provisions being interpreted. For example, it is sometimes said that treaty norms protecting the human person form a special category. See THEODOR MERON, *THE HUMANIZATION OF INTERNATIONAL LAW* 193-201 (2006). The report of the International Law Commission (ILC) on fragmentation notes that, “[i]n State practice, and the practice of international tribunals, particular approaches to interpretation have of course developed. Thus it has become a practice of human rights bodies to adopt readings of human rights conventions that look for their *effet utile* to an extent perhaps wider than regular treaties.” Rep. of the Study Group of the Int’l Law Comm’n, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, 58th Sess., May 1-June 9, July 3, Aug. 11, 2006, ¶ 428, U.N. Doc. A/CN.4/L.682 (Apr. 13, 2006) [hereinafter *Fragmentation Report*]. More recently, one hears that treaties protecting the environment have a special place. See *id.* ¶ 493(1). Some commentators have argued that these substantive norms are different (and subject to differential treatment in interpretation) because they represent interests of the international community as opposed to the mere bilateral interests of the parties. See Bruno Simma, *From Bilateralism to Community Interest in International Law*, 250 RECUEIL DES COURS 217 (1994); Santiago Villalpando, *The Legal Dimension of the International Community: How Community Interests Are Protected in International Law*, 21 EUR. J. INT’L L. 387 (2010). Others suggest that inter-state treaties that create rights or benefits for third party non-state actors should be treated differently for purpose of interpretation, by qualifying the weight given to the evolving intentions of the parties. See, e.g., Anthea Roberts, *Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States*, 104 AM. J. INT’L L. 179, 202 (2010) (“Treaties that grant rights to nonstate actors, such as human rights and investment treaties, do not share the symmetry between those who hold the rights and those who can interpret them . . . . The treaty parties may still be the masters of the treaty, but one cannot assume no harm, no foul in accepting their interpretations of nonstate actors’ rights.”).

19. See Alexander Feldman, Note, *Evolving Treaty Obligations: A Proposal for Analyzing Subsequent Practice Derived from WTO Dispute Settlement*, 41 N.Y.U. J. INT’L L. & POL. 655, 676 (2009).

20. See AMERASINGHE, *supra* note 15, at 49-56; GARDINER, *supra* note 14, at 244-49.

transformation of these organizations through the interpretive practices of their judicial bodies has had dramatic effects, enhancing these constituted bodies' general powers and rendering them significantly more autonomous vis-à-vis the states that created them.

The ICJ and ECtHR deploy subsequent practice in different ways, and with different kinds of effects. The ICJ has held that the practice of the organs (and other bodies) of the U.N. Organization provides an authoritative guide to the interpretation of the U.N. Charter—as a proxy for the subsequent practice of the parties.<sup>21</sup> However, the Court lacks the jurisdictional competence to weigh in on the interpretive value of the organs' practice most of the time.<sup>22</sup> As a result, the power of its jurisprudence lies in its role as a signal to the more competent organs that they may establish an authentic interpretation of the Charter through their consistent practice. In particular, the Court's approach empowers the Security Council (UNSC) and the General Assembly (UNGA). At the same time, it also empowers some states parties against others—especially the five permanent members of the Security Council (P5). By contrast, the ECtHR's approach to interpreting its constituent instrument, the European Convention on Human Rights (ECHR),<sup>23</sup> is more directly court-empowering. That Court does look to the actual practice of the states parties to establish authentic subsequent practice. However, it has proven willing to rely on the practice of merely *most* states under its jurisdiction, even in the face of blatant contradictory conduct by the others. What is essential, in the view of the ECtHR, is that the practice of the parties is sufficient to establish a "European consensus." It remains within the province of the Court to determine just how much practice will suffice in particular cases.<sup>24</sup> Both the ICJ and the ECtHR adopt very different approaches to subsequent practice, with different constitutional consequences. What the practices of these Courts have in common is their broader transformative effect of empowering each organization as a whole, over and above the states parties.

The following Part lays the conceptual groundwork for the rest of the Article. I seek to both elaborate a narrow concept of the "constitution" of an international organization, and develop a theoretical apparatus for qualifying constitutional change over time. In Part III, I examine traditional approaches to interpretation on the basis of subsequent practice. I first develop the contours of subsequent practice as it is typically applied outside the context of international organizations, to indicate the strong consensual basis of the technique. Second, I examine the use of subsequent practice by the WTO-AB, as an exemplar of the traditional approach, even in the context of constitutional interpretation. In

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21. Certain Expenses of the United Nations, Advisory Opinion, 1962 I.C.J. 151, 157 (July 20); Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 16, ¶¶ 21-22 (June 21); Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶¶ 27-28 (July 9).

22. See *infra* Part IV.

23. Convention for the Protection of Human Rights and Fundamental Freedoms (Rome), Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter ECHR].

24. See, e.g., *Öcalan v. Turkey* [GC], App. No. 46221/99, Eur. Ct. H.R. (May 12, 2005).

Part IV, I examine the ICJ's evolving approach to interpretation on the basis of subsequent practice *qua* the "practice of the organization."<sup>25</sup> I attempt to draw out the transformative effects of its approach from a constitutional perspective, as well as expound its prospective transformative potential. In Part V, I turn to the ECtHR, with a focus on its use of "European consensus" as a stand-in for subsequent practice. Here too, though in a different way, the Court's expansive assertion of competence to interpret the Convention on the basis of practice has had significant constitutional effects. Finally, in Part VI, I sketch a foundation for the informed critique of informal change in international organizations. I suggest that informal change is not necessarily a bad thing, and it is important to proceed on a case-by-case basis. Nevertheless, I emphasize certain general problems of legitimacy and accountability that are always likely to follow in the wake of transformation through constitutional interpretation, especially in the context of international organizations.

## II. CONSTITUTIONS AND CONSTITUTIONAL CHANGE: AN APPROACH TO THE STUDY OF INTERNATIONAL ORGANIZATIONS

The concept of a constitution is employed in innumerable ways.<sup>26</sup> If not adequately cabined, its deployment in the context of international organizations can cause conceptual mischief.<sup>27</sup> In this section, I first attempt to avoid a misleading dichotomy between the concepts of an international treaty and a constitution. I then develop the idea of constitutions and constitutional change in the context of international organizations by drawing three more meaningful distinctions: between the formal and material constitution of an international organization; between two methodological perspectives on the constitution

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25. See generally *Certain Expenses*, 1962 I.C.J. 151; *Namibia*, 1971 I.C.J. 16; *Wall*, 2004 I.C.J. 136.

26. At the outset I want to disclaim an especially broad use of the concept of a constitution on the global stage: i.e., the claim that the constituent instrument of a public international organization amounts to, or represents part of, some kind of global constitution. The idea occasionally surfaces that the U.N. Charter represents the constitution of the world. See Bardo Fassbender, *The United Nations Charter as Constitution of the International Community*, 36 COLUM. J. TRANSNAT'L L. 36 (1998); Thomas Franck, *Is the UN Charter a Constitution?*, in VERHANDELN FÜR DEN FRIEDEN 95 (Jochen Frowein et al. eds., 2003). Others highlight the Charter as the best candidate for developing such a constitution in the future. See, e.g., Jürgen Habermas, *The Constitutionalization of International Law and the Legitimation Problems of a Constitution for World Society*, 15 CONSTELLATIONS 444 (2008). Another line of argument suggests that the Charter, along with other major universal agreements, constitute fragmented islands in a global constitutional archipelago. See JAN KLABBERS, ANNE PETERS & GEIR ULFSTEIN, *THE CONSTITUTIONALIZATION OF INTERNATIONAL LAW* (2009). It has been suggested, in this vein, that the World Trade Agreements (including the Global Agreement on Tariffs and Trade) play the part of a world trade constitution. J.H. Jackson, *The WTO "Constitution" and Proposed Reforms: Seven "Mantras" Revisited*, 4 J. INT'L ECON. L. 67, 67-78 (2001); Joel Trachtman, *The Constitutions of the WTO*, 17 EUR. J. INT'L L. 623 (2006). Unsurprisingly, these views have their detractors. However I want to side-step the issue of the global constitution altogether, foregoing any position on the relationship between these organizations and any constitution of the world. The focus here is not the global constitution or lack thereof. Admittedly, organizations like the United Nations, WTO, and ECtHR are interesting largely because they are charged with the exercise of public power on the international stage. But the point of talking about their constitutions is to illuminate something about each organization's internal composition as a discrete entity, and their power over their members.

27. Neil Walker, *Postnational Constitutionalism and the Problem of Translation*, in EUROPEAN CONSTITUTIONALISM BEYOND THE STATE 27 (Joseph Weiler & Marlene Wind eds., 2003).

(juridical and political); and between constitutional amendment (formal change) and constitutional transformation (informal change).

### A. *Treaty vs. Constitution*

Certain scholars insist on drawing particularly stark lines between “constitutions” and mere “treaties.” This proclivity tends to arise in the literature on federalism and, especially, in the context of the European Union—often by reference to the American experience with federation in the late eighteenth century.<sup>28</sup> Certain voices distinguish between treaties and constitutions in order to stratify phases of federal integration.<sup>29</sup> Treaty and constitution here become analogues for two ideal types: a *confederation*, meaning a loose political organization of sovereign states (e.g., the United States as envisioned by the Articles of Confederation of 1781)<sup>30</sup>; and a veritable *federal state*, meaning a single state composed of a combination of sub-units (e.g., the United States as established by the U.S. Constitution of 1789).<sup>31</sup> In this milieu, constitution comes to be inexorably associated with the notion of a sovereign federal state, while treaty is associated with the weaker confederation

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28. The issue is particularly sharp in the debates surrounding the proposed “Treaty Establishing a Constitution for Europe,” Oct. 29, 2004, 2004 O.J. (C 310) 47, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2004:310:FULL:EN:PDF>. Even in spite of the label “Constitution,” certain eminent scholars insisted that the new treaty cannot be understood as a true constitution. See, e.g., Dieter Grimm, *Integration by Constitution*, 3 INT’L J. CONST. L. 193, 193-98 (2005); see also DEBORAH Z. CASS, THE CONSTITUTIONALIZATION OF THE WORLD TRADE ORGANIZATION: LEGITIMACY, DEMOCRACY, AND COMMUNITY IN THE INTERNATIONAL TRADING SYSTEM 3 (2005); Jeffrey Dunoff, *Constitutional Conceits: The WTO’s ‘Constitution’ and the Discipline of International Law*, 17 EUR. J. INT’L L. 647, 672 (arguing “that there is no WTO constitution, and that scholarly invocation of constitutional discourse represents an effort to invest international legal structures with the power and authority that domestic constitutional entities possess”). See generally SYMPOSIUM ON THE PROPOSED EUROPEAN CONSTITUTION, 3 INT’L J. CONST. L. 163, 163-515 (2005). See even the hesitation of a constitutionalist like Miguel Poiares Maduro, in writing about the proposed “Treaty for a Constitution of Europe” in 2005. Miguel Poiares Maduro, *The Importance of Being Called a Constitution: Constitutional Authority and the Authority of Constitutionalism*, 3 INT’L J. CONST. L. 332, 352 (insisting that “the choice of the legal form of a treaty, and the subjection of the text, for the most part, to the traditional mechanisms of treaty ratification make clear that we are not confronting a constitution in the classical sense”).

29. Grimm, *supra* note 28, at 193-94, 208; Michel Rosenfeld, *The European Treaty-Constitution and Constitutional Identity: A View from America*, 3 INT’L J. CONST. L. 317, 317-18 (2005). But see J.H.H. Weiler, *On the Power of the Word: Europe’s Constitutional Iconography*, 3 INT’L J. CONST. L. 173, 174 (2005) (referring to the proposed EU Constitution as a “treaty masquerading as a constitution,” in the interest of impugning what he takes to be an empty gesture at formal constitutionalism). Weiler does, however, insist that the European Union is a constitutional entity *in spite of* the “constitutional” paucity of its formal instruments; materially speaking, “in its quotidian existence Europe is constitutional and accepted as such.” *Id.* at 183. This “run-of-the-mill treaty amendment” only more or less modifies an already constituted EU polity, established at first by earlier treaties but only truly constitutionalized by the praxis of the European Court of Justice in tandem with the national courts of the Member States. See *id.* at 173; J.H.H. WEILER, *The Transformation of Europe*, in THE CONSTITUTION OF EUROPE, 10 (1999); see also *infra* Section II.B (discussing the distinction between a formal and a material constitution).

30. See ARTICLES OF CONFEDERATION of 1781.

31. See U.S. CONST.; see generally HANS Kelsen, GENERAL THEORY OF LAW AND STATE 316-19 (1945) (classically distinguishing between a fundamentally unitary (but decentralized) federal state, and a confederation—which Kelsen calls a “purely international union of states”).

form.<sup>32</sup> In a similar vein, some of these scholars add an ideational element to the concept of a constitution, as opposed to a mere treaty, such as the presence of an authentic *demos*.<sup>33</sup> Irrespective of the level of integration achieved by agreement between states, by this view, a compact can only be understood as being a true constitution when it constitutes (and is constituted by) a political community of individuals who share in a single constitutional identity.<sup>34</sup> In broad strokes, the name "constitution" is reserved for only those treaties or instruments that establish a unitary sovereign power, reflecting the identity of a constituent (and in turn reflexively constituted) *demos*; anything less remains a mere treaty-based organization among sovereigns.<sup>35</sup> To many in the world of scholarship on federalism, and especially European integration, the conflation of the concepts of treaty and constitution amounts to a cardinal analytical sin.<sup>36</sup>

Most international organizations, however, make no pretensions to federalism, nor do they lay claim to sovereignty as a *telos*. And it would be difficult indeed to argue that many (if any) reflect a true *demos* with a unitary constitutional identity.<sup>37</sup> Organizations like the WTO and ECtHR do not fall neatly on an axis of federal-confederal integration. Even the United Nations cannot be easily conceived in such terms, despite the very forward-looking aspirations of certain eminent scholars.<sup>38</sup> It too is ultimately a functionally delimited organization to which states have delegated significant powers in

32. Grimm, *supra* note 28, at 208. But see JEAN L. COHEN, GLOBALIZATION AND SOVEREIGNTY, 80-158 (2012) (problematizing the hard distinction between federal state and confederation as ideal types, especially in the context of understanding the European Union and the United Nations).

33. Grimm, *supra* note 28, at 193; Rosenfeld, *supra* note 29, at 317.

34. See Grimm, *supra* note 28, at 198 ("[I]t is not the [proposed European Union] constitution's legal functions that are of central importance—these could be fulfilled by treaties. Rather, the constitution is viewed as crucial because of its anticipated collective and emotive benefits.").

35. See *id.* at 208 ("[T]he desire for a transition from treaty to constitution . . . still lacks a solid basis in reality. At present, there is little reason to expect that the [Treaty for a Constitution for Europe] will make up for the European Union's legitimacy deficit, anchor the Union in the hearts of Europe's citizens, and, in so doing, play an integrative and identificatory role.").

36. In Europe, the "constitutional" status of the European treaties is hotly contested even in the courts, with a palpable linguistic divergence in the jurisprudence of the Court of Justice of the European Union (CJEU) and the supreme courts of the Member States. See Joined Cases C-402/05 P & C-415/05 P, *Kadi v. Council*, 2008 E.C.R. I-06351, ¶ 285 ("[T]he obligations imposed by an international agreement [UNSC Res. 1267] cannot have the effect of prejudicing the constitutional principles of the EC Treaty, which include the principle that all community acts must respect fundamental rights, that respect constituting a condition of their lawfulness which it is for the Court to review in the framework of the complete system of legal remedies established by the Treaty."). But see the opinion of the German Constitutional Court in its Decision on the Treaty of Lisbon, Bundesverfassungsgericht (BVerfG) (Federal Constitutional Court), June 30, 2009, 2 be 2/08, ¶¶ 233, 235, [http://www.bverfG.de/entscheidungen/es20090630\\_2bve000208en.html](http://www.bverfG.de/entscheidungen/es20090630_2bve000208en.html), which insists that Europe is not at present a true federal State, and stating moreover that the German Constitution would prohibit any degree of integration going so far as to supplant "the constituent power of the Member States as the masters of the Treaties." In other words, in the view of the Court, the constituent power of the peoples of Europe remains within the national Member States; and at least in Germany it must remain so.

37. I bracket the European Union because it is too state-like, too integrated, and too much like a federal constitution; for present purposes it would only muddy the analysis. There is a serious argument that the European Union is a fully constituted system where the locus of sovereign power remains relatively undecided. See COHEN, *supra* note 32, at 123, 136. It is further very much up for discussion whether it satisfies the ideational requirement, proposed by some scholars, of a *demos* with a true constitutional identity. See Grimm, *supra* note 28, at 208; Rosenfeld, *supra* note 29, at 317.

38. See Habermas, *supra* note 26, at 444.

relatively specific spheres; it can boast of no high level of integration (let alone federation) and cannot easily be said to reflect any global *demos*.<sup>39</sup>

Yet international organizations wield substantial power over their creators; they are in essence creatures of governance. And after all, the notions of constitution and constitutionalism are about the analysis, regulation, and critique of public power. These organizations have been delegated substantial governmental powers by the parties. Most importantly, in many cases (and to varying degree) the states have ceded significant control over their affairs to the organization by agreeing in advance to submit to the decisions of its organs without their unanimous consent.<sup>40</sup> These organizations enjoy substantial autonomy from, and power over, their constituent states parties. There would be something very artificial about forgoing the tools of analysis associated with the concept of a constitution simply because these treaty-based bodies have no pretensions to sovereignty, or because they rarely act upon—let alone capture—the hearts and minds of individuals across the borders of their member states.

While the treaty frame is indispensable to the study of international organizations, constitutional theory can also offer valuable insight into the structure of law and power within these supranational bodies. Three distinct but related reasons stand out: first, the conceptual and analytical power of the constitutional frame; second, its value as a platform for assessment and critique; and third, its historical specificity.

The first and most immediate benefit of the constitutional frame is its power for analyzing institutions of governance, and how they change over time. The idea of a constitution presents a rich frame for analyzing the capacities of a public governance organization, emphasizing both law and power. The typical questions are: What powers does the organization possess? How are these powers organized? How might they be changed? Thinking about an organization in constitutional terms draws particular attention to the various modes through which it exercises power through the promulgation, execution, and interpretation of legal norms.<sup>41</sup> It further directs attention to the related questions of how powers are separated, checked, and balanced among the constituted bodies, and whether power is divided in such a way as to ensure accountability. And of course such institutional features are likely to be found in some form in different organizations; the comparative value of the language lies in the ubiquity of constitutional forms.

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39. See Neil Walker, *Constitutional Pluralism in Global Context*, in CONSTITUTIONALISM IN EUROPE AND BEYOND (M. Avbelj & J. Kormek, eds., forthcoming 2013).

40. Within the U.N. system, amendments of the Charter, as well as decisions and resolutions of the UNSC, ICJ, and UNGA, are taken not on the basis of unanimity but by majority (or super-majority) vote. Similarly the decisions of the ECtHR are binding upon states parties as respondents, even when they evidently disagree with the result. Finally, within the WTO system, the opinions ("Reports") of the Panels and WTO-AB comprising the Dispute Settlement Mechanism (DSM) become binding on losing States, unless said States can convince the entire membership (including the victor in the particular suit in question) to *reject* the report by consensus. As Kelsen rightly suggests, the possibility of action by majority vote renders an international organization independent and non-identifiable with its member states. See HANS Kelsen, *PEACE THROUGH LAW* 20-21, 43-44 (1944).

41. See *infra* Section II.B.

Secondly, the constitutional frame invites normative reflection and evaluation. It is not only a powerful analytical and comparative tool, but also connects to modern ideas about how public power *should* be organized. When linked to the construction and organization of public power, the idea of a constitution is not just about analysis of institutions but also inherently about their evaluation.<sup>42</sup> The concept is inexorably tied to the ethos of constitutionalism: any constitution creates powers, but only the *good* constitution constrains them in appropriate ways. The devices of constitutionalism—e.g., the separation of powers, checks and balances, and judicial review—are just as valuable for the constraint of power on the international stage as within the domestic state.<sup>43</sup>

Finally, the idea of a constitution draws strength from its deep historical roots, reaching back to the dawn of political modernity.<sup>44</sup> Since the eighteenth century, the idea of a constitution has connoted an instrument that can create public power, but also organize and constrain its use by law.<sup>45</sup> Though nurtured in the cradle of the modern state, there is nothing *necessarily* state-centric about the ideal of constitutional government. Indeed the power of the constitutional idea is manifest throughout the history of international organizations.<sup>46</sup> The individual officials at the centers of these organizations tend to speak about their institutions in constitutional terms, especially in emphasizing the autonomy of these bodies from their creators.<sup>47</sup> Most tellingly, the language of

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42. See Julian Arato, *Constitutionality and Constitutionalism Beyond the State: Two Perspectives on the Material Constitution of the United Nations*, 10 INT'L J. CONST. L. 627 (2012) (distinguishing between a purely *juridical perspective* on a material constitution, concerned with analysis of the legal system of a constituted order, and a *political-theoretical perspective* more oriented toward the analysis of power; the first may be relativistic, but the second is inherently value-driven and encourages evaluation).

43. See Mattias Kumm, *The Legitimacy of International Law: A Constitutionalist Framework of Analysis*, 15 EUR. J. INT'L L., 907, 929 n.55 (2004) (defending constitutionalism as an approach to the assessment and design of national and transnational institutions in light of a wide range of features that affect legitimation); Walker, *supra* note 27, at 42 (portraying constitutionalism as "an exercise in practical reasoning" with the aim of working out a viable and legitimate framework for the organization of political community, within the state and beyond).

44. THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA ch. 13 (1781); E.J. Siéyès, *Dire sur la question du veto royale* (1789), in *ÉCRITS POLITIQUES* 236, 239 (Roberto Zapperi ed., 1985); MARQUIS DE CONDORCET, PROJET DE CONSTITUTION FRANÇAISE, tit. 3, 8, 9 (1793).

45. See THE FEDERALIST, No. 51 (James Madison); THE FEDERALIST No. 67 (Alexander Hamilton); JEFFERSON, *supra* note 44, ch. 13; Siéyès, *supra* note 44; CONDORCET, *supra* note 44; A.V. DICEY, THE LAW OF THE CONSTITUTION, 110 (8th ed. 1915) (naming the absence of institutional discretion as an essential feature of constitutional government, i.e., in his view, the rule of law).

46. Already in 1784, Immanuel Kant argued that the most difficult problem of constitutional government on the global scale is to constrain the governors by law and thus stop slippage from the rule of law toward arbitrary personal rule. IMMANUEL KANT, IDEA FOR A UNIVERSAL HISTORY FROM A COSMOPOLITAN POINT OF VIEW, thesis 5, 6, and 7 (Lewis White Beck trans., 1963).

47. See ALVAREZ, *supra* note 2; Jan Klabbers, *Constitutionalism Lite*, 1 INT'L ORG L. REV. 31, 32-33 (2004). For example, then Director-General Renato Ruggiero generated significant controversy by referring to the WTO in constitutional terms in a 1998 speech. Renato Ruggiero, WTO Director General, Address to the Royal Institute of International Affairs in London: The Multilateral Trading System at Fifty (Jan. 16, 1998), [http://www.wto.org/english/news/e/spr/e/london\\_e.htm](http://www.wto.org/english/news/e/spr/e/london_e.htm); see Trachtman, *supra* note 26, at 628 (discussing the controversy arising out of Ruggiero's remarks). By contrast, and perhaps with said controversy in mind, current Director-General Pascal Lamy studiously avoids the use of explicit constitutional language, even when emphasizing the autonomy of the WTO regime. See, e.g.,

constitutions and constitutionalism tends to arise in the opinions of their judicial bodies and individual judges in justifying or advocating a dynamic approach to the interpretation of their constituent instruments. The ECtHR has gone so far as to justify its expansive approach to interpretation on the basis of the special nature of the ECHR as a “constitutional instrument of European public order.”<sup>48</sup>

There are thus good reasons to refer to the architecture of public international organizations in constitutional terms.<sup>49</sup> In essence the constitutional analytic draws our attention to important facts about the structure of power and authority in international organizations, while at the same time providing a familiar language for assessment, comparison, and critique.

The concepts of treaty and constitution operate on different planes and illuminate different things. We may provisionally define a treaty as a juridical instrument, reflecting a binding agreement between states and apportioning rights and obligations between them. As elaborated below, a constitution reflects a much more complex juridical, political, and social reality—an architecture that creates and regulates public power through law. But there is no reason that an international treaty cannot provide the basis for a constitutional system. This Article is concerned with treaties that constitute public international organizations (constituted bodies), by formal agreement among contracting sovereign states (constituent power). Such instruments should be understood *both* as treaties and constitutions.

### B. *Formal vs. Material Constitution*

A constitution is more than a paper document. It is a complex architecture of norms, articulating the composition and competences of an organization charged with the exercise of public power. Public international organizations are generally constituted by formal treaty; but any such constituted body will likely be much more than the dry parchment that created it. This is not to say that the solemn instrument is not important. Rather the point is not to succumb

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Pascal Lamy, *The Place of the WTO and Its Law in the International Legal Order*, 17 EUR. J. INT'L L. 969, 970 (2007) (referring to the WTO as a “distinctive organization” comprising a “true legal order”).

48. *Loizidou v. Turkey* (preliminary objections) [GC], App. No. 15318/89, Eur. Ct. H.R. ¶ 75 (Mar. 23, 1995); see also *Voting Procedure on Questions Relating to Reports and Petitions Concerning the Territory of South-West Africa*, Advisory Opinion, 1955 I.C.J. 67, 106 (June 7) (separate opinion of Judge Lauterpacht) (“A proper interpretation of a constitutional instrument must take into account not only the formal letter of the original instrument, but also its operation in actual practice and in the light of the revealed tendencies in the life of the Organization.”).

49. The analytical framework of constitutions and constitutionalism is, of course, only one among many—I do not suggest that it is the only useful lens for the study of international organizations. There is much to be gained from alternative scholarly approaches to the phenomenon of global institutions and governance, such as the “Global Administrative Law” project most closely associated with the N.Y.U. School of Law. See Benedict Kingsbury, Nico Krisch & Richard B. Stewart, *The Emergence of Global Administrative Law*, 68 LAW & CONTEMP. PROBS. 15, 17 (2005). The “Public Law” project associated with the Max Planck Institute represents another fruitful school of analysis. See THE EXERCISE OF PUBLIC AUTHORITY BY INTERNATIONAL INSTITUTIONS: ADVANCING INTERNATIONAL INSTITUTIONAL LAW (Armin von Bogdandy et al. eds., 2010).

to textual formalism in assessing the constitutional order of an organization, if the goal is to understand its real capabilities.<sup>50</sup>

The founding document may be called the *formal* constitution of an organization.<sup>51</sup> Necessarily in writing, it shapes and establishes the functions, powers, and limits of an organization in the first cut. Further, it attempts to entrench aspects of this structure and, in some cases, other important norms,<sup>52</sup> by making them particularly difficult to change (usually via an onerous amendment rule).<sup>53</sup> Yet a formal constitution is neither a necessary nor a sufficient component of a constitution in the full sense of the term. Even in the domestic context, states like the United Kingdom have no solemn document at all, and yet clearly possess a normative structure that articulates how and by whom laws shall be passed, interpreted, executed and enforced. If the goal of constitutional analysis is to understand how a state or organization is "constituted"—how a system provides for the creation, interpretation, and application of legal norms, and how powers are delegated, divided and delimited—it would seem farcical to ignore foundational norms simply because they are not expressed in a solemn charter. Likewise, even where there is some kind of founding document, no state's formal constitution really articulates the full constitutional structure, especially over time. Some norms in the document may fall into *desuetude*, while others are expanded by legislative, executive, and judicial bodies to mean all sorts of things—often totally unanticipated by the text and sometimes at cross-purposes with other aspects of the document.

Hans Kelsen thus classically distinguishes the *material* constitution from the purely formal document. The material constitution, he explains, is that set of norms that dictate the methods through which norms are created, interpreted and applied at the highest level of the legal system.<sup>54</sup> It may consist of a wide array of laws and customs, some perhaps enshrined in a document, and others developed through legislation, judgment, convention, or other practices of the constituted organs of government.<sup>55</sup> As opposed to the formal document, the

50. 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 35 (1999) ("If we are to do justice to American realities, we must see that effective power is organized on very different lines, that it has a very different genealogy from the one set out by our paper Constitution."); see also Weiler, *supra* note 29, at 174.

51. See Kelsen, *supra* note 31, at 124-25, 258 (articulating the notion of a formal constitution); Kelsen, *supra* note 40, at 9, 127.

52. See, for example, the substantive rights of the ECHR, or the prohibition on the use of force and the right to self-defense, codified in the Charter of the United Nations. U.N. Charter, arts. 2(4), 5.

53. HANS KELSEN, *PURE THEORY OF LAW* 222 (Max Knight trans., The Lawbook Exchange rev. ed. 2002) (1967).

54. Kelsen, *supra* note 31, at 258.

55. For example, judicial review in the United States is mentioned nowhere in the formal constitutional document—yet the rule asserted in *Marbury* that the Court has final say over the validity of legislation under the constitution would certainly fall into the material constitutional structure of the United States. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) (asserting the Court's power of judicial review and invalidation). Similarly, though passed as normal legislation by a vote of fifty percent plus one, the Reform Act of 1832 transformed the constitution of the United Kingdom by radically overhauling the electoral system to expand representative government. See Great Reform Act, 1832, 2 & 3 Will. 4, c. 45 (Eng.) (reforming popular representation in the House of Commons by eliminating the "rotten boroughs" and significantly expanding the size of the electorate).

material constitution describes the fundamental normative architecture within which the constituted bodies function.

The material constitution comprehends the full constitution of any organization. Nothing in it is non-constitutional, and nothing is missing from it that is constitutional for that given entity. By contrast, the formal constitution is both incomplete and may include some norms that would not normally be considered constitutional from the material point of view.<sup>56</sup> However, it bears noting that the formal document may have material significance, insofar as it entrenches particularly important norms and provides for authoritative interpretation or even review. Moreover, and especially important for present purposes, the interpretation of the formal constitution can have a profound material effect.<sup>57</sup> But it is crucial to bear in mind that any organization will likely entail other un-entrenched norms of the highest constitutional significance.

### C. *Juridical vs. Political Perspective*

It is important not to be overly legalistic. For Kelsen, the material constitution consisted entirely of that highest set of norms articulating how valid legal norms are generated, applied, interpreted and reviewed throughout a legal order. This archetypically “juridical” view is interested mainly in understanding a constitution in terms of its internal hierarchy of norms organizing how validity is transmitted throughout a legal order. As important as this point of view is for understanding how a constitution operates, in isolation it obscures much about the most important facets and effects of its operation. Constitutions do not belong exclusively to the province of pure legal theory; they are not just about law, but also about power. In establishing institutions, rights, and obligations, constitutions create and regulate power, and as such they also belong to the realm of politics. The study of constitutions should thus be as multifaceted as its object; it should proceed from two perspectives at once—the juridical point of view and the perspective of political theory.<sup>58</sup>

From a political point of view, it is not enough to ask how validity is transmitted through a legal system. It is just as important to ask how power is divided up within such a system. Who gets to create, apply, and interpret norms? Are these powers separated among different bodies? If so, are they checked? Balanced? How much discretion do these bodies enjoy? And how much power does the organization wield over the governed? This political dimension is the central concern of the modern normative ethos of

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56. Kelsen, *supra* note 31, at 125. For example, though formally entrenched, the Eighteenth Amendment to the U.S. Constitution (on prohibition) had minimal constitutional significance from a material perspective.

57. *Marbury*, 5 U.S. (1 Cranch) at 173; *Kesavananda Bharati v. State of Kerala*, A.I.R. 1973 S.C. 1461 (India) (asserting the judicial power to review and invalidate duly enacted constitutional amendments that violate the “basic structure” of the Constitution).

58. See also Arato, *supra* note 42, at 638-43 (further elaborating the mutual complementarity of the juridical and the political points of view for analyzing, evaluating, and comparing constitutional forms).

*constitutionalism*. It provides the central basis for the comparison and critique of constitutional forms.

Thus a constitution should be understood as the normative architecture of an organization—a structure of norms that may or may not entail a formal constitutional instrument, with both juridical and political dimensions. From one perspective the constitution represents the fundamental structure of an organization as a legal order. But at the same time it articulates the structure of power within that legal order, and provides for the valid exercise of power through law.

#### D. *Amendment vs. Transformation*

To borrow Georg Jellinek's distinction, constitutional change can occur through two different modes: amendment and transformation.<sup>59</sup> Amendment should be understood to refer only to change of the formal constitutional document occurring through formal procedure (e.g., Article V of the U.S. Constitution or Articles 108 and 109 of the U.N. Charter). It is an inherently intentional act, which brings about obvious changes in the constitution. Unlike amendment of the formal constituent instrument, which depends on the willful use of formal procedures, constitutional transformation can occur through the less-than-intentional action of the constituted bodies. The issue is not the intentions of the actors but the *consequences* of their actions. Intent aside, how do the practices of constituted bodies contribute to material (if informal) change in the constitutional order to which they belong?

Constitutional transformation can occur through the organs' exercise of their delegated powers at all levels of the system (as opposed to only the constituent level): through the enactment of important legislation, the actions of the executive power, or interpretation by the courts.<sup>60</sup> Moreover it may occur through a variety of more subtle means, including longstanding usages, customs, and conventions of the constitution.<sup>61</sup> What is important, here, is not the procedure but the effect of material change in the constitutional order.

Transformation can bring into effect change of all magnitudes, from minor readjustments to sweeping systemic reorganization.<sup>62</sup> The material effect

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59. See Jellinek, *supra* note 1.

60. See *id.* at 55. For a more recent debate as to the possibility and propriety of informal constitutional change in context of the United States, see Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 801 (1995) which examines the emergence of a particular transformation of the power to bind the nation through international treaty under the U.S. Constitution, through the sustained, interrelated, and occasionally competitive practices of all of three branches of government. Cf. Lawrence Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1225-26 (1995) (taking a skeptical view of the propriety of informal change under the U.S. Constitution, and questioning the validity of the putative changes to the treaty power identified by Ackerman and Golove).

61. This Article focuses on treaty interpretation as a mechanism for change. Full discussion of the other informal mechanisms will be confined to another paper, but suffice it to note for the moment that I mean to refer to constitutional development through non-legal means like conventions in the sense employed in British constitutional theory since Dicey. See generally DICEY, *supra* note 45; IVOR JENNINGS, *THE LAW AND THE CONSTITUTION* 79-135 (4th ed. 1952).

62. Jellinek, *supra* note 1, at 54-55; ACKERMAN, *supra* note 50, at 43.

of a constitutional transformation can be just as profound as any change achieved through formal amendment.<sup>63</sup> The more difficult issue is to demarcate what kinds of architectural changes the concept is meant to connote. As noted above, formal amending procedures may bring into effect changes to the constitution of both profound and miniscule import from a material perspective—they are viewed as “constitutional” changes simply by virtue of their formal incorporation. Constitutional transformation, by contrast, necessarily refers to a change of some material significance. It will generally connote two main kinds of change: the reordering of power among the organs of the organization (e.g. procedural adjustments, or the restructuring of checks and balances); or changes to the power of the organization as a whole, vis-à-vis the constituent power.

The focus here will be on material transformation through judicial interpretation—specifically a constituted court’s interpretation of its formal constitution. It may not be immediately obvious why a court, in interpreting the formal constitution, contributes to a material transformation. Indeed, it may seem that the court is not transforming anything, but simply expounding the text of the formal charter. Here, however, the distinction between juridical and political perspectives is particularly illuminating.<sup>64</sup> From a juridical point of view, even an expansive or evolutive interpretation might seem to entail no *constitutional* change. Such an interpretation, by a duly authorized court, would appear as simply expounding what is already there. But from a political-theoretical perspective, the image may appear in a substantially different light. Instead of focusing on the juridical question of the normative validity of the court’s interpretation, the political lens focuses on the effect of the court’s interpretation on the ordering of power throughout the organization to which it belongs. Where an interpretation entails a new assertion of judicial power, the reordering of the powers of the organs more generally, or the alteration of the powers of the organization as a whole, it may be understood as transforming (or contributing to the transformation of) the constitution of the organization in a politically significant manner.<sup>65</sup> Depending on perspective, an interpretation

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63. Some prominent voices in the United States object to the possibility of significant informal constitutional change *in practice*, especially in the presence of an express provision on amendment. See Sanford Levinson, *How Many Times Has the United States Constitution Been Amended?* (A) <26; (B) 26; (C) 27; (D) >27: *Accounting for Constitutional Change*, in RESPONDING TO IMPERFECTION 13, 18–19 (Sanford Levinson ed., 1995) (attempting to draw lines between informal change, amendment, and revision in terms of degree of change); Tribe, *supra* note 60 (arguing that extent of change matters—small reinterpretations may be possible, but never the kind of transformation that would change the “topology” of the text or structure of the Constitution). These objections should be understood in context: these critics do not deny the general theoretical possibility that informal means may produce fundamental constitutional change; rather they challenge the propriety of any such process in the specific context of the U.S. Constitution. It should be understood that *conceptually* the process connotes change of all sizes; of course it remains perfectly appropriate to challenge the legality or legitimacy of a particular transformation on grounds of its magnitude in a particular constitutional legal system.

64. See Arato, *supra* note 42.

65. See, e.g., *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803); Kesavananda Bharati v. State of Kerala, A.I.R. 1973 S.C. 1461 (India). Even if these Courts attempted to ground their newly asserted powers of review in the formal constitution, it would be difficult to deny that these assertions amounted to monumental transformations of their respective constitutions in a material sense.

might thus appear as both mere elaboration (juridically) and dramatic transformation (politically).<sup>66</sup>

Judicial interpretation can bring about constitutional transformation in two ways. On the one hand, a given interpretation might bring about a direct, "first-order" change in the material constitution of the interpreting tribunal. Such would be the case where a particular interpretation directly alters the powers of the organization as a whole, or reorders the competences of the various organs in such a way as to substantially alter the division of powers within the organization. In other words, the *substance* of a particular interpretation may of itself entail the informal and material transformation of the organization's constitution—for example, an interpretation of the scope of presidential powers. On the other hand, a judicial body might significantly transform its constitution in a "second-order" sense, by its *approach* to interpretation. Irrespective of the particular substantive interpretations in question, a court's method of interpretation might gradually bring about the transformation of the organization to which it belongs.

Formal amendment is surely the most obvious (and uncontroversially legitimate) mechanism through which the constitutions of international organizations evolve over time.<sup>67</sup> But their material constitutions can change dramatically through less formal means as well. Of particular importance is the transformation of their constitutions engendered by the interpretation of their constituent instruments *as international treaties*—i.e., the interpretation of an organization's formal constitution by its constituted judicial body according to the external law of treaty interpretation. And thus we come back to the beginning: it is crucial to appreciate the constituent instrument of an international organization as *both* a constitution and a treaty. On the one hand, as in myriad domestic constitutional orders, the judicial organs of international organizations play an important role in expounding and developing their material constitutions through the interpretation of their formal constitutions. On the other hand their interpretive practices do not proceed in a vacuum—they are expected to and generally do proceed according to the rules of interpretation under the external international law of treaties.<sup>68</sup> The traditional rules of interpretation exert a real pull. As we shall see, even when judicial organs like the ICJ and ECtHR deviate from the normal approach to interpretation they tend to justify their approaches in legalese, by appeal to Articles 31 and 32 of

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66. In Jellinek's matchless phrase, "Be bright and lively in expounding, if you can't expound, then pound it in . . ." these words of the poet are the highest maxim for constitutional transformation through judicial interpretation." Jellinek, *supra* note 1, at 56 (invoking Goethe, "*In Auslegen seid Frisch und munter, legt ihr's nicht aus, so leget was unter*").

67. To this category we might add amendment and modification according to the default rules of the VCLT, *supra* note 8, arts. 39-41, which provide for amendment in the absence of a formal amendment rule, or under certain conditions the modification of a treaty between some of the parties only. The rules on amendment and modification of treaties in the VCLT may be understood as comprising a "default amendment rule" in international law, basically akin to typical constitutional amendment (and analytically distinct from constitutional transformation).

68. VCLT, *supra* note 8, arts. 31-33.

the VCLT. But deviate they do, and occasionally with dramatic transformative effect.

### III. SUBSEQUENT PRACTICE AND THE PRIMACY OF CONSENT

It is important not to go too fast. The peculiarities of subsequent practice in the context of constitutional interpretation need to be thrown into relief, by contrast to the longstanding and far more common use of the technique in the interpretation of bilateral and multilateral conventions by third-party courts and tribunals *not* engaged in the interpretation of their own constituent instruments (“*ad hoc* interpretation”). This section begins with a brief excursus elaborating the contours of subsequent practice as it is traditionally and generally employed in the *ad hoc* interpretation of international treaties. It concludes with an analysis of the interpretive practice of the WTO-AB, as an example of an international organization adopting a highly restrictive and voluntaristic approach to subsequent practice, even in the interpretation of its own constituent instrument.

#### A. *The Traditional Contours of Subsequent Practice*

At bottom subsequent practice is a technique of interpretation based on state consent. The centrality of consent is evident in the modern formulation of the technique, as codified at VCLT 31(3)(b), which provides that interpreters should take into account “any subsequent practice in the application of the treaty which establishes the *agreement* of the parties regarding its interpretation.”<sup>69</sup> The doctrine envisions giving weight to subsequent practice in two closely related and mutually consistent ways. On the one hand, the technique provides a method for uncovering (or construing) the “original” intentions of the parties. As stated by the Permanent Court of Arbitration in 1912, “the fulfillment of engagements between states, as between individuals, is the surest commentary on the meaning of those engagements.”<sup>70</sup> On the other hand, under certain conditions, subsequent practice provides a mechanism for treaty change and adaptation, by giving weight to the parties’ evolving intentions. State consent links these two modes, and renders them harmonious.<sup>71</sup> The doctrine of subsequent practice thus seeks to resolve two

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69. *Id.*, art. 31(3)(b) (emphasis added).

70. Russian Claim for Interest on Indemnities (Russ. v. Turk.), 11 R.I.A.A. 421, 433 (Perm. Ct. Arb. 1912) (“*Considérant que l’exécution des engagements est, entre Etats comme entre particuliers, le plus sûr commentaire du sens de ces engagements.*”).

71. See Julian Arato, *Subsequent Practice and Evolutive Interpretation: Techniques of Treaty Interpretation over Time and Their Diverse Consequences*, 9 LAW & PRAC. INT’L CTS. & TRIBUNALS., 443, 444-45 (2010); Gardiner, *supra* note 14, at 230-32. As evidenced by the current work plan of the ILC, the criteria and outer contours of the technique may be in some degree of flux. See Rep. of the Int’l Law Comm’n, 60th Sess., May 5-June 6, July 7-Aug. 8, 2008, U.N. Doc. A/63/10; GAOR, 63d Sess., Supp. No. 10 (2008), Annex A: Treaties over Time [hereinafter Annex A: Treaties over Time]. But what remains consistent, outside of the context of international organizations, is an appreciation of the technique’s foundations in the common intentions of the parties as objectively evidenced in their subsequent conduct. See Rahim Moloo, *When Actions Speak Louder than Words: The Relevance of Subsequent Party Conduct to Treaty Interpretation*, 30 BERKELEY J. INT’L L. (forthcoming 2013).

questions: What did the parties consent to in the first place? And have they subsequently agreed to develop and extend the ambit of their common consent such that the treaty should be viewed as having changed over time?

Whether employed in the search for the parties' original intent, or whether the treaty should be understood as changing over time in light of the parties' evolving intentions, subsequent practice is traditionally grounded on the same basic premise: under international law, states are the masters of their treaties.<sup>72</sup> According to this perennial recitation, a treaty is nothing more than an agreement between two or more sovereigns.<sup>73</sup> Acting together, the parties remain free to do with their engagements what they will: whether interpretation, reinterpretation, the progressive development of vague terms, outright modification, or even letting the agreement wither away through *desuetude*.<sup>74</sup>

In general, international courts and tribunals tend to be sensitive to the traditional primacy of consent in relying on subsequent practice. But context is important. Subsequent practice normally arises as an interpretive criterion in the context of *ad hoc* interpretation.<sup>75</sup> In this more typical situation, international courts and tribunals are charged with interpreting treaties on an *ad hoc* basis—either where states call upon a standing tribunal to resolve a particular dispute over the meaning of their treaty (as in many of the ICJ's contentious cases), or where the tribunal itself is constituted on an *ad hoc* basis to resolve a particular treaty dispute. *Ad hoc* interpretation may be opposed to constitutional interpretation in international organizations, where a standing judicial organ is charged with the interpretation of its own constituent instrument.<sup>76</sup> At least in the context of *ad hoc* interpretation, judicial

72. See IAN SINCLAIR, *THE VIENNA CONVENTION ON THE LAW OF TREATIES* 98 (1984) (citing LORD MCNAIR, *THE LAW OF TREATIES* 169 (1961)); VILLIGER, *supra* note 12, at 46-47 ("Parties are States for which the treaty is in force . . . and they are the masters of the treaty."). This notion of mastery of the treaty may overly simplify a great many things. See more recently, and more subtly, Roberts, *supra* note 18, at 202. But it remains a valuable heuristic for two reasons: first, it is historically important as the traditional justification for reliance on subsequent practice and indeed for much of the law of treaties as a whole; second, the expression consistently arises in scholarship and jurisprudence even today, and thus appears to exert an influence somewhat disproportionate to its merit. Most strikingly, the word has emerged in the jurisprudence of the German Constitutional Court in its opinion on the Treaty of Lisbon. See German Constitutional Court in its Decision on the Treaty of Lisbon, Bundesverfassungsgericht (BVerfG) (Federal Constitutional Court), June 30, 2009, 2 BvE 2/08, ¶ 235, [http://www.bverfg.de/entscheidungen/es20090630\\_2bve000208en.html](http://www.bverfg.de/entscheidungen/es20090630_2bve000208en.html) (holding that the German Constitution would prohibit any degree of integration going so far as to transfer "the constituent power of the Member States as the masters of the Treaties."). Still, the "traditional view" presented here represents only an ideal type of a certain venerable and influential brand of voluntarism in the interpretation of treaties. In fairness, not all traditionalists are so traditional.

73. See VILLIGER, *supra* note 12. Of course not everyone goes so far. As noted above, some eminent voices believe that certain kinds of treaties should not be so easily linked to the changing will of the parties. See MERON, *supra* note 18; SIMMA, *supra* note 18; and Roberts, *supra* note 18.

74. See Kelsen, *supra* note 31, at 119; Marcelo Kohen, *Desuetude and Obsolescence of Treaties*, in *THE LAW OF TREATIES BEYOND THE VIENNA CONVENTION* 350, 352 (Enzo Cannizzaro ed., 2011).

75. See, e.g., Kasikili/Sedudu Island (Botswana/Namib.), 1999 I.C.J. 1045, ¶ 74 (13 Dec.). See also the more common *ad hoc* arbitral awards, for example *Russian Indemnities*, 11 R.I.A.A. at 433; *Air Transport Services Agreement Arbitration* (U.S. v. Fr.), 38 I.L.R. 182, 248-55 (1963).

76. See AMERASINGHE, *supra* note 15, at 49-56; GARDINER, *supra* note 14, at 245-49.

interpreters tend to rely on subsequent practice cautiously, in a manner highly deferential to the consent of the parties. But as we shall see, the picture can be very different in the context of constitutional interpretation.

In assessing the contours of subsequent practice as it is traditionally (and typically) deployed, two issues tend to stand out. The first is a matter of evidence: how can authoritative, subsequent practice be established? The second question concerns the expansive potential of the doctrine: to what extent can the subsequent practice of the parties support developing a treaty provision? The relevance of state consent as a premise undergirding the technique depends upon the answers to these questions. These two issues will return as the critical tension points distinguishing the approaches to subsequent practice within the WTO-AB, ICJ, and ECtHR.

Regarding the first (evidentiary) issue, subsequent practice is usually considered authentic and relevant to interpretation only insofar as it demonstrates the parties' *common* understanding of the treaty's meaning. As the ILC explains in the Commentaries to its original draft of the VCLT, subsequent practice requires that *all* of the parties to a treaty, not just some of them, act in such a way as to evidence their agreement on the interpretation.<sup>77</sup> Certain preeminent voices have added that the parties' practice must not only be common, but also concordant and consistent.<sup>78</sup> The Commentaries allow that this need not mean that all of the parties must actively engage in the practice—it would be sufficient that any non-engaging party simply acquiesce in the practice of the others.<sup>79</sup>

The second issue concerns the expansive potential of the doctrine. What is clear is that subsequent practice can support both interpretation and reinterpretation. According to some, it can even lead to modification.<sup>80</sup>

Often the disputes in which subsequent practice proves relevant mark the first time a treaty provision has been authoritatively interpreted. Here subsequent practice can provide strong evidence of the parties' original understanding of their rights and obligations under the agreement. However, subsequent practice may just as well evidence the parties' intention to *reinterpret* the treaty—in other words to augment or reject a prior interpretation by positing a new one that may be different or even contrary to its precursor. The parties are generally free to reinterpret their treaty again and again; the judicial interpreter should simply examine what their subsequent practice establishes as to their common understanding about the treaty, even if it entails a departure from a prior interpretation.<sup>81</sup>

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77. ILC DALT, *supra* note 12, at 222.

78. GARDINER, *supra* note 14, at 227; SINCLAIR, *supra* note 72, at 137 (citing Yasseen, *L'interprétation des traités d'après la Convention de Vienne sur le droit des traités*, 151 RECUEIL DES COURS 1, 48. (1978));

79. ILC DALT, *supra* note 12, at 222; VILLIGER, *supra* note 12, at 431; *see also* Arato, *supra* note 71, at 460 (noting the perennial problem of identifying such acquiescence).

80. GARDINER, *supra* note 14, at 243-45; AMERASINGHE, *supra* note 15, at 54-55.

81. GARDINER, *supra* note 14 at 225-49.

Finally, an interpretation or reinterpretation based on the subsequent practice of the parties may appear, on its face, to go beyond the scope of, or even contradict, the plain meaning of the treaty text—here interpretation can shade imperceptibly into modification.<sup>82</sup> In the words of the ILC, modification of treaties by subsequent practice means cases “where the parties by common consent in fact apply the treaty in a manner which its provisions do not envisage.”<sup>83</sup> There remains significant controversy as to whether it is appropriate to rely on this interpretive doctrine to establish the modification of a treaty. In finalizing the VCLT, the contracting parties explicitly rejected the ILC’s draft provision supporting treaty modification through subsequent practice (Draft Article 38).<sup>84</sup> Two arguments stood out in their discussions: first that inclusion of such a provision would cause significant constitutional problems for those parties whose domestic law requires the ratification of treaties and treaty amendments;<sup>85</sup> and second, with regard to multilateral treaties with formal amendment rules, the idea of modification through practice might sanction an end-run around the ordinary amending procedures.<sup>86</sup> The latter charge loomed especially large: to the extent that Draft Article 38 might permit a treaty modification that could not have been achieved through formal amendment procedures, it would seriously undermine the consent-based foundations of the law of treaties.<sup>87</sup>

82. See, e.g., *Air Transport Services Agreement Arbitration (U.S. v. Fr.)*, 38 I.L.R. 182, 248-55 (1963); *Delimitation of the Border between Eritrea and Ethiopia (Eth./Eri.)*, 25 R.I.A.A. 83, ¶ 3.29 (Apr. 13, 2002) (setting out that in determining the weight of subsequent practice in the context of the boundary delimiting provisions of a border treaty, the “conduct of one Party must be measured against that of the other” and that “[e]ventually, but not necessarily so, the legal result may be to vary a boundary established by a treaty”).

83. ILC DALT, *supra* note 12, at 236.

84. Article 38 of the ILC’s original Draft Articles on the Law of Treaties explicitly provided for modification through subsequent practice in a separate provision. *Id.* art. 38. However this proposed article was rejected in its entirety—indeed it was the only provision to suffer the fate of wholesale elimination by the representatives of the parties. United Nations Conference on the Law of Treaties, 1st Sess., Mar. 26-May 24, 1968, *Summary Records of the Plenary Meetings and of the Meetings of the Committee as a Whole* 215, U.N. Doc. A/CONF.39/C.1/SR.38 (Apr. 25, 1968) [hereinafter VCLT Conference Minutes].

85. Jean-Jacques de Bresson (France) insisted upon a principle of “formal parallelism,” whereby modifications of a treaty should follow the same domestic procedure as was required to ratify the original text. “If the manner in which the responsible officials applied the treaty was in itself capable of leading to modification, that requirement of parallelism could hardly be met.” VCLT Conference Minutes, *supra* note 84, at 208. See also statement by Masato Fujisake (Japan), noting that “the Japanese Constitution stipulated that treaties must be concluded with the approval of the Legislature, and the same rule applied to the amendment of a treaty.” *Id.* at 208.

86. As noted by de Bresson (France), “many international agreements contained specific provisions on the conditions of their revision: to admit that the parties could derogate from those clauses merely by their conduct in the application of the treaty would deprive those provisions of all meaning.” *Id.* at 208.

87. Santiago Martínez-Caro (Spain) best expressed the concern, proclaiming that “article 38 could mean that it was possible and legal to do by tacit agreement what it was impossible and illegal to do by formal agreement; it could only be regarded as conflicting with the principle *pacta sunt servanda*.” *Id.* at 209; see also Tribe, *supra* note 60 (raising similar objections to the possibility of the informal amendment of the U.S. Constitution).

And yet the deletion of Draft Article 38 from the final VCLT did not lay the question to rest, even at the time.<sup>88</sup> Controversial as the prospect may be, at least a few international courts and tribunals have relied on subsequent practice to establish treaty modification—both before and after the 1969 conclusion of the VCLT.<sup>89</sup> Finally, it should be borne in mind that the line between interpretation and modification will always be mercurial.<sup>90</sup>

In its traditional form, interpretation on the basis of subsequent practice relies on the actual existence and nature of the parties' practice. The technique can support significant treaty change, but only to the extent established by the parties' common practice in applying the treaty (or their acquiescence in one another's conduct). Both the possibility and extent of any such change are thus supposed to remain, more or less, in the hands of the states parties. The idea of relying upon subsequent practice thus does not undermine the foundational status of state consent *as such*. As traditionally understood, the technique is rather a device for giving voice to the changing intentions of the parties, while protecting the limits of their consent.

#### B. *Subsequent Practice in the WTO: A Traditional Approach*

The WTO-AB exemplifies the traditional voluntarism of the law of treaties in its approach to subsequent practice—taking rigorous care to respect the consent of the parties (and the limits thereof) even in engaging in constitutional interpretation.<sup>91</sup> When interpreting its complex constituent instrument, the highest judicial organ of the WTO relies assiduously on subsequent practice in a way that conforms to the traditional contours of the technique. As such, the interpretive practices of the WTO-AB provide a useful

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88. Several delegations insisted that the provision reflected already extant customary international law. See, for example, statements by Adolfo Maresca (Italy) ("[A]rticle 38 reflected a legal fact which had always existed. International law was not a slave to formalism and by reason of its nature must adapt itself to practical realities"), and Mustafa Kamil Yasseen (Iraq) (stating that Article 38 "reflected positive law"). VCLT Conference Minutes, *supra* note 84, at 211. Even as the VCLT committee voted to reject Article 38, special rapporteur Sir Humphrey Waldock of the ILC insisted that the principle was already enshrined in positive (customary) international law. *Id.* at 214. Even earlier, Sir Gerald Fitzmaurice, the previous special rapporteur on the law of treaties, had similarly argued that subsequent practice was a legitimate means of modification under contemporary international law. Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice 1951-4: Treaty Interpretation and Other Treaty Points*, 33 BRIT. Y.B. INT'L L. 203, 225 (1957) (stating that just as it is "the duty of a tribunal 'to interpret treaties, not to revise them', it is equally the duty of a tribunal to interpret them as revised, and to give effect to any revision arrived at by the parties"—including through their conduct).

89. See, e.g., *Air Transport Services Agreement Arbitration (U.S. v. Fr.)*, 38 I.L.R. 182, 248-55 (1963); *Delimitation of the Border between Eritrea and Ethiopia (Eth./Eri.)*, 25 R.I.A.A. 83, ¶ 3.29, 4.60 (Apr. 13, 2002).

90. In voting against Article 38 at the Vienna Conference, Shabtai Rosenne explained that the Israeli delegation considered the provision redundant to the future 31(3)(b): "A theoretical distinction certainly existed between subsequent practice as a means of interpreting a treaty and the modification of a treaty through subsequent practice in its application; but in practice, the consequences were substantially the same, so that it did not seem necessary to insert a separate article." VCLT Conference Minutes, *supra* note 84, at 213.

91. See Georg Nolte, *Subsequent Practice as a Means of Interpretation in the Jurisprudence of the WTO Appellate Body*, in *THE LAW OF TREATIES BEYOND THE VIENNA CONVENTION*, *supra* note 74, at 138; Feldman, *supra* note 19.

control to better gauge the breadth and effects of the more liberal approaches to subsequent practice of the ICJ and the ECtHR.

The Appellate Body was formally constituted by the relatively recent Marrakesh Agreement, as part of the modern-day Dispute Settlement Body (DSB) of the WTO. It must be understood, however, that this seemingly discrete treaty incorporates a complex web of agreements linking together a coherent system of trade law reaching back across the past half century.<sup>92</sup> Properly understood, the Body is constituted by this entire inter-locking regime of treaties, taken as a whole ("the Agreements").<sup>93</sup> It has jurisdiction to review points of law on appeal from the decisions of the lower Panels, concerning the entire web of Agreements.<sup>94</sup> Its opinions ("Reports") become binding and authoritative absent an agreement by all of the parties *not* to adopt it, including the party winning its appeal ("negative consensus").<sup>95</sup> As such, the WTO-AB has essentially binding authority to interpret the Agreements, and enjoys ample opportunity to do so.

The Agreements may be understood together as the formal constitution of the WTO system. And indeed they are frequently portrayed in constitutional terms, often by appeal to their singular importance in the international economic order.<sup>96</sup> But what is most significant, for present purposes, is that the Agreements establish a set of permanent institutions, charged with various functions of governance over the parties. Among the constituted bodies, the WTO-AB is the highest judicial organ of the system. At least formally its task of authoritatively interpreting the Agreements may be qualified as constitutional interpretation. Yet, as we shall see, the WTO-AB goes about its task of interpretation in an especially rigid way, generally eschewing dynamism in favor of strict deference to member state consent.

The WTO-AB routinely relies on VCLT Article 31 in interpreting the Agreements.<sup>97</sup> In considering subsequent practice as part of its analysis, it frequently appeals to VCLT 31(3)(b).<sup>98</sup> It has added specificity to the sparse words of the Vienna rules, specifically invoking Yasseen's formulation. In the

92. As WTO Director-General Lamy notes, "The WTO is a treaty comprising some 500 pages of text accompanied by more than 2,000 pages of schedules and commitments." Lamy, *supra* note 47, at 971. Moreover, "50 years' worth of GATT practice and decisions, what is known as the '*GATT acquis*'—have been incorporated into what constitutes the new WTO Treaty." *Id.* at 971-72.

93. See *id.* at 971-72; Appellate Body Report, *Argentina—Safeguard Measures on Imports of Footwear*, ¶ 81, WT/DS121/AB/R (Dec. 14, 1999) (the WTO Agreements "must *a fortiori* be read as representing an *inseparable package* of rights and disciplines which have to be considered in conjunction").

94. See ISABELLE VAN DAMME, *TREATY INTERPRETATION BY THE WTO APPELLATE BODY* 293 (2009); Lamy, *supra* note 47, at 972.

95. Marrakesh Agreement Establishing the World Trade Organization, Annex 2, arts. 6.1, 16.4, 17.4, Apr. 15, 1994, 1869 U.N.T.S. 401 [hereinafter DSU]; see John Jackson, *The WTO DSU: Misunderstandings on the Nature of Legal Obligation*, 91 AM. J. INT'L L. 60 (1997).

96. See Jackson, *supra* note 26; Jessica Lawrence, *Contesting Constitutionalism: Constitutional Discourse at the WTO*, 2 GLOBAL CONSTITUTIONALISM 63 (2013).

97. See, e.g., Appellate Body Report, *United States—Standards for Reformulated and Conventional Gasoline*, at 17, WT/DS2/AB/R (Apr. 29, 1996).

98. See, e.g., Appellate Body Report, *Japan—Taxes on Alcoholic Beverages*, at 10-12, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (Oct. 4, 1996).

view of the WTO-AB, 31(3)(b) permits reliance upon only a “‘concordant, common and consistent’ sequence of acts or pronouncements which is sufficient to establish a discernible pattern implying the agreement of the parties regarding [the treaty’s] interpretation.”<sup>99</sup> The Body couches its approach in highly voluntaristic terms. It insists that “[s]ubsequent practice’ in the application of a treaty may be an important element in treaty interpretation *because* it constitutes objective evidence of the understanding of the parties on the meaning of the treaty.”<sup>100</sup> And indeed the WTO-AB has consistently followed through with its rhetoric in practice—by rigorously demarcating the contours of the doctrine in a manner calculated to reflect only the actual consent of the parties, and to respect its limits. The caution in the Appellate Body’s approach is manifest in its statements about both the evidentiary criteria for establishing subsequent practice, and the expansive potential of the doctrine as applied to the Agreements.

With regard to evidentiary criteria, the WTO-AB has been particularly clear about whose practice it will look to and what types of conduct it will accept. The kinds of practice generally at issue reflect the complexity of the Agreements under the Court’s jurisdiction. The issue tends to arise in disputes relating to specific parties’ substantive trade commitments under the Agreements, for example their bound tariff rates (under the GATT), or their market commitments for trade in services (under the GATS)—in other words, technical trade commitments that are negotiated bilaterally or plurilaterally, and automatically incorporated into the Agreements upon adoption.<sup>101</sup> Parties in dispute before the WTO-AB have relied upon a wide variety of “practices” in construing one another’s trade commitments, including: the practice of the parties in applying their trade commitments,<sup>102</sup> as well as their conduct within the organs and committees of the WTO.<sup>103</sup> In all cases, the WTO-AB has viewed such claims skeptically, with an eye to the primacy of the consent of the parties.

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99. *Japan—Alcoholic Beverages II*, WT/DS8/AB/R at 12; see also Appellate Body Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 192, WT/DS285/AB/R (Apr. 7, 2005) (stating that to establish authentic subsequent practice, “(i) there must be a common, consistent and discernable pattern of acts or pronouncements; and (ii) those acts or pronouncements must imply agreement on the interpretation of the relevant provision”).

100. Appellate Body Report, *European Communities—Customs Classification of Frozen Boneless Chicken Cuts*, ¶ 255, WT/DS269/AB/R, WT/DS286/AB/R (Sept. 12, 2005) (emphasis added) (quoting 2 Y.B. INT’L L. COMM’N 1, 219, A/CN.4/SER.A/1966/Add. 1).

101. See Appellate Body Report, *European Communities—Customs Classification of Certain Computer Equipment*, ¶ 109, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R (June 5, 1998) (“[T]he fact that Members’ Schedules are an integral part of the GATT 1994 indicates that, while each Schedule represents the tariff commitments made by *one* Member, they represent a common agreement among *all* Members.”). In WTO parlance, “plurilateral” refers to an agreement between more than two parties, but not amounting to an agreement among *all* of the parties.

102. *EC—Chicken Cuts*, WT/DS269/AB/R at ¶ 252 (concerning the classification practices of the European Communities).

103. *Japan—Alcoholic Beverages II*, WT/DS10/AB/R at 13 (concerning the adoption of panel reports by the parties in the DSB); *US—Gambling*, WT/DS285/AB/R, ¶ 193 (concerning Scheduling Guidelines adopted by the Council for Trade in Services).

First, the WTO-AB only looks to the direct practice of states in applying the Agreements; it has refused to consider the resolutions or decisions of various organs and bodies of the WTO as a suitable proxy for the subsequent practice of the parties.<sup>104</sup> The Appellate Body has been most firm, in this regard, in *Japan—Alcoholic Beverages II*, where it rejected the possibility that decisions of Panels in previous disputes constituted relevant subsequent practice, even upon adoption by the parties (either by affirmative consensus, under GATT 1947, or by “negative consensus” under the WTO).<sup>105</sup>

Second, even in considering the weight of the parties’ conduct in applying their individual trade commitments under the Agreements, the WTO-AB will only give weight to practice that evidences a common interpretation of *all* of the parties. The WTO-AB has proven unwilling to rely on the conduct of even a vast majority of the parties in the face of contrary practice by a small fraction of them.<sup>106</sup>

The WTO-AB does not require that absolutely all of the parties *affirmatively* engage in the practice. It has noted its willingness, under certain narrow conditions, to give weight to the practice of some parties coupled with the acquiescence of the others.<sup>107</sup> In *EC—Chicken Cuts*, the Appellate Body acknowledged that “not each and every party must have engaged in a particular practice for it to qualify as a ‘common’ and ‘concordant’ practice.”<sup>108</sup> Nevertheless, it demands evidence of active participation in the practice by a substantial number of parties.

[P]ractice by some, but *not all* parties is obviously not of the same order as practice by only one, or very few parties. To our mind, it would be difficult to establish a ‘concordant, common and discernible pattern’ on the basis of acts or pronouncements of one, or very few parties to a multilateral treaty, such as the *WTO Agreement*.<sup>109</sup>

Further, it requires that such substantial active participation be complimented by the discernible acquiescence of the others. The Appellate

104. *US—Gambling*, WT/DS285/AB/R, ¶ 193 (“We have difficulty accepting Antigua’s position that the 2001 Scheduling Guidelines constitute ‘subsequent practice’ revealing a common understanding that Members’ specific commitments are to be construed in accordance with W/120 and the 1993 Scheduling Guidelines. Although the 2001 Guidelines were explicitly adopted by the Council for Trade in Services . . . they do not constitute evidence of Members’ understanding regarding the interpretation of *existing* commitments . . . [and do not] of themselves, constitute ‘subsequent practice’ within the meaning of Article 31(3)(b) of the *Vienna Convention*”); *Japan—Alcoholic Beverages II*, WT/DS10/AB/R at 13.

105. *Japan—Alcoholic Beverages II*, WT/DS10/AB/R at 13-14 (“We do not believe that the CONTRACTING PARTIES, in deciding to adopt a panel report, intended that their decision would constitute a definitive interpretation of the relevant provisions of GATT 1947 . . . their character and their legal status have not been changed by the coming into force of the *WTO Agreement* . . . [thus we do not agree] that panel reports adopted by the GATT CONTRACTING PARTIES and the WTO Dispute Settlement Body constitute subsequent practice in a specific case” (internal quotation marks omitted)).

106. *EC—Computer Equipment*, WT/DS62/AB/R, ¶¶ 92-93; *id.* ¶ 95 (“Inconsistent classification practice, however, *cannot* be relevant in interpreting the meaning of a tariff concession.”).

107. *EC—Chicken Cuts*, WT/DS269/AB/R, ¶ 272 (“We do not exclude that, in specific situations, the ‘lack of reaction’ or silence by a particular treaty party may, in the light of attendant circumstances, be understood as acceptance of the practice of other treaty parties.”).

108. *Id.* ¶ 259.

109. *Id.*

Body's discomfort with making assumptions about the intentions of the parties is manifest. It requires that such acquiescence be evident, and not simply presumed from silence.

Such situations may occur when a party that has not engaged in a practice has become or has been made aware of the practice of other parties (for example, by means of notification or by virtue of participation in a forum where it is discussed), but does not react to it.<sup>110</sup>

Finally, and perhaps most radically, the WTO-AB will only consider the conduct of the parties in the interpretation of the Agreements as relevant if it is sufficiently determinate. In other words, the Appellate Body requires evidence that the parties not only engaged in a given practice, but that the conduct reflects their actual understanding of the meaning of the provisions in question—something like *opinio juris*, by analogy to the elements of customary international law.<sup>111</sup> The Appellate Body most clearly articulated its requirement of such determinacy in *US—Gambling*, where it refused to take into account certain non-binding guidelines adopted by the Council for Trade in Services as authentic subsequent practice. In the view of the WTO-AB, the Guidelines in question were non-binding, and were, moreover, adopted “in the context of the negotiation of *future* [trade] commitments.”<sup>112</sup> They were essentially forward-looking<sup>113</sup>:

As such, they do not constitute evidence of Members' understanding regarding the interpretation of existing commitments. Furthermore, as the United States emphasized before the Panel, in its Decision adopting the 2001 Guidelines, the Council for Trade in Services explicitly stated that they were to be ‘non-binding’ and ‘shall not modify any rights or obligations of the Members under the GATS.’<sup>114</sup>

Thus the Appellate Body decided that it could not consider the guidelines as sufficiently determinate to qualify as “‘subsequent practice’ revealing a common understanding.”<sup>115</sup>

The WTO-AB takes a similarly restrained view of the expansive potential of subsequent practice. While the Appellate Body has indicated its willingness to consider the subsequent intentions of the parties for purposes of interpretation, it rejects the possibility that any interpretation may go so far as to modify the Agreements.<sup>116</sup> Of course the line between interpretation and

110. *Id.* ¶ 272.

111. In *US—Gambling*, the WTO-AB emphasized that the technique requires a demonstration that the practice in question actually reflects the parties' view on interpretation: to qualify as practice, the relevant “acts or pronouncements must imply agreement on the interpretation of the relevant provision.” *US—Gambling*, WT/DS285/AB/R at ¶ 192; see also *Japan—Alcoholic Beverages II*, WT/DS10/AB/R, at 13.

112. *US—Gambling*, WT/DS285/AB/R, ¶ 193.

113. See Nolte, *supra* note 91, at 138.

114. *US—Gambling*, WT/DS285/AB/R, ¶ 193.

115. *Id.*

116. See Appellate Body Report, *European Communities—Regime for the Importation, Sale, and Distribution of Bananas, Second Recourse to Article 21.5 of the DSU by Ecuador*, ¶¶ 391-93, WT/DS27AB/RW2/ECU, WT/DS27/AB/RW/USA (Nov. 26, 2008) (explaining, while specifically considering interpretation on the basis of subsequent agreement (VCLT 31(3)(a)), that modification through interpretation would be impermissible).

modification is hazy. What is important is that the Appellate Body draws a line at all, and that it does so out of fidelity to the text as the best and highest evidence of the intentions of the parties.

In sum, the WTO-AB will only consider the conduct of the parties where two conditions are met: first, if there is evidence that a substantial number of parties have actively engaged in the practice, no states have acted in a directly contrary fashion, and the acquiescence of the others can be demonstrated (as opposed to simply presumed on the basis of their silence); and second, if there is some determinate evidence that the practice actually represents an agreement of the parties regarding interpretation. And even where such conditions are met, the Appellate Body will only rely on such practice to interpret the Agreements—never to modify their provisions.

From the constitutional perspective, this glimpse into the WTO-AB's interpretive practice yields a static and restrained picture. As the foregoing evidences in microcosm, the WTO-AB makes sincere efforts to respect the extent of and limits to the consent of the parties, as evident in its outsized reliance on textual analysis in interpretation over and above other canons.<sup>117</sup> It thus rigorously restricts its use of subsequent practice so as not to take liberties in holding parties to interpretations to which they might not have consented.<sup>118</sup> In other words, while the WTO-AB may be said to be engaging in "constitutional interpretation" as a formal matter, its approach must be characterized as restrained, voluntaristic, and highly textualist; one would be pressed to point to any major idiosyncrasies in its approach to subsequent practice as compared to the typical case of *ad hoc* dispute resolution. The WTO-AB treats the parties with genuine deference, as veritable masters of the treaties. The same cannot so easily be said of either the ICJ or the ECtHR.

#### IV. CONSTITUTIONAL INTERPRETATION IN THE UNITED NATIONS: "THE PRACTICE OF THE ORGANIZATION" AS SUBSEQUENT PRACTICE IN THE ICJ

As compared to the WTO, the United Nations is a highly dynamic constituted organization. Its formal constitution, the U.N. Charter, establishes six official organs,<sup>119</sup> among which the ICJ represents the "principal judicial

117. See Douglas Irwin & Joseph Weiler, *Measures Affecting the Cross-Border Supply of Gambling and Betting Services (DS 285)*, 7 *WORLD TRADE REV.* 71, 89 (2008) (branding the interpretive approach of the WTO-AB as "textual fetishism").

118. Its restrictive attitude toward interpretation is not limited to 31(3)(b). For example, José Alvarez notes the WTO-AB's similar caution in interpreting the Agreements in light of "other rules of international law applicable in the relations between the parties[.]" José Alvarez, *The Factors Driving and Constraining the Incorporation of International Law in WTO Adjudication*, in *THE WTO: GOVERNANCE, DISPUTE SETTLEMENT, AND DEVELOPING COUNTRIES* 611 (Merit Janow ed., 2008) (quoting VCLT 31(3)(c)). Alvarez suggests that the WTO-AB's aversion to any appearance of law-making can be partially explained by the express terms of Article 3.2 of the DSU, which states that "recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements," and in part by a more general perception of their own "tenuous legitimacy." *Id.* at 616.

119. U.N. Charter art. 7 (including in the full list the U.N. General Assembly (UNGA), the U.N. Security Council (UNSC), the Economic and Social Council (ECOSOC), the Trusteeship Council, and the Secretariat). See generally ALF ROSS, *CONSTITUTION OF THE UNITED NATIONS: ANALYSIS OF*

organ of the United Nations.”<sup>120</sup> The Charter formally delegates certain powers to each of the constituted bodies, and provides a general framework for their interaction.<sup>121</sup> It should be borne in mind throughout that the formal terms of the Charter are extremely difficult to change, in light of its rigid provisions on amendment.<sup>122</sup>

The Charter leaves the ICJ in a relatively weak position. First, the Charter confers upon the Court only two thin bases of jurisdiction. It may only exercise jurisdiction over states in “contentious cases” with their express consent, and only its judgments in these kinds of cases are technically binding.<sup>123</sup> Its only other basis of jurisdiction is its power to render non-binding advisory opinions at the request of a competent institution.<sup>124</sup> Nevertheless, as a material matter the advisory opinions of the ICJ carry significant weight, especially insofar as they express the opinion of the Court on an interpretation of the Charter.<sup>125</sup> Arguably, the non-binding form actually frees the Court to adopt more adventurous legal positions.<sup>126</sup>

STRUCTURE AND FUNCTION (1950) (providing an early analysis of the United Nations in constitutional terms).

120. U.N. Charter art. 92.

121. However, in finalizing the Charter at the 1945 San Francisco Conference, the parties indicated their understanding that each principal organ of the United Nations would have some leeway to interpret its own competence for itself. 11 DOCUMENTS OF THE UNITED NATIONS CONFERENCE ON INTERNATIONAL ORGANIZATION, SAN FRANCISCO 37 (1945); see SIMON CHESTERMAN, THOMAS FRANCK & DAVID MALONE, LAW AND PRACTICE OF THE UNITED NATIONS: DOCUMENTS AND COMMENTARY 8 (2008).

122. U.N. Charter arts. 108-09 (requiring a two-thirds super-majority vote, plus the ratifications of two-thirds of the members. Also required is the assent of each of the five permanent members of the UNSC); see HANS Kelsen, THE LAW OF THE UNITED NATIONS: A CRITICAL ANALYSIS OF ITS FUNDAMENTAL PROBLEMS 818-19 (2000) (confirming that the facially different amendment provisions in Articles 108 and 109 amount, numerically, to the same thing). By comparison, the amendment rule of the WTO is, for most matters, significantly more flexible. A handful of fundamental articles can only be amended by unanimity, including core substantive provisions of the GATT, General Agreement on Trade in Services (GATS), and Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), the rules of decision-making and interpretation (Article IX), and the amendment rule itself (Article X). The rest may be amended under a variety of procedures requiring a qualified majority—thereby altering only the rights and obligations of those parties who have adopted the amendment. See WTO Agreement, art. X.

123. Statute of the International Court of Justice art. 35, June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993 [hereinafter I.C.J. Statute]. Thus, as against the stronger jurisdictional bases of the WTO-AB and especially the ECtHR, the ICJ enjoys comparatively few opportunities to interpret the Charter. Moreover, it lacks any formal power to interpret the Charter with universally binding effect. See ALVAREZ, *supra* note 2, at 68.

124. U.N. Charter art. 96(a) (empowering the UNGA and UNSC to request an “advisory opinion on any legal question”); *id.* art. 96(b) (adding that “[o]ther organs of the United Nations and specialized agencies, which may at any time be so authorized by the General Assembly, may also request advisory opinions of the Court on legal questions arising within the scope of their activities”).

125. MOHAMMED SAMEH M. AMR, THE ROLE OF THE INTERNATIONAL COURT OF JUSTICE AS THE PRINCIPLE JUDICIAL ORGAN OF THE UNITED NATIONS 115 (2003).

126. See José Alvarez, *The New Dispute Settlers: (Half) Truths and Consequences*, 38 TEX. INT’L L.J. 405, 423, 431 (2003) (suggesting that the very softness of the advisory-jurisdiction form may afford international courts like the ICJ greater leeway to make general pronouncements of law, with greater legal effect, than is possible in the context of binding international dispute settlement). By contrast and perhaps counterintuitively, as Alvarez notes elsewhere, the WTO-AB may be “more not less reticent to make broad pronouncements of law” than the ICJ, despite enjoying an apparently stronger basis of jurisdiction and formally binding adjudicative authority; precisely because of these apparent strengths the Body may be all the more wary that “the perception of judicial activism

The ICJ frequently relies on subsequent practice when appraised with the interpretation of treaties.<sup>127</sup> Usually it hews quite closely to the traditional contours of the technique. However, it has developed a peculiar approach to subsequent practice when engaged in the interpretation of the U.N. Charter. The Court has developed its *sui generis* approach gradually, over the course of three advisory opinions spanning forty years: *Certain Expenses*, *Namibia*, and *Wall*. In each case, the Court has progressively broadened the contours of its interpretive approach. Taken together, these three cases represent a significant material transformation of the constitution of the United Nations as a whole.

A. *From "Subsequent Practice" to the "Practice of the Organization"*

Everything begins with *Certain Expenses* (1962). At issue there was the interpretation of the General Assembly's (UNGA) budgetary competence. The Charter delimits the organ's budgetary power at Article 17, which provides in relevant part: "(1) The General Assembly shall consider and approve the budget of the organization; (2) The expenses of the Organization shall be borne by the members as apportioned by the General Assembly."<sup>128</sup>

The Court was asked to render an advisory opinion as to whether certain expenditures authorized by the UNGA (specifically, extraordinary expenses to cover the costs of U.N. operations in the Congo (ONUC) and the U.N. Emergency Force in the Middle East (UNEF)<sup>129</sup>) fell within its competence under Article 17, or were rather *ultra vires*. In relevant part, the Court addressed several arguments intended to cabin the General Assembly's budgetary authority under Article 17 as implicitly limited to "regular" or "administrative" expenses.<sup>130</sup> The ICJ ultimately found that the budgetary expenditures were well within the General Assembly's competences. For present purposes, the ICJ's very plausible substantive interpretation of the Charter as including such expenditures is not particularly noteworthy. What is extraordinary is the Court's method of interpretation.<sup>131</sup>

The Court articulated its approach in very traditional terms. It noted that when it interprets the Charter, it follows "the principles and rules applicable in general to the interpretation of treaties" for the simple enough reason that "the Charter is a multilateral treaty, albeit a treaty having certain special characteristics."<sup>132</sup> But its next move was critical: the Court then indicated that it would consider, in this regard, "the manner in which the organs concerned

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encourage WTO Members to adopt reforms that would weaken the WTO dispute settlement system." Alvarez, *supra* note 118, at 628.

127. See *Kasikili/Sedudu Island (Botswana/Namib.)*, 1999 I.C.J. 1045 (13 Dec.); *Temple of Preah Vihear (Cambodia v. Thai.)*, 1962 I.C.J. 6, 34 (June 15).

128. U.N. Charter art. 17.

129. *Certain Expenses of the United Nations*, Advisory Opinion, 1962 I.C.J. 151, 156 (July 20).

130. *Id.* at 159, 165.

131. The gravity of the Court's interpretive approach was already clear at the time to a handful of the judges writing separate opinions, and above all Sir Percy Spender. *Id.* at 189-90 (separate opinion of Judge Spender). The full potential of the Court's nascent canon would only become apparent in subsequent opinions.

132. *Id.* at 157.

'have consistently interpreted the text' in their practice."<sup>133</sup> Everyone agreed at the time that the general law of treaties had long included a principle authorizing the consideration of subsequent practice like that eventually codified at VCLT 31(3)(b).<sup>134</sup> Yet subsequent practice had always referred to the subsequent conduct of the *states parties*. There seems to have been absolutely no precedent for the notion that the practice of the organs of an international organization might act as a proxy for subsequent state conduct.<sup>135</sup> And this position engendered no small amount of controversy among the judges in the event—certain of whom decried the seismic potential of the Court's novel interpretive shift.<sup>136</sup>

Though muddying the novelty of its position, the Court was abundantly clear in articulating its approach to interpreting the Charter: *Certain Expenses* stands for the proposition that the consistent practice of the organs of an international organization is an authentic and appropriate guide to the meaning of that organization's constituent instrument.<sup>137</sup> The Court relied upon its nascent doctrine alongside a barebones textual analysis to dismiss the attempts to limit the scope of the General Assembly's budgetary power. First, the Court stated that Article 17 cannot be interpreted as excluding peace and security from the budgetary competence of the UNGA in light of that organ's longstanding conduct. The Court noted that "[i]t is a consistent practice of the General Assembly to include in the annual budget resolutions, provision for expenses relating to the maintenance of international peace and security."<sup>138</sup> On this basis, it concluded that "there is no justification for reading into the text of Article 17, paragraph 1, any limiting or qualifying word before the word 'budget.'"<sup>139</sup>

Finally, the Court turned from its general interpretation of Article 17 of the Charter to the more specific question of whether the particular impugned expenses fell within the UNGA's broad mandate. Here again, the Court gave great weight (indeed seemingly decisive weight) to the UNGA's own practice. With regard to funding UNEF operations, the Court concluded that, "from year to year, the expenses of UNEF have been treated by the General Assembly as

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133. *Id.*

134. *Id.* at 189-90 (separate opinion of Judge Spender).

135. The Court claimed that its approach was nothing new and cited several "precedents," including Competence of the General Assembly for the Admission of a State to the United Nations, Advisory Opinion, 1950 I.C.J. 4, 8-9 (Mar. 3). The Court did note there that the organs at issue had "consistently interpreted the text" in a way that conformed to its interpretation of the plain text. However, the Court in no way relied upon such practice as anything like an authentic criterion of interpretation. The Court explicitly decided upon an interpretation based on the plain meaning of the text, and only then indicated in passing that such meaning was borne out by the practice of the relevant organs. As noted by Judge Spender in his separate opinion to *Certain Expenses*, the Court could not claim any precedent in 1962 for the notion that it may actually ground its interpretation of the Charter on organ practice. *Certain Expenses of the United Nations*, 1962 I.C.J. 151, 194-95 (July 20) (separate opinion of Judge Spender).

136. *Id.* at 189-90 (separate opinion of Judge Spender); *id.* at 230-31 (dissenting opinion of President Winiarski).

137. *Certain Expenses*, 1962 I.C.J. at 157-65.

138. *Id.* at 160.

139. *Id.* at 161.

expenses of the Organization within the meaning of Article 17, paragraph 2, of the Charter.”<sup>140</sup> Turning to ONUC, the Court reasoned that the “General Assembly has twice decided that even though certain expenses are ‘extraordinary’ and ‘essentially different’ from those under the ‘regular budget’, they are none the less ‘expenses of the organization’” for purposes of Article 17(2).<sup>141</sup> Most surprisingly of all, several of the Resolutions relied upon were not unanimous, and indeed entailed substantial negative votes by diverse and representative states, including even the USSR—a Permanent Member of the Security Council.<sup>142</sup> The Court considered it sufficient that the Resolutions in question were “adopted by the requisite two-thirds majority” necessary for authorizing expenditures.<sup>143</sup>

To reiterate, it is not the particular interpretation of the UNGA’s budgetary authority that is important here—the substance of the Court’s interpretation was on its face eminently plausible. What gives pause is the Court’s subtle assertion of a canon of interpretation based on the subsequent practice of the organs of the Organization. And, indeed, the innovative nature of this assertion was not lost on everyone at the time: while the opinion of the Court blithely assumes its method as a given,<sup>144</sup> several of the judges underscore its novelty in their separate opinions.<sup>145</sup> *Certain Expenses* represents a highly significant extension of the traditional state-centric canon based on the subsequent practice of the states parties in applying a treaty to encompass “organ practice.”<sup>146</sup> For the purpose of interpreting the formal constitution of an international organization, the practice of the constituted bodies (organs) would henceforth join the practice of the constituent power (states parties) in the pantheon of authoritative evidentiary criteria. Most critically, though left unsaid, the Court considered that the resolutions of an organ like the General Assembly can be afforded interpretive weight *even if adopted in the face of dissenting votes*—making it difficult, in other words, to argue that such “organ

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140. *Id.* at 175.

141. *Id.* at 178-79.

142. Great weight was placed, for example, on Resolution 1089 (XI), which was adopted by a vote of sixty-two to eight, with seven abstentions. *Id.* at 174 (citing U.N.G.A. Res. 1089 (XI) A/RES/1089 (XI) (Dec. 21, 1956)); see also Christopher Peters, *Subsequent Practice and Established Practice of International Organizations: Two Sides of the Same Coin?*, 3 GOETTINGEN J. INT’L L. 617, 640 (2011). The Court also gave weight to Resolution 1151 (XII), adopted with fifty-one votes in favor, eleven against, and nineteen abstentions (including a negative vote by the USSR). Official voting records for the foregoing Resolutions are available at the website of the General Assembly. United Nations General Assembly—Voting Records (last visited Apr. 17, 2013), <http://www.un.org/en/ga/documents/voting.asp>.

143. *Certain Expenses of the United Nations*, 1962 I.C.J. 151, 174 (July 20).

144. Indeed, the Court relied on previous cases that provide little support for its method. See, e.g., *Competence of the General Assembly for the Admission of a State to the United Nations*, Advisory Opinion, 1950 I.C.J. 4, 8-9 (March 3). The ICJ may be best understood here as indulging in a typical case of what Ackerman and Golove have called the judicial “myth of continuity.” Ackerman & Golove, *supra* note 60, at 890-91 (explaining the tendency of U.S. Courts to insist that there is nothing new under the sun, even while contributing to the thorough transformation of the Constitution).

145. See *Certain Expenses*, 1962 I.C.J. at 189-90 (separate opinion of Judge Spender); *id.* at 230-31 (dissenting opinion of President Winiarski).

146. See also ALVAREZ, *supra* note 2, at 87-92.

practice” is relevant simply by virtue of reflecting the agreement of the parties on the interpretation of the Charter.

Nine years later, in 1971, the Court clarified its approach in a second advisory opinion in the *Namibia* case. The Court there confirmed that it viewed organ practice as connected to and grounded in the venerable doctrine of interpretation on the basis of the subsequent practice of the parties. Moreover, it clarified the expansive scope of its technique as a doctrine capable of establishing an interpretation at clear odds with the plain text.

In relevant part, *Namibia* interprets the Charter on the basis of the consistent practice of the UNSC. In Resolution 284 (1970) the Council requested the Court’s opinion on the legality of South Africa’s continued presence in Namibia (originating under the Mandate system of the League of Nations).<sup>147</sup> The crucial moment comes at the outset of the advisory opinion, in the Court’s assessment of its jurisdiction. South Africa objected, *inter alia*, that the Council’s request for an advisory opinion suffered from fatal procedural flaws of sufficient gravity as to render Resolution 284 *ultra vires*, null and void—thereby removing the grounds of the ICJ’s advisory jurisdiction.<sup>148</sup>

South Africa’s main complaint alleged fatal voting irregularities in the adoption of the request for an advisory opinion.<sup>149</sup> The Charter articulates the Council’s voting procedures at Article 27(3), providing that decisions of the UNSC on non-procedural matters “shall be made by an affirmative vote of nine members *including the concurring votes of the permanent members*.”<sup>150</sup> Resolution 284 was adopted by twelve members of the Security Council with three abstentions; however, South Africa insisted that the Resolution was *ultra vires* nevertheless, because two of the abstainers were permanent members—Great Britain and the Soviet Union.<sup>151</sup> The case thus turned on the interpretation of Article 27(3): is “concurring vote” limited to a vote in the affirmative, or is concurrence broad enough to include abstentions? South Africa alleged that the phrase “including the concurring votes” of the P5 requires that each permanent member explicitly vote in the affirmative for a decision of the Council to be legally valid.<sup>152</sup> The Court rejected that interpretation, reading the provision to require only that the permanent members do not vote in the negative—thereby crystallizing the “veto” as we know it today.<sup>153</sup>

Again, what is crucial for present purposes is the Court’s methodology. The ICJ expended no words assessing the “ordinary meaning” of Article 27(3),

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147. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 16, ¶ 1 (June 21).

148. *Id.* ¶ 20.

149. *Id.* ¶ 21.

150. U.N. Charter art. 27(3) (emphasis added).

151. *Namibia*, 1971 I.C.J. ¶ 21.

152. *Id.* ¶ 21.

153. *Id.* ¶ 22.

let alone its context or object and purpose.<sup>154</sup> It relied exclusively on the Council's practice to establish its interpretation. The critical passage reads:

[T]he proceedings of the Security Council extending over a long period supply abundant evidence that presidential rulings and the positions taken by members of the Council, in particular its permanent members, have consistently and uniformly interpreted the practice of voluntary abstention by a permanent member as not constituting a bar to the adoption of resolutions . . . . This procedure followed by the Security Council, which has continued unchanged after the amendment in 1965 of Article 27 of the Charter, has been generally accepted by Members of the United Nations and evidences a general practice of that Organization.<sup>155</sup>

Herein lie several important insights into the Court's use of organ practice in interpreting the Charter, each of which needs to be excavated.

First, this passage elucidates the connection between organ practice and the subsequent practice of the states parties to the Charter. Rather than simply emphasizing the practice of the Council as such, the Court indicates that the organ's practice is probative *because* it represents the subsequent practice of the members of the Council, and "in particular its permanent members."<sup>156</sup> Moreover, the Court insists on the importance that such practice has been "generally accepted by the Members of the United Nations" as a whole.<sup>157</sup> The Court indicates that the probative value of organ practice for interpretation will depend either upon whether the practice is accepted by the membership as a whole, or whether the members have at a minimum acquiesced.<sup>158</sup> The Court thus indicates that it relies on "organ practice," coupled with the members' acquiescence, as a kind of proxy for the subsequent practice of the states parties.<sup>159</sup> It subsumes this coupling under the broader concept of a "general practice of the Organization."<sup>160</sup>

*Namibia* further extends the expansive potential of the Court's interpretive approach. The case differs critically from *Certain Expenses* in that

154. See VCLT, *supra* note 8, art. 31(1). Indeed, the Court made no mention, in this regard, of the Vienna Convention on the Law of Treaties of 1969.

155. *Namibia*, 1971 I.C.J. ¶ 22.

156. *Id.*

157. *Id.*

158. Recall that under the traditional view of subsequent practice, the subsequent conduct of one or more parties will be considered authentic subsequent practice even in the absence of similar conduct by *all* parties, so long as those not engaging in the practice acquiesce in the others' conduct.

159. Recall, however, that in *Certain Expenses* the Court relied on certain GA Resolutions adopted over the dissenting votes of some Member States—a practice to which the Court would return in the 2004 *Wall* opinion. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136 (July 9). To the extent that the Court considers the practice of the organization relevant only insofar as it reflects the understanding of the Membership as a whole, it seems to thus consider the simple fact of negative votes to be insufficiently determinate to defeat the possibility that a Resolution reflects an interpretation of the Charter. The view is not entirely untenable: a negative vote could have a variety of explanations, and it is not outrageous for the Court to require a more explicit protest to defeat the presumption that a UNGA Resolution carries interpretive weight.

160. *Namibia*, 1971 I.C.J. ¶ 22. By encapsulating the entirety (organ practice plus Member acquiescence) within the concept of a "general practice of the Organization," the Court reintroduces some obscurity into its interpretive approach. Without further illuminating the meaning of the expression, *Namibia* simply indicates that the "general practice of the Organization" is the plenary criterion for interpretation—merely *evidenced* by the practice of its organs and the acquiescence of its members. What remains clear is those elements will be, together, sufficient to establish an interpretation.

the resulting interpretation is not particularly easy to square with the text. The interpretation in *Certain Expenses* is by any measure a plausible reading of Article 17(2)—it simply construes “expenses of the organization” as including “extraordinary” expenses as opposed to merely those required to meet normal administrative budgetary needs.<sup>161</sup> The Court’s interpretation in *Namibia*, by contrast, entails greater linguistic contortion. Article 27(3), again, provides that decisions of the UNSC “shall be made by an affirmative vote of nine members *including the concurring votes of the permanent members*.”<sup>162</sup> The requirement of their concurring votes is framed in very active language, and strongly seems to require the affirmative votes of the P5. Yet the Court inverts the plain language, requiring only that none of the P5 actively vote against the proposal. In the Court’s reading, “By abstaining, a member does not signify its objection to the approval of what is being proposed,” and does not thereby defeat the measure for lack of concurrence.<sup>163</sup> *Namibia* thus confirms that the Court’s technique of interpretation can establish interpretations that strain the text, arguably amounting to a modification.<sup>164</sup>

In one brief paragraph, *Namibia* expounds two aspects of the doctrine of “organ practice” in dramatic fashion: it elucidates the evidentiary criteria of the technique as organ practice coupled with member acquiescence; and it extends the scope of the technique to include interpretations at odds with the plain text, arguably even amounting to a modification.<sup>165</sup> The Court thereby establishes a rebuttable presumption that the organs can establish an interpretation of the Charter through their practice, even one difficult to square with the text, with the burden on the member states to protest or reject the interpretive relevance of any organ practice that might establish an interpretation with which they disagree.<sup>166</sup>

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161. *Certain Expenses of the United Nations*, Advisory Opinion, 1962 I.C.J. 151, 178-79 (July 20).

162. U.N. Charter art. 27(3) (emphasis added).

163. *Namibia*, 1971 I.C.J. ¶ 22.

164. Writing in dissent on other grounds, Judge Fitzmaurice stated that “the practice of an organization, or of a particular organ of it, can modify the manner of exercise of one of its functions (as for instance in the case of the veto in the Security Council which is not deemed to be involved by a mere abstention).” *Id.* ¶ 94 (dissenting opinion of Judge Fitzmaurice) (continuing to note that “such practice cannot, in principle, modify or add to the function itself”). It may be noted in passing that this is the same Sir Gerald Fitzmaurice who had previously sat as ILC Special Rapporteur on the Law of Treaties and there insisted on the possibility that subsequent practice can establish treaty modification. GARDINER, *supra* note 14, at 245 (stating, of *Namibia*, that “this seems an example of an interpretation close to accepting amendment by practice, particularly given that the preparatory work of the Charter suggests an intent contrary to the adopted practice on the part of the eventual permanent members of the Security Council”). This position runs afoul of the harsh counsel of Judge Spender in the earlier case of *Certain Expenses*, refusing to agree “that a common practice pursued by an organ of the United Nations, though *ultra vires* and in point of fact having the result of amending the Charter, may nonetheless be effective as a criterion of interpretation.” *Certain Expenses*, 1962 I.C.J. at 189-90 (separate opinion of Judge Spender).

165. *Namibia*, 1971 I.C.J. ¶ 22.

166. As established by *Certain Expenses*, the mere fact that an organ’s recommendation was adopted over negative votes does not vitiate its interpretive value as the conduct of that organ. *Certain Expenses*, 1962 I.C.J. at 174. It would thus appear that, in the view of the ICJ, protest must be more explicit and determinate to rebut the presumption in favor of assigning weight to the recommendations or decisions of the political bodies.

The *Wall* opinion represents the final and most recent case in our trio. It mirrors *Namibia* in that it concerns a challenge to the legal validity of the request for an advisory opinion under the terms of the Charter—this time issued by the General Assembly. In its Tenth Emergency Session in December 2003, the UNGA resolved to request an advisory opinion from the ICJ concerning the legality of Israel's construction of a wall in the Occupied Palestinian Territories, including in and around East Jerusalem.<sup>167</sup> Israel alleged, however, that the General Assembly's request exceeded its competence under the Charter. Though normally the UNGA would be competent to issue such a request, Israel contended that its competences were curtailed by Article 12(1) of the Charter—which limits the General Assembly's sphere of action when the Security Council is apprised of a situation. The issue was thus whether, in requesting the Court's advisory opinion, the UNGA impermissibly encroached upon the UNSC's competence.

Article 12, paragraph 1 of the Charter provides: “[W]hile the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests.”<sup>168</sup> In light of Article 12(1), and “given the active engagement of the Security Council with the situation in the Middle East, including the Palestinian Question,” Israel contended that “the General Assembly acted *ultra vires* under the Charter” in requesting an advisory opinion on the construction of the wall in the Occupied Palestinian Territory—rendering the request null and void, and stripping the Court of jurisdiction.<sup>169</sup> In deciding the case, the Court confirmed that it would examine the significance of Article 12(1) by “having regard to the relevant texts and the practice of the United Nations.”<sup>170</sup>

As in *Certain Expenses* and *Namibia*, the Court mainly looked to the practice of the relevant organs, this time including both the UNGA and the UNSC; unlike those two preceding cases, the Court found itself confronted with a glaring inconsistency in the organs' practice over time.

As regards the practice of the United Nations, both the General Assembly and the Security Council initially interpreted and applied Article 12 to the effect that the Assembly could not make a recommendation on a question concerning the maintenance of international peace and security while the matter remained on the Council's agenda.<sup>171</sup>

And yet, of course things can change—not least in the realm of legal interpretation. In view of the more recent “practice of the United Nations,” including that of both the UNGA and the UNSC, the Court found that “this

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167. See Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶ 1 (July 9).

168. U.N. Charter art. 12(1).

169. *Wall*, 2004 I.C.J. ¶ 24.

170. *Id.* ¶ 25.

171. *Id.* ¶ 27.

interpretation of Article 12 has evolved subsequently.”<sup>172</sup> The Court noted that “the General Assembly deemed itself entitled in 1961 to adopt recommendations in the matter of the Congo . . . and in 1963 in respect of the Portuguese colonies,” in both cases while the situation “still appeared on the Council’s agenda, without the Council having adopted any recent resolution concerning them.”<sup>173</sup> Once again, the Court relied mostly on Resolutions adopted in the face of substantial negative votes, including by a member of the P5.<sup>174</sup> Even more probative for the Court was the fact that “there has been an increasing tendency over time for the General Assembly and the Security Council to deal in parallel with the same matter concerning the maintenance of international peace and security.”<sup>175</sup> Finally, the Court took into consideration the opinion of the Legal Counsel of the United Nations, who confirmed in response to a question posed by Peru “that the Assembly interpreted the words ‘is exercising the functions’ in Article 12 of the Charter as meaning ‘is exercising the functions at this moment.’”<sup>176</sup>

In other words, the Court held that the “practice of the United Nations” evidences a dramatic reinterpretation of the Charter. Although Article 12 may once have been understood as preempting the General Assembly’s request for an opinion in a case like this, it can no longer be understood as so limiting the organ’s competence today.<sup>177</sup>

*Wall* pushes the ball in three ways. One concerns the evidentiary criteria required to establish a “practice of the organization” relevant to the interpretation of the Charter. The other two implicate the expansive potential of interpretation on the basis of organizational practice.

First, the Court confirms and extends its position on the question of whose subsequent practice is relevant for interpreting the Charter. Echoing its brief remark in *Namibia*, the Court states that the relevant criterion is the “practice of the United Nations.”<sup>178</sup> As in both *Namibia* and *Certain Expenses*, the Court in *Wall* looks primarily to the practice of the relevant organs—the

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172. *Id.*

173. *Id.*

174. *Id.* (citing G.A. Res. 1600 (XV), U.N. Doc. A/RES/1600 (Apr. 15, 1961) (adopted with 60 votes in favor, 16 votes against, and 23 abstentions, including a dissenting vote by the USSR); G.A. Res. 1913 (XVIII), U.N. Doc. A/RES/1913 (Dec. 13, 1963) (adopted by 91 affirmative votes over 2 negative votes)). Official voting records for the foregoing Resolutions are available at the website of the General Assembly. Voting Records, UNITED NATIONS, <http://www.un.org/en/ga/documents/voting.asp> (last visited Apr. 17, 2013).

175. *Wall*, 2004 I.C.J. ¶ 27. The Court also cites the matters involving Cyprus, South Africa, Angola, Southern Rhodesia and more recently Bosnia and Herzegovina and Somalia. The Court adds that “[i]t is often the case that, while the Security Council has tended to focus on the aspects of such matters related to international peace and security, the General Assembly has taken a broader view, considering also their humanitarian, social and economic aspects.” *Id.*

176. *Id.* (quoting U.N. GAOR 23rd Sess., 1637th mtg. ¶ 9, U.N. Doc. A/C.3/SR.1637, (Dec. 12, 1968)).

177. *Id.* ¶ 28.

178. *Id.* ¶¶ 27-28; see also Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 16, ¶ 22 (June 21) (using the more general phrase “practice of th[e] [o]rganization,” to be established by the general practice of the organs of the organization coupled with the acquiescence of the Member States).

UNSC and the UNGA, both of whose competences are at stake in the interpretation of Article 12. But here the Court goes further in extending its examination beyond the practice of only the organs of the United Nations, attaching weight to statements by the Legal Counsel of the United Nations.<sup>179</sup> The Legal Counsel is indeed a constituted body, and may be many things more—but the office is by no means a formal organ under the terms of the Charter.<sup>180</sup> And, unlike the UNSC and UNGA, the office cannot claim to speak on behalf of even one state. Thus the Court seems to indicate that organizational practice might not need to reflect state practice even indirectly.

The Court's consideration of the views of the U.N. Legal Counsel may seem like only a marginal extension. Yet closer scrutiny reveals its singular symbolism. This apparently small move is important because it undermines the link between organizational practice and the affirmative "subsequent practice" of any actual states. Even if only in this small way, the opinion seems to indicate that acquiescence may be enough to maintain the bond between the "practice of the organization" and the intentions of its members. Henceforth, the Court indicates, the presumption shall be that the organization as a whole determines the meaning of the Charter; insofar as they disagree with the practice of the organization, the burden falls upon the states parties to express their disapproval.

Second, the Court confirms its position in *Namibia* concerning the expansive potential of the interpretive technique by again adopting an interpretation that contorts the Charter's text. To reiterate, Article 12 states that "while the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests."<sup>181</sup> The provision seems categorical, on its face. In *Wall*, however, the Court interprets the provision as less-than-categorical in three ways. First, it reads Article 12(1) to allow the UNGA to adopt recommendations regarding a situation on the Council's docket about which the latter has not adopted any *recent* resolutions.<sup>182</sup> Second, it reads the phrase "is exercising the functions" as "is exercising the functions *at this moment*."<sup>183</sup> Finally, it indicates that in some cases the UNSC and UNGA may act in concert consistently with Article 12(1) by focusing on different aspects of a situation—the Council might focus on international peace and security, while the General Assembly might take a broader view, considering "humanitarian, social and economic aspects" of the situation.<sup>184</sup> Taken together these three exceptions chafe against the categorical "shall not" language of Article 12(1),

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179. *Wall*, 2004 I.C.J. ¶ 27.

180. See U.N. Charter art. 7 (establishing only six formal organs: the UNGA, UNSC, ECOSOC, Trusteeship Council, ICJ, and the Secretariat).

181. *Id.* art. 12(1).

182. *Wall*, 2004 I.C.J. ¶ 27.

183. *Id.* (emphasis added).

184. *Id.*

arguably amounting to a modification of the provision.<sup>185</sup> In any event, they confirm the Court's view that organizational practice can support the very significant development of the Charter's text.

Finally, the Court makes clear that practice may support a reinterpretation, even establishing a new interpretation that is both entirely inconsistent with the prior practice of the organization and difficult to square with the text. Not only did the Court significantly contort Article 12(1) on the basis of the practice of the organization, but it did so in spite of a long history of materially countervailing practice. What mattered was not that the relevant organs had *always* engaged in a certain practice, but that once they started doing so they continued to do so consistently. Though the earlier practice may have supported an earlier interpretation (one, we might add, more consistent with the text), the Court relied on a later phase of practice to find that the correct interpretation of Article 12 "has evolved subsequently."<sup>186</sup>

Thus *Wall* clarifies and develops the expansive potential of the ICJ's interpretive doctrine based on the "practice of the organization," as well as its evidentiary criteria. *Wall* makes clear that organizational practice may ground not only an interpretation at significant odds with the text, but also successive interpretations that chafe against both the text and the prior consistent practice of the organization. In other words, the practice of the organization can establish interpretation, reinterpretation, and arguably even successive modifications. As to the establishment of the authentic practice of the organization, the Court suggests that it is not only the practice of U.N. organs (composed of representatives of states) that carry weight, but also the practice of non-representative bodies like the office of the Legal Counsel of the United Nations. Carried to its full conclusions, the interpretive rule asserted in *Wall* seems to unravel all bonds between the practice of the organization and the practice of the states parties to the Charter save one: the gossamer thread requiring at least tacit consent through acquiescence (meaning here the absence of outright and direct protest).

#### B. *A Transformative Jurisprudence and Its Political Effects*

Big things can occur through small steps.<sup>187</sup> Through three advisory opinions spanning several generations, the ICJ has contributed to a sizeable transformation of the material constitution of the United Nations, resulting in an organization more autonomous, assertive, and powerful over its constituent member states. It did not accomplish this feat alone, but rather in conjunction with the more active organs (the UNGA and the UNSC). Still, at the heart of

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185. See Jessica Liang, *Modifying the UN Charter Through Subsequent Practice: Prospects for the Charter's Revitalisation*, 81 NORDIC J. INT'L L. 1, 10 (2012) (suggesting that the interpretation in *Wall* represents a "procedural modification").

186. *Wall*, 2004 I.C.J. ¶ 27.

187. See Ackerman & Golove, *supra* note 60, at 873 (using the term "piecemeal precedentism" to describe the contribution of the U.S. courts to the transformation of the U.S. Constitution, not through a single judgment but through the combination of a series of disparate opinions acting in conjunction with the movement of the political branches of government).

this subtle evolution lies the Court's increasingly expansive assertion that the Charter may be legitimately interpreted, reinterpreted, and even modified on the basis of the practice of the organization. Before assessing the constitutional implications of the ICJ's interpretive practice, it is worth pausing for a moment to take stock—by comparing its reliance on organizational practice to the traditional contours of the subsequent practice rule as it is usually employed in *ad hoc* dispute settlement.

As traditionally employed, subsequent practice has relatively strict evidentiary criteria: the rule only grants interpretive weight to the conduct of the *states parties* to a treaty; and only if *all* of the parties engage in the conduct, or at least materially acquiesce in one or another's conduct in applying the treaty.<sup>188</sup> The traditional rule is also generally understood as having a relatively limited scope. While everyone agrees that subsequent practice can support interpretation and reinterpretation, it is controversial whether the doctrine extends to modification under the general law of treaties.<sup>189</sup> Even those who contend that the subsequent practice of the parties can support modification tend to indicate that such expansive change would demand a more exacting evidentiary standard.<sup>190</sup> The rationale behind both the strictness of the evidentiary criteria, and the discomfort surrounding the possibility of informal modification, is the sanctity of state consent in the law of treaties.

As it stands today, the ICJ's understanding of the role of practice in the interpretation of its constituent instrument contrasts sharply with the traditional rule. In interpreting the Charter, the Court has loosened the evidentiary criteria for establishing authentic practice, and it has relied on the technique to establish quite substantial treaty change over time. First, in lieu of relying on the direct practice of the parties, the Court treats the "practice of the organization" as a proxy for state conduct—including the practice of organs like the UNSC and UNGA and other non-representative bodies like the office of legal counsel.<sup>191</sup> The Court has proven willing to give this proxy presumptive interpretive weight, indicating that it will consider such practice authoritative so long as the parties appear to have acquiesced.<sup>192</sup> At least in the case of the practice of the General Assembly, mere evidence that a number of states voted against a particular Resolution has proven insufficient to defeat this presumption, even where a substantial and diverse group votes against,

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188. See GARDINER, *supra* note 14, at 109-12. See also the view of the WTO-AB, that conduct only counts as subsequent practice where it is "concordant, common, and consistent" among the parties. Appellate Body Report, *Japan—Taxes on Alcoholic Beverages*, at 13, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (Oct. 4, 1996).

189. See *supra* text accompanying note 84.

190. See Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 16, ¶ 94 (June 21) (dissenting opinion of Judge Fitzmaurice); AMERASINGHE, *supra* note 15, at 463 (suggesting that especially clear and determinate evidence of the intentions of the parties would be necessary in such cases); Peters, *supra* note 142, at 632.

191. *Wall*, 2004 I.C.J. ¶ 27.

192. *Namibia*, 1971 I.C.J. ¶ 22.

including a member of the P5.<sup>193</sup> In other words, the Court seems to treat the practice of the organization as authoritative so long as no party *explicitly* protests the relevance of a particular conduct for interpretation. Second, as regards the expansive potential of the technique, the Court has relied upon the consistent practice of the organization to establish: an interpretation of the Charter; a reinterpretation of the Charter at odds with previous consistent practices; and even interpretations and reinterpretations at significant odds with the text, arguably amounting to the informal modification of the Charter's express terms.<sup>194</sup>

From the perspective of the law of treaties, the ICJ's gradual jurisprudence on subsequent practice represents a thorough broadening of a patently malleable rule of interpretation. Although the breadth of its doctrine may be remarkable, there is nothing particularly surprising about Courts stretching techniques of interpretation to suit their ends. From the point of view of constitutional theory, however, and in conjunction with the active practice of the UNGA and the UNSC, it would appear that the Court's interpretive practices have contributed to the dramatic transformation of the constitution of the United Nations as a whole.

Recall that judicial interpretation may lead to constitutional transformation in two ways. On the one hand, a particular interpretation may bring about an immediate first-order change, where the judicial body directly interprets (and changes) the normative architecture of the organization—as, for example, where it interprets provisions of its constituent instrument delineating the competences of the organs. On the other hand, a judicial body may bring about a second-order transformation by asserting a particular method of interpretation over time, insofar as its methodological approach itself alters or develops the material constitution of the organization. The series of advisory opinions outlined above appears to qualify under both types. However the second, here, proves far more significant than the first.

Each of the three advisory opinions arguably entails a degree of first order constitutional change.<sup>195</sup> In *Certain Expenses*, the Court developed the material budgetary authority of the UNGA, though admittedly in a manner that fits quite comfortably within the formal text.<sup>196</sup> *Namibia*, by contrast, entailed very little in the way of a material transformation but rather confirmed the long-standing practice of the UNSC regarding voting-procedures; the interpretation does, however, appear to strain the Charter's formal text.<sup>197</sup> Finally, *Wall* entailed the clearest first-order transformation. The Court acknowledged that both the plain text and the consistent practice of the UNGA and UNSC had long ago

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193. *Certain Expenses of United Nations*, Advisory Opinion, 1962 I.C.J. 151, 174 (July 20); *Wall*, 2004 I.C.J. ¶ 27; *see supra* text accompanying notes 142 and 174.

194. *Wall*, 2004 I.C.J. ¶¶ 27-28.

195. As noted above these opinions are non-binding, but the advisory opinions of the "principal judicial organ of the United Nations" are highly authoritative to the extent that they entail the interpretation of the Charter. U.N. Charter, art. 92; *see also* AMR, *supra* note 125, at 115.

196. *See supra* text accompanying note 139. The case represents at most a development of the material constitution of the United Nations that sits comfortably with the formal Charter.

197. *See supra* text accompanying note 164.

established an authentic interpretation of the Charter to the effect that the former could not make any recommendations concerning a situation currently on the docket of the latter. However the Court considered that recent and apparently consistent trends in the practices of both organs established a reinterpretation of the Charter permitting the Assembly to make such recommendations where the Council had failed to act, or was not actively considering the situation "at that moment." *Wall* thus entailed a clear material shift in the ordering of competences between the two bodies. Moreover, this shift is difficult to square with the Charter's formal text.

The importance of each of these first-order developments should not be dismissed. Taken together, however, the series of advisory opinions reveals a much more imposing second-order constitutional transformation. Through the gradual articulation of its principle of interpretation on the basis of the "practice of the organization," the Court has materially transformed the constitution of the United Nations in such a way as to render this constituted organization significantly more autonomous and indeed more powerful vis-à-vis the constituent power, namely the states parties to the Charter.

The single most important fact about the Court's approach to interpretation, from the perspective of constitutional theory, is that its reliance on the practice of the organization frays the threads of consent tying the United Nations to its member states. The Court presumes that the practice of the organs and other constituted bodies of the organization may establish an interpretation of the Charter, except in the remote situation where the relevance of such practice to interpretation is specifically protested within the membership—and simply voting against a resolution apparently does not count (at least not in the UNGA).<sup>198</sup> As the Court has twice held, interpretation on the basis of such practice may contort the Charter's formal text.<sup>199</sup> As a result, the Court has developed a mechanism for affecting informal constitutional change within the United Nations, capable of skirting the stringent requirements of the formal amendment rule.<sup>200</sup> In other words, through these advisory opinions the ICJ has sanctioned, and partially developed, an informal mode of constitutional change based on the usages, customs and practices of the various constituted bodies. The Court's approach empowers the constituted bodies to develop the material constitution of the United Nations without the express assent of the parties. Indeed it leaves the constituent member states with only the narrowest

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198. *Certain Expenses*, 1962 I.C.J. at 174; *Namibia*, 1971 I.C.J. ¶ 22.

199. *Namibia*, 1971 I.C.J. ¶ 22; *Wall*, 2004 I.C.J. ¶¶ 27-28.

200. The Court's principle of interpretation on the basis of the autonomous practice of the organization, when coupled with the often expansive practice of the more active political organs, would appear to vindicate Judge Lauterpacht's portrayal of the U.N. Charter as a living constitution. Voting Procedure on Questions Relating to Reports and Petitions Concerning the Territory of South-West Africa, Advisory Opinion, 1955 I.C.J. 67, 106 (June 7) (separate opinion of Judge Lauterpacht) (stating that the interpretation of the Charter must take into account "its operation in actual practice and in the light of the revealed tendencies in the life of the Organization").

forms of recourse to prevent such change (through explicit and determinate protest) or to counteract it (by recourse to the rigid formal amendment rule).<sup>201</sup>

Ultimately, the full constitutional significance of the ICJ's approach to interpretation lies in the fact that it empowers the other organs of the United Nations significantly more than it empowers itself. Unlike other tribunals, the World Court is institutionally incapable of playing the role of gatekeeper. It cannot monitor the practice of the various organs and decide when such practice is sufficiently consistent as to establish an interpretation or reinterpretation of the Charter. The ICJ simply lacks the jurisdictional capabilities: it has no compulsory jurisdiction, nor may it render advisory opinions of its own accord. Moreover, its contentious cases are only binding on the parties to the dispute and its advisory opinions are not formally binding on anyone.<sup>202</sup> But its blessing of constitutional change and development through practice has long resonated throughout the organization. By far the most dramatic examples of transformation through practice have not been litigated before the ICJ, but can be easily justified under its interpretive approach<sup>203</sup>: for example the UNSC's creation of criminal tribunals to try international crimes in Rwanda and the Former Yugoslavia,<sup>204</sup> as well as its more recent legislative experiments in promulgating general norms of indefinite duration to combat terrorism<sup>205</sup> and nuclear proliferation.<sup>206</sup> Indeed, as Alvarez rightly notes, "the principle which accords weight to institutional practice is a powerful tool for the expansion of power at the expense of the wishes of even a majority of the membership."<sup>207</sup>

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201. It is true that a kernel of this idea may be found in the original *travaux* of the Charter, embedded in a well-known statement adopted by the San Francisco Conference. The drafters there acknowledged that the malleable terms of the Charter may from time to time have to be interpreted by the organs of the organization themselves. However "it is to be understood," the statement insists that if an interpretation made by any organ of the Organization . . . is not generally acceptable it will be without binding force. In such circumstances, or in cases where it is desired to establish an authoritative interpretation as a precedent for the future, it may be necessary to embody the interpretation in an amendment to the Charter.

ALVAREZ, *supra* note 2, at 79. Alvarez rightly characterizes this statement on interpretation as "neither total abdication to national sovereignty nor idealized resort to supranational authority." *Id.* This kernel seems, however, a far cry from the thoroughly supranational principle of reliance on the "practice of the organization" in the form actually worked out in the jurisprudence of the ICJ—whereby the Charter may be interpreted, reinterpreted, and arguably *modified* on the basis of even contested organ practice (and, apparently, the practice of other non-organic bodies). The extent to which the essence of the ICJ's approach is contained in the statement by the drafters in San Francisco is perhaps debatable. In any case the unfolding of this kernel over sixty years of practice must be understood as a profound constitutional movement.

202. U.N. Charter art. 96; see Alvarez, *supra* note 126, at 423, 431.

203. See generally Arato, *supra* note 42 (examining, in this regard, the UNSC's assertion of general legislative powers in the areas of international criminal law, combatting terrorism, and nuclear non-proliferation).

204. S.C. Res. 955, U.N. Doc. S/Res/955 (Nov. 8, 1994) (establishing the ICTR); S.C. Res. 827, U.N. Doc. S/Res/827 (May 25, 1993) (establishing the ICTY).

205. S.C. Res. 1267, U.N. Doc. S/Res/1267 (Oct. 15, 1999); S.C. Res. 1373, U.N. Doc. S/Res/1373 (Sept. 28, 2001).

206. S.C. Res. 1540, U.N. Doc. S/Res/1540 (Apr. 28, 2004).

207. ALVAREZ, *supra* note 2, at 92.

From the juridical perspective of the law of treaties and treaty interpretation, the ICJ takes a very broad approach to the doctrine of subsequent practice. But its breadth can be (and has been) bracketed as the province of a special regime: the interpretive community of the United Nations.<sup>208</sup> From a political-theoretical perspective, however, it appears that the broad interpretive rule has contributed to the material transformation of the constitution of the organization. The material significance of the Court's approach to interpretation lies in the fact that it sanctifies a second track of constitutional change, outside of the formal amendment rule. The informal track is, in the end, more readily available to the other organs than to the Court itself. But what is important is that the "principal judicial organ of the United Nations" has sanctioned the more active organs' past and future reliance on this informal mode of change. True, the approach most directly empowers the other organs, but at a higher level of abstraction it significantly contributes to the autonomy of the organization as a whole. Under the color of the law of treaties, the Court has illuminated a path by which the organization can develop and expand the scope of its competences, through the sustained practice of its more capable organs. This informal mechanism circumvents the rigid formal amendment rule and enables organizational development without direct recourse to the constituent member states. Taken together, and through no small interpretive alchemy, the organs of the United Nations have contributed to the gradual transformation of the Organization, enhancing the autonomy and power of the constituted bodies over and above the constituent power.

V. THE TRANSFORMATION OF THE EUROPEAN COURT OF HUMAN RIGHTS:  
"EUROPEAN CONSENSUS" AS SUBSEQUENT PRACTICE

Of the Courts considered in this Article, the European Court of Human Rights is the most dynamic. Like the WTO-AB and the ICJ, the ECtHR is a standing judicial organ of an international organization (the CoE) that engages in a form of constitutional interpretation—through the sustained interpretation of its constituent instrument (the ECHR). Its mandate includes the interpretation of fundamental human rights as codified in the Convention, as well as the mechanisms for their enforcement (including its own judicial competences). And alone among the bodies considered here, the ECtHR has expressly described its task as a constitutional enterprise.<sup>209</sup> Like the ICJ—though in a different way and with important differences in result—the ECtHR's approach to constitutional interpretation has proven transformative in effect.

However the organizational position of the ECtHR differs from that of either the WTO-AB or the ICJ in three crucial respects, relating to its peculiar

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208. See, e.g., AMERASINGHE, *supra* note 15, at 49-55; GARDINER, *supra* note 14, at 246-49.

209. *Loizidou v. Turkey* (preliminary objections) [GC], App. No. 15318/89, Eur. Ct. H.R. ¶ 75 (Mar 23, 1995) (describing the Court's task as interpreting a "constitutional instrument of European public order").

formal constitutional arrangement as an organ of the CoE; its bases of jurisdiction; and its *ad hoc* procedures for formal amendment.

First, though usually studied in its own right, the ECtHR is formally a judicial organ of the Council of Europe, alongside the supreme legislative Committee of Ministers and a deliberative Parliamentary Assembly (PACE), and amidst a wide range of specialized bodies and committees. This complex organization was not created all at once but rather by separate successive treaties. The CoE was originally founded by the 1949 Treaty of London, establishing the Committee of Ministers and the Assembly. Only in the following year did the members adopt the ECHR, codifying a bill of fundamental human rights and establishing two new organs of the CoE to enforce its provisions (the ECtHR and the now-defunct European Commission on Human Rights). The ECHR is nevertheless understood as a fundamental and integral instrument of the CoE, and its ratification is a condition of membership in the organization. From a constitutional perspective, the ECHR is thus best understood as both the constituent instrument of the ECtHR and an integral aspect of the larger formal constitution of the CoE.

Second, the ECtHR enjoys a far stronger jurisdictional foothold than either the ICJ or the WTO. Under the formal terms of the ECHR, the ECtHR has compulsory jurisdiction over all of its members.<sup>210</sup> Moreover, it may hear cases between the states parties, as well as complaints by individuals against the member states.<sup>211</sup> In both types of case, the ECtHR enjoys express authority to interpret the Convention with binding effect on all parties.<sup>212</sup> The possibility of direct individual complaints is of critical importance, because it affords the ECtHR an exponentially greater caseload than most international courts and tribunals.<sup>213</sup> The caseload causes problems, but for present purposes the point is that it creates an enormous number of opportunities for the ECtHR to consider and reconsider its interpretations of the Convention.

Third, in contrast to the WTO Agreements and the U.N. Charter, there is no express procedure for amending the ECHR. Rather, amendment occurs through an *ad hoc* procedure, whereby the Committee of Ministers of the CoE drafts a proposal for an additional protocol to be submitted to the parties for

210. ECHR, *supra* note 23, arts. 32-34, 46-48.

211. *Id.* arts. 33, 34 (using the terms "Inter-State Cases" and "Individual Applications").

212. *Id.* arts. 32-46. In addition the Court has the capacity to render Advisory Opinions upon request by two-thirds majority of the Committee of Ministers. *Id.* arts. 46-48 (The Court may refuse any such request at its discretion). Although this procedure is now getting more political attention it has to date only been used twice, regarding relatively minor issues concerning the election of new judges. Advisory Opinion on Certain Legal Questions Concerning the Lists of Candidates Submitted with a View to the Election of Judges to the European Court of Human Rights (*Advisory Opinion No. 1*), Eur. Ct. H.R. (Feb. 12, 2008); Advisory Opinion on Certain Legal Questions Concerning the Lists of Candidates Submitted with a View to the Election of Judges to the European Court of Human Rights (*Advisory Opinion No. 2*), Eur. Ct. H.R. (Jan. 22, 2010).

213. As a result, the ECtHR suffers from an enormous backlog of cases, implicating all aspects of the Convention. In 2009, 57,200 applications were allocated to judges, and the backlog reached 119,300. *Fact Sheet: Protocol 14, The Reform of the European Court of Human Rights*, COUNCIL OF EUROPE (May 25, 2010), <http://www.echr.coe.int/NR/rdonlyres/57211BCC-C88A-43C6-B540-AF0642E81D2C/0/CPProtocol14EN.pdf>.

ratification. The procedure can take two different forms: an “amending protocol” (requiring unanimous consent and ratification, and binding on all parties) or an “optional protocol” (requiring a certain number of ratifications to come into force, and binding only upon the ratifying states).<sup>214</sup> The parties have relied on optional protocols to expand the substantive rights of the ECHR,<sup>215</sup> while resorting to amending protocols to alter the institutional machinery of the Convention (with one exception).<sup>216</sup> On the one hand, this *ad hoc* procedure has proven effective: the ECHR has been amended no less than fourteen times, more than once with comprehensive and systematic effect.<sup>217</sup> On the other hand, the pressure to adopt the unanimity-based procedure for amending the organizational aspects of the Convention makes it difficult for the parties to challenge the ECtHR’s understanding of its competence through formal means.

Through its sustained interpretive practice the ECtHR has developed a second, informal track of constitutional change within the Convention system. Like the ICJ, the ECtHR has transformed its constitution through reliance on subsequent practice in the interpretation of its constituent instrument, the ECHR. In some ways it is even more explicit than the World Court. It expressly grounds its approach in VCLT 31(3)(b), and indeed focuses much more directly on the actual practice of the states parties.<sup>218</sup> Yet just as explicitly, it has proven willing to rely on the subsequent practice of a majority of the parties, even in

214. The approach is in many ways more flexible than the express amendment rule of the U.N. Charter, and similar in spirit to the multifaceted amendment provisions of the WTO Agreement.

215. See, e.g., Protocol 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 22, 1984, Europ. T.S. No. 117 (entered into force Nov. 1, 1988) (restricting the death penalty).

216. See, e.g., Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Restructuring the Control Machinery Established Thereby, May 11, 1994, Europ. T.S. No. 155 (entered into force Nov. 1, 1998) (abolishing the European Commission on Human Rights, allowing individuals to apply directly to the Court, and giving compulsory jurisdiction to the Court over all disputes arising out of the ECHR); Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Amending the Control System of the Convention, May 13, 2004, Europ. T.S. No. 1194 (entered into force June 1, 2010) (establishing a “single-judge” procedure to increase efficiency, whereby initial admissibility decisions may be made by one judge, rather than by committee of three judges, as well as providing for enhanced enforcement mechanisms in connection with the CoE—such as issuing interpretations of past judgments and/or ruling on a Respondent Party’s compliance with adverse judgments. *But see* Protocol 14bis to the Convention for the Protection of Human Rights and Fundamental Freedoms, May 27, 2009, Europ. T.S. No. 204 (entered into force Oct. 1, 2009) (adopted as an optional protocol in order to afford the Court access to the single judge procedure for cases against the ratifiers only, in order to address its backlog of cases while waiting for the final ratification of Protocol 14).

217. See, e.g., Protocol 11, *supra* note 216; Protocol 14, *supra* note 216.

218. The ECtHR does, in fact, give significant weight to reports and resolutions of other organs and bodies of the CoE; but it considers such soft law to be relevant to its interpretive task not as subsequent practice, but as “relevant rules of international law applicable in the relations between the parties” via VCLT, *supra* note 8, art. 31(3)(c). Although this aspect of the Court’s interpretive approach falls outside the scope of the present article, I have argued elsewhere that it has had a similarly transformative effect. Julian Arato, *Constitutional Transformation in the ECtHR: Strasbourg’s Expansive Recourse to External Rules of International Law*, 37 BROOK. J. INT’L L. 349 (2012). Under the rubric of VCLT, *supra* note 8, art. 31(3)(c), the Court has proven willing to interpret the Convention on the basis of non-binding sources emanating from the CoE and other international organizations, as well as treaty provisions neither signed nor ratified by even a majority of the States parties (including even the Respondent in the particular case). See, e.g., *Demir v. Turkey* [GC], App. No. 34503/97, Eur. Ct. H.R. (Nov. 11, 2008).

plain view of contrary practice by the minority. Moreover, the ECtHR is much more articulate than the ICJ about the expansive potential of its interpretive doctrine: it has plainly stated that it regards the subsequent practice of the parties as capable of establishing an interpretation, reinterpretation, and modification of the Convention. Despite its nod to the terms of 31(3)(b), the Court has developed a broad, *sui generis* approach to subsequent practice. And as opposed to the ICJ's approach to organizational practice, the ECtHR's approach is significantly more Court-empowering.

Before going any further, and in view of the ECtHR's enormous and varied case-law, it is worth clarifying what this section is and is not meant to do. First, the following is not an argument about how the ECtHR *generally* interprets the ECHR or how it *tends* to do so. I am here intentionally drawing out a selection of disparate cases with the intention of demonstrating a particular assertion of judicial power, even if the ECtHR only makes full use of that power relatively infrequently. Second, and in a similar vein, this section is not meant to suggest that the ECtHR usually takes an expansive approach to the interpretation of the rights in its charge. While most of the cases considered here involve the expansion of rights, the full picture of the ECtHR's jurisprudence is considerably more checkered.<sup>219</sup> The following selection of cases is rather meant to draw a very particular constellation, reflecting the ECtHR's capacious understanding of its competences under the law of treaty interpretation. Specifically, I want to demonstrate its willingness—*some of the time*—to expand and even modify the ECHR on the basis of the subsequent practice of a majority of the parties, despite clear evidence of a non-consenting minority. Moreover it does so openly, as a matter of doctrinal principle under the rubric of “European consensus.”

Irrespective of whether the ECtHR makes full use of this self-generated power in all, or even most cases, the assertion itself has had a profound and material constitutional meaning. The sustained assertion of the doctrine of European consensus represents a significant transformation of the relationship between this constituted supranational Court and the constituent power—the states parties to the ECHR.

A. “*European Consensus*”: *The Weight of Majorities, Minorities, and Trends*

The ECtHR expressly relies upon the Vienna rules in interpreting all aspects of the ECHR, including both the substantive rights of the Convention and its organizational provisions concerning the Court's competences, jurisdiction, and procedure. As the Court acknowledged in *Golder*, “it should be guided by Articles 31 to 33 of the Vienna Convention of 23 May 1969 on

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219. Though the ECtHR has significantly advanced the cause of human rights in Europe, it is often criticized for affording the member states too much leeway under the Convention. See, e.g., Oren Gross & Fionnuala Ni Aolain, *From Discretion to Scrutiny: Revisiting the Application of the Margin of Appreciation Doctrine in the Context of Article 15 of the European Convention of Human Rights*, 23 HUM. RTS. Q. 625 (2001).

the Law of Treaties,” which “enunciate in essence generally accepted principles of international law.”<sup>220</sup> The Court frequently relies upon the practice of the parties as an authentic and wholly sufficient criterion of interpretation and has explicitly grounded its approach on VCLT article 31(3)(b) on several occasions.<sup>221</sup>

However, the Court usually relies on the practice of the parties in a somewhat eccentric context: the determination of the margin of appreciation of the member states to decide individually the extent to which they will enforce or limit the enforcement of the Convention rights at the national level. At the heart of this much-criticized doctrine is an idea of deference to the parties and respect for their varied legal traditions. The Convention is a supranational instrument codifying open-textured human rights, enforceable directly by the nationals of its member states; therefore the Court must, in its view, afford a degree of respect to the different ways in which the parties balance rights protection with other legitimate priorities. The Court will, however, always enforce a certain minimum level of protection, a level it determines as a matter of treaty interpretation in light of the Vienna rules—including *inter alia*, by reference to the subsequent practice of the parties. Under the auspices of VCLT article 31(3)(b), the Court examines the parties’ domestic laws and de facto administrative practices,<sup>222</sup> as well as their inter-state conduct,<sup>223</sup> to determine whether or not there is a consensus among them as to the appropriate minimum level.<sup>224</sup> It further appeals to such practices in order to determine whether it should expand the appropriate minimum over time, shrinking the margin of appreciation with regard to the right in question.

Within this narrow context, however, the ECtHR adopts an extraordinarily broad construction of VCLT article 31(3)(b) itself, notable in two important respects. First, the singular feature of the Court’s approach is that it does not require the common practice of *all* of the parties, even when it is aware of the contradictory practice of a minority of parties. So long as the practice of the parties evidences the agreement of *most* of them on a given interpretation, the Court will consider the interpretation authentic and established.<sup>225</sup> In the Court’s words, it looks to practice in order to establish a “European consensus”—but it really means “near-consensus” or even an

220. *Golder v. United Kingdom*, App. No. 4451/70, Eur. Ct. H.R. (Feb. 21, 1975) (plenary).

221. *Banković v. Belgium* (dec.) [GC], App. No. 52207/99, Eur. Ct. H.R. ¶¶ 56, 62 (Dec. 12, 2001); *Loizidou v. Turkey* (preliminary objections) [GC], App. No. 15318/89, Eur. Ct. H.R. ¶ 75 (Mar. 23, 1995); *Cruz Varas v. Sweden*, App. No. 15576/89, Eur. Ct. H.R. ¶ 100 (Mar. 20, 1991) (plenary).

222. *See, e.g., Soering v. United Kingdom*, App. No. 14038/88, Eur. Ct. H.R. (July 7, 1989) (plenary).

223. *See Al-Saadoon v. United Kingdom*, App. No. 61498/08, Eur. Ct. H.R. (Mar. 2, 2010); *Öcalan v. Turkey* [GC], App. No. 46221/99, Eur. Ct. H.R. (May 12, 2005).

224. Note, of course, that the Court relies on all other provisions of the Vienna Rules in setting this level, and will not necessarily set a low level simply because no such consensus can be found. For example, even in the absence of a “European Consensus,” the Court may nevertheless deny the margin in light of other “relevant rules of international law” as per VCLT, *supra* note 8, art. 31(3)(c). *See Demir v. Turkey* [GC], App. No. 34503/97, Eur. Ct. H.R. (Nov. 11, 2008); Arato, *supra* note 218, at 349.

225. *See Kanstantsin Dzehtsiarou, European Consensus and the Evolutive Interpretation of the European Convention on Human Rights*, 12 GER. L.J. 1730, 1733 (2011).

evolving trend toward consensus.<sup>226</sup> Second, the ECtHR openly considers interpretation on the basis of Article 31(3)(b) to be capable of establishing quite expansive treaty change over time. The Court explicitly holds that interpretation on the basis of the subsequent practice of the parties can establish an amendment of the Convention. These two areas of breadth compound one another. In the most spectacular cases, the Court has expressly grounded treaty modification on European consensus even in the face of explicitly contrary practice by a handful of the parties.<sup>227</sup>

1. *Establishing Consensus: The Subsequent Practice of (Most of) the Parties*

The ECtHR has expressly identified the doctrine of European consensus with interpretation on the basis of the subsequent practice of the parties to the ECHR within the meaning of VCLT article 31(3)(b).<sup>228</sup> In relying on such consensus to justify a developmental interpretation of the Convention as a “living” instrument, the ECtHR’s stated purpose is to enhance the protection of human rights in lockstep with tendencies among the parties to buttress and expand rights protection. In the Court’s words, a failure to maintain a dynamic approach in view of such tendencies would “risk rendering [the Convention] a bar to reform or improvement.”<sup>229</sup>

But the doctrine of European consensus departs significantly from the notion of subsequent practice as it is usually understood. As one commentator has recently noted, by “consensus” the ECtHR means “a general agreement among the majority of Member states of the Council of Europe about certain rules and principles identified through comparative research of national and international law and practice.”<sup>230</sup> The critical word in this observation is “majority” as opposed to true “consensus”: the Court has frequently proven willing to interpret the ECHR on the basis of the consistent practice of *most* of the parties, even in view of the contrary practice of the respondent state or other parties not represented in a given case. In this vein, the Court takes the notion of interpretation on the basis of practice extraordinarily far. Even if some states

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226. Indeed, the Court has proven willing to rely on what it takes to be an “emerging consensus” when coupled with other considerations. See, e.g., *Demir*, App. No. 34503/97, Eur. Ct. H.R. ¶ 85 (“The consensus emerging from specialised international instruments and from the practice of Contracting States may constitute a relevant consideration for the Court when it interprets the provisions of the Convention in specific cases.”); *Christine Goodwin v. United Kingdom* [GC], App. No. 28957/95, Eur. Ct. H.R. ¶¶ 84-85 (July 11, 2002) (noting a weak but “emerging consensus” among the parties, but attaching “less importance to the lack of evidence of a common European approach to the resolution of the legal and practical problems posed, than to the clear and uncontested evidence of a continuing international trend in favour not only of increased social acceptance of transsexuals but of legal recognition of the new sexual identity of post-operative transsexuals”). For further discussion, see *infra* Subsection V.A.1.

227. See also *Al-Saadoon*, App. No. 61498/08, Eur. Ct. H.R.; *Öcalan* [GC], App. No. 46221/99, Eur. Ct. H.R.; *infra* Subsection V.A.2.

228. *Öcalan* [GC], App. No. 46221/99, Eur. Ct. H.R. ¶ 163; *Loizidou v. Turkey* (preliminary objections) [GC], App. No. 15318/89, Eur. Ct. H.R. ¶ 37 (Mar. 23, 1995).

229. *Christine Goodwin*, App. No. 28957/95, Eur. Ct. H.R. ¶ 74 (citing *Stafford v. United Kingdom* [GC], App. No. 46295/99, Eur. Ct. H.R. ¶ 68 (May 28, 2002)).

230. *Dzehtsiarou*, *supra* note 225, at 1733.

actually protest the interpretation or engage in the opposite practice, the affirmative practice of a large majority of parties will suffice to establish an expansive interpretation.<sup>231</sup>

The *urtext* of European consensus is the perennially cited judgment in *Tyrer v. United Kingdom*.<sup>232</sup> The case concerned the corporal punishment of juveniles as provided by law on the Isle of Man, a territory of the United Kingdom. The question before the Court was whether the specific form of judicial corporal punishment at issue (known as "birching") constituted degrading punishment and was thus in contravention of the proscriptive terms of Article 3 of the ECHR.<sup>233</sup> Birching had long been administered on the Isle of Man, and indeed the Attorney General for the Isle attempted to rest his case on the argument "that the judicial corporal punishment at issue in this case was not in breach of the Convention since it did not outrage public opinion in the Island."<sup>234</sup>

The Court famously noted that it was not—and could not—be impressed by such arguments about consistent usages within just one member state. First, the Court held that the Convention was not stuck in time, and the mere fact that some state activities may have been permissible in one generation does not guarantee that the ECHR will not prohibit the same activity in the future. The Court insisted that it must "recall that the Convention is a living instrument which . . . must be interpreted in the light of present-day conditions."<sup>235</sup> In words that have echoed throughout the ECtHR's long jurisprudence, the Court proclaimed that it "cannot but be influenced by the developments and commonly accepted standards in the penal policy of the member states of the Council of Europe in this field."<sup>236</sup> Even though the practice was long and overtly considered permissible within this semi-autonomous territory of the United Kingdom, the Court determined that the Convention had evolved to proscribe such behavior in light of the clear and consistent practice of the other member states.

In other words, the Court held that it would look to the practice of the member states to determine the meaning of the Convention. Where such practice consistently and overwhelmingly develops in a certain direction, the Court may consider the Convention as having evolved. Such evolution is possible even given the clear and consistent *contrary* practice of a respondent state in a given case.

Since *Tyrer*, European consensus has played a significant role in the Court's development of the Convention. One example is particularly illuminating: the Court's 1995 judgment on Preliminary Objections in *Loizidou*

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231. *Loizidou* [GC], App. No. 15318/89, Eur. Ct. H.R. ¶ 79.

232. App. No. 5856/72, Eur. Ct. H.R. (Apr. 25, 1978).

233. *Id.* ¶ 28; see also ECHR, *supra* note 23, art. 3 ("No one shall be subjected to torture or to inhuman or degrading treatment or punishment.").

234. *Tyrer*, App. No. 5856/72, Eur. Ct. H.R. ¶ 31.

235. *Id.*

236. *Id.*

*v. Turkey*.<sup>237</sup> The case is notable, first, because the Court explicitly grounds its reliance on European consensus in Article 31(3)(b) of the VCLT. Indeed the Court construes Article 31(3)(b) as condoning its approach to interpretation on the basis of the practice of a large majority of parties, even in the face of contrary practice by some of them. Second, the Court makes especially clear that it is willing to ignore not only the contrary practice of a respondent state in a particular case, but even similar practice among a handful of member states not party to the proceedings. As *Loizidou* establishes, in the Court's broad conception of Article 31(3)(b) it is wholly appropriate to interpret and reinterpret the Convention on the basis of the common and consistent practice of *most* of the states irrespective of the disagreement of the outliers.

*Loizidou* was, at bottom, a property claim. The applicant, a Cypriot national, claimed title to several plots of land in Northern Cyprus; she alleged that she had been prevented from peacefully enjoying her property by the Turkish military since Turkey's invasion and occupation of Northern Cyprus.<sup>238</sup>

The pertinent issue, for present purposes, revolves around Turkey's dispute of the Court's jurisdiction. Turkey claimed that the Court lacked jurisdiction over *Loizidou*'s claim, *inter alia*, because it lacked territorial jurisdiction. In acceding to the ECHR, Turkey deposited two declarations defining its understanding of its commitments under Articles 25 and 46 of the Convention (defining the competences of the now-defunct European Commission on Human Rights and the ECtHR, respectively).<sup>239</sup> Turkey claimed that the Court lacked jurisdiction *ratione loci* because "in accordance with their declarations under Articles 25 and 46 . . . they had not accepted either the competence of the Commission or the Court to examine acts and events outside their metropolitan territory."<sup>240</sup> It was not seriously disputed that the claims at issue arose outside of Turkey's metropolitan territory (Turkey did not, after all, claim sovereignty over Northern Cyprus); the case rather turned on the legal significance of Turkey's interpretive declarations attempting to limit its commitments under the Convention.<sup>241</sup>

Turkey strongly contested the notion that there was any consistency in the parties' practice sufficient to establish an authentic subsequent practice

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237. *Loizidou v. Turkey* (preliminary objections) [GC], App. No. 15318/89, Eur. Ct. H.R. ¶ 71 (Mar. 23, 1995).

238. *Id.* ¶¶ 10-11.

239. Turkey's initial declaration in acceding to Article 25 stated that "(i) the recognition of the right of petition extends only to allegations concerning acts or omissions of public authorities in Turkey performed within the boundaries of the territory to which the Constitution of the Republic of Turkey is applicable." *Id.* ¶ 15. Turkey renewed its position in this regard in 1990 and 1993. *Id.* ¶¶ 25-26. In addition, Turkey opted in to Article 46 in 1990, declaring then that it would hereby recognize as compulsory ipso facto and without special agreement the jurisdiction of the European Court of Human Rights in all matters concerning the interpretation and application of the Convention which relate to the exercise of jurisdiction within the meaning of Article 1 of the Convention, performed within the boundaries of the national territory of the Republic of Turkey.

*Id.* ¶ 27.

240. *Id.* ¶ 55.

241. *Id.* ¶¶ 65-89.

demonstrating their agreement that the jurisdictional provisions of the ECHR were not susceptible to reservation. True, Turkey noted that its interpretive declaration gave rise to a handful of statements opposing its limitation of the jurisdictional clauses.<sup>242</sup> But in spite of these statements, Turkey contended that it had not "been established that there is a practice reflecting an agreement among *all Contracting Parties* concerning the attachment of conditions to these instruments of acceptance."<sup>243</sup> It strongly emphasized that its declarations were consistent with the similar practice of other parties, including Cyprus itself<sup>244</sup> and the United Kingdom,<sup>245</sup> both of which claimed limitations to the Court's jurisdiction. The United Kingdom's declaration in particular included very similar restrictions on the territorial scope of the Court's jurisdiction, excluding the state's colonial holdings.<sup>246</sup>

The Court firmly rejected Turkey's analysis of the evidentiary criteria for authentic subsequent practice. The Court as usual began its analysis with a nod to *Tyrer*, indicating that even the procedural and jurisdictional provisions of the Convention "cannot be interpreted solely in accordance with the intentions of their authors as expressed more than forty years ago."<sup>247</sup> However the Court

242. *Id.* ¶ 67.

243. *Id.* (emphasis added).

244. In opting in to Article 25 in 1988, Cyprus declared that the competence of the Commission by virtue of Article 25 . . . of the Convention is not to extend to petitions concerning acts or omissions alleged to involve breaches of the Convention or its Protocols . . . if the acts or omissions relate to measures taken by the Government of the Republic of Cyprus to meet the needs resulting from the situation created by the continuing invasion and military occupation of part of the territory of the Republic of Cyprus by Turkey.

*Id.* ¶ 30 (quoting Declaration from the Minister for Foreign Affairs of Cyprus, Convention for the Protection of Human Rights and Fundamental Freedoms, Sept. 2, 1988, available at <http://conventions.coe.int/Treaty/Commun/ListeDeclarations.asp?PO=CYP&NT=005&MA=999&CV=0&NA=Ex-25&CN=999&VL=1&CM=5&CL=ENG>). This is more precisely a restriction of jurisdiction *ratione materiae*, but it has an implicit territorial scope.

245. The United Kingdom submitted a declaration when opting into Article 25 in 1966, which it has successively renewed as required under the provision, providing that

the Government of the United Kingdom of Great Britain and Northern Ireland recognise, *in respect of the United Kingdom of Great Britain and Northern Ireland only* and not, pending further notification, in respect of any other territory for the international relations of which the Government of the United Kingdom are responsible . . . the competence of the European Commission of Human Rights to receive petitions . . . [and] the jurisdiction of the European Court of Human Rights as compulsory.

*Id.* ¶ 33 (quoting Declarations Contained in Two Letters from the Permanent Representative of the United Kingdom, Convention for the Protection of Human Rights and Fundamental Freedoms, Jan. 14, 1966, available at <http://conventions.coe.int/Treaty/Commun/ListeDeclarations.asp?PO=UK&NT=005&MA=999&CV=0&NA=Ex-25&CN=999&VL=1&CM=5&CL=ENG>). The declaration underscores this point, adding that the United Kingdom's acceptance of Article 25

does not extend to petitions in relation to anything done or occurring in any territory in respect of which the competence of the European Commission of Human Rights to receive petitions has not been recognised by the Government of the United Kingdom or to petitions in relation to anything done or occurring in the United Kingdom in respect of such a territory or of matters arising there.

*Id.*

246. *Id.* ¶ 67.

247. *Id.* ¶ 71 (adding that its approach under *Tyrer v. United Kingdom*, App. No. 5856/72, Eur. Ct. H.R. (Apr. 25, 1978), "is not confined to the substantive provisions of the Convention, but also

acknowledged that interpretation is not a free for all—it must proceed according to the terms of VCLT article 31. The Court stated that in determining “whether Contracting Parties may impose restrictions on their acceptance of the competence of the Commission and Court, . . . [i]t shall also take into account, together with the context, ‘any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.’”<sup>248</sup> On the basis of a highly revealing analysis of the subsequent practice of the parties, the Court rejected the possibility of unilaterally restricting the territorial scope of the jurisdiction of either the Commission or the Court under Articles 25 and 46.

The Court emphasized that “[s]ince the entry into force of the Convention until the present day, *almost all* of the thirty Parties to the Convention, apart from the respondent Government, have accepted the competence of the Commission and Court to examine complaints without restrictions *ratione loci*.”<sup>249</sup> The Court explicitly considered the exceptions raised by Turkey. Noting that the Cypriot declaration was eventually withdrawn, the Court turned to and dismissed the much more relevant declaration by the United Kingdom regarding Article 25.<sup>250</sup> The Court acknowledged that the declaration looks quite a bit like contrary practice. On its face “the restriction was formulated by the United Kingdom . . . in order to exclude the competence of the Commission to examine petitions concerning its non-metropolitan territories.”<sup>251</sup> However, it notes that this evidence of contrary practice was ultimately not dispositive. In the critical passage, the Court declares that it

is not called upon to interpret the exact scope of this declaration which has been invoked by the respondent Government as an example of a territorial restriction. Whatever its meaning, this declaration and that of Cyprus do not disturb the evidence of a practice denoting *practically universal agreement* amongst Contracting Parties that Articles 25 and 46 . . . of the Convention do not permit territorial or substantive restrictions.<sup>252</sup>

In other words, the Court makes it clear that the practice of the United Kingdom is not, on its own, dispositive *whether or not* it amounts to a contrary practice confirming the respondent’s argument that there exists no common and concordant practice evidencing the agreement among all the parties. The “practically universal” practice of the parties suffices to ground an interpretation of the competences of the Commission and Court under Articles 25 and 46 in spite of the expressly contrary practice of a small handful of states.<sup>253</sup>

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applies to those provisions, such as Articles 25 and 46 (art. 25, art. 46), which govern the operation of the Convention’s enforcement machinery”).

248. *Id.* ¶ 73.

249. *Id.* ¶ 79 (emphasis added).

250. *Id.* ¶¶ 79–80.

251. *Id.* ¶ 80.

252. *Id.* (emphasis added).

253. The Court thus considers “the restrictions *ratione loci* attached to Turkey’s Article 25 and Article 46 (art. 25, art. 46) declarations . . . invalid.” *Id.* ¶ 89. Indeed, the Court ultimately went so far as to rule that “the impugned restrictions can be separated from the remainder of the text leaving intact the

Thus the first major point of breadth in the Court's approach to subsequent practice goes to evidentiary criteria. The ECtHR has relied on European consensus to develop a wide variety of substantive Convention rights,<sup>254</sup> as well as to develop provisions relating to its competences, jurisdiction and procedure.<sup>255</sup> Often the Court simply relies on trends in practice.<sup>256</sup> As *Loizidou* makes clear, the Court will not be dissuaded from relying on the practice of most of the parties to establish an interpretation binding on all of them, even in the face of clear and consistent contrary practice by the respondent state<sup>257</sup> and/or a handful of others.<sup>258</sup>

It must be re-emphasized that the Court does not by any means *tend* to overturn the margin through reliance on consensus or near-consensus among the parties; it is common for the Court to come to precisely the other result,<sup>259</sup> occasionally in surprising ways.<sup>260</sup> Critically important, however, is that the

acceptance of the optional clauses" and thus "contain valid acceptances of the competence of the Commission and Court." *Id.* ¶¶ 97-98.

254. For example, the Court has relied upon European Consensus to develop Article 3 in *Öcalan v. Turkey* [GC], App. No. 46221/99, Eur. Ct. H.R. ¶ 164 (May 12, 2005) (regarding the death penalty); and *Selmouni v. France* [GC], App. No. 25803/94, Eur. Ct. H.R. ¶101 (July 28, 1999) (regarding the definition of torture); to develop the Article 6 right to a fair trial in *Airey v. Ireland*, App. No. 6289/73, Eur. Ct. H.R. ¶ 26 (Oct. 9, 1979) (regarding the right to free legal aid in civil cases); and to develop the Article 8 right to a private life in *Christine Goodwin v. United Kingdom* [GC], App. No. 28957/95, Eur. Ct. H.R. ¶ 74 (July 11, 2002) (regarding the entitlement of post-operation transsexuals to legal recognition of their gender reassignment). For further discussion, see Dzehtsiarou, *supra* note 225, at 1731-32.

255. *Loizidou v. Turkey* (preliminary objections) [GC], App. No. 15318/89, Eur. Ct. H.R. ¶ 71 (Mar. 23, 1995).

256. See, e.g., *Christine Goodwin* [GC], App. No. 28957/95, Eur. Ct. H.R. ¶¶ 84-85; *Loizidou* (preliminary objections) [GC], App. No. 15318/89, Eur. Ct. H.R. ¶¶ 75-79.

257. See, e.g., *Demir v. Turkey* [GC], App. No. 34503/97, Eur. Ct. H.R. ¶¶ 52, 85 (Nov. 11, 2008) (interpreting the freedom of association in Article 11 as applying to public workers on the basis of the subsequent practice of the "vast majority" of member states, despite Turkey's clear contrary practice); *Tyrer v. United Kingdom*, App. No. 5856/72, Eur. Ct. H.R. (Apr. 25, 1978).

258. See, e.g., *Al-Saadoon v. United Kingdom*, App. No. 61498/08, Eur. Ct. H.R. ¶ 120 (Mar. 2, 2010); *Öcalan* [GC], App. No. 46221/99, Eur. Ct. H.R. ¶ 163; *Loizidou* (preliminary objections) [GC], App. No. 15318/89, Eur. Ct. H.R. ¶ 79.

259. See, e.g., *Stübing v. Germany*, App. No. 43547/08, Eur. Ct. H.R. ¶ 61 (Apr. 12, 2012) (finding "no consensus between the member States as to whether the consensual commitment of sexual acts between adult siblings should be criminally sanctioned"); *Şahin v. Turkey* [GC], App. No. 44774/98, Eur. Ct. H.R. ¶ 109 (Nov. 10, 2005) (noting that "[i]t is not possible to discern throughout Europe a uniform conception of the significance of religion in society," and as a result "the role of the national decision-making body must be given special importance . . . when it comes to regulating the wearing of religious symbols in educational institutions, especially . . . in view of the diversity of the approaches taken by national authorities on the issue").

260. For example, in considering Ireland's ban on abortion, after finding a sufficiently large consensus against the practice, the Court nevertheless resorted to the margin in light of the particularly fraught moral and political considerations surrounding the question. *A, B & C v. Ireland* [GC], App. No. 25579/05, Eur. Ct. H.R. ¶¶ 235-37 (Dec. 16 2010) ("[T]he Court considers that there is indeed a consensus amongst a substantial majority of the Contracting States of the Council of Europe towards allowing abortion on broader grounds than accorded under Irish law . . . . However, the Court does not consider that this consensus decisively narrows the broad margin of appreciation of the State."); see also *Şahin*, App. No. 44774/98, Eur. Ct. H.R. ¶ 3 (Tulkens, J., dissenting) (refusing to accept the "the margin-of-appreciation approach" on the basis of the "diversity of practice between the States on the issue of regulating the wearing of religious symbols in educational institutions and, thus, the lack of a European consensus in this sphere"). Judge Tulkens objected that the majority took an unjustifiable view of the comparative law, for "in none of the member States has the ban on wearing religious symbols

Court does not clearly demarcate between cases where consensus is or is not sufficient to overcome the margin in a principled way. By avoiding abstract statements about the kind, amount, or degree of practice necessary to establish a European consensus, the Court maintains a gatekeeping role for determining the scope and evolution of Convention rights.

## 2. *Expansive Potential: Interpretation, Reinterpretation, and Modification*

The second peculiarity of the doctrine of European consensus as a flavor of subsequent practice concerns the extent of its potential to establish treaty change over time. Recall that under general international law the expansive potential of subsequent practice is hotly contested. A few authorities, including some arbitral awards, have considered clear subsequent practice to be capable of establishing a modification. But such cases are few and far between, and generally concern bilateral agreements. Even while straining the text in both *Namibia* and *Wall*, the ICJ has balked at explicitly referring to its interpretations of the Charter as “modifications.”<sup>261</sup> The ECtHR, by contrast, expressly considers subsequent practice capable of establishing a modification of the ECHR, even in plain view of contrary practices among a minority of the parties. The Court’s reliance on the technique to interpret, reinterpret, and successively modify the terms of the ECHR is particularly vivid in a trilogy of opinions on the legality of capital punishment under the Convention: *Soering v. United Kingdom*,<sup>262</sup> *Öcalan v. Turkey*,<sup>263</sup> and *Al-Saadoon v. United Kingdom*.<sup>264</sup>

The relevant question in each of the three cases concerned the legality of the death penalty under the ECHR. Each of the cases turned on the interpretation of Articles 2 and 3. The latter provides in categorical terms that “no one shall be subjected to torture or to inhuman or degrading treatment or punishment.”<sup>265</sup> Article 2 specifically protects the right to life, however its terms explicitly leave room for capital punishment by law. Article 2(1) provides that “everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally *save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law*.”<sup>266</sup> In each case a claim was raised—at first on the applicant’s behalf,<sup>267</sup>

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extended to university education, which is intended for young adults, who are less amenable to pressure.” *Id.*

261. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶¶ 27-28 (July 9); Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 16, ¶ 22 (June 21).

262. *Soering v. United Kingdom*, App. No. 14038/88, Eur. Ct. H.R. (July 7, 1989) (plenary).

263. *Öcalan v. Turkey* [GC], App. No. 46221/99, Eur. Ct. H.R. (May 12, 2005).

264. *Al-Saadoon v. United Kingdom*, App. No. 61498/08, Eur. Ct. H.R. (Mar. 2, 2010).

265. ECHR, *supra* note 23, art. 3.

266. *Id.* art. 2(1) (emphasis added).

267. Although *Soering* did not himself suggest that the death penalty *per se* violated Article 3, Amnesty International intervened on his behalf, submitting that “the evolving standards in Western

and in the latter two instances by the applicant himself<sup>268</sup>—that the death penalty had become so offensive to European mores as to violate Article 3, despite the express permissive terms of Article 2(1).

Over the course of these three cases, the Court determined that the permissive language of Article 2(1) had been modified by the subsequent practice of the member states so as to no longer provide an exception to the right to life for capital punishment of any kind, thereby clearing the way for an evolutive interpretation of Article 3 prohibiting the death penalty on the basis of the subsequent practice of the parties.<sup>269</sup>

*Soering v. United Kingdom* concerned a German national who was detained in the United Kingdom pending extradition to the United States to face double-homicide charges in Virginia.<sup>270</sup> In relevant part, the Court considered an intervention on Soering's behalf by Amnesty International, concerning the inconsistency of the death penalty with Article 3. Amnesty submitted that "the evolving standards in Western Europe regarding the existence and use of the death penalty required that capital punishment should now be considered as an inhuman and degrading punishment within the meaning of Article 3."<sup>271</sup>

The Court noted up front that "[c]apital punishment is permitted under certain conditions by Article 2(1) of the Convention."<sup>272</sup> At the same time, the Court cited *Tyrer* to the effect that it "cannot but be influenced by the developments and commonly accepted standards in the penal policy of the member states of the Council of Europe."<sup>273</sup> The Court noted sweeping changes in the legal practices of the parties since the ECHR had come into force.

De facto the death penalty no longer exists in time of peace in the Contracting States to the Convention. In the few Contracting States which retain the death penalty in law for some peacetime offences, death sentences, if ever imposed, are nowadays not carried out. This virtual consensus . . . is reflected in Protocol No. 6 to the Convention, which provides for the abolition of the death penalty in time of peace. Protocol No. 6 was opened for signature in 1983, which in the practice of the Council of Europe indicates the absence of objection on the part of any of the Member States of the Organisation; it came into force in March 1985 and to date has been ratified by thirteen Contracting States to the Convention, not however including the United Kingdom.<sup>274</sup>

The obvious question was thus how to square text and practice: on the one hand Article 2(1) provides a clear and rigid window for states to impose capital punishment by law; on the other hand, clear and consistent practice had

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Europe regarding the existence and use of the death penalty required that the death penalty should now be considered as an inhuman and degrading punishment within the meaning of Article 3." *Soering*, App. No. 14038/88, Eur. Ct. H.R. ¶ 101 (plenary).

268. *Al-Saadoon*, App. No. 61498/08, Eur. Ct. H.R. ¶ 102; *Öcalan* [GC], App. No. 46221/99, ¶ 157.

269. *Al-Saadoon*, App. No. 61498/08, Eur. Ct. H.R. ¶ 120.

270. *Soering*, App. No. 14038/88, Eur. Ct. H.R. ¶¶ 11-13.

271. *Id.* ¶ 101.

272. *Id.*

273. *Id.* ¶ 102 (citing *Tyrer v. United Kingdom*, App. No. 5856/72, Eur. Ct. H.R. ¶ 31 (Apr. 25, 1978)).

274. *Id.* (internal quotation marks omitted).

emerged, indicating that the membership was coming to consider the death penalty to be inconsistent with Article 3.<sup>275</sup> The Court explained that the question of whether “these marked changes have the effect of bringing the death penalty per se within the prohibition of ill-treatment under Article 3 must be determined on the principles governing the interpretation of the Convention.”<sup>276</sup> In no uncertain terms, the Court explained that its approach to interpretation might sometimes privilege practice over even the clearest textual provision:

Subsequent practice in national penal policy, in the form of a generalised abolition of capital punishment, *could* be taken as establishing the agreement of the Contracting States to abrogate the exception provided for under Article 2 § 1 . . . and hence to remove a textual limit on the scope for evolutive interpretation of Article 3.<sup>277</sup>

At this stage the Court contented itself to register its view in *obiter dictum*. The Court emphasized the fact that the parties had opted to rely on the normal provisions for amending the ECHR by formal protocol.<sup>278</sup> In view of the promulgation of Protocol No. 6, and its several signatories to date, the Court considered that “the intention of the Contracting Parties as recently as 1983 was to adopt the normal method of amendment of the text in order to introduce a new obligation to abolish capital punishment in time of peace.”<sup>279</sup> Further, the Protocol reflects the parties’ choice to pursue change “by an optional instrument allowing each State to choose the moment when to undertake such an engagement.”<sup>280</sup> As a result the Court held that at this time Article 3 could not be interpreted as generally prohibiting the death penalty.<sup>281</sup>

Sixteen years later, in *Öcalan v. Turkey*, a new applicant followed up on the Court’s dicta in *Soering*, arguing that the parties had, by their practice through the ensuing years, “abrogated the exception set out in the second sentence of Article 2 § 1 of the Convention and that the death penalty constituted inhuman and degrading treatment within the meaning of Article 3.”<sup>282</sup>

The Court recalled that in *Soering* it had found the states’ evident intention to rely on the normal amendment rule to be dispositive.<sup>283</sup> It noted,

275. *Id.* ¶ 103.

276. *Id.* ¶ 102.

277. *Id.* ¶ 103 (emphasis added).

278. *Id.* ¶ 102 (citing ECHR, *supra* note 23, Protocol No. 6).

279. *Soering*, App. No. 14038/88, ¶ 103.

280. *Id.*

281. *Id.* The Court ultimately ruled that Mr. Soering’s extradition would violate Article 3 by subjecting the applicant to the extreme emotional hardship attendant to capital punishment in the United States, and would for that reason be nevertheless impermissible. In the Court’s view,

having regard to the very long period of time spent on death row in such extreme conditions, with the ever present and mounting anguish of awaiting execution of the death penalty . . . the applicant’s extradition to the United States would expose him to a real risk of treatment going beyond the threshold set by Article 3.

*Id.* ¶ 111.

282. *Öcalan v. Turkey* [GC], App. No. 46221/99, Eur. Ct. H.R. ¶ 157 (2005).

283. *Id.* ¶ 163.

however, that "the legal position as regards the death penalty has undergone a considerable evolution since *Soering* was decided."<sup>284</sup> It emphasized that the "de facto abolition" noted in *Soering* in respect of twenty-two Contracting States in 1989 had "developed into a *de jure* abolition in forty-three of the forty-four Contracting States and a moratorium in the remaining State that has not yet abolished the penalty, namely Russia."<sup>285</sup> Furthermore, all of the parties had now signed Protocol No. 6, and forty-one had already ratified it.<sup>286</sup> In light of what it took to be such overwhelming practice, the Court decided it did not need to await ratification by the three remaining States. It proceeded to conclude that the death penalty exception in Article 2(1) had been adequately modified, explaining that "[a]gainst such a consistent background, it can be said that capital punishment in peacetime has come to be regarded as an unacceptable . . . form of punishment that is no longer permissible under Article 2."<sup>287</sup>

Thus the Court no longer considered itself bound to respect the parties' choice to rely on formal amendment. In light of the overwhelming tendency of their practice, (to which the optional Protocol obviously contributed), the Court was willing to jump ahead and find Article 2(1) modified so as to no longer permit the death penalty in peacetime.

Nevertheless, the case concerned the death penalty in time of war. The Court found that the parties' practice was significantly less imposing with regard to capital punishment in wartime and remained insufficient to abrogate the permissive clause of Article 2(1) in that circumstance. The Court emphasized, as it had in *Soering*, that "by opening for signature Protocol No. 13 concerning the abolition of the death penalty in all circumstances, the Contracting States have chosen the traditional method of amendment of the text of the Convention in pursuit of their policy of abolition."<sup>288</sup> By the date of its judgment, three states had yet to sign Protocol No. 13, and sixteen had yet to ratify it. The Court noted that "this final step towards complete abolition of the death penalty . . . can be seen as confirmation of the abolitionist trend in the practice of the Contracting States."<sup>289</sup> However it left its analysis there, stating only obliquely that:

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284. *Id.*

285. *Id.* (quoting *Öcalan v. Turkey*, App. No. 46221/99, Eur. Ct. H.R. ¶ 195 (Mar. 3, 2003)).

286. *Id.*

287. *Id.*

288. *Id.* ¶ 164

289. *Id.* It is worth noting, here, that the Court gives some weight to a very different kind of practice in determining whether a European consensus has emerged as to the meaning of the ECHR. Not only does the Court look at what the parties actually do or do not prohibit in their domestic law, but also to their undertakings on the supranational level (e.g., in considering the numbers of signatures and ratifications of the optional Protocol No. 13). It would seem as though the Court considers these supranational commitments at least relevant to the determination of whether a sufficient level of "near-consensus" has emerged to justify developing the Convention. It might be argued that this gives a signature more legal significance (as "practice") than it would normally have under the law of treaties. See VCLT, *supra* note 8, art. 18 (obliging a signatory only "to refrain from acts which would defeat the object and purpose of [the] treaty" where the agreement requires ratification to become binding).

For the time being, the fact that there is still a large number of States who have yet to sign or ratify Protocol No. 13 may prevent the Court from finding that it is the established practice of the Contracting States to regard the implementation of the death penalty as inhuman and degrading treatment contrary to Article 3 of the Convention, since no derogation may be made from that provision, even in times of war.<sup>290</sup>

Resting once more on *dicta*, the Court found it was “not necessary . . . to reach any firm conclusion on these points” since the respondent would have violated Article 2 in any event by imposing the death penalty at the culmination of an unfair trial.<sup>291</sup>

Five years later, and twenty-six years after *Soering*, the Court finally vitiated the permissive clause of Article 2(1) in *Al-Saadoon & Mufdhi v. United Kingdom*. The Court noted that “*Öcalan* did not exclude that Article 2 had already been amended so as to remove the exception permitting the death penalty.”<sup>292</sup> On the basis of intervening practice, it emphasized that “the position has evolved” once again.<sup>293</sup>

According to the Court, the subsequent practice of the parties over the span of the Convention’s long history overwhelmingly pointed in one direction. All forty-seven member states had, by 2010, signed Protocol No. 6, and all except for Russia had ratified it.<sup>294</sup> In the intervening five years since *Öcalan*, ratifications of Protocol 13 had jumped to 42 member states; it had been signed but not ratified by a further three (Armenia, Latvia and Poland). Indeed, it was signed by the respondent, “the United Kingdom, on 3 May, 2002, ratified on 10 October, 2003 and entered into force in respect of that state on 1 February, 2004.”<sup>295</sup> The Court somewhat dismissively acknowledged evidence of contrary practice, observing that “Azerbaijan and Russia are alone in not having signed the Protocol.”<sup>296</sup> In spite of the fact that the parties had evidently continued to rely on the formal amendment rule—given so much weight in *Soering* and even in *Öcalan*—the Court considered the trend as having finally crystallized on the basis of sufficiently overwhelming practice.

These figures, together with consistent State practice in observing the moratorium on capital punishment, are strongly indicative that Article 2 has been amended so as to prohibit the death penalty in all circumstances. Against this background the Court does not consider that the wording of the second sentence of Article 2 § 1 continues to act as a bar to its interpreting the words ‘inhuman or degrading treatment or punishment’ in Article 3 as including the death penalty.<sup>297</sup>

On the basis of practice subsequent to *Öcalan*, the Court finally interpreted Article 2 as being thoroughly amended so as to no longer permit the death

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290. *Öcalan* [GC], App. No. 46221/99, Eur. Ct. H.R. ¶ 165.

291. *Id.*

292. *Al-Saadoon v. United Kingdom*, App. No. 61498/08, Eur. Ct. H.R. ¶ 120 (Mar. 2, 2010).

293. *Id.*

294. *Id.* ¶ 116.

295. *Id.* ¶ 117.

296. *Id.*

297. *Id.* ¶ 120.

penalty under any circumstances—in peacetime or in times of war.<sup>298</sup> Henceforth, the Court thus held, capital punishment would be prohibited in all contexts under an evolutive interpretation of Article 3.

Taken together *Soering*, *Öcalan*, and *Al-Saadoon* illuminate several aspects of the Court's approach to interpreting the Convention on the basis of the subsequent practice of the member states. First, and most obviously, the cases stand for the proposition that the Court will rely on the subsequent practice of the parties to interpret, reinterpret, and even successively modify the ECHR. Second, the Court has twice indicated its hesitation to modify the Convention on the basis of informal practice while the parties appear to have opted to amend the Convention through formal procedures—especially by optional protocol, binding only upon those who opt-in.<sup>299</sup> However, the Court has also twice decided to stop waiting for the relevant Protocols to be signed or ratified unanimously, choosing instead to rely on the states' conduct in signing and ratifying the Protocols alongside their national legislative and executive practices as *further* evidence of a practice of sufficient weight as to establish an amendment of the Convention.<sup>300</sup>

Finally, the Court confirmed throughout the death penalty cases that it would rely on mere near-consensus to modify the Convention even in the face of contrary practice, as it does in cases of interpretation where modification is not at issue (like *Tyrer* and *Loizidou*). The Court does rely on quite a high degree of practice in *Öcalan* and *Al-Saadoon*. But it leaves completely open the question of how much practice is necessary to establish a European consensus sufficient to modify the plain text of the Convention where the parties had not opted to employ formal amendment procedures.

### B. “European Consensus” as a Transformation of Judicial Power

In terms of form and content, the ECtHR's approach to subsequent practice differs markedly from that of the ICJ. The World Court relies on organ practice as a tenuous proxy for the practice of the parties, and has in many ways proven insensitive to the difficulty of establishing state consent to its interpretations. By contrast, the ECtHR looks directly at the practice of the parties, but has frequently expressed its willingness to rely on majority practice even in the face of the clear and consistent contrary practice of a handful of outlier parties—thus even more willfully ignoring the traditional notion that authentic subsequent practice should establish the agreement of *all* of the

298. *Id.*

299. *Soering*, App. No. 14038/88, Eur. Ct. H.R. ¶ 103 (refusing to interpret Article 2(1) as amended on the basis of practice in light of the parties' choice to amend the provision through Protocol No. 6); *Öcalan v. Turkey* [GC], App. No. 46221/99, Eur. Ct. H.R. ¶ 164 (May 12, 2005) (refusing to interpret Article 2(1) as prohibiting the death penalty in all circumstances, in light of the parties' attempt to amend the Convention via the optional Protocol No. 13).

300. *Öcalan* [GC], App. No. 46221/99, Eur. Ct. H.R. ¶ 165 (finding the Convention as having been modified to prohibit the death penalty in peacetime in spite of the non-unanimous adherence to Protocol No. 6); *Al-Saadoon*, App. No. 61498/08, Eur. Ct. H.R. ¶ 120 (finding the Convention as having been modified to bar capital punishment in all circumstances in spite of the non-unanimous adherence to Protocol No. 13).

parties. Further, while the ICJ has proven willing to contort the text of the Charter in relying on organ practice, the ECtHR has gone further in explicitly relying on European consensus to establish the modification of the clear text of the Convention—again even in plain view of the contrary practice of a handful of member states. Yet in spite of their differences, a critical conceptual similarity remains: like the World Court, the ECtHR's approach to subsequent practice has materially and dramatically transformed its constitutional position, rendering it significantly more autonomous from the membership. Even more clearly than the ICJ's interpretive principle, the ECtHR's assertion of judicial competence strains the bonds of consent between the organization and its constituent states parties—the nominal “masters of the treaty.”

Recall that treaty interpretation can contribute to a constitutional transformation in two ways: directly, through particular substantive interpretations; or in a second-order sense, connected to the overall method of interpretation.

Some of the Court's substantive interpretations fit into the first-order type of transformation in that they involve the direct expansion or reinterpretation of an organ's competences or procedures as expressed or implied by its constituent instrument.<sup>301</sup> *Loizidou* fits into this category, insofar as the Court interpreted the provisions in Articles 25 and 46 as not amenable to reservations concerning the territorial scope of the Court's jurisdiction (as well as that of the Commission).<sup>302</sup> The Court construed those provisions as empowering it to hold a state party's interpretive declaration on territorial scope to be invalid, and further as entitling it to sever that invalid reservation from the state's general accession to the jurisdiction of the Court—thus preserving its jurisdiction over the respondent.<sup>303</sup> However, most of the ECtHR's jurisprudence concerns the scope of the substantive rights in the ECHR, and not the more organizational features of the Convention.<sup>304</sup> While these interpretations are often expansive, and in many cases explicitly evolutive, such rights-expansion does not necessarily entail a reordering of the organization's constitution.<sup>305</sup> Rights expansion (and limitation) is indeed a normal and necessary part of the function of all courts charged with rights-adjudication.<sup>306</sup>

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301. Recall the analogous case of the ICJ's interpretation of the competences of the UNGA in *Wall*. See *supra* Part IV.

302. *Loizidou v. Turkey* (preliminary objections) [GC], App. No. 15318/89, Eur. Ct. H.R. ¶ 71 (Mar. 23, 1995).

303. *Id.* ¶ 97.

304. *But see* *Mamatkulov v. Turkey* [GC], App. Nos. 46827/99, 46951/99, Eur. Ct. H.R. ¶¶ 111, 123-24 (2005).

305. Arguably the interpretation of the contours and limits of substantive rights could amount to a transformation where such rights are expanded to such an extent as to create altogether new rights.

306. See, e.g., J.H.H. WEILER, *Fundamental Rights and Fundamental Boundaries: On the Conflict of Standards and Values in the Protection of Human Rights in the European Legal Space*, in *THE CONSTITUTION OF EUROPE* 102 (1999); George Letsas, *Strasbourg's Interpretive Ethic: Lessons for the International Lawyer*, 21 *EUR. J. INT'L L.* 509 (2010); Lucas Lixinski, *Treaty Interpretation by the Inter-American Court of Human Rights: Expansionism at the Service of the Unity of International Law*, 21 *EUR. J. INT'L L.* 585 (2010).

However the Court's method of interpretation has had a much more dramatic constitutional effect in the second-order sense. Implicit in the ECtHR's reliance on subsequent practice is an assertion of a significant judicial power—one that has transformed the relationship between the Court and the member states by diluting the parties' mastery over the treaty.

Through its interpretive practice, the Court has come to assert the competence to literally modify the Convention on the basis of the consistent practice of a mere majority of states parties, even in the face of open, active, and longstanding contrary practice of a minority. This assertion of judicial competence under 31(3)(b) (*qua* European consensus) seriously erodes the bonds of consent tethering the Court to each member state individually. By broadly construing its mandate under VCLT 31(3)(b) (and despite that provision's voluntaristic pedigree), the Court has successfully transformed its constitutional position vis-à-vis the parties—empowering itself to hold them to an evolving Convention capable of substantial modification even without their unanimous consent. This is not to say that the Court has rendered itself a completely autonomous lawmaker; its assertion still depends on the practice of *some* of the parties, and usually a substantially qualified majority. But the fact that it is willing to ignore the dissenting minority's evident lack of consent in establishing a modification of the Convention through interpretation represents a significant step. Moreover, the Court has been careful not to make a numbers game out of the doctrine of European consensus—it has never spelled out an amount or percentage of parties that would suffice to establish a particular interpretation, reinterpretation, or modification. It has carefully left the matter to its own discretion, thus enabling it to determine on a case-by-case basis whether or not a sufficient degree of practice has crystallized into a new interpretation binding on any holdouts.

The constitutional meaning of the ECtHR's interpretive practice might be distinguished from that of the ICJ on one level: while the latter mostly empowers other organs of the organization, the former is more clearly court-empowering. As noted above, the ICJ lacks compulsory jurisdiction over states, and its advisory opinions lack binding effect. The full constitutional meaning of its approach to interpretation is only manifest in the practice of the more powerful organs like the UNGA and UNSC, acting under the aegis of the ICJ's interpretive blessing.<sup>307</sup> By contrast the ECtHR's assertion represents a transformation of its own judicial power vis-à-vis the parties. The Court may not always or even generally rely on the full extent of this competence, on the basis of a variety of doctrinal considerations or political calculations; what is remarkable and transformative is that the Court asserts the competence to develop and modify the Convention on the basis of contested majoritarian practice at all, while maintaining its discretion to decide when and when not to do so. And unlike many other international courts and tribunals, the Court has no shortage of opportunities to reevaluate its interpretations of the Convention over time.

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307. See *supra* Section IV.B.

At the highest level of abstraction, the interpretive approaches of the ICJ and ECtHR have had common constitutional effects. Both have asserted extraordinarily broad approaches to interpretation on the basis of subsequent practice, capable of establishing thoroughgoing changes to their respective constituent instruments on the basis of (at best) tenuous evidence of the consent of their respective parties. In so doing, both have opened their respective constitutional systems to a second track of informal change through a combination of practice and interpretation, parallel to, but more flexible than, the normal procedures for formal amendment. Both Courts have thus contributed, in different ways and to different degrees, to the transformation of their constitutions. As a result of their interpretive judicial practices, the ECtHR (as a judicial organ) and the U.N. organization as a whole have grown more autonomous, and more capable of binding the states that created them.

From the juridical perspective of the law of treaties, the ECtHR's approach to interpretation appears to be broad, but not unimaginably broad—just as in the case of the ICJ's reliance on organ practice. In the scholarship, the breadth of the ECtHR's approach to practice tends to be cabined as the idiosyncratic approach of a special regime for the protection of human rights.<sup>308</sup> From the perspective of political theory, however, it appears that the technique of interpretation has played an important role in transforming the ECtHR as a constituted supranational judicial body with significant governance functions on the international plane. Through its interpretive practice, the Court has successfully accrued to itself the ability to develop and even modify the ECHR—a multilateral, consent-based *treaty*—on the basis of the contested practice of a majority of the parties. Article 31(3)(b) was and remains the crucible for this exemplar of judicial alchemy.

#### VI. CONCLUSION: LEGITIMATE AUTHORITY, ACCOUNTABILITY, AND THE AUTONOMY OF INFORMAL TRANSFORMATION

By bringing together the juridical and the political, the constitutional frame sheds light upon the meaning of interpretive practices within international organizations—meaning that remains obscure from the doctrinal perspective of the law of treaties alone. Viewed in purely juridical terms, the ICJ and the ECtHR have developed broad approaches to the interpretation of their constituent instruments. They stretch the ambit of VCLT Article 31(3)(b) in interpreting the U.N. Charter and the ECHR. Still, from the perspective of the law of treaties, their expansive approaches can be explained away as two sets of special interpretive rules characteristic of two special treaty regimes.<sup>309</sup> But from the political point of view, their interpretive practices appear much more vibrant and meaningful. It is of the highest political significance that these Courts have developed such broad techniques in the interpretation of *their*

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308. See, e.g., MAGDALENA FOROWICZ, *THE RECEPTION OF INTERNATIONAL LAW IN THE EUROPEAN COURT OF HUMAN RIGHTS* 372 (2010); Letsas, *supra* note 306.

309. See GARDINER, *supra* note 14, at 247.

own constituent instruments.<sup>310</sup> In so doing, these constituted judicial bodies have transformed the composition and capacities of their respective organizations. What matters most, at this altitude, is that these Courts' interpretive practices have enhanced the material power and autonomy of the organizations to which they belong vis-à-vis the states parties. What appears as expansive treaty interpretation from one point of view thus appears as dramatic constitutional transformation from another.

As a normative matter, informal constitutional change is not necessarily a bad thing. Sometimes transformation brings happy results, and in some contexts it may even be necessary. The possibility of transformation through interpretation should not be rejected out of hand, nor should the practices of the ICJ and the ECtHR be subjected to bludgeons like the label of judicial activism. Rather, I want to suggest that informal changes must primarily be assessed on a case-by-case basis, in light of the particularities of the very different constitutional orders within which they occur.

Constitutional interpretation in the WTO cannot be measured by the same metric as would be appropriate for the United Nations, nor can either be evaluated in the same way as the interpretive practices of the ECtHR. The functions of each treaty organization must be taken into account. For example, the informal expansion of mechanisms for the regional protection of individuals' human rights may be desirable in an international order populated by states. But the informal empowerment of organs charged with the maintenance of international peace and security may be more troubling—as in the case of the UNSC's arrogation of the power to order states to freeze the assets of specific individuals suspected of financing international terrorism.<sup>311</sup> And of course the desirability of informal change through interpretation may again be very different in the context of the WTO-AB, in light of its function of stewardship over a web of technical rules for the liberalization of trade. All constitutional transformation entails the reordering of power within a system of governance, either among the constituted bodies or as against the governed; the merits of any such reconfiguration can only be appropriately judged in relation to the specific function and powers of the particular organization in question.

Further militating in favor of a case-by-case approach is the fact that, in the context of international organizations, constitutional transformation can also affect relations of power among the parties—and in innumerable context-driven ways. The ICJ's ascription of normative weight to organizational practice greatly empowers those states capable of steering the political bodies, for example the P5 in the case of the UNSC, or those states in a position of influence within the UNGA. Likewise, the ECtHR's willingness to rely on

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310. Indeed, when charged with the interpretation of unrelated treaties the ICJ has actually adopted a rather strict approach to subsequent practice. See *Kasikili/Sedudu Island (Botswana/Namib.)*, 1999 I.C.J. 1045, ¶ 74 (Dec. 13) (requiring determinacy in the practice of the parties as evidencing an interpretation of the Treaty; a condition which the I.C.J. did not view as necessary in relying on "organ practice" in *Certain Expenses*).

311. See, e.g., Thomas Franck, *The "Powers of Appreciation": Who Is the Ultimate Guardian of UN Legality?*, 86 AM. J. INT'L L. 519, 520 (1992).

majority practice may enhance the power of some blocs against others, although the effect seems weak insofar as the Court remains the ultimate gatekeeper as to whether a new consensus has emerged. This is not to say that the transformations described above ultimately boil down to reconfigurations of power among the member states. To the contrary, the reordering of power among particular members occurs alongside (and indeed through) the empowerment of the larger organization over the membership as a whole. Rather the point is that the varied ways in which informal change shifts power among their member states further complicates any general assessment of the phenomenon in the context of international organizations.

At the same time, informal tracks of constitutional change are inherently likely to give rise to certain general problems that deserve special emphasis. Whatever the desirability of particular changes in particular organizations, it is important to bear in mind certain risks. Two problems in particular share a special affinity with the informal transformation of public international organizations. The first is a problem of legitimate authority, stemming from the *autonomy* of transformation through constitutional interpretation. The second is a problem of accountability, arising out of the *informality* of constitutional change through interpretation in the face of formal procedures of amendment. Both problems are all the more serious in light of the exponential growth in the delegation of public power to transnational institutions in recent years. By way of conclusion, the following paragraphs briefly address each problem in turn.

The fundamental tenet of the law of treaties is, of course, the consent of the parties. Thus we see the perennial recital that the parties always remain the masters of their treaties,<sup>312</sup> not least in the context of treaty interpretation over time.<sup>313</sup> This principle grounds the legitimacy of any treaty-based organization. And yet the ICJ's and ECtHR's reliance on broad modalities of subsequent practice belie the parties' mastery, and indeed fly in the face of the traditional doctrine of "state consent above all." The law of treaties does envision the expansive interpretation of treaties over time, but not absent *some* basis in consent. In the context of a treaty-based organization, the erosion of consent through dynamic constitutional interpretation can give rise to a serious problem of legitimation. The glosses on subsequent practice by the ICJ (practice of the organization) and the ECtHR (European consensus) may differ in their contours, but they similarly strain the bonds of state consent from which these bodies derive their treaty-based authority in the first place.

This consent-based problem of legitimate authority is not merely speculative; it has arisen at various milestones in our story of transformation. The problem was raised most eloquently by Judge Percy Spender of the ICJ at the very beginning. Writing separately in *Certain Expenses*, he decried the

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312. See the opinion of the German Constitutional Court in its Decision on the Treaty of Lisbon, Bundesverfassungsgericht (BVerfG) (Federal Constitutional Court), June 30, 2009, 2 BvE 2/08, ¶ 235, [http://www.bverfg.de/entscheidungen/es20090630\\_2bve000208en.html](http://www.bverfg.de/entscheidungen/es20090630_2bve000208en.html)

313. See VILLIGER, *supra* note 12, at 46-47.

conversion of (contested) organ practice to “subsequent practice” as alchemical heresy:

The Charter establishes an Organization. The Organization must function through its constituted organs. The functions and authorities of those organs are set out in the Charter. However the Charter is otherwise described the essential fact is that it is a multilateral treaty. It cannot be altered at the will of the majority of the Member States, no matter how often that will is expressed or asserted against a protesting a minority and no matter how large be the majority of Member States which assert its will in this manner or how small the minority.<sup>314</sup>

In Spender's view, the Court's reliance on non-unanimous UNGA resolutions in interpreting the Charter is of itself an impermissible transgression of the voluntaristic spirit of the law of treaties. Judge Fitzmaurice continued the charge at the next stage in his dissent in *Namibia*, insisting that the possibility of modification only compounds the problem of consent underlying the ICJ's interpretive jurisprudence.<sup>315</sup> Similar worries resound in the separate opinions and dissents of disappointed judges of the ECtHR,<sup>316</sup> with echoes of their protestations rippling throughout the high courts of the CoE member states.<sup>317</sup>

International organizations like the United Nations and the ECtHR are critical in the porous world of the twenty-first century. It is admittedly important that such governance institutions enjoy a degree of flexibility in exercising their powers. But taken far enough, the casual treatment of consent may weaken the authority of these crucial organizations. In some cases the risk

314. Certain Expenses of the United Nations, 1962 I.C.J. 151, 196 (July 20) (separate opinion of Judge Spender); see also *id.* at 189-90 (“Nor can I agree . . . that a common practice pursued by an organ of the United Nations, though *ultra vires* and in point of fact having the result of amending the Charter, may nonetheless be effective as a criterion of interpretation.”).

315. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 16, 220 (June 21) (Fitzmaurice, J., dissenting) (“[W]hereas the practice of an organization, or of a particular organ of it, can modify the manner of exercise of one of its functions (as for instance in the case of the veto in the Security Council which is not deemed to have been involved by a mere abstention), such practice cannot, in principle, modify or add to the function itself.”).

316. Indeed, the very same Sir Gerald Fitzmaurice, writing as a judge of the ECtHR after his tenure on the ICJ, reserved scathing words for the Court's evolutive method of interpreting the ECHR in dissent to the judgment in *Golder*. *Golder v. United Kingdom*, App. No. 4451/70, Eur. Ct. H.R. ¶ 37 n.21 (Feb. 21, 1975) (Fitzmaurice, J., dissenting) (“It is one thing for a national constitution to allow part of its legislative processes to be effected by means of judge-made ‘case law’: quite another for this method to be imposed *ab extra* on States parties to an international convention supposed to be based on agreement.”); see also *Loizidou v. Turkey* (preliminary objections) [GC], App. No. 15318/89, Eur. Ct. H.R. (Mar. 23, 1995) (Gölcüklü and Pettiti, JJ., dissenting) (decrying the Court's willingness to expansively develop the Convention and its own power to sever the territorial restrictions attached to Turkey's accession to the jurisdiction of the ECtHR on the basis of a supposed “uniform and consistent practice” evidenced by the statements of just five States).

317. In a recent lecture at the ECtHR entitled “What are the Limits to the Evolutive Interpretation of the Convention,” Baroness Hale, Judge of the U.K. Supreme Court, chastised the ECtHR for its dynamic approach to interpretation on the basis of practice. Noting the Convention's appellation as a “living document,” she contends that it is difficult to determine the “natural limits to the growth of the living tree.” In the end, she notes, “the standard most often appealed to in the Court's jurisprudence is the common European understanding. But sometimes . . . this is judged by the standards to be found in the domestic legislation of the member States; and at other times . . . it is judged by evolving European attitudes and beliefs.” Sometimes, finally, “it seems to get some way ahead of both.” Baroness Hale, *Dialogue Between Judges: What are the Limits to the Evolutive Interpretation of the Convention?*, EUR. CT. H.R. 18 (2011), [http://www.echr.coe.int/NR/rdonlyres/D901069F-76A0-401F-BF48-248FC80E728A/0/DIALOGUE\\_2011\\_EN.pdf](http://www.echr.coe.int/NR/rdonlyres/D901069F-76A0-401F-BF48-248FC80E728A/0/DIALOGUE_2011_EN.pdf).

may be worth taking.<sup>318</sup> But the more the bonds of consent are strained through change on the informal track, the more likely are such legitimation problems to arise.

In addition to the problem of consent, constitutional transformation can give rise to serious issues of accountability. The formal amendment of an international organization occurs through the willful act of the states parties, in accordance with clear procedures. The constituent power remains in control of the development of its constitution. By contrast, informal tracks of constitutional change take the development of the organization out of the hands of the parties, and thereby supplant a form of international law making. In the case of the ECtHR, such competence accrues to the Court itself as gatekeeper; in the case of the United Nations, the ICJ's rule empowers the political organs to develop their competences for themselves without the need for judicial imprimatur. But in both instances the constituted bodies gain a sizeable degree of control over their constitutions, with only remote accountability to the constituent states parties.

The rigidity of amendment rules in most international organizations only amplifies the problem. The formal means of amending the U.N. Charter and the ECHR are difficult to operationalize. Some, dissatisfied with the sluggishness of these organizations' amendment procedures, openly advocate the use of broad interpretative methods to get around such formalism in the interest of peace, justice, and other moral imperatives.<sup>319</sup> As Dicey observed long ago, rigidity in amendment rules can incentivize informal tracks of constitutional change.<sup>320</sup> But where such bodies do resort to informal means of change, the very same rigidity of the formal amendment procedures inhibits the parties' capacity to correct the actions of the constituted bodies.<sup>321</sup> In other words, informal change achieves flexibility at the expense of oversight.

So what is to be done? In the first place, it must be reiterated that, in some cases, informal constitutional change can have highly desirable results despite its attendant complications. The assessment of constitutional transformation in international organizations must take place on a case-by-case basis, in light of each particular organization's specific functions. Moreover, abuses cannot be

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318. As Andrew Guzman has recently argued, "An excessive commitment to consent can cripple efforts to use international law as a tool to help solve the world's largest problems." Andrew Guzman, *Against Consent*, 52 VA. J. INT'L L. 747, 753 (2012).

319. See Liang, *supra* note 185 (advocating modification through interpretation to facilitate the adaptation of the U.N. organization to changing external conditions); Letsas, *supra* note 281 (advocating the continued expansive interpretation of the ECtHR on the basis of truly moral concerns, and even elevating the Strasbourg Court's interpretive ethic as a "lesson to international lawyers"); see also SATO, *supra* note 14.

320. DICEY, *supra* note 45, at 469-70.

321. The UNSC presents a striking illustration of this point. Because each of the five Permanent Members of the Council enjoy a veto over any amendment of the U.N. Charter, the amending power is virtually unavailable as a means of overriding the bodies' self-arrogation of power in the realm of international peace and security. See COHEN, *supra* note 32, at 282-83. More generally, the more rigid the rules of amendment the more likely are the constituted bodies to resort to informal avenues, and the more difficult it becomes to correct abuses. As Dicey explains, "a constitution may be undermined by the passing of laws which, without nominally changing its provisions, violates its principles." DICEY, *supra* note 45, at 475.

simply washed away through sweeping positive gestures. What is crucial is to understand such processes, and to curtail excesses that risk undermining the authority of international institutions. To this end, two approaches to reform appear promising—one arising out of the law of treaties, the other relating to institutional design.

International law still operates on a fundamentally consensual basis, despite ongoing trends toward something more communitarian.<sup>322</sup> Some of the most promising approaches to securing greater legitimacy and accountability in international organizations are thus grounded in positive international law. One approach entails the further development of the law of treaties, specifically with regard to lacunae in the codified rules of treaty interpretation, so as to better guide interpretation in international institutions.<sup>323</sup> It is especially telling that the ILC has itself begun to reassess the proper criteria and scope of subsequent practice. Georg Nolte, as Chairman of the Study Group on Treaties over Time, opened the project with a clarion call:

Treaties are not just dry parchments. They are instruments for providing stability to their parties and to fulfill the purposes which they embody. They can therefore change over time, must adapt to new situations, [and] evolve according to the social needs of the international community. . . . It is suggested that the Commission revisit the law of treaties as far as the evolution of treaties over time is concerned. Problems arise frequently in this context. As certain important multilateral treaties reach a certain age, they are even more likely to arise in the future.<sup>324</sup>

The outcome of such projects remains to be seen, but the project of clarifying and potentially limiting the appropriate contours of interpretation over time on a multilateral level is plausible and laudable.

The second avenue of reform goes beyond doctrine, attacking the problem of informal change in international organizations from a more political sensibility. Though rarely easy to accomplish, formal institutional design remains a viable path toward mitigating the legitimization and accountability problems of informal change, and toward reducing the perceived need to resort to informality in the first place. In conceiving and constructing international organizations, statesmen and international lawyers should draw from constitutional theory and the normative ethos of modern constitutionalism. As in the domestic state, though of course not in the same way, in the context of powerful international organizations the value of tools like the internal

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322. See Simma, *supra* note 18, at 233; Villalpando, *supra* note 18.

323. In this regard some scholars have more explicitly suggested reappraising the rules of interpretation in the context of international organizations, so as to better foster legitimacy. Some, for example, suggest that legitimacy can be at least partially secured if the evidentiary requirements for establishing modification through subsequent practice are understood as being higher than those for establishing a “mere interpretation” fitting more comfortably with the text. AMERASINGHE, *supra* note 15, at 463; see also Peters, *supra* note 142, at 632.

324. Annex A: Treaties over Time, *supra* note 71, ¶¶ 1, 6. The ILC has since recast and formalized its study of treaties over time, appointing Georg Nolte as Special Rapporteur for the newly constituted topic *Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties*. Rep. of the Int’l L. Comm’n, 64th Sess., May 7–June 1, July 2–Aug. 3 2012, ¶ 227, U.N. Doc. A/67/10, GAOR, 67th Sess., Supp. No. 10 (2012).

separation of powers and checks and balances cannot be overstated.<sup>325</sup> And perhaps more flexible amendment procedures may mitigate the perceived need to resort to informal modes of change. Structural reforms of this kind can range from the minute to the grand—from the plausible to the unfathomable. And it is important to remember that in the context of institutional design, small steps can have big effects.

But while both clarifying the rules of interpretation and institutional design are important, it should be obvious from the foregoing that neither will be a panacea. It would be futile and undesirable to try to fully constrain the discretion of judicial interpreters by systematically trying to predetermine the contours of the various doctrines of interpretation.<sup>326</sup> And it is similarly unrealistic to expect international judicial organs to completely restrain themselves out of respect for more flexible amendment procedures. Indeed the ECtHR has made some of its most expansive forays in parallel to the use of formal amendment procedures by the parties—as in *Öcalan* and *Al-Saadoon* where the Court took note of the parties' contemporaneous attempts at amending the Charter through formal protocol, and simply crossed the Rubicon on the laggards' behalf.

It is not clear that we should expect (or seek) an easy solution to the problems attending informal constitutional change. What is needed today are new principles of international authority and accountability—so as to better understand legal and political change in international organizations, to anticipate these processes and their attendant problems, and to subject them to informed critique. The venerable ground of constitutional theory and the related ethos of modern constitutionalism provide a fertile place to start.

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325. See Arato, *supra* note 42.

326. Indeed, the ILC envisions its project in a much more subtle light. See Annex A: Treaties over Time, *supra* note 71.

