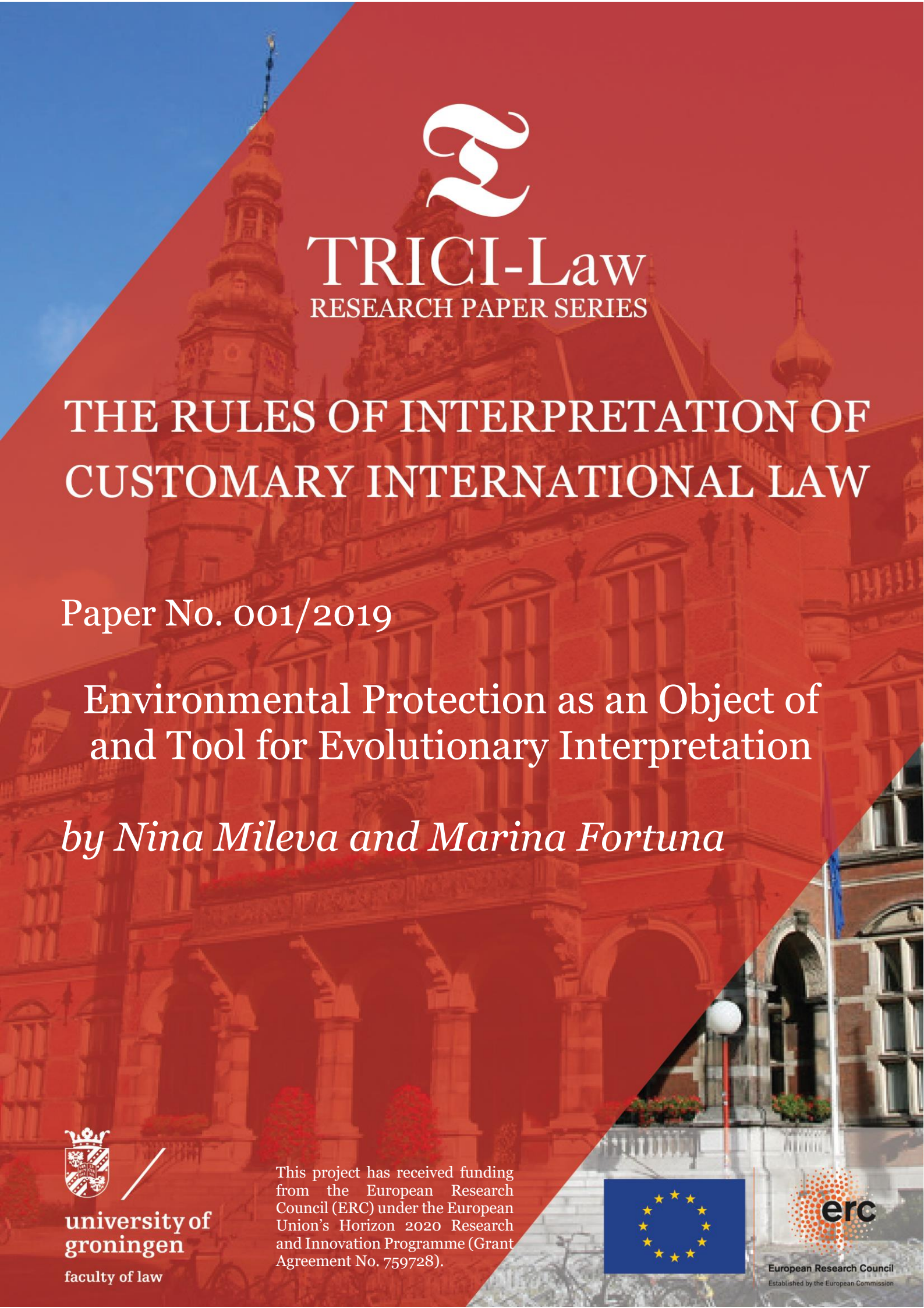

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Environmental Protection as an Object of and Tool for Evolutionary Interpretation

by Nina Mileva and Marina Fortuna

university of groningen
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Environmental Protection as an Object of and Tool for Evolutionary Interpretation

Nina Mileva and Marina Fortuna

Introduction

Evolutionary interpretation covers situations in which a relevant interpretive authority interprets a term or a legal obligation as having a meaning or content capable of evolving.[1] In doctrine, lengthy discussions have taken place in order to identify the legal basis of evolutionary interpretation. In general, scholars identify the basis for evolutionary interpretation in the intention of the parties,[2] the object and purpose of the instrument being interpreted,[3] or the language used,[4] and evolutionary interpretation can occur in instances of evolution of fact or evolution of law.[5] Recourse to evolutionary interpretation has become a growing trend in, among others, the field of environmental law.[6] Moreover, scholars have argued that, absent explicit new legislation by states, international environmental law may be updated in response to new developments through the medium of evolutionary interpretation.[7] Thus, obligations relevant to the protection of the environment may be interpreted evolutively to include new knowledge or developments,[8] and further the objective of environmental protection.

It is against this theoretical background that the paper purports to address two interconnected questions: how has evolutionary interpretation contributed to the development of environmental protection, and, reversely, how has environmental protection furthered our understanding of evolutionary interpretation? These questions are explored along two conceptual categories: i) environmental protection as an object of evolutionary interpretation and ii) environmental protection as a tool for evolutionary interpretation. The categories were chosen

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[1] E Bjorge, *The Evolutionary Interpretation of Treaties* (Oxford, Oxford University Press, 2014) 1–2, reflecting on a working definition provided by the International Court of Justice in *Dispute regarding Navigational and Related Rights (Costa Rica v Nicaragua)* (Judgment) [2009] ICJ Rep 213.

[2] H Thirlway, 'The Law and Procedure of The International Court of Justice 1960–1989 Supplement, 2006: Part Three' (2006) 77 *British Year Book of International Law* 1, 65–68; J Pauwelyn and M Elsig, 'The Politics of Treaty Interpretation; Variations and Explanations Across International Tribunals' in JL Dunoff and MA Pollack (eds.) *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (Cambridge, Cambridge University Press, 2012) 445, 451–452; P Merkouris, '(Inter)Temporal Consideration in the Interpretive Process of the VCLT: Do Treaties Endure, Perdure or Exdure?' (2014) 45 *Netherlands Yearbook of International Law* 121; Bjorge, above n 1, 3-4; *See also* Merkouris, above n 2, 139–141 for the argument that these indicators are all actually reflections of the intention of the parties.

[3] Pauwelyn and Elsig, above n 2, 442; Merkouris, above, n 2, 139.

[4] Merkouris, above n 2, 124; C Djeffal, *Static and Evolutionary Treaty Interpretation: a Functional Reconstruction* (Cambridge, Cambridge University Press, 2016).

[5] Merkouris, above n 2, 139–140.

[6] ibid, 140.

[7] M Vordemayer, 'Gardening the Great Transformation: The Anthropocene Concept's Impact on International Environmental Law Doctrine' (2015) 25 *Yearbook of International Environmental Law* 79, 110–111.

[8] ibid, 109.

because they aptly illustrate the relationship between environmental protection and the practice of evolutionary interpretation, where evolutionary interpretation has both contributed to furthering the goal of environmental protection and has been developed in more detail as a result of it. This distinction is of course not a rigid one, and, as will be seen throughout the paper, interpreters sometimes thread this conceptual line. Thus the relationship between 'environmental protection as object' and 'environmental protection as tool' may be understood as two sides of the same coin.

The first section of the paper focuses on environmental protection as an object of evolutionary interpretation, and explores this topic through selected cases from the jurisprudence of the International Court of Justice (ICJ). This section chooses the jurisprudence of the ICJ as the focus of its analysis for several reasons. Firstly because, as pointed out by scholars, the practice of the ICJ is one of the standard-setters in the field of interpretation.[9] Thus, its practice can greatly inform the analysis of environmental protection as an object of evolutionary interpretation. Secondly because, in the absence of a permanent international environmental court, the ICJ is currently the only permanent court which can adjudicate environmental cases. Consequently, its jurisprudence may yield more concrete results as to patterns of evolutionary interpretation compared to arbitral or *ad hoc* tribunals dealing with the same matter. Finally, because, as will be evident in the analysis, a string of cases in the Court's jurisprudence illustrate a forward-progressing development of environmental protection through the practice of evolutionary interpretation. Thus, the section posits, the ICJ has gradually developed a more open and detailed evolutionary interpretation aimed at environmental protection. The second section of the paper focuses on environmental protection as a tool of interpretation and explores this topic through selected cases from the jurisprudence of the European Court of Human Rights (ECtHR) and the Inter American Court of Human Rights (IACtHR). The ECtHR is a pioneer in bringing environmental concerns within the realm of human rights. The IACtHR on the other hand, recently handed down an advisory opinion which is both novel when compared to earlier jurisprudence of the Court, and a detailed example of environmental protection as a tool for evolutionary interpretation. The third section explores recent domestic environmental litigation as an interesting example of a combined approach, i.e. environmental protection as both an object of and tool for evolutionary interpretation. The paper includes this brief exploration of domestic cases because the practice of domestic courts is becoming increasingly more significant in the interpretation, application and development of international law. This is particularly evident in what scholars have called 'sectoral regimes' such as environmental law, where regulation taking place on the international level may have a direct bearing on domestic regulation, and vice-versa.[10] Thus, interpretive practices of domestic courts in this regard may directly influence the development of international law as well. [11] Finally, the fourth section briefly comments on the limits of evolutionary interpretation. The selected cases are by no means an exhaustive exploration of jurisprudence on the topic. They were selected because the authors believe that

[9] Djeffal, above n 4, 214.
[10] ILA Study Group on Principles on the Engagement of Domestic Courts with International Law, *Mapping the Engagement of Domestic Courts with International Law* (Final Report, 2016) para 10.
[11] ibid, paras 10–14.

they aptly illustrate both the contribution of evolutionary interpretation to the protection of the environment, and the reverse influence that the cases have had on our understanding of evolutionary interpretation through the lens of environmental protection as a tool for interpretation. Thus, they offer an illustrative overview of the current state of affairs, and open up fruitful avenues of further research.

1. Environmental Protection as an Object of Evolutionary Interpretation

For the purposes of this section, the protection of the environment may be considered an object of evolutionary interpretation in two scenarios: i) cases where the relevant interpretive body interpreted a legal obligation to include environmental considerations where there were none envisaged at the time of the original conclusion of that legal obligation; and ii) cases where legal obligations which were already environmental at the time of their conclusion (including specific environmental obligations stemming from more general, non-environmental treaties) are now interpreted evolutively in the light of new legal or factual circumstances. This latter scenario may at times thread the conceptual line between environmental protection as an object v. environmental protection as a tool, and the section will also make a brief comment on this where such examples arise in the upcoming analysis.

One of the first critical examples of environmental protection as the object of evolutionary interpretation in the jurisprudence of the ICJ is the judgment in the *Case Concerning the Gabcikovo-Nagymaros Project of 1997* (*Gabcikovo-Nagymaros*). In interpreting a broad obligation of environmental protection from a bilateral treaty between the parties concerning the construction and operation of the Gabcikovo-Nagymaros barrage system, the Court found that 'newly developed norms of environmental law are relevant for the implementation of the Treaty, and that the parties could, by agreement, incorporate them through the application of [relevant articles] of the Treaty'.[12] These articles did not contain specific obligations of performance but required the parties to carry out their obligation of environmental protection by taking new environmental norms in consideration. 'By inserting these evolving provisions in the Treaty', the Court argued, "the parties recognized the potential necessity to adapt the Project. Consequently, the Treaty is not static, and is open to adapt to emerging norms of international law', including new environmental norms.[13] This reasoning of the Court provides an example where the Court interpreted an already environmental legal obligation ly by emphasizing new legal circumstances, namely new environmental norms. The Court however did not point out specific environmental norms which were to be included in the legal obligation, but rather referred generally to "new

[12] *Gabčíkovo–Nagymaros Project (Hungary v Slovakia)* (Judgment) [1997] ICJ Rep 7, para 112.
[13] ibid.

environmental norms". Thus, evolutionary interpretation served the object of environmental protection by including new environmental norms in the legal obligation of the parties, but only in a more general manner. Interestingly, in a later point of its analysis, the Court took its evolutionary interpretation progressively forward by referring to sustainable development as a new norm which has to be taken in consideration by States.[14] In doing this, the Court came very close to pronouncing what would amount to a new environmental principle with the potential of affecting future interpretation.[15] Nonetheless, here again the Court remained general. Moreover, in a Separate Opinion to the judgment, Judge Bedjaoui argued for limiting an evolutionary approach, and cautioned against what he considered a potential revision of a treaty via evolutionary interpretation.[16] In *Gabcikovo Nagymaros* the Court thread the conceptual line between protection of the environment as object and as tool, and remained cautious in its application of evolutionary interpretation. Nonetheless, the case stands at the beginning of a sequence of interpretative episodes by the ICJ which, this section argues, have furthered the protection of the environment by crystalizing legal obligations through the practice of evolutionary interpretation.

The analysis continues with the judgment in the *Case Concerning Pulp Mills in the River Uruguay* (*Pulp Mills*). Two findings by the Court in *Pulp Mills* are relevant to the discussion in this section. The first is the finding of the Court concerning the procedural obligation of Uruguay to inform CARU[17], stemming from the obligation of prevention. According to a 1975 bilateral treaty between Argentina and Uruguay for the rational utilization of the part of the river Uruguay which constitutes a border between the two states, Uruguay had the obligation to inform CARU when initiating a planned activity on that part of the river. CARU would then make a preliminary finding whether the planned activity may cause significant damage to the other party.[18] With respect to this, the Court pointed out that:

> the principle of prevention, as a customary rule, has its origins in the due diligence that is required of a State in its territory. It is 'every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States'[19] […] A State is thus obliged to use all the means at its disposal in order to avoid activities which take place in its territory, or in any area under its jurisdiction, causing significant damage to the environment of another State. This Court has established that this obligation 'is now part of the corpus of international law relating to the environment'[20].[21]

In this paragraph the Court traced the evolution of the principle of prevention from its origin in *Corfu Channel* as a due diligence requirement to its inclusion of environmental considerations in

[14] ibid, para 140.
[15] Djeffal, above n 4, 262.
[16] *Gabčíkovo–Nagymaros Project*, above n 12, Separate Opinion of Judge Bedjaoui.

[18] *Pulp Mills on the River Uruguay (Argentina v Uruguay)* (Judgment) [2010] ICJ Rep 14, para 94.
[19] ibid, para 101, citing *Corfu Channel (United Kingdom v Albania)* (Merits) [1949] ICJ Rep 4, 22.
[20] ibid, citing *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226, para 29.
[21] ibid, para 101.

the *Nuclear Weapons* Advisory Opinion and the present case. This reasoning illustrates environmental protection as an object of evolutionary interpretation resulting from the evolution of law. The second observation relevant to this section comes from the Court's finding, when examining whether Uruguay had violated its obligation to prevent pollution, with respect to the notion of an Environmental Impact Assessment (EIA). The Court began by referencing its earlier finding in *Dispute Regarding Navigational and Related Rights* that:

> there are situations in which the parties' intent upon conclusion of the treaty was, or may be presumed to have been, to give the terms used - or some of them - a meaning or content capable of evolving, not one fixed once and for all, so as to make allowance for, among other things, developments in international law.[22]

In this sense, the Court found:

> the obligation to protect and preserve, […], has to be interpreted in accordance with a practice, which in recent years has gained so much acceptance among States that it may now be considered a requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource.[23]

The Court thus explicitly relied on evolutionary interpretation to arrive at the conclusion that the obligation of prevention also contains the customary obligation to conduct an EIA. Interestingly, the Court observed that general international law does not specify the exact scope and content of an EIA.[24] In light of this, EIAs may be considered as a customary generic term that may evolve in time and whose content will be open to evolutionary interpretation in future case law.[25]

The analysis culminates in the recent joint judgment of the Court in the *Case Concerning Certain Activities Carried Out by Nicaragua in the Border Area* (C*osta Rica v. Nicaragua*) and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica*) of 16 December 2015 (hereinafter *Joint Judgment*). In this judgment the ICJ provided valuable insight into the interpretation of the obligation to conduct an EIA and the obligation to notify and consult. More interestingly however, in addition to interpreting each of these obligations individually, the Court considered them under the wider umbrella of the customary rule of prevention, and thus provided an interpretation of the rule of prevention with these obligations as separate but constitutive components. The Court began by recalling the content of the rule of prevention as delineated in its earlier jurisprudence: "a state is obliged to use all means at its disposal in order to avoid activities which take place in its territory, […] causing significant damage to the

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[22] ibid, para 204, citing *Dispute Regarding Navigational and Related Rights (Costa Rica v Nicaragua)* (Judgment) [2009] ICJ Rep 213, para 64.
[23] ibid.
[24] ibid, para 205.
[25] P Merkouris, 'Case Concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay): Of Environmental Impact Assessments and Phantom Experts' (2010) 9, www.papers.ssrn.com/sol3/papers.cfm?abstract_id=2378882 (accessed 12 December 2018).

environment of another state".[26] With respect to the obligation to conduct an EIA, the Court recalled its judgment in *Pulp Mills* where it pronounced its customary character. The Court then observed that although *Pulp Mills* concerned specific industrial activities, the underlying principle applies generally to activities that might have a significant adverse transboundary impact. It thus held that:

> "[T]o fulfil its obligation to exercise due diligence in preventing significant transboundary environmental harm, a State must, before embarking on an activity having the potential adversely to affect the environment of another State, ascertain if there is a risk of significant transboundary harm, which would trigger the requirement to carry out an environmental impact assessment". […]
> "If the environmental impact assessment confirms that there is a risk of significant transboundary
> harm, the State planning to undertake the activity is required, in conformity with its due diligence obligation, to notify and consult in good faith with the potentially affected State, where that is necessary to determine the appropriate measures to prevent or mitigate that risk".[27]

It seems that the Court lays out a set of steps to be followed in pursuance of prevention. First, a State needs to ascertain whether a planned activity has the potential to cause harm. If it has such a potential, the State then needs to conduct an EIA. If the EIA confirms that there is a risk of significant transboundary harm, the State then needs to notify and consult the other concerned State with a view to finding appropriate measures to prevent or mitigate. This reasoning provides an example of environmental protection as an object of evolutionary interpretation because the Court relies on new developments in the law to arrive at a broader and more specific interpretation of the content of the obligation of prevention. Namely, the Court seems to be interpreting prevention as a substantive obligation which has as its procedural constituents the customary obligation to conduct an EIA (recently established) and the obligation to notify and consult. Moreover, the Court's evolutionary interpretation is very detailed, as it puts these constituent obligations in a sequential order.

Several observations concerning the contribution of evolutionary interpretation to the protection of the environment can be made on the basis of the above-analyzed ICJ jurisprudence. Firstly, as evidenced by *Gabcikovo Nagymaros*, jurisprudence sometimes threads the conceptual line between protection as an object of and protection as a tool for evolutionary interpretation. This also seems to be the case in an example of domestic environmental jurisprudence that will be analyzed in Section 3 bellow. This may be owed to the novelty of litigation with the object of environmental protection. Namely, as this field is still fairly new, interpreters may rely on environmental norms both for the interpretation of a legal obligation (i.e. as a tool) and as an end to be achieved or strengthened (i.e. as an object). Secondly, as evidenced by *Pulp Mills* and the

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[26] *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v Costa Rica)* (Judgment) [2015] ICJ Rep 665, para 104, citing *Pulp Mills*, above n 18, para 101.
[27] ibid, para 104.

Joint Judgment, interpreters seem to be relying on customary international law when engaging in evolutionary interpretation with the object of environmental protection. In *Pulp Mills* this was evidenced by introducing the requirement of an EIA as a customary constituent of the obligation of prevention, and in the *Join Judgment* this was taken even further by laying out a set of sequential procedural obligations as constitutive elements of the customary rule of prevention. Finally, and perhaps most importantly, it seems that in the time from *Gabcikovo Nagymaros* to the *Joint Judgment* the Court developed a strong jurisprudence of environmental protection through the medium of evolutionary interpretation both by interpreting already environmental obligations to be broader and more detailed, and by interpreting originally non-environmental obligations to include environmental considerations as well. Thus, we observe a forward-progressing development in the Court's practice of evolutionary interpretation, which holds the potential to both clarify and expand legal obligations with a view to environmental protection.

2. Environmental Protection as a Tool for Evolutionary Interpretation

Flipping the coin, this section analyzes how international courts and tribunals have used environmental protection as a *tool* for evolutionary interpretation. For the purposes of this section, the protection of the environment is considered a tool for evolutionary interpretation in cases where a relevant interpretive authority relies on environmental norms and standards to ly interpret an originally non-environmental term or obligation to now include environmental considerations as well.

The section focuses on the case law of two regional human rights courts: the IACtHR and the ECtHR. The first part of this section focuses on the case law of the ECtHR[28] to show how the Strasbourg Court has incorporated environmental concerns into the provisions of the European Convention of Human Rights (ECHR), whereas the second part of this section analyses the recent *Inter-American Court of Human Rights Advisory Opinion on Environment and Human Rights*.[29] The final part of this section makes a brief comparison between the way in which the IACtHR engaged in an evolutionary interpretation of human rights norms by reference to environmental protection norms compared to the ECtHR. This comparison aims to further our understanding of the role of environmental norms in evolutionary interpretation, but also of the different extent to which environmental norms can inform the content of human rights norms.

Generally, the mutual influence between the protection of the environment and human rights was explicitly acknowledged in the Stockholm Declaration in 1972.[30] Principle 1 of the Declaration proclaimed man's 'fundamental right to freedom, equality and adequate conditions

[28] For a more in-depth analysis of evolutionary interpretation in the case law of the ECHR see M Fitzmaurice, 'Dynamic (Evolutionary) Interpretation of Treaties Part I' (2008) 21 *Hague Yearbook of International Law* 121–153.
[29] *The Environment and Human Rights (State obligations in relation to the environment in the context of the protection and guarantee of the rights to life and to personal integrity – interpretation and scope of Articles 4(1) and 5(1) of the American Convention on Human Rights)*, Advisory Opinion OC-23/17, IACHR Series A No 23 (15 November 2017).
[30] Declaration of the United Nations Conference on the Human Environment, Report of the United Nations Conference on the Human Environment, Stockholm, 5–16 June 1972, A/CONF.48/14/Rev.1.

of life, in an environment of a quality that permits a life of dignity and well-being'.[31] Although the formally proclaimed right to a healthy environment was not endowed with binding force, it caused a ripple effect, manifested differently on the international level compared to the national one. On the domestic level, some States have amended their Constitutions by including a right to a healthy environment, while others have given a liberal interpretation to their pre-existing constitutional provisions.[32] On the international level, however, the incorporation of environmental concerns was done, among other means, through the use of evolutionary interpretation.[33]

Among the international courts, the ECtHR was a pioneer in bringing environmental concerns within the realm of human rights. At the moment of the conclusion of the ECHR in 1950 the drafters had not envisaged an implied right to a healthy environment contained in any of the treaty provisions. A first proposal on the conclusion of an additional protocol to the ECHR that would include a right to a healthy environment was made in 1970.[34] The proponents forwarded the inclusion in the ECHR of ' a right to reasonably pollution-free air and water, the right to be protected against excessive noise and other nuisances, and the right to reasonable access to coasts, countryside, and mountains'.[35] Interestingly, this proposal was made before the 1973 Stockholm Declaration, which means that the European States were already aware at the time of the inter-relationship between the environment and the enjoyment of human rights. After the declaration, another proposal on the inclusion of a right to a healthy environment was formulated by a German jurist, but, similarly to the first proposal, it was rejected.[36] None of this, however, precluded the Court from interpreting evolutively the pre-existing provisions of the Convention in a way that

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[31] ibid, Principle 1.

[32] Indicatively: *Damodhar Rao v The Special Officer, Municipal Corporation of Hyderabad* AIR 1987 AP 171 at www.indiankanoon.org/doc/205063/ (accessed 20 December 2018); *M.C. Mehta v Union of India* AIR 1987 SC 965 at www.indiankanoon.org/doc/1599374/ (accessed 21 December 2018); *Subhash Kuimar v State of Uttar Pradesh*1991 AIR 420 at www.indiankanoon.org/doc/1646284/ (accessed 23 December 2018). *Community of Pyrga v Republic of Cyprus* ILDC 1790 (CY 1991) paras 6–16; *Mohiuddin Farooque v Bangladesh* 48 DLR 1996 in United Nations Environment Programme, Compendium of Summaries of Judicial Decisions in Environment Related Cases 90; *Salt Miners Labour Union v The Director, Industries and Mineral Development* 1994 SCMR 2061 para 4; *Gbembre v Shell Petroleum Development Company of Nigeria* ILDC 924 (NG 2005) para 45; *Waweru, Mwangi and Others v Kenya* ILDC 880 (KE 2006) paras 32, 40. For a detailed analysis on the subject see DR Boyd, *The Environmental Rights Revolution. A Global Study of Constitutions, Human Rights and the Environment* (Vancouver, UBC Press, 2012); BE Hill, S Wolfson and Nicholas Targ, 'Human Rights and the Environment: A Synopsis and Some Predictions' (2004) 16 *Georgetown International Law Review* 359, 381–400.

[33] M Burger, 'Bi-Polar and Polycentric Approaches to Human Rights and the Environment' (2003) 28 *Columbia Journal of Environmental Law* 371, 372; J Arato, 'Subsequent Practice and Evolutionary Interpretation: Techniques of Treaty Interpretation over Time and their Diverse Consequences' (2010) 9 *Law and Practice of International Tribunals* 443, 456, footnote 45.

[34] J-P Jacqué, 'La Protection du Droit a l'Environnement au Niveau Europeen ou Regional' in P Kromarek (ed) *Environnement et Droits de L'Homme* (Paris, Unesco, 1987) 70–71.

[35] D Shelton, 'Human Rights, Environmental Rights, and the Right to Environment' (1991) 28 *Stanford Journal of International Law* 103, 132.

[36] H Steiger and the Working Group for Environmental Law, The Right to a Humane Environment: Proposal for an Additional Protocol to the European Human Rights Convention, 27 Beitrfigezur Umweltgestaltung, E Schmidt Verlag, Heft A 13, Berlin (1973) cited in B Van Dyke 'A Proposal to Introduce the Right to a Healthy Environment into the European Convention Regime' (1994) 13 *Virginia Environmental Law Journal* 323, 337.

connected environmental degradation with human rights as a result of the growing environmental concerns and legal developments in international environmental law. Art. 2, art. 3, art. 5, art. 6, art. 8 and art. 1 of the Additional Protocol 1 to the ECHR have all served as 'points of entry'[37] of environmental concerns and norms into the ECHR.[38] This is owed to both the nature of the ECHR, but also to the construction of its provisions in broad and rather vague terms.[39] Most cases, however, concerned the right to respect for private and family life enshrined in art. 8. Art. 8 of the ECHR, was first invoked in relation to environmental issues in the 1990 *Powell and Rayner v. UK* case. [40] However, it was not until the 1994 *Lopez Ostra v. Spain* case that the Strasbourg Court held a State responsible for a violation of art. 8 in an environmental activities related case. From that case onwards, the Strasbourg Court has consistently found art. 8 to be applicable to cases concerning environmentally harmful activities that have impaired or had the potential to impair the right of individuals to enjoy their home and/or their private lives.[41] Moreover, through the course of its case law the Strasbourg Court had not only incorporated environmental concerns in the scope of action of the articles of the Convention, but had also developed more specific environment-related obligations.[42] Since all these cases concerned applicants who lived in proximity to the place where environmentally harmful activities took place,[43] the Court was able, without difficulty, to place their claims inside the textual limits of art. 8, in line with the requirements of art. 31 of the VCLT.[44] As the Court stated in *Giacomelli v. Italy*: 'breaches of the

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[37] Merkouris, above n 2, 139–144 uses the notion of 'points of entry' with respect to the provisions of Article 31 of the VCLT.

[38] Indicatively: *Fredin v Sweden (no 1)* Series A no 192 (1991) 13 EHRR 784; *Gorraiz Lizarraga and Others v Spain* (2007) 45 EHRR 45; *Öneryıldız v Turkey* [GC] (2005) 41 EHRR 20; *N.A. and Others v Turkey* (2007) 45 EHRR 287; *Budayeva and Others v Russia* (2014) 59 EHRR 2; *Mangouras v Spain* [GC] (2012) 54 EHRR 25; *Bursa Barosu Başkanlığı and Others v Turkey* App no 25680/05 (ECtHR, 19 June 2018).

[39] R Bernhardt, 'Evolutionary Treaty Interpretation, Especially of the European Convention on Human Rights'(1999) 42 *German Yearbook of International Law* 11, 12.

[40] *Powell and Rayner v UK* App no 9310/81 (ECtHR, 21 February 1990).

[41] *Guerra and Others v Italy* [GC] (1998) 26 EHRR 357, paras 57, 60; *Hatton v UK* [GC] (2003) 37 EHRR 28, paras 96, 98–99; *Taşkın and Others v Turkey* (2006) 42 EHRR 50, paras 113, 115; *Fadeyeva v Russia* (2007) 45 EHRR 10, paras 66–70; *Giacomelli v Italy* (2007) 45 EHRR 871, paras 76–79; *Tătar v Romania* App no 67021/01 (ECtHR, 27 January 2008) paras 85–88; *Dubetska and Others v Ukraine* App no 30499/03 (ECtHR, 10 February 2011) paras 105–108. Notwithstanding the use of evolutionary interpretation by the Court in environment-related cases falling under Article 8 of the ECHR, not all the cases where Article was applicable have resulted in the Court finding a violation. This was, however, not because the Court took a step back from evolutionary interpretation, but rather because the Court found that the State acted inside the margin of appreciation afforded to it. For instance, in the *Hatton* case, the Grand Chamber considered that no violation of Article 8 had occurred because the UK had struck a fair balance between the two competing interests: right to private life and the economic interest of the State. The dissenting judges claimed that the Court, by refusing to recognise a violation of Article 8 of the ECHR, had taken a step backwards and had not 'complied' with the evolutionary and progressive approach that it had taken with regard to claims through which applicants sought protection from pollution and hazardous activities. *Hatton v UK* [GC] (2003) 37 EHRR 28, Joint Dissenting Opinion of Judges Costa, Ress, Türmen, Zupančič and Steiner paras 2, 5.

[42] K Morrow, 'After the Honeymoon: The Uneasy Marriage of Human Rights and the Environment under the European Convention on Human Rights and in UK Law under the Human Rights Act 1998' (2013) 43 *Revue Générale de Droit* 317, 327.

[43] Indicatively: *Powell and Rayner v UK*, above n 40, para 38; *López Ostra v Spain* Series A no 305 (1995) 20 EHRR 277, para 47; *Guerra and Others v Italy*, above n 41, para 69.

[44] For a different opinion see I Buga, *Modification of Treaties by Subsequent Practice* (Oxford, Oxford University Press, 2018) 99–100.

right to respect for the home are not confined to concrete or physical breaches, such as unauthorised entry into a person's home, but also include those that are not concrete or physical, such as noise, emissions, smells or other forms of interference'.[45] The right to respect for private life and home, then, has been ly interpreted by the Strasbourg Court to extend towards the amenities of the home[46] but also, albeit implicitly, include a certain *quality* of private life and home – a 'characteristic' of home and private life that does not transpire from the explicit intention of the drafters, but is allowed by virtue of the broadness of the term. In evolutively interpreting the provisions of the Convention, the Strasbourg Court, however, made an explicit point that 'the crucial element which must be present in determining whether, in the circumstances of a case, environmental pollution has adversely affected one of the rights safeguarded by paragraph 1 of Article 8 is the existence of a harmful effect on a person's private or family sphere and not simply the general deterioration of the environment.'[47] In other words, the evolutionary interpretation was allowed to go further than the ECHR drafters expressly intended at the moment of its conclusion,[48] but not too far, or at least not as far as recognizing an autonomous right to a healthy environment.[49]

Turning to the case law of the IACtHR, one observes that, aside from the *Advisory Opinion* further analyzed, the jurisprudence on environmental protection as an instrument of evolutionary interpretation is scarce compared to the rich jurisprudence of the ECtHR.[50] Most cases where environment-related situations were brought before the Court concerned indigenous communities and were analyzed from an angle where protection of the environment *per se* did not have a central place. [51] In this respect one scholar has pointed to a peculiar approach taken by the Court toward environmental issues – the entanglement of environmental concerns with the protection of indigenous communities.[52] One instance where the Court made reference to UN documents concerning environmental protection and constitutional provisions on the right to a healthy environment, albeit not for purposes of evolutionary interpretation, was in *Kawas-Fernandez v. Honduras* – a case concerning freedom of association where the Inter-American Court

[45] *Giacomelli v Italy*, above n 41, para 76.
[46] L Loucaides, 'Environmental Protection Through the Jurisprudence of the European Convention on Human Rights' (2005) 75 *British Year Book of International Law* 249, 266.
[47] *Kyrtatos v Greece* (2005) 40 EHRR 16, para 52.
[48] The *travaux préparatoires* to the Convention do not mention discussions on the possible impact of environment-related activities on human rights. For *travaux préparatoires* of the ECHR see www.echr.coe.int/Documents/Library_TravPrep_Table_ENG.pdf (accessed 3 December 2018).
[49] *Hatton v UK*, above n 41, para 96*; Kyrtatos v Greece*, above n 47, para 52.
[50] On use of other international law norms for the purposes of an evolutionary interpretation of the American Convention on Human Rights see L Burgorgue-Larsen and A Ubeda de Torres, *The Inter-American Court of Human Rights*: *Case Law and Commentary* (Oxford, Oxford University Press, 2011) 375-380; CE Arevalo Narvaez and PA Patarroyo Ramirez 'Treaties Over Time and Human Rights: A Case Law Analysis of the Inter-American Court of Human Rights' (2017) 10 *Annuario Colombiano de Derecho Internacional* 295, 316–323.
[51] *Community of San Mateo de Huanchor v Peru*, IACHR Report No 69/04 (15 October 2004); *Case of the Saramaka People v Suriname*, IACHR Series C No 172 (28 November 2007); *Case of the Indigenous Community Yakye Axa v Paraguay*, IACHR Series C No 142 (6 February 2006); *Case of the Kichwa Indigenous People of Sarayaku v Ecuador*, IACHR Series C No 245 (27 June 2012).
[52] L Lixinski, 'Treaty Interpretation by the Inter-American Court of Human Rights: Expansionism at the Service of the Unity of International Law' (2010) 21*The European Journal of International Law* 585, 594.

emphasized the 'undeniable link between the protection of the environment and other human rights'.[53]

Considering this reluctance of the Court in using the environmental protection as a tool for interpretation, the *Advisory Opinion on Environment and Human Rights*[54] comes as a breath of fresh air. At the basis of the *Advisory Opinion* is a question submitted by Colombia. This State Party to the American Convention on Human Rights (ACHR) asked the IACtHR to elucidate how the provisions of the Convention should be interpreted in light of treaty and customary law environmental norms when there is a risk that large infrastructure works may affect the marine environment and, as a result, the enjoyment by the inhabitants of the coastal States of the rights guaranteed by the Convention.[55] At the outset, the Court expressly acknowledged that it will be engaging in evolutionary interpretation.[56] It stated that the use of evolutionary interpretation is justified by the nature of the treaty (a human rights treaty) and that it must accompany the evolution of times and living conditions.[57] Further on, the Court stated expressly that 'another consequence of the interdependence and indivisibility between human rights and environmental protection is that, in the determination of these [human rights law] State obligations, the Court can make use of the principles, rights and obligations of international environmental law, which as part of the international *corpus iuris* contribute decisively to set the scope of the obligations derived from the American Convention in this area.'[58] In using the environmental law provisions for the purposes of interpretation, the Court drew two main conclusions: (1) that the jurisdiction of State Parties to the Convention to respect and ensure human rights is applicable to situations of transboundary environmental damage, whenever a State Party exercised effective control over the source of pollution[59] and (2) that the right to life and the right to personal integrity interpreted by reference to the principle of prevention, principle of cooperation and the precautionary principle oblige States to take certain environment-related obligations to ensure the full enjoyment of the rights guaranteed in the Convention.[60]

Going back to the case law of the Strasbourg Court, one can notice this: the practice of the two regional courts in using environmental norms and concerns as tool for evolutionary interpretation is in some points somewhat similar, whereas in others quite different. Both the ECtHR and the IACtHR have included environment-related obligations as a means to ensure the fulfilment of the express human rights duties contained in the Convention. At the same time, while the ECtHR requires a certain minimum threshold of harm to trigger the applicability of the

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[53] *Kawas-Fernandez v Honduras*, IACHR Series C No 196 (3 April 2009) para 148.
[54] Advisory Opinion OC-23/17, above n 29.
[55] ibid, para 1.
[56] ibid, para 43.
[57] ibid.
[58] ibid, para 55, unofficial translation provided by the Environmental Law Alliance in Summary of Advisory Opinion OC-23/17, 26 February 2018 at www.elaw.org/system/files/attachments/publicresource/IACHR_summary_ELAW.pdf (accessed 20 December 2018).
[59] ibid, para 82.
[60] ibid, para 242.

Convention, the American Court states that any damage is significant damage and is sufficient to determine the applicability of the provisions of the Convention.[61] This may be owed to the *pro persona* interpretative principle contained in art. 29 of the Convention,[62] or the Courts' especially strong commitment to the full and effective enjoyment of human rights. Nonetheless, regardless of the reasons behind the court's reasoning, it shows that the use of environmental concerns as tools for evolutionary interpretation in the hands of the IACtHR goes a bit further than in the case of ECHR. Needless to say that the American Court went much further that the ECHR when deciding that the Convention contains an autonomous and *justiciable* right to live in a healthy environment, with a basis not only in the San Salvador Protocol, but also in art. 26 of the Convention,[63] while at the moment of the conclusion of the San Salvador Protocol the right to a healthy environment contained in art. 11 was not among the rights enumerated by art. 19 (6) that gave the right of individual petition to the Commission or the Court.

On the basis of the aforementioned analysis, two important things can be concluded. Firstly – that environmental protection can be an efficient tool for evolutionary interpretation because, as can be seen from the *Advisory Opinion on Environment and Human Rights*, it can expand considerably the scope of other international law norms, especially human rights norms. Such an expansion of human rights norms allows this field of law to develop in line with the evolution of other 'special regimes' of international law. At the same time, it is important that courts keep within the 'natural limits' of evolutionary interpretation,[64] such as the general rule of interpretation enshrined in art. 31 of the Vienna Convention on the Law of Treaties (VCLT). Going beyond these limits puts the courts at a risk of backlash from states, on which the courts' legitimacy depends.[65] Secondly – that environmental protection norms and environmental concerns can be used in different ways as instruments of evolutionary interpretation, depending on the court that is engaged in the interpretative exercise – even when the courts have jurisdiction in the same 'special area' of international law. Finally, environmental protection as a tool for evolutionary interpretation is useful in bringing together different fields of international law and, thus, in overcoming the problem of fragmentation. This is especially relevant with regard to human rights and environmental law. As transpires from the IACtHR *Advisory Opinion on Environment and Human Rights*, there is a 'natural' connection between human rights and environmental protection, which both justifies and *requires* the adjudicator to interpret them together.

[61] ibid, para 140.
[62] ibid, para 42.
[63] ibid, para 55.
[64] On the limits of evolutionary interpretation see Merkouris, above n 2, 150; JE Helgesen, 'What are the Limits to the Evolutionary Interpretation of the European Convention on Human Rights?' (2011) 31 *Human Rights Law Journal* 275.
[65] A Brysk and M Stohl (eds), *Expanding Human Rights. 21st Century Norms and Governance* (Cheltenham, Edward Elgar, 2017) 170.

3. Environmental Protection as both an Object and a Tool for Evolutionary Interpretation

As stated in the introduction, on closer scrutiny, the 'environmental protection as an object' and the 'environmental protection as a tool' for the purposes of evolutionary interpretation are not two completely separate and separable interpretative exercises. There are cases, where the line between the two is blurred, so much so in fact that the claim could be made that they make up two sides of the same coin. The most recent case in this regard is the *Urgenda* case brought in front of Dutch national courts. This case is relevant in an analysis of international law because the court both interpreted international law provisions and relied on these provisions for the purposes of interpretation of domestic law.

The *Urgenda* case arose from a claim brought by a Dutch Foundation against the Netherlands in which it asked the court to order the State to limit the annual greenhouse gas emissions by at least 25% by 2020, compared to 1990.[66] The dispute revolved around two main questions. First – whether in pursuing a reduction target lower than 25% by 2020, the State was breaching its duty of care enshrined in art. 21 of the Dutch Constitution and the provisions of the Dutch Civil Code,[67] especially in light of the international obligations undertaken by the Netherlands and its high rate of greenhouse gas emissions *per capita*. Secondly – whether the State, by setting a target of less than 25%, acted in contradiction to the provisions of art. 2 and art. 8 of the ECHR.

The first instance court held that it cannot analyze Urgenda's claim based on art. 2 and art. 8 of the ECHR, since the foundation did not satisfy the victim requirements provided for by art. 34 of the European Convention. It analyzed the claim by reference to the duty of care contained in domestic legal sources, but in interpreting the scope of the duty of care it relied on the provisions of art. 2 and art. 3 UN Climate Change Framework Convention, the no harm principle, and art. 2 and art. 8 of the ECHR. [68] The first instance court evolutively interpreted the environmental duty of care by reference to both international norms on climate change and international human rights norms – an instance of environmental protection as an *object* of evolutionary interpretation. In light of international environmental norms, the Court constructed the constitutional duty of care – an obligation of means that is usually quite broad – *narrowly* and, as a result, reached the conclusion that the State 'has acted negligently and therefore unlawfully towards Urgenda by starting from a reduction target for 2020 of less than 25% compared to the year 1990'.[69] In the appellate proceedings of the same case,[70] environmental protection norms took on a different role

[66] *Urgenda Foundation v The State of the Netherlands*, Case no 200.178.245/01, Hague District Court, Judgment of 24 June 2015, para 3.2.
[67] Book 6, Section 162 and Book 5, Section 37 of the Dutch Civil Code.
[68] *Urgenda Foundation v Netherlands*, above n 66, paras 4.46, 4.52, 4.55, 4.63.
[69] ibid, para 4.93.
[70] *The State of the Netherlands v Urgenda*, Case no 200.178.245/01, The Hague Court of Appeal, Judgment of 9 October 2018.

– that of shaping the contents of art. 2 and art. 8 of the ECHR. The Court used the precautionary principle to extend the applicability of art. 2 and art. 8 of the ECHR to the threats posed by climate change – an instance of evolutionary interpretation. While in the jurisprudence of the ECHR the presence of a real, imminent and foreseeable threat to identifiable victims is crucial to determine the applicability of the provisions of the Convention, the Dutch domestic courts went beyond these limits set by the authoritative interpretations done by the ECHR. Although the reality of the threat of catastrophic consequences on the lives of individuals caused by climate change is difficult to dispute, the foreseeability and imminence to particular, identifiable individuals is open to question. This is one of the reasons why scholars have argued that bringing climate-change related claims in front of the ECHR has a very low chance of success.[71] This approach of the Dutch domestic courts brings a new dimension to the way evolutionary interpretation is exercised when it comes to the issue of environmental protection. Since the domestic court interpreted the imminence requirement in a more expansive way than the ECtHR, it would be interesting to observe whether this approach could affect how the ECtHR interprets imminence in the future. Similarly, it might be interesting to observe whether environmental considerations more generally affect how evolutionary interpretation is employed by the ECtHR and other relevant interpretive bodies.

Similar cases, relying on a combination of domestic obligations and obligations stemming from human rights and general international law, are currently undertaken against the governments of Ireland,[72] the US,[73] and Belgium.[74] Unfortunately, at the time of writing, these cases are still ongoing and have not yielded any definitive judgments which may be analyzed for the purposes of this paper. Nonetheless, the cases indicate a growing trend of domestic litigation aimed at environmental protection and it will be interesting to observe whether these cases, like *Urgenda*, rely on evolutionary interpretation to read environmental protection into the obligations of states, and thus further the goal of environmental protection on a global level.

4. The Limits of Evolutionary Interpretation

While this paper has largely focused on the positive application of evolutionary interpretation with respect to the protection of the environment, mention must be made of the limits of this practice, as well as the dangers of expanding interpretation beyond what is envisaged in Arts. 31 and 32 of the VCLT.

[71] S Humphreys and M Robinson, *Human Rights and Climate Change* (Cambridge, Cambridge University Press, 2009) 76.
[72] Climate Case Ireland, www.climatecaseireland.ie/climate-case/ (accessed on 20 December 2018).
[73] Our Children's Trust, 'Juliana v. US – Climate Lawsuit', www.ourchildrenstrust.org/us/federal-lawsuit (accessed on 20 December 2018).
[74] Klimaatzaak, 'De rechtszaak', www.klimaatzaak.eu/nl/the-case (accessed on 20 December 2018).

In his Separate Opinion to the *Gabcikovo Nagymaros* Judgment, Judge Bedjaoui laid out what he considered should be the precautions taken when engaging in evolutionary interpretation. His observation was prompted by an earlier finding of the Court in the *Namibia Advisory Opinion*, which stated that a treaty should be interpreted within the framework of the entire legal system prevailing at the time of the interpretation, and which was relied upon by Hungary in its arguments in the present case.[75]

> 'Taken literally and in isolation, [Judge Bedjaoui argued], there is no telling where this statement may lead. The following precautions must be taken:
>
> - an "*evolutionary interpretation*" can only apply in the observation of the general rule of interpretation laid down in Article 31 of the Vienna Convention of the Law of Treaties;
>
> - the "*definition*" of a concept must not be confused with the "*law*" applicable to that concept;
>
> - the "interpretation of a treaty must not be confused with its "r*evision*"."[76]

With respect to Art. 31 VCLT, Judge Bedjaoui further clarified that evolutionary interpretation must respect the principle of *pacta sunt servanda* unless there is incompatibility with *jus cogens*,[77] and must comply with the intention of the parties as expressed at the time of the conclusion of the treaty.[78] Along similar lines, he stressed that the interpretation of the 'negotiated and approved text' may never result in its substitution with a 'completely different text which has neither been negotiated nor agreed'. This, Judge Bedjaoui argued, would amount to a distorted revision.[79] Scholars have made similar observations concerning the limits of evolutionary interpretation, stressing that the interpretative process can never result in a contravention to *jus cogens* norms, that evolutionary interpretation is limited by the principle of non-retroactivity, and that evolutionary interpretation may never amount to a revision of the treaty being interpreted.[80] The most important limitation outlined in scholarship however, is that evolutionary interpretation should always observe the general rule laid down in Art. 31 VCLT, and in particular the text of the provision being interpreted, its context, and the intention of the parties.[81] Taking this last observation under consideration, it may be argued that this is the most important limitation because by respecting the parameters laid down in Art. 31 VCLT, interpreters would make sure that none of the other identified limits of evolutionary interpretation are breached.

Having identified the limits of evolutionary interpretation, it might be worth looking back at what interpreters invoke as the basis for engaging in this practice. As indicated in the introduction of the paper, the intention of the parties, the object and purpose of the instrument being interpreted, or the language used have been identified as possible bases for evolutionary

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[75] *Case Concerning the Gabčikovo–Nagymaros Project*, above n 12, Separate Opinion of Judge Bedjaoui, para 4.
[76] ibid, para 5.
[77] ibid, para 6
[78] ibid, para 7.
[79] ibid, para 12.
[80] Merkouris, above n 2, 150.
[81] ibid, 150–151; Helgesen, above n 64.

interpretation. In other words, it may be observed that the basis for evolutionary interpretation is once again found within Art. 31 VCLT. Evolutionary interpretation does not exist as a separate method of interpretation outside the VCLT and customary law interpretative edifice, but is rather the result of a proper application of the usual means of interpretation, through which the intention of the parties is established.[82]

In light of the above discussion, when it comes to the limits of evolutionary interpretation, the following two conclusions seem to hold true. On the one hand, the limits as to how much a term or legal obligation may evolve through interpretation are dictated by the parameters expressed in Arts. 31 and 32 of the VCLT. On the other hand, evolutionary interpretation itself, when applied appropriately, finds its basis and justification in those same parameters. Therefore, similar to the 'object' and 'tool' categories discussed throughout this paper, the limits posed to evolutionary interpretation by Arts. 31 and 32 VCLT, and the justification for it found in the same provisions, seem to operate as two sides of the same coin.

Conclusion

This paper examined the contribution of evolutionary interpretation to the development of environmental protection, and reversely the contribution of environmental protection to our understanding of evolutionary interpretation. The relationship was examined through the conceptual categories of environmental protection as 'object' and as 'tool', and the paper relied on jurisprudence from the ICJ, regional human rights courts, and domestic courts, which have recently dealt with environmental litigation. Through these examples the paper identified a general forward-progressing development of environmental protection through the practice of evolutionary interpretation. In the jurisprudence of the ICJ, environmental protection was an object achieved through the medium of evolutionary interpretation, and over time the Court increasingly relied on evolutionary interpretation both to interpret environmental obligations expansively and in more detail, and to interpret originally non-environmental obligations to include environmental considerations as well. In the jurisprudence of human rights bodies on the other hand, environmental protection played the role of a tool for evolutionary interpretation, and environmental principles were relied on by courts to interpret human rights expansively to also include environmental considerations. Finally, in domestic courts, the paper traced a convergence of the 'object' and 'tool' categories, and courts both engaged in evolutionary interpretation aimed at environmental protection and relied on environmental standards to evolutively interpret legal obligations.

These cases illustrate that evolutionary interpretation holds the potential to clarify and even modify legal obligations with a view to environmental protection. This is particularly

[82] Bjorge, above n 1, 3.

pertinent in the face of increasing environmental litigation in the field of climate change, and in particular the fast-developing field of domestic climate litigation. Nevertheless, it must be observed that evolutionary interpretation does not provide interpreters with a carte blanche to modify or create legal obligations. Judges and scholars have both cautioned against the expansion of evolutionary interpretation beyond what is envisaged for the practice of interpretation in article 31 of the VCLT. Thus, having discovered the Janus-faced character of environmental protection as both object and tool for evolutionary interpretation, as well as some of its limitations, it remains to be seen how interpreters learn from these practices and develop them further.