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THE INTERPRETIVE APPROACH TO INTERNATIONAL LAW: A POSITIVIST VIEW

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Abstract

The interpretive approach to international law, specifically the evolutionary interpretation of international law, is a powerful instrument in the determination and subsequent development of its norms. The interpretive process should not be guided by abstract political morality, but by the general rules of interpretation laid down in Articles 31-32 of the 1969 Vienna Convention on the Law of Treaties, which require the parties to act in good faith and determine the common intention of the parties.

The right to interpret international legal norms may be exercised not only by international judicial bodies such as the International Court of Justice (ICJ), the European Court of Human Rights (ECHR), etc., but also by international treaty monitoring mechanisms such as the Committee on Economic, Social and Cultural Rights (CESCR). Such an approach can be conducive to the elaboration of a new broad interpretation of the norms laid down in the original documents (e.g. the ECHR has eventually come to regard the right to respect for private and family life as comprising the right to an ecologically sound environment) or the setting apart of specific norms from more general ones (e.g. a number of separate human rights have developed out of the right to health, thanks to the interpretive activities of the CESCR and other human rights bodies).

Keywords
International law, interpretive approach, general principles of law, political morality, positivist principles, evolutionary interpretation

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I. DWORKIN'S INTERPRETIVE THEORY OF LAW AND ITS POSITIVIST CRITIQUE

International law is a live legal system, which continues to develop even though it was not recently created, as its origins date back to the ancient times when the *jus gentium* was created by the Romans. The development of international law became especially intense in the 20th century both in terms of its substance and scope. Some Western scholars characterize the present system of the international law sources enumerated in Article 38 of the International Court of Justice (ICJ) Statute as lacking any hierarchical order. The first conclusion drawn from these arguments is that *fundamental norms* of international law which should generally enjoy "supremacy ... over domestic constitutional law", are laid down in international conventions, whilst international customary rules and general principles of law can be applied "according to their substantial weight and significance"[1] without

[1] J Klabbers, A Peters, G Ulfstein, 'The Constitutionalization of International Law' (2009) Oxford University Press 348. Cited in G Palombella, 'International law raison d'être and the grounds for the interpretive approach' (2014) 2 Kutafin University Law Review.

stipulating any formal priorities between them. The second conclusion suggested as a result of this way of thinking is that general principles of law, especially those cited by international courts and tribunals (e.g. self-preservation, good faith, principles of responsibility, and principles regulating judicial proceedings), should serve as guidance of paramount importance for the process of law-functioning.[2]

In his recent article, Gianluigi Palombella delves into this principle-based approach analyzing the ideas voiced in Ronald Dworkin's renowned book "Law's Empire" (1986). Palombella singles out three separate theories of international law: *positivist*, *naturalist* and *interpretivist*.[3] Under this classification, the criterion for classification remains elusive. While the first two cases concern the question of who created the *jus naturale* (the law of nature) vis-vis *jus positivum* (man-made law), the third case focuses on the methods by which it is created (through interpretation exercised primarily by the judicial bodies). It is the purpose pursued in elaborating legal norms that holds a central place in Dworkin's original classification. Thus, the three theories of law he distinguished could be called *consensual* (law reflects a consensus in respect of norms accepted within a specific community), *teleological* (law provides a necessary means for achieving social goals), and *interpretive* (law ensures the desired integrity in the political and legal spheres).[4]

Two principles appear to stand out quite prominently within the i*nterpretive* paradigm. These are, to use Dworkin's terminology, the principle of *mitigation* of states' power and the principle of *salience*. The former connotes every state's willingness to accept and tolerate certain constraints on its sovereignty in order to promote an effective international order. It would appear that there are good chances to become more influential over time if a state takes account of the objective need for cooperative efforts in order to ensure common goods, such as for instance, the security of mankind, which may be seriously undermined by climate change or other

2 G Palombella (n 1) 159.

3 G Palombella (n 1) 162-163.

4 R Dworkin, Law's Empire (Cambridge Mass.: Harvard University Press, 1986).

environmental challenges.[5] This in turn presupposes a duty to adhere to the rules accepted by a vast majority of states and peoples.

Palombella acknowledges that the principle of the *mitigation* of states' power is "insufficiently determinative as to different possible regimes of international law".[6] The principle of *salience* is no less indeterminate. An inevitable question arises as to who has the authority to determine the existence and scope of these principles along with other principles of *political morality* (another key term coined by Dworkin), which is very difficult to answer. Under conditions of such uncertainty, history will continue to repeat itself: what seems to be political morality as a direct reason for action for some *(ex iniuria ius oritur)*[7] is perceived as a sheer act of *political amorality* by others.[8] Even though no one would deny that politics and law, including international law in particular, are intertwined and influence each other considerably, it does not seem appropriate to incorporate political concepts intentionally into legal parlance. Politics and law still remain separate regulatory systems. Ideally, humanity aspires to achieve the rule of law in politics and to end up giving way to the rule of politics in law.

The interpretive approach as understood by Dworkin and Palombella strikes us as being something that is rather difficult to accept for the

5 G Palombella (n 1) 166.

6 ibid.

7 Back in 1999, A Cassese wrote concerning NATO's involvement in Kosovo that "Human rights are increasingly becoming the main concern of the world community as a whole. There is a widespread sense that they cannot be trampled upon with impunity in any part of the world... [T]he international community is increasingly intervening, through international bodies, in internal conflicts where human rights are in serious jeopardy". A Cassese, '*Ex iniuria ius oritur:* Are We Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?' (1999) 10 Eur J Int'l Law 23, 26. Cited in TM Franck, 'Lessons of Kosovo' (1999) 93 American Journal of International Law 857.

8 'Ofitsialnye materialy. Agressiya NATO protiv Yugoslavii' // Diplomaticheskiy vestnik. 1999. №4. <http://www.mid.ru/bdomp/dip_vest.nsf/99b2ddc4f717c733c32567370042ee43/5391756565aad624c325688700436c5e!OpenDocument> accessed 19 March 2015 ('Official materials. NATO aggression against Yugoslavia' (1999) 4 The Diplomacy Herald <http://www.mid.ru/bdomp/dip_vest.nsf/99b2ddc4f717c733c32567370042ee43/5391756565aad624c325688700436c5e!OpenDocument> accessed 19 March 2015).

representatives of the continental system of law. Dworkin was a fervent advocate of the interpretivist theory with its focus on adjudication. This without doubt holds true for the Anglo-American legal system in which the courts enjoy considerable "judicial discretion, if not judicial norm-creation",[9] but it cannot possibly boast a universal appeal.

The Soviet school of international law was firmly grounded in positivist principles. Russian legal scholarship still upholds this tradition. In his recent book "Essays on Philosophy and International Law" (2009), Stanislav V. Tchernichenko powerfully states that "International law is first and foremost positive law", going on to assert that "The general principles of law should not be enumerated among the sources of law, in particular of international law. They are not a form of embodiment of international law, but its substantial part". He then clarifies this assertion, referring to the general principles of law as "specific norms establishing in positive law (domestic and international) regularities [and] legal criteria pertaining to natural law".[10] This conclusion is in full accord with the teachings of such a prominent Soviet scholar as Roman L. Bobrov who stressed back in 1962 that "one should not interpret principles of law as categories detached from norms, as categories that simply reflect the guiding ideas and qualitative peculiarities of this system of law". Such a proposition, in his opinion, would have far-reaching consequences for the development of the science of international law.[11] Thus, the general principles of law are supposedly the principles that have already entered into the corpus of international law either through international custom or under an international treaty, leaving little or no scope for international courts and other international bodies to fill in possible legal gaps. Returning to the principles of *political morality*, it must be mentioned that their existence, scope and value for the system of international law in general can only be

9 G Palombella (n 1) 158.

10 Tchernichenko S.V. Ocherki po filosofii i mezhdunarodnomu pravu / M.: Nauchnaya kniga, 2009 (SV Tchernichenko, Essays on Philosophy and International Law (Science book, 2009)).

11 Bobrov R.L. Sovremennoe mezhdunarodnoe pravo (ob'ectivnye predposylki i sotsialnoye naznacheniye) / L.: LGU, 1962 (RL Bobrov, Contemporary International Law (Objective Preconditions and Social Purpose) (LGU 1962)).

identified through a consensus between major actors, and this role is still performed by states.

The main conceptual foundation of legal positivism is the acknowledgment that international law is premised on the consent of states. It is states that conclude international treaties and recognize principles of customary international law as being legally binding. It is presumed within this framework that Article 38(1)(b) of the ICJ Statute, which provides a definition of international custom, should be read as "evidence of a general practice accepted as law" *by states*.

The Soviet, and subsequently Russian, schools of legal thought view Grigory I. Tunkin's *concordance of the wills of states* as a concept of major importance. It is based on the recognition that states are primary actors in the process of international rule-making in relation to the formation of both treaty law and customary law.[12] Western scholars continue to question the exclusive right of states to create international customary law. Back in 1958, the British scholar C. Wilfred Jenks pointed to the enhanced role of international organizations in the development of international law, including customary law, even though traditionally "international custom is to be deduced from the practice of States".[13] Recently, the American scholar Jordan Paust made a similar point in a more radical way, "Contrary to false myth perpetrated in the early twentieth century, the subjective element of customary international law (i.e., *opinio juris* or expectations that something is legally appropriate or required) is to be gathered from patterns of generally shared legal expectation among humankind, not merely among official State elites".[14] This point was further elaborated by his compatriot Isabelle R. Gunning who voiced the idea that nongovernmental organizations

12 Tunkin G.I. Teoriya mezhdunarodnogo prava / Pod obshch. red. L.N. Shestakova. M.: Zertsalo, 2009 (GI Tunkin, The Theory of International Law (L Shestakov ed, Zertsalo 2009)).

13 CW Jenks, 'The Common Law of Mankind' (1958) Stevens & Sons 1958 190-191. Cited in BD Lepard, Customary International Law: a New Theory with Practical Applications (New York: Cambridge University Press, 2010.

14 JJ Paust, International Law as Law of the United States (2nd ed., Carolina Academic Press 2003) 4. See also MS McDougal, HD Lasswell, L Chen, *Human Rights and World Public Order: The Basic Policies of an International Law of Human Dignity* (Yale University Press 1980) 269. Cited in BD Lepard (n 13) 186.

(NGOs) can "participate both in the practice and *opinio juris* components of customary law creation".[15]

NGOs can really contribute to the evolution of *opinio juris* by carrying out investigations into state practices in a certain field and provoking reactions by states to these investigations. In a number of cases, NGOs even manage to contribute to the elaboration of new treaty provisions. This is one of the trends which are transforming international law – Rosalyn Higgins labels it as the "Reformation in international law".[16] For instance, it was NGOs which suggested some of the formulations of human rights that came to be enshrined in the 1945 UN Charter and the 1948 Universal Declaration of Human Rights.[17] NGOs can also make a significant contribution to the interpretation of international law. NGOs such as the International Commission of Jurists, the International Association of Penal Law and the Urban Morgan Institute of Human Rights were actively involved in the drafting of the "Siracusa Principles" on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights in 1984.[18] In 1958, the International Committee of the Red Cross (the ICRC) championed a broad construction of existing international humanitarian law. In its Commentary on the Fourth Geneva Convention, the ICRC acknowledged that the grave breach

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15 IR Gunning, 'Modernizing Customary International Law: The Challenge of Human Rights' (1991) 31 Virginia Journal of International Law 211-247. Cited in BD Lepard (n 13) 186. See also D Shelton, 'Normative Hierarchy in International Law' (2006) 100 (2) American Journal of International Law 293, 321.

16 R Higgins, 'The Reformation in International Law' in R Rawlings (ed), Law, Society, and Economy. Centenary Essays for the London School of Economics and Political Science, 1895-1995 (Oxford: Clarendon Press, 1997).

17 A Cassese, *Human Rights in a Changing World* (1990); W Korey, *NGOs and the Universal Declaration of Human Rights: a Curious Grapevine* (1998), PG Lauren, *The Evolution of International Human Rights: Visions Seen* (1998)183,188-190; WM Reisman, *Private International Declaration Initiatives. In 'La Déclaration Universelle des Droits de l'Homme 1948-99* (1998) 79; LB Sohn, 'The United Nations at Fifty: How American International Lawyers Prepared for the San Francisco Bill of Rights' (1995) vol 89 American Journal of International Law 540. Cited in S Charnovitz, 'Nongovernmental Organizations and International Law' (2006) 100 (2) American Journal of International Law.

18 T Boven, 'The Role of Non-Governmental Organizations in International Human Rights Standard-Setting: A Prerequisite of Democracy' (1990) vol 20 California International Law Journal 207, 219-220. Cited in S Charnovitz (n 17) 352.

of inhuman treatment by "wilfully causing great suffering or serious injury to body or health" envisaged in Article 147 was to be interpreted in the context of Article 27 prohibiting rape.[19]

Nowadays it is impossible to deny that many intergovernmental organizations and NGOs find themselves engaged in an interactive discussion with states on the desirability of recognizing new norms of international law. The positivist view does not ignore a growing interaction between states and non-state actors. Quite on the contrary, it takes this into account within its explanation of social and legal phenomena. However, its basic precepts are not shattered by this recognition: ultimately it is still states that react (whether favourably or not) to the reports presented by NGOs, recognize international customary rules as legally binding and adopt new international treaty norms.

II. GENERAL RULES OF INTERPRETATION

General rules of interpretation can be found in Article 31 of the 1969 Vienna Convention on the Law of Treaties, which provides that "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose" (Article 31(1)). For interpretive purposes, the concept of the "context" of a treaty encompasses the text of a treaty including its preamble and annexes and any agreement or other instrument related to the treaty that can be concluded at the same time as the treaty (Article 31(2)). Any subsequent agreement or subsequent practice in the application of the treaty manifesting an agreement between the parties regarding its interpretation or any relevant rules of international law may also be helpful in the process of interpreting the treaty or applying its provisions (Article 31 (3)).

Article 32 of the Vienna Convention on the Law of Treaties concerns the concept of a "supplementary means of interpretation". This includes the preparatory works (*travaux préparatoires*) and the circumstances surrounding its conclusion. The supplementary means of interpretation enable either to confirm the meaning or to determine it when interpretation

19 T Meron, 'Rape as a Crime under International Humanitarian Law' (1993) 87 (3) American Journal of International Law.

leaves the meaning ambiguous or obscure or leads to a manifestly absurd or unreasonable result.

The aim of the author of the present article is to demonstrate that the interpretive approach to international law can indeed be exercised within positivist boundaries. With due respect, Dworkin cannot take credit for the authorship of the idea of interpretivism in law. In fact, hermeneutics as a theory of textual interpretation is centuries-old and dates back to the pre-Christian times, whilst the patristic legacy of biblical exegesis provided it with a considerable incentive for further development. Nowadays, the so-called evolutionary approach, which can certainly be viewed as a specific form of a more general interpretive approach, proves to be quite useful within the practice of international courts and international treaty bodies monitoring the implementation of states' obligations in the realm of human rights.

The formulation "evolutionary interpretation" conveys the idea that "a treaty term is capable of evolving, that it is not fixed once and for all, so that allowance is made for ... developments in international law".[20] The ICJ held in its judgment on the *Navigational and Related Rights* dispute that, if a term's meaning is no longer the same as it was at the time the treaty was concluded, it is necessary to take account of its actual meaning when the treaty is interpreted to be applied. [21]

The requirements of the evolutionary interpretation of international treaties dictate first that parties should act in *good faith* and secondly that the *common intention of the parties* should be upheld.[22] The element of good faith "imposes on the international judge an obligation to adjudicate reasonably", which precludes as inadmissible any formalistic approach under which form prevails over substance.[23] The second element denotes a need to look

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20 E Bjorge, 'The Evolutionary Interpretation of Treaties' (2014) Oxford University Press.

21 Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua) Judgment (2009) ICJ Rep 242 at [64] <http://www.icj-cij.org/docket/files/133/15321.pdf> accessed 11 March 2015.

22 E Bjorge (n 20) 63-83.

23 Cf U Linderfalk, *On the Interpretation of Treaties: The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties* (Springer, 2007); O Corten, *L'utilization du 'raisonnable' par le juge international* (Brulant, 1997). Cited in E.Bjorge (n 20) 68.

for the common intention of the parties. Since the two elements are closely interconnected, "[i]t is obviously contrary to good faith to argue that a treaty term must be interpreted contemporaneously (i.e. as not having evolved) when it follows from what must be held to have been the common intention of the parties that the treaty terms were to be interpreted evolutionarily".[24]

In its judgment resolving the *Navigational and Related Rights* dispute, the ICJ singled out two types of case in which evolutionary interpretation is needed. First, the subsequent practice of the parties, in accordance with Article 31(3)(b) of the 1969 Vienna Convention, can result in a departure from the original intent on the basis of a tacit agreement between the parties. Second, there are situations in which the parties' intent was, or may be presumed to have been, to give all the terms or some of them a meaning or content capable of evolving, not one fixed once and for all, so as to make allowance for ... developments in international law.[25] The following section is dedicated to a presentation of two examples which illustrate this line of reasoning.

III. EVOLUTIONARY INTERPRETATION IN INTERNATIONAL LAW: TWO APPLICATIONS OF THE THEORY

The first example shows how the European Court of Human Rights (ECHR) in the absence of a separate right to life in a healthy environment in the 1950 European Convention for the protection of Human Rights and Fundamental Freedoms (the 1950 European Convention) gradually developed an approach by which this right is defined as an integral part of the right to respect for private and family life, home and correspondence laid down in Article 8 of the 1950 European Convention.

The ECHR has always sought a consensus, i.e. the *common intention of the Council of Europe member states*. "The existence of a consensus has long

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24 Cited in E Bjorge (n 20) 76.

25 Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua). Judgment (2009). ICJ Rep. 242 at [64] <http://www.icj-cij.org/docket/files/133/15321.pdf> accessed on 11 March 2015.

played a role in the development and evolution of Convention protections ..., the Convention being considered a 'living instrument' to be interpreted in the light of present-day conditions. Consensus has therefore been invoked to justify a dynamic interpretation of the Convention".[26] In situations in which the Court is confronted with the absence of a European consensus on delicate issues such as euthanasia,[27] the scientific and legal definition of the beginning of life[28] or possible limitations on the freedom to manifest one's religion or beliefs, it stresses its own fundamentally subsidiary character and places special weight on the role which the domestic policy-maker should have "in matters of general policy, on which opinions within a democratic society may reasonably differ", thus leaving the states a wide margin of appreciation.[29] Protocol No. 15 to the 1950 European Convention, adopted in 2013, respectfully acknowledges in Article 1, which amends the preamble to the Convention, that there the High Contracting Parties enjoy a margin of appreciation in securing the rights and freedoms defined in the 1950 Convention and the Protocols thereto.

Since the 1990s, the ECHR has broadly interpreted the right to respect for private and family life, home and correspondence in full accord with the very etymology of the term "|ecology" (literally "a science about home" from the Greek "οἶκος" – a house, a dwelling and "logos" – a teaching, a science). The Strasbourg Court has held that this includes the right to a

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26 *A, B and C v Ireland* App no 25579/05. Judgment of the European Court of Human Rights of 16 December 2010 at [234]. <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-102332#{"itemid":["001-102332"]}> accessed on 11 March 2015.

27 *Haas v Switzerland* App no 31322/07. Judgment of the European Court of Human Rights of 20 January 2011 at [55] <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx#{"fulltext":["Haas"],"sort":["docnamesort Ascending"],"respondent":["CHE"],"itemid":["001-102940"]}> accessed on 11 March 2015.

28 *A, B and C v Ireland* App no 25579/05. Judgment of the European Court of Human Rights of 16 December 2010 at [175]. <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-102332#{"itemid":["001-102332"]}> accessed on 11 March 2015.

29 *S.A.S. v France* App no 43835/11. Judgment of the European Court of Human Rights of 1 July 2014 at [129]. <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-145466#{"itemid":["001-145466"]}> accessed on 11 March 2015.

favourable environment as a necessary component, thereby requiring the states to implement a number of positive obligations in this area.

The first judgment in which the ECHR demonstrated such an approach was given in the case of *Powell and Rayner v. the United Kingdom*. The British nationals Richard John Powell and Michael Anthony Rayner lived close to Heathrow, a major airport, and complained of excessive noise generated by air traffic. The applicants lodged their petitions with the European Commission of Human Rights on 31 December 1980, which declared them admissible and forwarded them to the ECHR on 16 March 1989. The applicants claimed that a number of their rights guaranteed under the 1950 European Convention had been violated, including the right to respect for personal and family life, home and correspondence (Article 8), the right of property (Article 1 of the Protocol 1), the right of access to the courts in civil matters (Article 6) and the right to an effective remedy under domestic law for alleged breaches of the Convention (Article 13). The Court stated in its judgment that no arguable claim that Article 8 had been violated in connection with the noise caused by the aircraft flying at a reasonable height and observing the air traffic regulations had been made out in relation to either applicant, and held in the operative part that it lacked jurisdiction to entertain the complaints under Article 8. However, the historic importance of *Powell and Rayner v. the United Kingdom* is that it was the first time that the need to ensure an ecologically sound environment was treated as a positive obligation of the state and a prerequisite for implementing certain other rights of the applicants. The notion of "private life" was construed broadly by the Court when holding that in each case "the quality of the applicant's private life and the scope for enjoying the amenities of his home had been adversely affected by the noise generated by aircraft using Heathrow Airport".[30]

In subsequent decisions the ECHR frequently held Article 8 to have been violated in situations in which public authorities had failed to protect

30 *Powell and Rayner v UK* App No 9310/81. Judgment of the European Court of Human Rights of 21 February 1990 at [46, 40] <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57622#{"itemid":["001-57622"]}> accessed on 12 March 2015.

their citizens properly from the risks to their health or life resulting from hazardous or polluting activities carried on by a state or a private business. The same approach was adopted by the ECHR in its judgment given on 9 December 1994 in the case *López Ostra v. Spain*. Gregoria López Ostra claimed that Articles 8 and 3 of the 1950 European Convention had been violated. The applicant and her family had been living in Lorca (Murcia) near to a liquid and solid waste treatment plant, which was a source of noise, polluting fumes and pestilent smells, eventually causing the health of the applicant and her daughter to deteriorate. Ostra argued that the Spanish authorities were responsible for their failure to act in this matter. Although in the Court's opinion, the Spanish authorities and the municipality of Lorca did not theoretically bear direct responsibility for the emission of polluting substances by the plant, the Court however pointed to the permit given by the town to build the plant on its land and to the State's subsidies awarded in relation to its construction. The ECHR stated that "The State did not succeed in striking a fair balance between the interest of the town's economic well-being - that of having a waste-treatment plant - and the applicant's effective enjoyment of her right to respect for her home and her private and family life". In the operative part of its judgment the Court held that Article 8 had been violated and obliged Spain to pay four million pesetas to Ostra as damages and one million five hundred thousand pesetas in costs and expenses.[31]

Russian citizens have also filed applications concerning different aspects of environmental well-being. The *Fadeeva v. Russia* case can serve as an example. Nadezhda Fadeeva argued that the operation of the Severstal steel plant within the sanitary security zone in which she lived in her native town of Cherepovets endangered her health and well-being by producing a high level of atmospheric pollution. On 17 October 2003 the ECHR ruled her application admissible. In the judgment rendered on 9 June 2005 the Court held that the State could be held responsible in environmental cases owing to a failure to regulate private industry and be subject to a positive duty to take reasonable and appropriate measures to secure the applicant's

31 *López Ostra v Spain* App no 16798/90. Judgment of the European Court of Human Rights of 9 December 1994 at [34, 52, 58] < http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57905> accessed on 12 March 2015.

rights under Article 8, in particular in order to evaluate pollution hazards and to prevent or reduce them. The Court held that the Government was under an obligation to take appropriate measures to remedy the applicant's individual situation, suggesting her resettlement to an ecologically safe area as a possible solution. In the operative part of the judgment, the Court held that Article 8 had been violated and obliged the Russian Federation to pay six thousand euros to Fadeeva in respect of non-pecuniary damages and compensate costs and expenses incurred by of the applicant's Russian and British lawyers.[32]

The three cases briefly outlined above demonstrate how the right to a favourable environment may be enforced within the Council of Europe system of human rights protection thanks to the Strasbourg Court's broad interpretation of Article 8 of the 1950 European Convention.

The second example is intended to demonstrate how evolutionary interpretation can be engaged in not only by international courts, but by international treaty monitoring bodies, too. The Committee on Economic, Social and Cultural Rights (CESCR) established by the Economic and Social Council resolution 1985/17 of 22 May 1985 is, *inter alia*, vested with the powers to make recommendations of a general nature, i.e. to interpret the provisions of the Covenant. It will be shown how the interpretive activities of the CESCR, the Human Rights Commission and the Human Rights Council that replaced it have gradually contributed to the establishment of separate rights to an ecologically sound environment, food and water.

The right to an ecologically sound environment was originally viewed as an element of the right of everyone to the enjoyment of the highest attainable standard of physical and mental health (the right to health). It is enshrined in Article 12 of the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR), a number of other international treaties, general comments of the CESCR and resolutions of the Human Rights Commission. Article 2 of the ICESCR obliges each States Parties Party to take steps "*to the maximum of its available resources*, with a view to achieving *progressively*

32 *Fadeeva v Russia* App no 55723/00. Judgment of the European Court of Human Rights of 9 June 2005 at [89, 92, 142] <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-69315#{"itemid":["001-69315"]}> accessed on 12 March 2015.

the full realization of the rights recognized in it". It can be deduced from it that first, the resources at the states' disposal differ and second, that measures are supposed to be taken gradually, developing continuously from one stage to another. This formulation seems to be the case when the treaty makers may have been presumed to give the treaty terms a meaning or content capable of evolving just like the evolutionary interpretation theory requires.

Article 25(1) of the 1948 Universal Declaration of Human Rights, the drafting history of the ICESCR and the list of measures to be taken by the States Parties to implement the obligation to ensure the right to health under Article 12 of the ICESCR show that being able to lead a healthy life presupposes the existence of a minimum range of socio-economic factors such as food, clothing, housing, medical care and necessary social services. With the passage of time it has become clear that all of these are to be interpreted broadly. In its General Comment No.14 adopted on 11 August 2000 the CESCR specified first that the list of the measures envisaged by Article 12(2) of the ICESCR is non-exhaustive (para.7), secondly that "the notion of health has undergone substantial changes and has also widened in scope" (para. 10) and thirdly that the right to a healthy natural and workplace environment now comprises the requirement to ensure "an adequate supply of safe and potable water and basic sanitation, the prevention and reduction of the population's exposure to harmful substances such as radiation and harmful chemicals or other detrimental environmental conditions that directly or indirectly impact upon human health" (para. 15) as well as "the participation of the population in all health-related decision-making at the community, national and international level' (para.11).[33]

However, not all scholars consider that it is necessary to make normative provision establishing a separate human right to an ecologically sound environment. In 1992, Handl voiced his doubts by pointing to the difficulty in establishing a definition, the inefficiency of environmental standards in

33 Committee on Economic, Social and Cultural Rights. Report on the twenty-second, twenty-third and twenty-fourth sessions (25 April- 12 May 2000, 14 August – 1 September 2000, 13 November – 1 December 20000.). The United Nations Economic and Social Council. Official records, 2001. Supplement No.2. E/2001/22; E/C.12/2000.21. Annex IV. P 128-148 <http://www.un.org/documents/ecosoc/docs/2001/e2001-22.pdf> accessed on 13 March 2015.

respect of individual petitions, the inappropriateness of controlling human rights bodies (such as the CESCR) to control the performance of states' obligations in the environmental sphere and the generally anthropocentric character of such an approach ("species chauvinism", in his words). Boyle who was also initially critical of the need to establish a separate right to an ecologically sound environment, changed his mind in his later works. In his opinion, it is impossible to ignore three positive trends in recent times: first, a substantial corpus of judicial decisions on the "greening" of civil and political rights in Europe, Africa and Latin America; secondly, the increased participation of citizens in decision-making and the granting of appropriate access to information concerning the environment; and thirdly the appearance of the rights to water, food and health as focal points for international human rights bodies when supervising the conduct of states in protecting the environment.[34]

The existence of a separate right to water does not seem to be a matter for discussion. It can be supported by the fact that the Human Rights Commission established a mandate for the Special Rapporteur on the right to food in April 2000, which was renewed by the Human Rights Council (at present Hilal Elver (Turkey) occupies this position).[35] The situation is more controversial with regard to the right to water. Has it become a separate right or is it still an integral part of other human rights? Scholarly opinions differ greatly. Bates, Beail-Farkas, Carlson and Rutherford argue in favour of a self-standing right to water , whereas Bluemel, Donoho and Teymurov disagree, viewing the "right to water" as a necessary component in the implementation

34 G Handl, *Human Rights, Sustainable Development and the Environment* (San José 1992) 117; *Human Rights Approaches to Environmental Protection* (A Boyle and M Anderson (eds.), Oxford University Press 1996); PM Dupuy, *The Right to Health as a Human Right* (RJ Dupuy ed., Alphen aan den Rijn 1979) 91; P Alston, 'Conjuring up New Human Rights: a Proposal for Quality Control' (1984) 78 American Journal of International Law 607. Cited in A Boyle, 'Human Rights and the Environment: a Reassessment' (2010) <http://www.unep.org/environmentalgovernance/Portals/8/documents/Events/HumanRightsEnvironmentRev.pdf> accessed 19 March 2015.

35 <http://www.ohchr.org/EN/Issues/Food/Pages/FoodIndex.aspx> accessed 14 March 2015.

of other rights.[36] Some scholars adhere to a compromise position, stating that the rights to water and food are being crystallized thanks to the CESCR's "revisionist views" and hinting at the absence of unanimous support on the part of states, i.e. a relative consensus at best.[37] The right to water is treated as a separate right by the UN Sub-Commission on the Promotion and Protection of Human Rights in its resolution 2002/6 of 19 November 2002,[38] by the CESCR in its General Comment No. 15 of 29 November 2002,[39] by the

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36 R Bates, 'The road to the well: an evaluation of the customary right to water' (2010) vol 19 3 Review of European Community and International Environmental Law 282-293; L Beail-Farkas,'The human right to water and sanitation: context, contours, and enforcement prospects' (2013) 30 (4) Wisconsin International Law Journal 772-774; J Carlson, 'A critical resource or just a wishing well? A proposal to codify the law on transboundary aquifers and establish an explicit human right to water' (2011) 26 (5) American University International law review 1412, 1436; R Rutherford, 'An international human right to water: How to secure the place of people ahead of profits in the struggle for water access' (2011) vol 62 4 Alabama Law Review 877, 884; EB Bluemel, 'The implications of formulating a human right to water' (2004) vol 31 4 Ecology Law Quarterly 1005-1006; D Donoho, 'Some critical thinking about a human right to water' (2012) vol 19 1 ILSA Journal of International and Comparative Law 99. Cited in: Teymurov E.S. Obespecheniye prava na vodu: pozitsii Ekonomicheskogo i Sotsial'nogo Soveta OON, Evropeyskogo suda po pravam cheloveka i natsional'nykh sudov Indii i Yuzhno-Afrikanskoy Respubliki // Evraziyskiy yuridicheskiy zhurnal. 2004. №4 (71). (ES Teymurov, 'Ensuring the Right to Water: Positions of the UN Economic and Social Council, the European Court of Human Rights and National Courts of India and South Africa' (2014) 4(71) Eurasian Legal Journal).

37 MI Dennis, DP Stewart, 'Justiciability of Economic, Social, and Cultural Rights: Should There Be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing, and Health?' (2004) 98 (3) American Journal of International Law.

38 United Nations Sub-Commission on the Promotion and Protection of Human Rights. Resolution 2002/6 "The promotion of the realization of the right to drinking water and sanitation". 19 November 2002. See also the Report on the relationship between the enjoyment of economic, social and cultural rights and the promotion of the realization of the right to drinking water supply and sanitation. E/CN.4/Sub2/2002/10 submitted by the Special Rapporteur of the Sub-Commission on the right to drinking water supply and sanitation, Mr..Elhadji Guissé <http://www.un.org/en/terrorism/pdfs/3/G0215493.pdf>accessed on 14 March 2015 20-22.

39 Committee on Economic, Social and Cultural Rights. General Comment No.15. 11-29 November 2002. The right to water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights) <http://www2.ohchr.org/english/issues/water/docs/cescr_gc_15.pdf> accessed on 14 March 2015

UN General Assembly in resolution 64/292 of 28 July 2010,[40] and by the Human Rights Council in resolution 15/9 of 30 September 2010.[41]

IV. CONCLUSION

The interpretive approach to international law and more specifically, the evolutionary interpretation of international law, have proved to be quite fruitful in the determination and subsequent development of its norms.

According to positivist tenets, the interpretive process should not be guided by abstract *political morality*, the origin of which remains unclear, but by general rules of interpretation reflected in Articles 31-32 of the 1969 Vienna Convention on the Law of Treaties, which require that the states parties act *in good faith* and that *the common intention of the parties* be determined.

The right to interpret international legal norms can be exercised not only by international judicial bodies (the ICJ, the ECHR, etc.), but also by international treaty monitoring mechanisms (such as for instance the CESCR). Such an approach can be conducive to arriving at a new broad interpretation of the norms laid down in the original documents (environmental nuisances are viewed as a violation of the right to respect for private and family life established by Article 8 of the 1950 European Convention) or even to establishing separate human rights (the rights to the ecologically sound environment, food, water have gradually developed out of the right to the enjoyment of the highest attainable standard of physical and mental health (the right to health) enshrined in Article 12 of the 1966 ICESCR, thanks to the interpretive activities of the CESCR and other human rights bodies.

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40 United Nations General Assembly resolution «The Human Right to Water and Sanitation». A/res/64/292. 28 July 2010 < http://www.un.org/es/comun/docs/?symbol=A/RES/64/292&lang=E> accessed on 14 March 2015.

41 Human Rights Council. Resolution15/9 «Human rights and access to safe drinking water and sanitation». A/65/53/Add.1. 30 September 2010 28-31 <http://www2.ohchr.org/english/bodies/hrcouncil/docs/A-65-53-Add1.pdf> accessed on 14 March 2015.

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Post-positivists reject this and much rather prefer interpretive and subjective study and believe that values cannot be separate from observation. Cox and Sjolander (1994:5) state that the way we approach theory does become a central question, and the central dichotomy becomes one between positivist and post-positivist avenues and therefore the â€œThird Debateâ€ is an excellent example of the great difference positivists and post-positivists have in their way of approaching IR theory.Â There is an opinion that the post-positivist approach is useful since it expands the debate of IR theory beyond facts to include ethics, morals and values (Goodman). In the positivist opinion, the source of a law is the establishment of that law by some legal authority which is recognised socially. The merits of a law are a separate issue: it may be a 'bad law' by some standard, but if it was added to the system by a legitimate authority, it is still a law.Â Legal positivism does not claim that the laws so identified should be obeyed, or that necessarily there is value in having clear, identifiable rules (although some positivists may also make these claims). Indeed, the laws of a legal system may be quite unjust, and the state may be quite illegitimate; as a result, there may be no obligation to obey them. Moreover, the fact that a law has been identified by a court as valid does not provide any guidance as to whether the court should apply it in a particular case. The positivist view does not ignore a growing interaction between states and non-state actors. Quite on the contrary, it takes this into account within its explanation of social and legal phenomena. However, its basic precepts are not shattered by this recognition: ultimately it is still states that react (whether favourably or not) to the reports presented by NGOs, recognize international customary rules as legally binding and adopt new international treaty norms.Â The aim of the author of the present article is to demonstrate that the interpretive approach to international law can indeed be exercised within positivist boundaries. With due respect, Dworkin cannot take credit for the authorship of the idea of interpretivism in law.